No. 19-1409

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

LINDA FROST,

Petitioner

v.

COMMONWEALTH OF EAST VIRGINIA

Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF EAST VIRGINIA

BRIEF FOR PETITIONER

Team P

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Can a person waive a right when they don't either the right being waived or the consequences of waiving that right?

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

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction after the Supreme Court of Appeals of East Virginia rendered final judgment in this case, where the validity of a state statute is drawn in question on the ground that it is unconstitutional, and where the Petitioner's Fifth Amendment rights set up under the United States Constitution have been violated.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, as relevant: "No person…shall be compelled in any criminal case to be a witness against himself…." U.S. Const. amend. V.

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

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

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

On Friday, June 16, 2017, Christopher Smith ("Smith"), a federal poultry inspector employed at a U.S. Department of Agriculture office in rural Campton Roads, East Virginia, was killed between the hours of 9 p.m. and 11 p.m. R. at 2.

Smith and Linda Frost ("Ms. Frost" or "Petitioner") had been seeing each other for some time prior to the killing. Some time before Smith's death, he and Ms. Frost had a heated argument on the phone, after which Smith was upset. R. at 2. On June 16, Ms. Frost, an

employee at Thomas's Seafood Restaurant and Grill, picked up an extra shift from 2 p.m. to 8 p.m., but due to the busy night at the restaurant, no one saw Ms. Frost leave, and she did not clock out as she was covering this shift as a last-minute favor. R. at 2. However, two eyewitnesses saw someone matching Ms. Frost's description near the entrance of nearby Lorel Park very late that night, but neither could definitively identify Ms. Frost. R. at 2.

On the morning of June 17, 2017, one of Smith's co-workers discovered his body in his office. R. at 2. During the investigation, the Campton Roads Police Department brought in Ms. Frost for questioning. R. at 2. In an interrogation room, Officer Nathan Barbosa read Ms. Frost her *Miranda* rights and she signed a written waiver of those rights. R. at 2. Later, Officer Barbosa testified that he saw nothing about Ms. Frost's demeanor at the beginning of the interrogation that caused him to be concerned or suspicious about her competency. R. at 2. The officer asked Ms. Frost if she wanted to talk about Smith, and she nodded. R. at 2. A few minutes later, the officer told Ms. Frost about the discovery of Smith's body and asked if she knew who might be responsible. R. at 3. Ms. Frost blurted out, "I did it. I killed Chris." R. at 3. When urged for more details, Ms. Frost said that she stabbed him and left the knife in the park. R. at 3. As the officer asked more questions, Ms. Frost began to talk about the "voices in her head" that told her to "protect the chickens at all costs." R. at 3. She said she did not believe that killing Smith was wrong because she believed that Smith would be reincarnated as a chicken, which was a "great favor" to Smith because "chickens are the most sacred of all creatures." R. at 3. Ms. Frost gave no further details about the murder but instead implored the officer to join her cause to "liberate all chickens in Campton Roads." R. at 3. Officer Barbosa then asked Ms. Frost if she wanted an attorney, to which she answered yes, and the officer terminated the interrogation. R. at 3.

As a result of Ms. Frost's statements, the police searched all the parks in Campton Roads and eventually found a bloody steak knife under a bush in Lorel Park. R. at 3. The knife had no identifiable prints, but DNA tests confirmed that the blood on the knife belonged to Smith, and the knife matched a set found in Ms. Frost's home. R. at 3. During the death investigation, the coroner determined that Smith died between 9 p.m. and 11 p.m. on June 16, 2017, as a result of multiple puncture wounds from a knife similar to the one found in Lorel Park. R. at 3.

II. PROCEDURAL HISTORY

Ms. Frost was then charged and indicted both in federal and in state court for Smith's murder. R. at 3. Prior to both trials, her attorney moved in federal court for a mental evaluation. R. at 3. Dr. Desiree Frain, a clinical psychiatrist, diagnosed Ms. Frost with paranoid schizophrenia and prescribed Ms. Frost appropriate medication to aid in her treatment. R. at 3. Ms. Frost had never before received any kind of mental health treatment and had never been diagnosed with any kind of mental disorder. R. at 3–4. During Dr. Frain's evaluation, Ms. Frost said that she believed that Smith needed to be killed to protect the sacred lives of chickens that Smith endangered through his job. R. at 4.

Ms. Frost was tried federally in the United States District Court for the Southern District of East Virginia under 18 U.S.C. § 1114, which prohibits murdering any federal employee.[1] R. at 4. Ms. Frost was deemed competent to stand trial in light of her treatment and stabilized mental health. R. at 4. Dr. Frain testified on Ms. Frost's behalf and opined that between June 16 and 17 Ms. Frost was in a psychotic state and suffering from severe delusions and paranoia. R. at 4. Dr. Frain further opined that, even though Ms. Frost intended to kill Smith and knew she was doing so, she was unable to control or fully understand the wrongfulness of her actions during that time

[1] *See* Appendix A for full text.

period. R. at 4. As a result, Ms. Frost was acquitted on the basis of insanity, which remains a defense in federal criminal proceedings under 18 U.S.C. § 17(a). R. at 4.

Once the federal proceedings ended, the Commonwealth Attorney in Campton Roads prosecuted Ms. Frost for murder in state court, where Ms. Frost was again found competent to stand trial. R. at 4. The East Virginia legislature voted in 2016 to abolish the previously-applied *M'Naghten* rule for the insanity defense in favor of a *mens rea* approach. R. at 4. Under the new statute, evidence of a mental disease or defect is only admissible to disprove competency to stand trial or to disprove the *mens rea* element of an offense. R. at 4. No longer is the lack of an ability to distinguish between right and wrong a defense. R. at 4.

During the state proceedings, Ms. Frost's attorney, Noah Kane, filed a motion to suppress her confession and a motion asking the trial court to hold that, by abolishing the insanity defense, E. Va. Code § 21-3439 violated the Eighth Amendment right not to be subject to cruel and unusual punishment and the Fourteenth Amendment right to Due Process. R. at 5.

The Circuit Court ruled that Dr. Frain's testimony was completely inadmissible in light of E. Va. Code § 21-3439 and denied both defense motions. R. at 5. The Circuit Court concluded that Ms. Frost either did not understand her *Miranda* rights or the consequences of waiving, but nevertheless denied the suppression motion because Ms. Frost initially appeared to be lucid and capable of waiving her rights, and the officer had no reason to know or suspect that she was mentally unstable until after she had waived and confessed. R. at 5. Further, the Court concluded that E. Va. Code § 21-3439 did not violate either the Eighth or the Fourteenth Amendments. R. at 5. At the close of trial, the jury convicted Ms. Frost of murder and the court then accepted the jury's recommendation of life in prison. R. at 5.

On appeal, the Supreme Court of East Virginia affirmed the Circuit Court's rulings, with four justices voting to affirm, and Chief Justice Evans dissenting. R. at 1, 9. Ms. Frost petitioned this Court for writ of certiorari, which was granted on July 31, 2019. R. at 12.

SUMMARY OF THE ARGUMENT

At the time of her interrogation, Ms. Frost was incapable of understanding the *Miranda* warnings recited by law enforcement; as such, her statements made to police should have been inadmissible at her criminal trial. *Miranda* waivers must be both voluntary, and knowing and intelligent. It is undisputed that Ms. Frost's waiver of her *Miranda* rights was voluntary, it is also undisputed that she could not understand either the meaning of her rights or the consequences of waiving those rights because of her illness. While *Connelly* was clear that police coercion is a necessary predicate for a finding that a waiver of Miranda rights is involuntary, it was also clear that its holding was confined to the voluntary prong.

The fundamental nature of a "waiver" of rights as laid out in *Zerbst*, demands that the individual waiving their right understands that right. Furthermore, *Miranda* and its clarifying progeny have made clear that *Miranda* warnings and rights only have value in so far as they are actually understood by the accused. Thus, it is not enough for the government to simply point to a lack of police abuse to prove the validity of a waiver; it must also prove that the accused actually understood their rights and the consequences of waiving those rights, regardless of whether the waiver was effectuated by police abuse. This rule can be easily implemented and serves to protect vulnerable populations from the inherently coercive nature of interrogations without unduly hampering law enforcement duties.

Furthermore, although the physical fruits of unmirandized statement are admissible, the illegally obtained statements made by Ms. Frost were essential in securing a conviction, and thus, the error made by the trial court to admit those statements was not harmless.

East Virginia recently abolished the insanity defense in favor of a new statute, codified at E. Va. Code § 21-3439. This statute completely gets rid of an affirmative insanity defense, instead installing a *mens rea* approach. Under this statute, evidence of mental disease or defect is only admissible to disprove competency to stand trial or to disprove the required *mens rea* element of a particular crime. This statute, however, provides no escape to defendants who intended to commit a crime, but honestly believed that they were in the right or that their action was justified, as is the issue in the instant case. Ms. Frost did kill Smith, but because she honestly believed she was *required* to in order to "save the chickens." But East Virginia recognizes nothing about Ms. Frost's case that entitles her to any less than the punishment she would receive if she were sane.

This statutory regime in East Virginia violates the Eighth Amendment's prohibition on cruel and unusual punishment and Ms. Frost's Fourteenth Amendment right to due process before the deprivation of liberty. The Cruel and Unusual Punishment prohibition does not simply apply to actual punishments but has been extended to apply to unjust convictions as well. Both of the Court's analyses under the cruel and unusual punishment clause would result in the East Virginia statute being found to be unconstitutional. The statute serves no legitimate penological interests in treating insane defendants and sane defendants in the same manner, and the statute fails to recognize a concept that this Court has long upheld—that individuals with less culpability ought not be treated in the same way as the normal criminal defendant.

This statutory regime also violates Ms. Frost's Fourteenth Amendment right to due

process of law. The right to raise an insanity defense is fundamental to criminally insane defendants, and is both deeply rooted in this nation's legal history and traditions, and is implicit in the concept of ordered liberty. The insanity defense has been widely protected in Anglo-American legal traditions since the 1300s and continued to be nationally protected in every jurisdiction until 1979. Previously while some states had tried to abolish insanity defenses in their state legislatures, state courts universally found that those moves violated the constitution.

An insanity defense is broader than a simple *mens rea* approach. This Court's jurisprudence shows a clear history of striking down as unconstitutional those laws that attempt to treat those who are less morally culpable in the same manner as those laws treat the average, sane defendant. Suddenly changing that pattern, and holding that insane defendants are not entitled to raise that defense during criminal proceedings clearly violates the Due Process Clause of the Constitution.

As a result, the Petitioner respectfully requests that this Court find that her confession was inadmissible and was not harmless error, and that the East Virginia statute violates the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process, and she asks that the Court remand this case back to the Circuit Court for a new trial.

ARGUMENT

I. MS. FROST'S INCRIMINATING STATEMENTS TO POLICE WERE INADMISSIBLE AT HER CRIMINAL TRIAL BECAUSE SHE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HER FIFTH AMENDMENT RIGHTS AS REQUIRED BY *MIRANDA V. ARIZONA*.

The Fifth Amendment to the United States Constitution guarantees that no person shall be compelled to be a witness against themselves in a criminal case. U.S. Const. amend. V. In

Miranda v. Arizona, 384 U.S. 436, 470-74 (1966), this Court clarified that this right includes the right to remain silent, to start or stop questioning at any time, and that exercising these rights cannot be held against a criminal defendant at trial. Further, the *Miranda* Court held that these rights must be relayed in "clear and unequivocal terms" to an individual whom the police are interrogating in their custody. *Id.* at 467-68. While these rights can be waived, the Court was clear that a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." *Id.* at 475. If the government cannot meet that burden, statements made by the accused may not be admitted into evidence. *Id.* at 476. Whether a waiver meets this standard is based on a totality of the circumstances.

Post-*Miranda* case law has clarified that in order for a waiver of *Miranda* rights to be valid, the government must show, by a preponderance of the evidence, that the waiver was 1. voluntary, and 2. knowing and intelligent. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). As to the voluntary prong, this Court in *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986), held that a court will not find that a waiver was involuntary absent some showing of police coercion. The court below interpreted the teachings of this decision as not only applying to the voluntary prong, but also the knowing and intelligent prong. R. at 6.

The government will likely assert that because there was no police misconduct in this case that *Connelly* controls the outcome. This position severely misunderstands the fundamental nature of waiver, the meaning of *Miranda* and its progeny, and is entirely out of step with public policy. Police abuse is not a necessary predicate for finding that an accused did not knowingly and intelligently waive their Miranda rights. Because it is undisputed that Ms. Frost was incapable of understanding her *Miranda* rights, this Court should reverse the judgement of the Supreme Court of East Virginia.

A. The holding in *Connelly* was narrowly confined to the facts of that case and does not control this case; the circuit courts that apply *Connelly* to the knowing and intelligent prongs of waiver misconstrue the breadth of its holding.

For the vast majority of cases following *Miranda*, the test for the validity of a defendant's waiver of their rights was a two-part test based on the standard laid out in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). This standard, as articulated in the same term as the Court's decision in *Connelly*, requires that the government prove *both* that a defendant's waiver was voluntary, *and* that the waiver was "made with a full awareness of both the nature a nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). This totality of the circumstances test focuses on the individual characteristics of the defendant and includes the mental capacity of the defendant. *Fare*, 442 U.S. at 725.

However, two circuit courts have held that the Court's opinion in *Connelly* altered the fundamental landscape of waiver rights and hold that the question is not whether a defendant had full awareness of their rights, but if a police officer thinks that the defendant has full awareness.

Colorado v. Connelly dealt with a criminal defendant who suffered from severe delusions. 479 U.S. at 161-62. The defendant walked up to a uniformed police officer and told him that he wanted to confess to a murder. *Id.* at 160. After being informed of his *Miranda* rights, the defendant acknowledged that he understood his rights and proceeded to confess to the police officer. *Id.* Later at his preliminary hearing, the defendant claimed that his confession was involuntary because he confessed on the direction of the "voice of God," which demanded that

he either confess or commit suicide. *Id.* at 161. There was never any contention that the defendant did not understand his *Miranda* rights. *Id.*

In ruling that the defendant's waiver of his rights was valid, the Supreme Court only discussed the voluntary nature of a waiver of rights. *Id.* at 169-71. The majority wrote that the defendant's position would have required courts "to find an attempted waiver invalid whenever the defendant feels *compelled* to waive his rights by reason of any *compulsion*, even if the *compulsion* does not flow from the police." *Id.* at 170 (emphasis added). However, *Connelly* itself was clear that this holding was limited in its scope. In note 4 to the opinion, the majority points out that, "It is possible to read the opinion of the Supreme Court of Colorado as finding respondent's *Miranda* waiver invalid on other grounds." *Id.* at 171 n.4. Because the record was developed with a focus on voluntariness, however, the Court nonetheless vacated the ruling of the lower court and left open the possibility that the waiver could be attacked on remand. *Id.*

Indeed, the very next year, the Court was clear that it had preserved the dual nature of the *Miranda* waiver test in *Colorado v. Spring*, 479 U.S. 564, 574 (1987). There the court reiterated that the voluntary prong is separate and apart from the knowing and intelligent prong. *Id.*

Nevertheless, some courts have construed *Connelly*'s focus on state action in the voluntariness prong as overturning the Supreme Court's clear command in *Burbine* that the government must show that a defendant had "a full awareness of the of both the nature of the right being abandoned and the consequences of the decision to abandon it." The Sixth and Seventh Circuits have expressed their troubles with the *Connelly* opinion's impact on waiver rights, and have either held or implied that a police-focused inquiry is appropriate. *Garner v. Mitchell*, 557 F.3d 257, 262-63 (6th Cir. 2009); *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998) (denying defendant's habeas claim on the validity of his waiver because there was no showing

that the defendant actually misunderstood his *Miranda* rights). In fact, the Seventh Circuit has recently published opinions that seem to call into doubt whether that circuit believes a police-focused review is appropriate. *E.g.*, *Collins v. Gaetz*, 612 F.3d 574, 587 n.6 (7th Cir. 2010).

The Fourth, Ninth, Eleventh, and the D.C. Circuits have all held that *Connelly*'s holding left in place the traditional method of determining waiver by a totality of the circumstances with a focus on the defendant's actual ability to comprehend the *Miranda* warnings.

In *United States v. Cristobal*, 293 F.3d 134 (4th Cir. 2002), the Fourth Circuit held expressly that because there are two distinct inquiries under the *Miranda* waiver analysis, police coercion "is not a prerequisite for finding that a waiver was not knowingly and intelligently made." *Id.* at 142 (citing *Spring*, 479 U.S. at 574).

In *United States v. Bradshaw*, 935 F.2d 295 (D.C. Cir. 1991), the D.C. Circuit found that the district court erred when it deemed that a defendant's mental capability was irrelevant in light of police good behavior. As the court noted, "Because the district court made no finding with respect to Bradshaw's understanding of his rights, we remand for this determination." *Id.* at 300.

In *Derrick v. Peterson*, 924 F.2d 813 (9th Cir. 1990), the Ninth Circuit relied heavily on the *Spring* decision's continued bifurcation of the *Miranda* waiver process in holding that police action is not required to find that a defendant did not understand their *Miranda* rights. *Id.* at 820-21.

Lastly, in *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1980), the Eleventh Circuit explicitly held that "mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his *Miranda* rights," without a showing that the police acted on that illness. *Id.* at 1539.

B. *Miranda* and its progeny are clear that actual understanding of rights is central to the effectiveness of the warnings

The central purpose of the *Miranda* warnings was to do just that: warn accused individuals that they had rights. *Miranda* itself, as well as the recent invocation case of *Berghuis v. Tompkins*, 560 U.S. 370 (2010), and the liberalization of the *Miranda* warnings in *Florida v. Powell*, 559 U.S. 50 (2010), make clear that for *Miranda* to do any work at all, defendants must actually understand their rights.

i. *Miranda v. Arizona*

It is undeniable that the remedy established in *Miranda* was designed to have a police-regulatory effect. *Miranda v. Arizona*, 384 U.S. 436 (1966). However, interpreting that police-regulatory effect to mean that *Miranda* only extends to police abuse is superficial and ignores the core of what *Miranda* provided. The second sentence of Chief Justice Warren's *Miranda* opinion makes the inquiry clear: "[W]e deal with…the necessity for procedures which assure the individual is accorded his privilege under the Fifth Amendment to the Constitution to not be compelled to incriminate himself." *Id.* at 439. The protections in *Miranda* were designed to actually inform defendants of their rights and to level the playing field relating to the "inherent compulsions of the interrogation process." *Id.* at 467.

If these warnings are not understood, then *Miranda* does no work whatsoever. Time and time again the *Miranda* court stressed the importance of actual understanding to its decision. For example, when discussing the right to silence: "For those unaware of the privilege, the warning is needed simply to make them aware of it—*the threshold requirement for an intelligent decision as to its exercise.*" *Id.* at 468 (emphasis added). On the need for an explanation of the right to silence the Court writes: "This warning is needed in order to make him aware not only of the

privilege, but also of the consequences of forgoing it. *It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.*" *Id.* at 469 (emphasis added). Again, Chief Justice Warren: "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel." *Id.* at 470-71. It is absolutely clear that actual understanding of these rights by individuals accused of a crime is paramount in their free exercise.

ii. *Berghuis v. Thompkins*

This assumption, that warnings serve to actually notify a defendant of his or her rights, is apparent in this Court's recent *Miranda* decisions. In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the Court ruled that one may impliedly waive their *Miranda* rights. In that case, an accused remained silent for three hours throughout a warned custodial interrogation; however, once the accused broke his silence, the Court ruled that he had waived his rights. *Id.* at 386. At the core of this decision was that the accused actually understood his rights. In fact, Justice Kennedy's majority opinion repeats the "understanding" requirement more than a dozen times. Andrew Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 Am. Crim. L. Rev. 1437, 1446 (2012). Not only does the *Berghuis* majority explicitly make clear that "the main purpose of *Miranda* is to ensure that an accused is advised of and *understands* the right to remain silent," the central premise of the holding in *Berghuis*, "that a suspect who has received and understood the Miranda warnings, and has not invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police," is only plausible if the accused actually understands those rights. *Id.* at 388-89. Indeed, the Court writes that "If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate 'a valid waiver' of *Miranda* rights. The

prosecution must make the additional showing that the accused understood these rights." *Id.* at 384 (quoting *Miranda*, 384 U.S. at 475) (internal citations omitted).

iii. *Florida v. Powell*

Lastly, though less directly, *Florida v. Powell*, 559 U.S. 50 (2010), held that there are no magic words that are required to satisfy the mandate of *Miranda*. Instead, the inquiry is based on whether the words used "reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Id.* at 60 (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (alterations in original)). Once again, the central point of this holding is that the core of *Miranda* is to actually convey information to suspects, and that a necessary predicate for conveying the information is that the suspect will actually understand those rights. *See id.* at 63 ("Different words were used in the advice Powell received, but they communicated the same essential message.").

C. Public policy demands that this Court adopt a defendant focused analysis of the knowing and intelligent prong of *Miranda* waiver.

A rule that waiver may be found based solely on police perceptions of a situation may serve to endanger vulnerable populations. The requirements for invocation instituted in *Berghuis* presuppose a defendant with a normal mental capacity. Thus, a defendant who does not understand their *Miranda* rights, almost by definition, cannot invoke them and receives none of the protections offered by *Miranda*. Instead, a defendant focused rule that simply asks whether a defendant actually understood their rights serves to provide greater protections for vulnerable populations. This rule can be implemented in a similar fashion as *Miranda* itself. In order for a waiver to be valid, defendants must be able to articulate in their own words what their rights mean. If they are incapable of doing so, they are incapable of waiving their rights. This rule

imposes a small burden on law enforcement when measured against the protections it provides to vulnerable populations.

The benefits to the intellectually disabled, those with mental illness, and juveniles are clear, *see* Ferguson, *supra*, at 1458-1467 (detailing the need for a revised *Miranda* warning and waiver system for vulnerable populations), some may argue that imposing an articulation requirement is burdensome on law enforcement.

Undeniably, this requirement would level the playing field for vulnerable populations and those who do not fully understand their rights during interrogations. Law enforcement may claim that this requirement may lose confessions, requires more training, and forces law enforcement to make decisions about whether a suspect actually understands their rights. All of these claims are likely true; however, they are not reasons to forego implementation. Ferguson, *supra*, at 1485-1488.

First, it is certainly possible that an articulation requirement would prevent some suspects from confessing. However, this is the same concern that was echoed in the wake of *Miranda*. *See* 384 U.S. at 478 ("Our decision is not intended to hamper the traditional function of police officers investigating crime."). Because the entire justification for *Miranda* is to adequately inform suspects of their rights, lost confessions are a necessary cost for the fulfillment of *Miranda'*s promise.

Second, while the articulation requirement would require more training, as Ferguson points out, many, if not most, confessions arise not out of a lack of knowledge of rights, but out of a sense of trust building between interrogators and suspects. *Id.* at 1487-88. If anything, this opportunity to build trust between law enforcement and suspects should be embraced by the police.

Lastly, this articulation would require that police make determinations as to the suspect's actual understanding of their rights. This is nothing new, however. Even under the government's police-focused approach, police are required to make determinations as to whether a suspect understands their rights. Indeed, in this case, the questioning was so brief, and the *Miranda* warnings so formal that there were few possible data points for the police to make an objective determination. R. at 3. This rule would not require law enforcement to become "mind readers" as the Supreme Court of Eastern Virginia described it. R. at 6. Just as *Miranda* did not require a "station house lawyer" so to this rule does not require a "station house psychiatrist." 384 U.S. at 474. It simply requires that law enforcement establish more data from which they can make the determination that they are already tasked with making.

D. The error in admitting Ms. Frost's incriminating statements was not harmless because it was constitutional error and certainly contributed to her conviction.

The government may argue that, because the physical fruits of illegal confessions are admissible, that the error by the trial court in admitting the statements was harmless. *United States v. Patane*, 542 U.S. 630 (2004). An error is not harmless if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). When the error is constitutional in nature, the burden rests on the government to show that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

While it is possible that the evidence outside of the confession could have convicted Ms. Frost, it is certainly not beyond a reasonable doubt that her confession contributed to her conviction. Her confession was the only piece of evidence that affirmatively connected her to the crime. R. at 2-4.

II. THE CONSTITUTION OF THE UNITED STATES REQUIRES AN INSANITY DEFENSE

"Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder." *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 570 (1953) (Frankfurter, J., dissenting). Since long before the Founding Fathers drafted the United States Constitution, and before Columbus even first stepped foot on the Americas, criminal defendants have been able to assert insanity as an affirmative defense to criminal charges. At the same time, the laws around the world unquestionably protected those who were insane from criminal liability for their actions. Thus, the right to raise an affirmative insanity defense is fundamental to due process and protections against cruel and unusual punishment, and prohibiting such a defense, as East Virginia has tried to do, violates criminal defendants' constitutional rights.

A. Prohibiting Ms. Frost from Asserting an Insanity Defense Violates Her Eighth Amendment Right against Cruel and Unusual Punishment.

The law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong. *Delling v. Idaho*, 568 U.S. 1038, 1038 (2012) (denial of certiorari) (Breyer, J., dissenting).

Any statute which criminally punishes a mentally ill person for conduct over which she has no control is unconstitutional and violates the Eighth Amendment's prohibition against inflicting cruel and unusual punishment. The Petitioner suffers from paranoid schizophrenia and, particularly, at the specific time at which she committed the act of taking Mr. Smith's life was in a psychotic state due to her mental disease. As Dr. Frain found and later testified to, during the dates in question Ms. Frost was in a psychotic state at the time of Mr. Smith's death and did not know what she was doing. This mental disease destroyed her ability to consciously appreciate the wrongfulness of her actions, and any acts she undertook as the result of this mental disease

were involuntary. As a result, criminal punishment for Ms. Frost, and for any person who suffers from a mental disease that causes them to not be able to understand or appreciate the wrongfulness of their actions, cannot withstand judicial scrutiny under the Eighth Amendment of the Constitution.

The Eighth Amendment in no uncertain terms prohibits excessive sanctions, stating that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (citing U.S. Const. amend. VIII). This Court's jurisprudence on the Eighth Amendment involves evaluating whether the "punishment for the crime [is] graduated and proportioned to the offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). But this Court's jurisprudence on the Eighth Amendment does not focus solely on punishment, instead, the Court has also applied the right against cruel and unusual punishment in prohibiting criminal convictions for certain cases, for reasons that certainly apply here. For example, in *Robinson v. California*, the Court invalidated a statute criminalizing narcotic addiction, stating that even though "imprisonment for ninety days, is not, in the abstract, punishment which is either cruel or unusual," it may not be imposed as a penalty for a status of narcotic addiction because such a sentence would be excessive, in violation of the Eighth Amendment. 370 U.S. 60, 666–67 (1962). As Justice Stewart further expounded, "Even one day in prison would be a cruel and usual punishment for the 'crime' of having a common cold." *Robinson*, 370 U.S. at 667. In his concurring opinion in *Robinson*, Justice Douglas propounded the very issue that comes before this Court, stating that he did "not understand how under our system being an addict can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity." *Robinson*, 370 U.S. at 674 (Douglas, J., concurring).

Conviction itself, just as much as the punishment for conviction, falls under the Eighth Amendment's prohibition against cruel and unusual punishment. "Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960). Even if a criminal defendant is not sentenced to life (as was the sentence given in this case), that defendant's ability to get a job, to work in certain industries, to apply for housing, to live in certain areas or to get an education can be severely compromised. As a result, this Court has placed questions of conviction squarely within its Eighth Amendment jurisprudence.

The Court's decisions on the Eighth Amendment, including *Bucklew v. Precythe* from last term, provide two separate analyses for evaluating whether a penalty is in violation of the Eighth Amendment. Regardless of which analysis this Court uses in the instant issue, the conclusion would be the same—that abolishing an insanity defense runs afoul of the right against cruel and unusual punishment. The first analysis, discussed in *Bucklew*, asks whether the practice in question "qualifie[s] as 'cruel and unusual,' as a reader at the time of the Eighth Amendment's adoption would have understood those words." *Bucklew*, 139 S. Ct. 1112, 1123 (2019). The other analysis that this Court has previously employed asks not whether that punishment would have been considered excessive when the Bill of Rights was adopted, but rather whether the punishment is considered excessive by standards that currently prevail. *Atkins*, 536 U.S. at 311. As Chief Justice Warren explained in writing for the Court in *Trop v. Dulles*, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 100–01 (1958).

i. Abolishing the Insanity Defense and Thereby Punishing the Criminally Insane Would Have Been Considered Cruel and Unusual in 1789

Legal insanity in criminal prosecutions has been an established concept in the United States and in Europe for centuries. *See Finger v. State*, 27 P.3d 66, 80 (Nev. 2001). Beginning in the 1300s under the reign of Edward II, there was "a shift toward recognizing insanity as a complete defense, which was perfected by the time of the ascension of Edward III to the throne" in 1326. *State v. Searcy*, 798 P.2d 914, 928 (Idaho 1990) (McDevitt, J., dissenting). As Justice McDevitt iterates the history of the insanity defense, he recognizes that by 1581 a lack of criminal liability for those who were insane was well established, as the insanity defense was thoroughly covered in criminal procedure books already, providing that a "mad man" or a "naturall (sic) foole (sic)" having no knowledge of good or evil who kills a man cannot be found guilty of a "felonious act" because that person will not have the right "understanding will" to be found liable for their actions. *Searcy*, 798 P.2d at 928–29. McDevitt continues, citing treatises and cases all of which clearly demonstrate that a person not understanding the wrongfulness of their actions cannot be found criminally liable. *Searcy*, 798 P.2d at 929–35.

Not only was the insanity defense widely protected, but there were often other resources for addressing those who might otherwise be criminally insane, often insulating those individuals from criminal trials in the first place. As noted by legal scholars, often "idiocy was addressed on a local level by the idiot's family and community," and, as a result, "idiots and lunatic were particularly unlikely to receive formal trials." *See* Michael Clemente, *A Reassessment of the Common Law Protections for "Idiots,"* 124 Yale L.J. 2746, 2781, 2784 (2015). Thus, exposing the criminally insane to trial at all would seem amiss, but if courts were to remove their ability to present an insanity defense (and therefore any evidence of their insanity), such events would seem utterly wrong to how those "reader[s] at the time of the Eighth Amendment's adoption

would have understood those words." *Bucklew*, 139 S. Ct. at 1123.

With such a robust history of insanity defenses and courts finding that insane defendants could not be liable for their crimes, the reasonable reader in 1789 when the Bill of Rights was established would absolutely understand that removing the ability of defendants to present this defense would have violated the Eighth Amendment's protections against cruel and unusual punishment. Abolishing a defense as widely accepted and promoted and employed such as the insanity defense would, in the minds of the reasonable readers in 1789, appear to violate the Eighth Amendment.

ii. Abolishing the Insanity Defense and Thereby Punishing the Criminally Insane Also Violates the Current Standards of Dignity and Decency in the United States

Under the analysis that this Court laid out in *Atkins*, another method of evaluating whether a practice runs afoul of the Eighth Amendment's prohibition on cruel and unusual punishment is whether that practice violates the current standards of decency. *Atkins*, 536 U.S. at 311. This standard embodies the idea that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). This proportionality review should be informed by "objective standards to the maximum possible extent." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991). This Court has further stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). This standard has allowed this Court to determine that the death penalty for rape and the death penalty for a defendant who neither took, attempted or intended to take life both violated the Eighth Amendment's prohibition on cruel and unusual punishment. See *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982).

In cases involving a legislative consensus (or even a large majority of legislatures

aligning their standards), this Court must determine whether to "disagree with the judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313; *Coker*, 433 U.S. at 597.

Objective evidence, however, does not "wholly determine" the controversy over whether a penalty violates the Eighth Amendment, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker*, 433 U.S. at 597. Further propounding on this idea, in *Enmund*, this Court stated that the defendant's "criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his *personal responsibility and moral guilt*." 458 U.S. at 801 (emphasis added).

When looking at whether the abolition of an insanity defense exposes insane defendants to cruel and unusual punishment, then, we must first look to the legislatures to see how they have treated insane defendants. Surveying the 53 jurisdictions, from East Virginia to the other fifty states, the District of Columbia, and federal criminal law, 48 out of 53 jurisdictions have preserved a defendant's absolute right to raise an insanity defense at some point and to be acquitted of criminal charges as a result.[2] But taking a step back and looking to jurisdictions that at least allow courts to consider mental disease or defect as mitigating evidence either during trial or in sentencing, that number shifts to 51 out of 53 jurisdictions.[3] Only Kansas and, now, East Virginia have completely abolished insanity defenses and completely bar courts, juries, and

[2] *See* Appendix B for the statutes or common law established in each jurisdiction

[3] Idaho and Montana allow juries and judges to find a defendant "guilty but insane," which allows the state to commit the defendant to treatment while still convicting the defendant of the act which they committed. Utah, in a similar vein, allows judges and juries to find that a defendant is "Guilty but Mentally Ill," with many of the same results as Idaho and Montana. Thus, only East Virginia and Kansas have completely abolished an insanity defense and have effectively barred any evidence showing that a defendant did not appreciate the wrongfulness of their actions from being entered at trial.

judges from finding criminal defendants had lesser liability because of their mental disease or defect. The statutes and common law that have preserved a defendant's ability to plead insanity are not all simply statutes that have sat on the books for years and have not changed. Many of these statutes have been recently updated and amended, demonstrating that state legislatures continue to value and preserve the right to raise an insanity defense for insane defendants. In the 1980s, when Congress was adopting its current federal insanity defense, Congress specifically recognized that the "insanity defense should not be abolished" because it reflects a "fundamental basis of Anglo-American criminal law: the existence of *moral culpability* as a prerequisite for punishment." H.R. Rep. No. 98-577, at 3, 7–8 (1983).

Applying the consensus of the various legislatures around the United States and this Court's objective standard to the case at issue then, nearly all legislatures around the country have spoken, and have spoken clearly: Insane defendants are less liable for criminal acts than defendants who are not insane, and therefore insane defendants should not receive the same convictions as sane defendants. As courts have found, the "status and condition in the eyes of the world, and under the law, of one convicted of crime, is vastly different from that of one simply adjudged insane." *State v. Strasburg*, 110 P. 1020, 1025 (Wash. 1910); *see also United States v. Greene*, 489 F.2d 1145, 1173 n.69 (D.C. Cir. 1974) (discussing, among other things, that abolishing the insanity defense would likely require a compelling legislative justification, and that an insanity defense appeared to be constitutionally required).

The concept of lesser liability for insane defendants is not new, and certainly is analogous to other types of protections for people who either cannot appreciate the wrongfulness of their actions, or who believed that their actions were right or justified under their circumstances: defenses such as infancy or justification. This Court has discussed cruel and unusual

punishments for juveniles on several occasions, generally holding that juveniles cannot be sentenced to death, cannot be sentenced to life in prison without a specific hearing showing that As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Like the hypothetical prisoner in Justice Stewart's hypothetical, Ms. Frost could not help her mental illness no more than Stewart's prisoner could help having a common cold. Ms. Frost did not understand that her illness was driving her to act in the way that she did, and the East Virginia statute at issue effectively punishes her for acting in a way that seemed right and justified based on how she saw and understood the world.

Furthermore, exposing criminally insane defendants to the same convictions and the same punishments as sane defendants implicates problems that this Court has already identified when dealing with potentially lesser-liable defendants: the "culpability of the offenders at issue," "the severity of the punishment in question," and "whether the challenged . . . practice serves legitimate penological goals." *Graham v. Florida*, 560 U.S. 48, 67 (2010) (finding that juveniles tend to be less criminally liable than adults and therefore cannot be sentenced to death); *see also Atkins*, 536 U.S. at 319 (discussing the "lesser liability of the mentally retarded").

iii. None of the Accepted Penological Justifications for Punishing Criminal Conduct are Served by Convicting Criminally Insane Defendants

There are generally four accepted penological justifications for punishing criminal conduct—retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 71; *see also* 18 U.S.C. § 3553 (2012) (providing the aims of a criminal sentence and requiring that judges must evaluate a possible sentence with regard to each aim before imposing a sentence). None of these justifications are served when states like East Virginia convict and punish criminally insane defendants.

Turning first to retribution, punishing a person who cannot appreciate that her conduct is wrong serves no retributive value. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). Culpability, as this Court has defined it, is comprised of a moral question that automatically assumes a rational agent with the ability to appreciate the potential wrongfulness or illegality of her actions. *See Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (describing retribution as "the need to offset a criminal act by a punishment of equivalent moral quality"). It follows, then, that an insane person, not being a rational agent who appreciates the wrongfulness of her actions, cannot be convicted pursuant to E. Va. § 21-3439 the same way that a sane defendant would be, as an insane person does not have the ability to appreciate the potential wrongfulness of her actions.

Deterrence utterly fails to provide a justification for this statute. Deterrence is not served by punishing insane defendants like Ms. Frost because it cannot serve to actual deter the defendant or provide an example to others. *See Ford*, 477 U.S. at 407. An insane defendant who cannot understand why their conduct was wrong cannot be deterred—after all, that defendant believes that she was in the right, or at least that her actions were justified. Little can be done to try and deter other similar defendants, as *Atkins* stated that "the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can . . . control their conduct" based on the possibility of criminal penalties. *Atkins*, 536 U.S. at 320. Insane defendants, then, cannot be deterred because they do not understand that their conduct was wrong in the first place and often cannot control their actions enough to be deterred by another's punishment.

Incapacitation via criminal punishment is an ineffective method for treating an insane

defendant's underlying mental disease and criminal acts, and will likely do very little to protect against any potential dangerousness in the future. Incarceration in a regular prison far from guarantees that an insane defendant will receive the necessary treatment for their mental disease. Furthermore, if it is in fact the mental disease that caused the criminal act in the first place (or did not stop the defendant from committing the criminal act), treatment of that disease ought to be sufficient to ensure that the defendant is no longer dangerous, but also no longer has the same understanding of the world.

Finally, and continuing from above, prisons are not equipped to effectively rehabilitate people who are criminally insane or suffer from mental diseases. Mental health services in prisons are almost non-existent and are often sub-par and cannot effectively treat those with severe mental diseases—such as, for example, the types of mental diseases that would cause a person to not understand why killing someone was not justified. But improving this situation is serving to be nearly impossible, due to the magnitude of the problem facing the prison system, near non-existent resources, and the constant security concerns of a prison. *See* Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 Crime and Justice 231, 249 (2017).

Convicting and then punishing an insane defendant identically to a sane defendant serves none of these penological purposes. In contrast, allowing an affirmative insanity defense which, if found not guilty by reason of insanity, allows the state to civilly commit an insane defendant until restored to competency and no longer dangerous, serves each and every one of these penological purposes. There are no arguments the Commonwealth could make that would show that the statute in question accomplishes any of these legitimate penological purposes.

Whether this case is evaluated through the modern proportionality analysis or the reader

at the enactment of the Bill of Rights analysis, the Eighth Amendment wholly prohibits East Virginia—and any other state who seeks to abolish the insanity defense—from punishing a criminal defendant with no regard as to his ability to rationally appreciate the wrongfulness of his or her actions as a result of that defendant's mental illness. There is "no greater cruelty than trying, convicting, and punishing a person [who is] wholly unable to understand the nature and consequence of his act, and . . . such punishment is certainly both cruel and unusual in the constitutional sense." *Sinclair v. State*, 132 So. 581, 484 (Miss. 1931) (Ethridge, J., concurring). Trying, convicting, and later punishing insane defendants in the same manner as sane defendants serves no legitimate penological purposes—rather, an affirmative insanity defense and civil commitment do serve these purposes. As a result, because East Virginia is punishing defendants with no regard to their ability to understand their own wrongful acts, such punishment runs afoul of the Eighth Amendment. Therefore, E. Va. Code § 21-3439 violates the Constitution's prohibition on cruel and unusual punishment, the statute must be invalidated, and Ms. Frost's conviction must be overturned.

B. Prohibiting Ms. Frost from Raising the Affirmative Defense of Insanity Also Violates Her Fourteenth Amendment Right to Due Process.

The Fourteenth Amendment to the United States Constitution states that "[n]o State shall make or enforce any law which shall abridge . . . any person of life, liberty or property, without due process of law." The Due Process Clause protects "those principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977). The Due Process Clause of the Fourteenth Amendment guarantees more than simply "fair process" and the "liberty" it protects includes more than the absence of physical restraint. *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). The Due

Process Clause also provides "heightened protection against government interference with certain fundamental rights and liberty interests." *Glucksberg*, 521 U.S. at 720; *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). This Court's jurisprudence on the Due Process Clause has expanded the protections of the Fourteenth Amendment past merely what is enumerated in the Bill of Rights, and this Court has held that the "liberty" protected by the Due Process Clause includes the right to marry, the right to have children, the right to direct the education and upbringing of one's children, the right to marital privacy, the right to use contraception, the right to have an abortion, and others. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In the realm of criminal justice and criminal procedure, this Court has held that the Due Process Clause requires that defendants be presumed innocent until proven guilty, that defendants be proven guilty beyond a reasonable doubt, that defendants are entitled to pretrial release until proven guilty as the spirit of bail is to "enable the[] [defendant] to stay out of jail until a trial has found them guilty". *See Coffin v. United States*, 156 U.S. 432, 453 (1895); *Bell v. Wolfish*, 441 U.S. 520, 582 n.11 (1979); *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

While this Court generally defers to the individual states for the administration of criminal justice and criminal procedure, this Court also has a higher duty to "ascertain whether [criminal proceedings] offend those canons of decency and fairness which express the notions of justice of [the United States and of all Western Civilization] even toward those charged with the most heinous offenses." *Rochin v. California*, 342 U.S. 165, 171–72 (1952); *see also Medina v. California*, 505 U.S. 437, 445–46 (1992). This Court has recognized that these heinous crimes

may "deeply stir[] popular sentiment [and] may lead the legislature of a State, in one of those emotional storms which on occasion sweep over our people, to enact" laws that otherwise strip criminal defendants of their rights. *Leland v. Oregon*, 343 U.S. 790, 802 (1952) (Frankfurter, J., dissenting). This Court's affirmative duty to step in and remedy unjust laws arises when legal traditions and history demonstrate that the asserted right is fundamental.

i. Raising an Insanity Defense Has Long Been Preserved in the United States and Abroad

Based on this Court's most recent jurisprudence on the Fourteenth Amendment, there are two basic features to identifying a fundamental liberty in Substantive Due Process analysis. First, the asserted right must be "deeply rooted in history and tradition." *Glucksberg*, 521 U.S. at 720–21. Second, the asserted right must be "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720–21. In identifying a fundamental right, the Court must use a "careful description" of the right. *Glucksberg*, 521 U.S. at 720–21. For example, in *Washington v. Glucksberg*, the right the Court had to analyze was the right to commit suicide, not the right to determine the time and manner of one's death, or the liberty to shape one's death. Later, in *Lawrence v. Texas*, this Court rejected its previous definition of the asserted liberty interest from *Bowers v. Hardwick* (which dealt with what the Court defined as an asserted right to "engage in homosexual sodomy") and more broadly defined the asserted liberty interest as the right to engage in private intimate sexual conduct. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

There is no dispute about the fundamental liberty interest at issue here: Ms. Frost asserts that she (and all defendants) have the right to raise an insanity defense in criminal proceedings as a defense to criminal liability. If this Court were to use the same type of definition that it employed in *Lawrence v. Texas*, this Court could reasonably find that the asserted right is slightly more broad, encompassed under the right to present evidence and raise any defense

(within reason) to criminal liability at all. Unlike in *Glucksberg*, where this Court determined that there was no fundamental right to physician-assisted suicide, the laws of the United States—and, in fact, of all of Western Civilization—have long preserved a defendant's right to raise an insanity defense. Beginning long before the thirteen colonies formed the United States, insanity has globally been recognized as a defense to criminal liability.

Until 1979, every jurisdiction in the United States (both at the federal and local levels) had an affirmative insanity defense. While not every iteration of the insanity defense was identical to one another, there still existed *an affirmative defense* in every single jurisdiction. Thus, the practice of defendants having the ability to prove insanity did not simply exist, but was universal. The first state to even attempt to abolish the defense occurred in 1910, but all of those early efforts were found to be unconstitutional. *See Sinclair v. State*, 132 So. 582, 582 (Miss. 1931) (per curiam); *State v. Lange*, 123 So. 639, 642 (La. 1929); *State v. Strasburg*, 110 P. 1020, 1021 (Wash. 1910). Not only, then, has legislation clearly shown that the right to raise an affirmative insanity defense is deeply rooted in this Nation's legal traditions, but also these examples clearly demonstrate that the right to raise an affirmative insanity defense is also implicit in the concept of ordered liberty:

> So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English-speaking countries that it has become a part of the fundamental laws thereof, to the extent that a statute which attempts to deprive a defendant of the right to plead it will be unconstitutional and void.

Sinclair, 132 So. at 584 (Ethridge, J., concurring).

Similar to this Court's finding in *Lawrence v. Texas*, the issue here (whether a defendant is allowed to present an insanity defense) is widely supported throughout the United States. In fact, allowing criminal defendants to raise insanity defenses is currently more protected than the issue in *Lawrence*, where thirteen states outlawed sodomy. Here, only five out of fifty-three

jurisdictions have laws on the books that prohibit insanity defenses—and three of those jurisdictions still at least allow evidence of insanity for mitigation and for certain pleas—one even *requires* judges to consider evidence of insanity. And in *Lawrence*, the Court concluded that deferring legal norms to moral or societal opposition to homosexual conduct violated Due Process. Similarly, deferring standards of insanity to each state's individual beliefs or feelings on the matter likewise violates Due Process. As this Court in *Lawrence* determined that individuals had a fundamental liberty interest in their private relationships, this Court should conclude that a defendant has a fundamental liberty interest in raising an affirmative insanity defense at trial.

ii. *Clark v. Arizona* is Not Controlling

The instant issue is not the first time that this Court has considered a question on the insanity defense before, but it is the first time that this Court has been asked to determine whether an insanity defense is required under the United States Constitution. The most recent case where this Court evaluated a state's choice in its insanity standard was in *Clark v. Arizona* in 2006. In that case, the Court was asked to decide whether Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong violated due process. *Clark v. Arizona*, 548 U.S. 735, 744 (2006). Clark, the defendant, had been charged and convicted of first-degree murder of a police officer. He never denied the shooting and killing, but disputed that he had the specific intent to kill a police officer due to his paranoid schizophrenia. While Clark did introduce evidence to show he suffered from significant delusions, the state presented evidence that Clark knew how to identify police officers and that he had previously expressed to acquaintances his intent to kill police officers. The trial court would not allow Clark to admit evidence of his mental disease to undermine the prosecution's *mens rea* element, but still allowed him to raise a general insanity defense. Before this Court, Clark disputed the validity of the *type* of insanity test that Arizona state law allowed. The

question before the Court in *Clark* was not whether insanity defenses were constitutional rights, but rather what kind of insanity defense the Constitution required. As a result, this Court rejecting Clark's argument and deferring to the state's decision on what standard of insanity test was appropriate is inapplicable here.

Generally, this Court does defer to state legislatures on issues of criminal procedure. *Medina*, 505 U.S. at 445–46. As a result, this Court will not tell the individual states what kind of insanity standard they are required to have. *See Clark*, 548 U.S. at 779. However, this Court does have a duty to preserve the Due Process of criminal defendants, and as a result ought to conclude that, while the exact standard of insanity that the states use is of little consequence, states are required under the Due Process Clause to allow criminal defendants to raise an insanity defense when appropriate.

iii. Failing to take into account a defendant's inability to distinguish good from evil (or lawful and unlawful) clearly violates Due Process

East Virginia's statute only taking into account mental disease for purposes of determining whether a defendant formed the required *mens rea* to commit a crime fails to provide the required process that defendants are due, as an insanity defense is broader than simply undermining *mens rea*. *See State v. Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989) ("criminal intent or lack thereof is not the focus of the insanity question," which "is and always has been broader"). Thus, "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Clark v. Arizona*, 548 U.S. 735, 796 (2006) (Kennedy, J., dissenting). Regardless of this standard, East Virginia's statute clearly conflates what has otherwise always been two distinct concepts.

The effects of this conflation are clearly shown throughout this record. This Court has observed that those who are "cognitively incapacitated are a subset of the morally incapacitated."

Clark, 548 U.S. at 754. East Virginia's approach by only considering evidence of mental disease for the purpose of *mens rea* offers no protection to the morally incapacitated defendant. For example, in his dissent in the Court's denial of certiorari in *Delling v. Idaho*, Justice Breyer illustrated this problematic gap with the following example: Suppose Defendant A is insane, and due to his mental disease he believes that the victim is a wolf and shoots and kills him. Then, Defendant B who is also insane believes as a result of his mental disease that a supernatural figure has ordered him to kill the victim. Both defendants are insane. Both defendants killed a human as a result of their delusions. But only Defendant A would be able to present that evidence in East Virginia. However, in the second example, Defendant B honestly believed that he needed to kill the victim because of his delusion—but no jury in East Virginia would be able to hear that evidence under E. Va. § 21-3439. Both of these defendants lack the "ability . . . of the normal individual to choose between good and evil." *Morrissette v. United States*, 342 U.S. 246, 250 (1952). But, to East Virginia, that fact does not matter. Defendant B would still be guilty, and Defendant A would not. The exact same evidence—Defendant B's mental disease and delusions—would lead to acquittal in at least 48 different jurisdictions in the United States. In some of the other jurisdictions, Defendant B's evidence would be admissible for the purposes of sentencing. But simply delivering a reduced sentence is far and distinct from an acquittal, which would otherwise avoid the numerous consequences and repercussions of a criminal conviction, "apart from the [resulting] sentence." *Ball v. United States*, 470 U.S. 856, 865 (1985).

This Court's precedents and decisions do not allow states to substitute the historical insanity defense with just a *mens rea* approach. In *Clark*, this Court stated correctly that it had never determined whether the Constitution requires that a defendant be able to raise an insanity

defense. 548 U.S. at 752 n.20. But the Arizona statutory scheme at issue in *Clark* still preserved the "requirement that the accused know his act was wrong" and effectively then did not "change the meaning of the insanity standard." *Clark*, 548 U.S. at 754, 755 n.24. The statutory scheme in East Virginia fails to preserve that requirement. Thus, the *mens rea* approach is far different from any scheme this Court has yet considered. Finally, for all the reasons laid out above, is unconstitutional.

CONCLUSION

For the above stated reasons, the Petitioner respectfully asks that this Court find that her confession was inadmissible under the Fifth Amendment, and that the abolition of the insanity defense by E. Va. Code § 21-3439 violates her Eighth Amendment right to be free of cruel and unusual punishment and her Fourteenth Amendment Right to due process. Petitioner further requests that this Court vacate her conviction and remand this matter back to the circuit court for a new trial.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2019, the foregoing brief was submitted via email to corrlee@mail.regent.edu.

/s/ *Team P*
Attorneys for Petitioner

APPENDIX A

Constitutional Provisions and 18 U.S.C. § 1114

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:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 1114 (2012):

> Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished—
>
> (1) in the case of murder, as provided under section 1111;
>
> (2) in the case of manslaughter, as provided under section 1112; or
>
> (3) in the case of attempted murder or manslaughter, as provided in section 1113.

APPENDIX B

Statutes and/or Common Law on an Insanity Defense

Alabama:

Ala. Code § 13A-3-1 (2014):

> (a) It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
> (b) "Severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
> (c) The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Alaska

Alaska Stat. Ann. § 12.47.010 (2011):

> (a) In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct.
> (b) The affirmative defense defined in (a) of this section may not be raised at trial unless the defendant, within 10 days of entering a plea or such later time as the court may for good cause permit, files a written notice of intent to rely on the defense.
> (c) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the affirmative defense under (a) of this section.
> (d) The affirmative defense specified in (a) of this section is the affirmative defense of insanity. A defendant who successfully raises the affirmative defense of insanity shall be found not guilty by reason of insanity and the verdict shall so state.

Arizona:

Ariz. Rev. Stat. Ann. § 13-502 (2012):

> A. A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.

Arkansas

Ark. Code Ann. § 5-2-312 (2014):

> (a)

(1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged he or she lacked criminal responsibility.
(2) When the affirmative defense of lack of criminal responsibility is presented to a jury, prior to deliberations the jury shall be instructed regarding the disposition of a defendant acquitted due to the defendant's lack of criminal responsibility as described under § 5-2-314.

(b) When a defendant is acquitted on a ground of lack of criminal responsibility, the verdict and judgment shall state that the defendant was acquitted on a ground of lack of criminal responsibility.

California

Cal. Penal Code § 25 (2017):

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.
(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

Colorado

Colo. Rev. Stat. § 16-8-101.5 (2016):

(1) The applicable test of insanity shall be:
(a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable; except that care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for, when the act is induced by any of these causes, the person is accountable to the law; or
(b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged, but care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when the act is induced by any of these causes, the person is accountable to the law.

Connecticut

Conn. Gen. Stat. § 53a-13 (2014):

(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial

capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.

Delaware:

Del. Code Ann. tit. 11, § 40 (2017):

(a) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or serious mental disorder, the accused lacked substantial capacity to appreciate the wrongfulness of the accused's conduct. If the defendant prevails in establishing the affirmative defense provided in this subsection, the trier of fact shall return a verdict of "not guilty by reason of insanity."

District of Columbia:

Howard v. United States, 954 A.2d 415 (D.C. 2008):

Discussing the application and procedure behind the insanity defense

D.C. Code § 24-501 (discussing treatment/disposition of a case after a defendant has been acquitted by reason of insanity).

Florida:

Fla. Stat. § 775.027 (2014):

(1) Affirmative defense. — All persons are presumed to be sane. It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. Insanity is established when:

(a) The defendant had a mental infirmity, disease, or defect; and

(b) Because of this condition, the defendant:

1. Did not know what he or she was doing or its consequences; or

2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.

Georgia:

Ga. Code Ann. § 16-3-2 (2014):

A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.

Hawaii:

Haw. Rev. Stat. § 704- 400 (2015):

(1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.

Idaho:

Idaho Code § 18- 207 (2016):

(1) Mental condition shall not be a defense to any charge of criminal conduct.

See also: Idaho Code Ann. § 19-2523:

(1) Evidence of mental condition shall be received, if offered, at the time of sentencing of any person convicted of a crime. In determining the sentence to be imposed in addition to other criteria provided by law, if the defendant's mental condition is a significant factor, the court shall consider such factors as:

(a) The extent to which the defendant is mentally ill;
(b) The degree of illness or defect and level of functional impairment;
(c) The prognosis for improvement or rehabilitation;
(d) The availability of treatment and level of care required;
(e) Any risk of danger which the defendant may create for the public, if at large, or the absence of such risk;
(f) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offense charged.

Illinois:

720 Ill. Comp. Stat. Ann. 5/6-2 (2014):

(a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct.
(c) A person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill.

Indiana:

Ind. Code § 35-41-3-6 (2014):

(a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

Iowa:

Iowa Code § 701.4 (2015):

A person shall not be convicted of a crime if at the time the crime is committed the person suffers from such a diseased or deranged condition of the mind as to render the person incapable of knowing the nature and quality of the act the person is committing or incapable of distinguishing between right and wrong in relation to that act. Insanity need not exist for any specific length of time before or after the commission of the alleged criminal act. If the defense of insanity is raised, the defendant must prove by a preponderance of the evidence that the defendant at the time of the crime suffered from such a deranged condition of the mind as to render the defendant incapable of knowing the nature and quality of the act the defendant was committing or was incapable of distinguishing between right and wrong in relation to the act.

Kansas:

Kan. Stat. Ann. § 21- 5209 (2011):

It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.

Kentucky:

Ky. Rev. Stat. Ann. § 504.020 (2013):

(1) A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or intellectual disability, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Louisiana:

La. Stat. Ann. § 14:14 (2014):

If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility.

Maine:

Me. Stat. tit. 17-A, § 39 (2014):

1. A defendant is not criminally responsible by reason of insanity if, at the time of the criminal conduct, as a result of mental disease or defect, the defendant lacked substantial capacity to appreciate the wrongfulness of the criminal conduct.

Maryland:

Md. Code Ann., Crim. P. § 3-109 (2016):

(a) In general. -- A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity to:

(1) appreciate the criminality of that conduct; or

(2) conform that conduct to the requirements of law.

Massachusetts:

Com. v. McHoul, 352 Mass. 544, 546–47 (1967):

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

Michigan:

Mi. Comp. Laws Ann. § 768.21a (2012):

(1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400 of the mental health code, or as a result of having an intellectual disability as defined in section 100b of the mental health code, , that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform

his or her conduct to the requirements of the law. Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity.

Minnesota:

Minn. Stat. 611.026 (2011):

> No person having a mental illness or cognitive impairment so as to be incapable of understanding the proceedings or making a defense shall be tried, sentenced, or punished for any crime; but the person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong.

Mississippi:

Miss. Code Ann. 99-13-7 (2013):

> (1) When any person is indicted for an offense and acquitted on the ground of insanity, the jury rendering the verdict shall state in the verdict that ground and whether the accused has since been restored to his sanity and whether he is dangerous to the community. If the jury certifies that the person is still insane and dangerous, the judge shall order him to be conveyed to and confined in one of the state psychiatric hospitals or institutions.

Missouri:

Mo. Rev. Stat. § 552.010 (2015):

> The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770. See also Mo Ann. Stat. 552.030: 1. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct.

Montana:

Mont. Code. Ann. 46-14-101 (2013):

> (1) The purpose of this section is to provide a legal standard of mental disease or disorder under which the information gained from examination of the defendant, pursuant to part 2 of this chapter, regarding a defendant's mental condition is applied. The court shall apply this standard:
>
> (a) in any determination regarding:
>
> (i) a defendant's fitness to proceed and stand trial;
>
> (ii) whether the defendant had, at the time that the offense was committed, a particular state of mind that is an essential element of the offense; and

(b) at sentencing when a defendant has been convicted on a verdict of guilty or a plea of guilty or nolo contendere and claims that at the time of commission of the offense for which the defendant was convicted, the defendant was unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law.

Nebraska:

Neb. Rev. Stat. § 29-2203 (2015):

(1) Any person prosecuted for an offense may plead that he or she is not responsible by reason of insanity at the time of the offense and in such case the burden shall be upon the defendant to prove the defense of not responsible by reason of insanity by a preponderance of the evidence. No evidence offered by the defendant for the purpose of establishing his or her insanity shall be admitted in the trial of the case unless notice of intention to rely upon the insanity defense is given to the county attorney and filed with the court not later than sixty days before trial.

Nevada:

Finger v. State, 117 Nev. 548 (2001):

Holding Nevada's ban on insanity defenses unconstitutional.

Nev. Rev. Stat. § 194.010: All persons are liable to punishment except those belonging to the following classes:

4. Persons who committed the act charged or made the omission charged in a state of insanity.

New Hampshire:

N.H. Rev. Stat. § 628:2 (2014):

I. A person who is insane at the time he acts is not criminally responsible for his conduct. Any distinction between a statutory and common law defense of insanity is hereby abolished and invocation of such defense waives no right an accused person would otherwise have.

New Jersey:

N.J. Stat. Ann. § 2C:4-1 (2015):

A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Insanity is an affirmative defense which must be proved by a preponderance of the evidence.

New Mexico:

State v. Hartley, 90 N.M. 488, 490 (1977):

The only further rule of law as to the defense of insanity which this Court is willing to adopt is as follows: Assuming defendant's knowledge of the nature and quality of his act and his knowledge that the act is wrong, if, by reason of disease of the mind, defendant has been deprived of or lost the power of his will which would enable him to prevent himself from doing the act, then he cannot be found guilty.

New York:

N.Y. Penal Law § 40.15 (2013):

> In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:
>
> 1. The nature and consequences of such conduct; or
> 2. That such conduct was wrong.

North Carolina:

State v. Humphrey, 283 N.C. 570, 573 (1973):

> The test of criminal responsibility to be the ability of the accused at the time he committed the act to realize and appreciate the nature and quality thereof -- his ability to distinguish between right and wrong.

N.C. Gen. Stat. § 15A-1321 (providing for the automatic civil commitment of a defendant found not guilty by reason of insanity).

North Dakota:

N.D. Cent. Code § 12.1- 04.1-01 (2016):

> 1. An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs:
>
> a. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and
> b. It is an essential element of the crime charged that the individual act willfully.

Ohio:

State v. Staten, 18 Ohio St.2d 13, 14 (1969):

> "To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

Oklahoma:

Okla. Stat. tit. 21, § 152 (2014)

> All persons are capable of committing crimes, except those belonging to the following classes:
>
> 4. Mentally ill persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness;

Oregon:

Or. Rev. Stat. § 161.295 (2015):

(1) A person is guilty except for insanity if, as a result of a qualifying mental disorder at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law.

Pennsylvania:

18 Pa. Cons. Stat. Ann. § 315 (2015):

(a) General rule. — The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense.

(b) Definition. — For purposes of this section, the phrase "legally insane" means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.

Rhode Island:

State v. Johnson, 121 R.I. 254, 267 (1979):

A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.

South Carolina:

S.C. Code Ann. § 17-24-10 (2011):

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

South Dakota:

S.D. Codified Laws § 22-1-2 (2015):

(20) "Insanity," the condition of a person temporarily or partially deprived of reason, upon proof that at the time of committing the act, the person was incapable of knowing its wrongfulness, but not including an abnormality manifested only by repeated unlawful or antisocial behavior;

(24) "Mental illness," any substantial psychiatric disorder of thought, mood or behavior which affects a person at the time of the commission of the offense and which impairs a person's judgment, but not to the extent that the person is incapable of knowing the wrongfulness of such act. Mental illness does not include abnormalities manifested only by repeated criminal or otherwise antisocial conduct;

Tennessee:

Tenn. Code Ann. § 39-11-501 (2013):

(a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of the defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Texas:

Tex. Penal Code Ann. § 8.01 (2012):

(a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.

Utah:

Utah Code Ann. § 76-2-305 (2014):

(1)

(a) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.

(b) Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony under Section 76-3-207 and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide offense under Section 76-5-205.5.

Vermont:

Vt. Stat. Ann. tit. 13, § 4801 (2016):

(a) The test when used as a defense in criminal cases shall be as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacks adequate capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law.

Virginia:

Prive v. Commonwealth, 228 Va. 452, 459 (1984):

"The actual M'Naghten test for insanity, stated in the disjunctive, is the rule in Virginia."

Washington:

Wash. Rev. Code. § 9A.12.010 (2013):

To establish the defense of insanity, it must be shown that:

(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

(a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or

(b) He or she was unable to tell right from wrong with reference to the particular act charged.

West Virginia:

W. Va. Code § 71-7A-2 (2017):

> (1) "A person adjudicated as a mental defective" means a person who has been determined by a duly authorized court, tribunal, board or other entity to be mentally ill to the point where he or she has been found to be incompetent to stand trial due to mental illness or insanity, has been found not guilty in a criminal proceeding by reason of mental illness or insanity or has been determined to be unable to handle his or her own affairs due to mental illness or insanity. A child under fourteen years of age is not considered "a person adjudicated as a mental defective" for purposes of this article.

Wisconsin:

Wis. Stat. § 971.15 (2019):

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.

Wyoming:

Wyo. Stat. Ann. § 7-11-304 (2017):

> (a) When a defendant couples a plea of not guilty with a plea of not guilty by reason of mental illness or deficiency, proof shall be submitted before the same jury in a continuous trial on whether the defendant in fact committed the acts charged, on the remaining elements of the alleged criminal offense and on the issue of mental responsibility of the defendant. In addition to other forms of verdict submitted to the jury, the court shall submit a verdict by which the jury may find the defendant not guilty by reason of mental illness or deficiency excluding responsibility.

Federal:

18 U.S.C. § 17 (2012):

> (a) Affirmative defense. It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.