No. 19-1409

In the Supreme Court of the United States

Linda Frost,
Petitioner,
v.
The Commonwealth of East Virginia,
Respondent.

On Writ of Certiorari to the Supreme Court of East Virginia

Brief for the Petitioner

Team R

QUESTIONS PRESENTED

I. Under *Miranda v. Arizona*, is a mentally ill defendant's waiver of her Fifth Amendment rights knowing and intelligent when, at the time, she was having a schizophrenic episode, did not understand reality, and could not comprehend the purpose or consequences of her waiver?

II. Under the Eighth and Fourteenth Amendments, is the elimination of the insanity defense for the *mens rea* approach unconstitutional when the accused formed the intent to commit the crime but was insane during its commission?

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STATEMENT OF THE CASE

On June 17, 2017, Campton Roads Police Department ("the Department") began an investigation into the death of Christopher Smith, a federal poultry inspector employed at a United States Department of Agriculture office in Campton Roads, East Virginia. R. at 2. The coroner determined that Mr. Smith died between 9:00 p.m. and 11:00 p.m. on June 16, 2017 from multiple puncture wounds. R. at 3. Mr. Smith's body was found in his office the next morning. R. at 2. Based on an anonymous tip, the Department brought in Linda Frost, Mr. Smith's girlfriend, for questioning. R. at 2. In the interrogation room, Officer Barbosa read Ms. Frost her *Miranda* rights. R. at 2. Ms. Frost signed a written waiver, and Officer Barbosa immediately began questioning her. R. at 2. According to Officer Barbosa, at the initiation of the interrogation, nothing about Ms. Frost's demeanor gave him any suspicion or concern that Ms. Frost might be suffering from a schizophrenic episode. R. at 2.

Officer Barbosa asked Ms. Frost if she wanted to talk about Mr. Smith. R. at 2. Ms. Frost nodded. R. at 2. Just a few moments into the interrogation, Officer Barbosa told Ms. Frost about the discovery of Mr. Smith's body. R. at 2–3. When Officer Barbosa asked Ms. Frost if she knew

who might be responsible for Mr. Smith's death, Ms. Frost blurted out, "I did it. I killed Chris." R. at 3. Officer Barbosa pressed Ms. Frost for more details. R. at 3. She stated, "I stabbed him, and I left the knife in the park." R. at 3.

Officer Barbosa attempted to elicit more information, but Ms. Frost began making statements about the "voices in her head" instructing her to "protect the chickens at all costs." R. at 3. Ms. Frost then proclaimed that she did not think it was wrong to kill Mr. Smith because he would be reincarnated as a chicken. R. at 3. Ms. Frost instead believed she had done Mr. Smith a "great favor" because "chickens are the most sacred of all creatures." R. at 3. Ms. Frost did not give Officer Barbosa any more information about Mr. Smith's death. R. at 3. However, Ms. Frost implored Officer Barbosa to join her efforts to "to liberate all chickens in Campton Roads." R. at 3. At this point, Officer Barbosa asked Ms. Frost if she desired a court-appointed attorney. R. at 3. Ms. Frost replied "yes," which forced Officer Barbosa to terminate the interrogation. R. at 3.

Following Ms. Frost's interrogation, the Department searched all parks in Campton Roads and found a steak knife under a bush in Lorel Park. R. at 3. The knife lacked any identifiable fingerprints. R. at 3. Yet, DNA tests indicated that the blood found on the knife belonged to Mr. Smith. R. at 3. The knife also matched a set of knives found in Ms. Frost's home. R. at 3. As a result, Ms. Frost was arrested and indicted in both federal and state court for Mr. Smith's murder. R. at 3.

While Ms. Frost awaited trial, her attorney filed a motion in federal court for a mental evaluation. R. at 3. A clinical psychiatrist, Dr. Desiree Frain, diagnosed Ms. Frost with paranoid schizophrenia. R. at 3. Ms. Frost had not previously been diagnosed with any mental disorder, and she had never received mental health treatment or medication. R. at 3–4. During the evaluation, Ms. Frost told Dr. Frain that Mr. Smith had to be killed to protect the sacred chickens

he endangered through his employment. R. at 4. After the evaluation, Dr. Frain prescribed medication to Ms. Frost for her paranoid schizophrenia. R. at 3.

Ms. Frost was tried for murder in the United States District Court for the Southern District of East Virginia under 18 U.S.C. § 114 (2019). R. at 4. After receiving schizophrenia medication from Dr. Frain, Ms. Frost was deemed competent to stand trial. R. at 4. Dr. Frain testified that, around the time of Mr. Smith's death, it was highly probable that Ms. Frost was in a psychotic state that caused severe delusions and paranoia. R. at 4. Dr. Frain also testified that Ms. Frost was unable to control or fully understand the wrongfulness of her actions during that period, even though she intended to kill Mr. Smith and was aware of her actions. R. at 4. Ms. Frost was acquitted on the basis of insanity, which is a federal affirmative defense under 18 U.S.C. § 17(a) (2019). R. at 4.

After Ms. Frost's acquittal in federal court, the Commonwealth's Attorney decided to prosecute her for Mr. Smith's murder. R. at 4. With medication, Ms. Frost was again deemed competent to stand trial. R. at 4. However, in this trial, Ms. Frost was unable to assert the insanity defense because the East Virginia legislature had abolished the traditional insanity defense in 2016. R. at 4. E. Va. Code § 21-3439 replaced East Virginia's traditional reliance on the *M'Naghten* test with the *mens rea* approach. R. at 4. Under the *mens rea* approach, the inability to distinguish right from wrong is not a defense available to the accused. R. at 4.

Before trial, Ms. Frost's attorney filed a motion to suppress her client's confession. R. at 5. Ms. Frost's attorney also filed a motion asking the trial court to find that E. Va. Code § 21-3439 violates the Eighth Amendment's protection against cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause. R. at 5. Circuit Court Judge Hernandez denied both motions and ruled that Dr. Frain's testimony was inadmissible. R. at 5. Judge Hernandez

determined it was clear that Ms. Frost neither understood her *Miranda* rights nor the significance of signing the *Miranda* waiver. R. at 5. However, Judge Hernandez denied the motion to suppress because Ms. Frost initially appeared objectively lucid during the interrogation; Officer Barbosa had no reason at the time to know or suspect she was mentally incompetent. R. at 5. Judge Hernandez also determined that E. Va. Code § 21-3439 did not violate the Eighth or Fourteenth Amendments. R. at 5.

The jury subsequently convicted Ms. Frost of murder, and she was given a life sentence. R. at 5. Ms. Frost's attorney timely appealed to the Supreme Court of East Virginia, arguing that the pre-trial rulings were in error. R. at 5. In a split opinion, the majority of the Supreme Court of East Virginia affirmed the circuit court's decision. R. at 1, 9. Ms. Frost's attorney then filed a petition for a Writ of Certiorari to the Supreme Court of the United States. R. at 12. This Writ of Certiorari was granted and forms the basis of this Brief. R. at 12.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) (2019). The East Virginia Supreme Court entered its judgment on December 31, 2018. The petition for certiorari was timely filed, thereafter, and granted in part on July 31, 2019.

SUMMARY OF THE ARGUMENT

This Court should hold that a defendant's waiver of her *Miranda* rights is not knowing and intelligent when, due to mental illness, she did not understand her rights even though she appeared lucid to the investigating officer when the waiver was made. Furthermore, this Court should hold that the elimination of the insanity defense for the *mens rea* approach violates the Fourteenth and Eighth Amendments. Accordingly, this Court should overturn Ms. Frost's murder conviction.

Ms. Frost is a paranoid schizophrenic who killed her boyfriend while she was under the influence of delusions and hallucinations. Even though Ms. Frost was able to form intent, she did not understand the consequences of her actions nor the wrongfulness of what she was doing. After Ms. Frost waived her *Miranda* rights and confessed to the death of her boyfriend, a federal poultry inspector, she explained that "voices in her head" instructed her "to protect the chickens at all costs." Since Ms. Frost demonstrated these signs of mental illness during the interrogation, it is a violation of Ms. Frost's *Miranda* rights to hold that her waiver was knowing and intelligent when, in almost the same breath as her waiver, she demonstrated the delusional belief that she was protecting sacred chickens.

Moreover, East Virginia violated the Fourteenth and Eighth Amendments by eliminating the insanity defense for the *mens rea* approach. The insanity defense is a fundamental principle protected by the Due Process Clause because it is a deeply rooted common law tradition that dates back to Judeo-Christian doctrine and Anglo-Saxon jurisprudence. Furthermore, eliminating the insanity defense violates the Due Process Clause because it fails to reasonably promote the government's legitimate interests in promoting justice and judicial efficiency.

The Eighth Amendment's freedom from cruel and unusual punishment also guarantees Ms. Frost the right to the insanity defense. Historic and evolving notions of human decency oppose the punishment of a morally blameless person; thus, it is cruel and unusual to deprive mentally ill defendants, including Ms. Frost, of this defense. The elimination of the insanity defense for the *mens rea* approach also deprived Ms. Frost of the individualized sentencing determination required by the Eighth Amendment for defendants with limited culpability: Ms. Frost was prohibited from introducing evidence of mental illness for any purpose other than to establish competency to stand trial or intent to commit the crime.

Mentally ill defendants, like Ms. Frost, are especially deserving of the protections that stem from *Miranda,* the Fourteenth Amendment, and the Eighth Amendment because their fragile mental states place them in positions where their rights may be easily disregarded. This Court should ensure that the rights of mentally ill defendants, including Ms. Frost, are protected by reversing the judgment of the East Virginia Supreme Court.

ARGUMENT

I. Ms. Frost's *Miranda* rights were not knowingly and intelligently waived because the totality of the interrogation's circumstances indicates that Ms. Frost was not fully aware of the nature and consequences of her waiver.

The Fifth Amendment guarantees the accused "in the face of interrogation" the protection against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 471 (1966). *Miranda v. Arizona* continued the safeguards provided by the Fifth Amendment of the United States Constitution, ensuring that no person "shall be compelled in any criminal case to be a witness against himself." *Id.* at 460–61; *Malloy v. Hogan,* 378 U.S. 1489, 1493 (1964). To protect the integrity of the Fifth Amendment, the *Miranda* Court sought "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Miranda*, 384 U.S. at 469.

While an individual may waive her self-incrimination protection under the Fifth Amendment, this waiver is only legitimate if "the waiver is made voluntarily, knowingly and intelligently." *Id*. at 444. There are "two distinct dimensions" for determining whether a waiver of *Miranda* rights is valid:

> First, the relinquishment of the right must be voluntary in the sense that it is the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must be made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421 (1986). Therefore, *United States v. Bradshaw* held that "police coercion is only a necessary prerequisite to determine that a waiver was involuntary and [does] not . . . bear[] on the separate question whether the waiver was knowing and intelligent." 935 F.2d 295, 299 (D.C. Cir. 1991). While Ms. Frost's waiver was not involuntary, it was not made "knowingly and intelligently." *Id.* When addressing whether a waiver was made knowingly and intelligently, "courts must consider the 'totality of the circumstances,' including the characteristics of the defendant, the setting of the interview, and the details of the interrogation." *United States v. Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002) (quoting *United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987)).

Colorado v. Spring clarifies the knowingly and intelligently dimension addressed in *Moran's* two-dimension test. 479 U.S. 564, 566 (1986). In *Spring*, the defendant was arrested for firearms violations. *Id.* After being read his *Miranda* rights, the defendant signed a form stating that he understood and waived these rights. *Id.* at 567. While the defendant was advised of his *Miranda* rights, he was not advised that he was being questioned for crimes other than firearms violations. *Id.* The defendant argued that since he did not knowingly waive his *Miranda* rights for the other crimes, the waiver was invalid. The court held that since the defendant did not show any mental impairment or inability to comprehend the purpose or consequences of the waiver, his waiver was valid. *Id.* at 577.

Unlike the defendant in *Spring*, Ms. Frost's understanding of her rights and the consequences of waiving those rights was impaired. Throughout the entire interrogation in *Spring*, the defendant did not show any signs of mental illness. Instead, he only argued that he was not aware of the crimes for which he was being interrogated, which is not a necessary consideration when evaluating the legitimacy of a *Miranda* waiver. *Id.* at 566, 575. Ms. Frost, on

the other hand, was not mentally competent to fully "understand the basic privilege guaranteed by the Fifth Amendment . . . [nor] the consequences of speaking freely to the law enforcement officials." *Id.* at 575.

Here, when Ms. Frost began speaking about Smith's reincarnation as a chicken it became apparent that she was incapable of understanding the constitutional privileges she was waiving. Officer Barbosa ended the interrogation after hearing her statements about chicken reincarnation, which demonstrates that even the Department recognized that Ms. Frost lacked mental capacity. Ms. Frost's incoherent statements showed that the second dimension of the two-part *Spring* analysis, full awareness of the nature of the right being waived, was not met. *Id.* at 566.

United States v. Bradshaw further addressed the issue of mental capability. 935 F.2d 295, 300 (D.C. Cir. 1991). The defendant, who suffered from schizophrenia and had been heavily drinking on the day he was arrested, was convicted of robbery and attempted bank robbery. *Id.* at 296–97. The officers provided the defendant with his *Miranda* rights both orally and in writing, and the defendant subsequently signed a form waiving these rights. *Id.* at 297. After signing the waiver, the defendant gave a statement admitting to bank robbery. *Id.* Following his statement, officers learned of the defendant's schizophrenia. *Id.* The defendant then challenged his conviction, claiming he did not knowingly and intelligently waive his *Miranda* rights and, therefore, his confession was inadmissible. *Id.* The court held that in order to safeguard the privileges of the Fifth Amendment, the defendant's mental capability was relevant "to the validity of his waiver of *Miranda* rights." *Id.* at 300. The court emphasized that a defendant's mental capability must be considered to safeguard the privileges of the Fifth Amendment. *Id.* However, since the defendant did not show any signs of his mental illness during the interrogation, his waiver remained valid. *Id*.

Like the officers who arrested the *Bradshaw* defendant, Officer Barbosa was not aware of Ms. Frost's mental illness at the start of the interrogation. However, an officer's unawareness of the defendant's mental illness is not enough to make the waiver valid. *Id.* For a waiver to be valid there must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). At the time of the interrogation, Ms. Frost was incapable of intentionally relinquishing or abandoning her *Miranda* rights because she was having a schizophrenic episode. During the interrogation, Ms. Frost began speaking incoherently about the sacredness of chickens and Mr. Smith's reincarnation as a chicken. While the defendant in *Bradshaw* did not show any signs of a schizophrenic episode during his interrogation, Ms. Frost's auditory hallucinations demonstrated to Officer Barbosa that she was unable to understand reality or the consequences of waiving her *Miranda* rights. Just as the *Bradshaw* court found mental capability a key factor, this Court should consider Ms. Frost's mental capability when assessing the validity of her *Miranda* waiver. *Bradshaw*, 935 F.2d at 300.

The totality of the interrogation and circumstances must be analyzed to properly determine whether an individual knowingly and intelligently waived their *Miranda* rights. *Kansas v. Bethel*, 66 P.3d 840, 852 (Kan. 2003). In *Kansas v. Bethel*, the defendant was diagnosed with a mental illness but during the investigation "showed substantial competent evidence supporting the trial court's conclusion that [the defendant's] statements were not unknowing or involuntary due to his mental condition at the time of the interview." *Id.* at 853–854. Review of the investigation in *Bethel* "clearly demonstrate[d] that the defendant was rational and alert during his interview. The defendant demonstrate[d] an awareness of self and awareness of his surroundings." *Id.* at 852. Therefore, the court held that the waiver was valid because there was "no indication . . . that the defendant was hallucinating." *Id.*

Unlike the defendant in *Bethel*, Ms. Frost did not demonstrate "substantial competent evidence" that she understood the purpose of her *Miranda* rights and the consequences of waiving them. *Id.* Instead, Ms. Frost's exclamations about reincarnation through chickens demonstrated her complete lack of awareness and mental impairment brought on by her schizophrenia. Officer Barbosa acknowledged such by ending the investigation. Just as the *Bethel* court considered the defendant's competency throughout the interrogation and not only the moments prior to the waiver, Ms. Frost's interrogation should be viewed in its totality. *Id.* at 853.

Therefore, to properly determine whether an individual was fully aware of the purpose of *Miranda* rights and the consequences of waiving them the court must look at the totality of the circumstances. *Garner v. Mitchell*, 557 F.3d 257, 273 (6th Cir. 2009). It has been well-established that "mental capacity is one of many factors to be considered in the totality of the circumstances analysis regarding whether a *Miranda* waiver was knowing and intelligent." *Id.* at 264. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of their constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him. *Spring*, 479 U.S. at 574. A court may only "properly conclude that the *Miranda* rights have been waived" if the "'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension." *Moran*, 475 U.S. at 421 (quoting *Fare v, Michael C.*, 442 U.S. 707, 725 (1979)). Ms. Frost was experiencing a severe schizophrenic episode and lost sight of reality; therefore, she did not have the "requisite level of comprehension." *Id.*

Miranda has long established "the necessity for procedures which assure that the individual is accorded the right under the Fifth Amendment to not be compelled to incriminate

[herself].” 384 U.S. at 439. Just as this Court in *Miranda* ensured the protection of the defendant’s constitutional rights, Ms. Frost’s rights are equally deserving of protection. It is essential that these “precious rights” are continually protected because they were “fixed in our Constitution only after centuries of persecution and struggle.” *Id.* at 442. These constitutional rights must continue to be preserved and “secure[d] ‘for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it.’” *Id.* (quoting *Cohens v. Virginia*, 19 U.S. 264, 387 (1821)).

Medical and scientific understanding of schizophrenia and other severe mental disorders have vastly improved in recent years. Janice Lim, Comment, *Civil Commitment in the 21st Century*, 50 U.S.F. L. Rev. 143, 144 (2016). When individuals are experiencing such a distorted view of reality their constitutional rights deserve special protection from overzealous police officers. An individual’s self-incriminating statements during a schizophrenic episode are not “involuntary in traditional terms” but the “concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest.” *Miranda*, 384 U.S. at 457. Scientific advancements allow us, today, to understand that while Ms. Frost’s statements were not involuntary in the traditional sense, they were still made involuntarily and without an understanding of their consequences. The *Miranda* rights were created to go beyond traditional coercion and to protect the Fifth Amendment rights of individuals who are unable to understand the consequences of their statements because the “privilege against self-incrimination” is an “essential mainstay of our adversary system.” *Id.* at 460.

Because Ms. Frost did not have a true understanding of reality when she made her statements, the waiver was not made knowingly or intelligently. *Id.* at 465. Determining whether a waiver is valid goes beyond the moment the waiver is made and “what police knew or should

have known." *Colorado v. Connelly*, 479 U.S. 157, 180 (1986). It is not enough to say that Ms. Frost did not show any signs of schizophrenia at the time she waived her rights. She could not comprehend reality during the interrogation, much less the purpose and consequences of waiving her *Miranda* rights.

The primary goal of *Miranda* rights "is to assure that the individual's right to choose between silence and speech remains unfettered *throughout* the interrogation process." *Miranda*, 384 U.S. at 469 (emphasis added). While Ms. Frost did not show symptoms of schizophrenia at the time she waived her rights, the goal of protecting Ms. Frost's Fifth Amendment privileges does not stop there. Ms. Frost was experiencing a schizophrenic hallucination throughout the interrogation, therefore, in order to protect her Fifth Amendment rights, her waiver was not valid.

II. East Virginia's *mens rea* approach violates both the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause because historical practice and contemporary understandings of mental illness require the availability of the traditional insanity defense.

The traditional insanity defense, a fundamental principle of common law, is much broader than the *mens rea* approach adopted by E. Va. Code § 21-3439. *See Ohio v. Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989). The *M'Naghten* test, a traditional formulation of the insanity defense, deems a defendant not guilty if, at the time of the act's commission, the defendant's mental illness prevented him from knowing "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." *Clark v. Arizona*, 548 U.S. 735, 747 (2006). This definition emphasizes moral blameworthiness by focusing on the defendant's ability to distinguish right from wrong.

However, under the *mens rea* approach, "[i]nsanity is only admissible as it relates to a material element of a criminal offense, such as intent." *Finger v. Nevada*, 27 P.3d 66, 75 (Nev. 2001). Therefore, a defendant is only entitled to an acquittal if "the level of mental illness

completely negates a necessary element" of the crime. *Id.* The *mens rea* approach treats intent like strict liability so that as "long as [the defendant] had the intent to commit a particular act, [the defendant] would be held liable for that act." *Id.* The *mens rea* approach is best explained by a hypothetical example from *Finger*:

> [I]f D is prosecuted for intentionally killing V, D may introduce evidence that, due to mental illness, she believed she was squeezing a lemon rather than strangling V and, therefore, that she lacked the intent to kill. Evidence of D's mental condition would be inadmissible, however, to show that she did not realize that taking a life is morally or legally wrong, that she acted on the basis of an irresistible impulse to kill, or even that she killed V because she hallucinated that V was trying to kill her.

Id. at 75 (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 330 (2d ed.1995)). While the *M'Naghten* test and other traditional formulations of the insanity defense would allow acquittals for both defendants, the *mens rea* approach would only allow an acquittal for the first defendant. *Id.*

In this case, the record does not indicate the level of *mens rea* that was required for Ms. Frost's murder conviction. However, the briefing order limits the parties to the constitutionality of eliminating the *mens rea* approach for the insanity defense when the accused formulated the intent to commit the crime but was insane at the time of the offense. Therefore, for purposes of appeal, it is conceded that Ms. Frost formed the intent to kill Mr. Smith but was insane at the time of the act's commission.

Thus, the analysis of whether eliminating the insanity defense for the *mens rea* approach infringes Ms. Frost's constitutional rights centers on whether E. Va. Code § 21-3439 violates the Eighth Amendment's prohibition against cruel and unusual punishment and/or the Fourteenth Amendment's Due Process Clause. First, this statute is unconstitutional because it abolishes the insanity defense, which is a fundamental principle of the common law, and violates the Due

Process Clause's requirement that a statute be reasonable. Second, this statute unconstitutionally imposes cruel and unusual punishment because it rejects both historic and evolving standards of decency and prevents defendants with limited culpability from receiving individualized sentencing.

A. E. Va. Code § 21-3439's elimination of the traditional insanity defense for the *mens rea* approach violates a fundamental principle of justice protected by the Due Process Clause because it disregards centuries of common law and unreasonably strips necessary protections from the mentally ill.

The Supreme Court has not yet addressed whether the insanity defense is constitutionally guaranteed by the Fourteenth Amendment. *Utah v. Herrera*, 895 P.2d 359, 364 (Utah 1995). While a state has the power to "regulate procedures under which its laws are carried out," a state is barred by the Due Process Clause from enacting a law that "offends some principle 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, 201–02 (1977) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). When determining whether a legal principle is fundamental, the primary consideration is the extent to which the principle is supported by historic practices. *Montana v. Egelhoff*, 518 U.S. 37, 43–44 (1996). Since the Fourteenth Amendment "has been construed to mean that the law itself must be certain and reasonable so that the citizen may know from the statute itself just what acts are prohibited," courts also consider whether the statute is reasonable. *Sinclair v. Mississippi*, 132 So. 581, 586 (Miss. 1931).

Therefore, whether the insanity defense is protected by the Due Process Clause depends on an analysis of this defense's history in the common law and an inquiry into the reasonableness of eliminating this defense for the *mens rea* approach. The insanity defense is protected by the Due Process Clause for two interrelated reasons: first, the insanity defense is a fundamental principle supported by a rich history in Western common law; second, the insanity defense,

unlike the *mens rea* approach, is a "certain and reasonable" statute regarding mental illness. *Id.* As a result, E. Va. Code § 21-3439 violates the Fourteenth Amendment.

1. Historical practices prove that the insanity defense had developed into a fundamental principle of Western common law by the time of the Fourteenth Amendment's ratification.

Multiple lower courts have already recognized the extensive evidence that the insanity defense is a fundamental principle of Western common law. *See e.g.*, *Finger*, 27 P.3d at 72; *Sinclair*, 132 So. At 583 ("Insanity to the extent that the reason is totally destroyed so as to prevent the insane person from knowing right from wrong, or the nature and probable consequence of his act, has always been a complete defense to all crimes from the earliest ages of the common law.").

"[T]he general concept of legal insanity in relation to criminal culpability is centuries old;" however, there has never been one single definition of legal insanity. *Finger*, 27 P.3d at 72. Although variations of the insanity defense have been utilized by different jurisdictions at different time periods, these variations all share the core component of moral blameworthiness. Therefore, the history of the common law indicates that an insanity defense with the core component of moral blameworthiness, which is not considered by the *mens rea* approach, is a fundamental principle. *Sinclair*, 132 So. at 583 ("The common law proceeds upon an idea that before there can be a crime there must be an intelligence capable of comprehending the act prohibited, and the probable consequence of the act, and that the act is wrong.").

The insanity defense traces its roots to early Judeo-Christian doctrine that proclaimed moral blameworthiness as a requisite for wrongdoing. *See e.g.*, James F. Hooper, *The Insanity Defense: History and Problems*, 25 St. Louis U. Pub. L. Rev. 409, 409 (2006) ("The Christian Bible discusses from the very beginning Adam and Eve's ability or inability to know right from

wrong.”); *Herrera*, 895 P.2d at 372 (Stewart, J., dissenting) (lamenting that the majority’s support of the *mens rea* approach ignored centuries of legal principles regarding moral blameworthiness that evolved from Judeo-Christian concepts). For example, traditional Jewish law required that a man who intentionally killed another person be put to death; however, under Jewish law, a man who unintentionally killed was given mercy because he lacked the requisite moral blameworthiness. Hooper, *supra*, at 409.

Subsequently, this Jewish concept of blameworthiness was firmly incorporated into Christian theology. Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 23 Pace L. Rev. 455, 463 (2008). By the 6th century A.D., the writings of St. Augustine, a prominent Christian leader, included references to the necessity of a “guilty mind” or “evil motive” for an individual to be truly guilty. *Id.* As a result of Christianity’s growing influence in European culture, Anglo-Saxon judges became reluctant to enforce strict criminal laws if the defendant lacked malice. *Id.* By the 13th century, moral blameworthiness was developing from a judicial consideration into an independent, requisite criminal element. *Id.* at 464. Henry Bracton, a prominent judge at the time, explained “[W]e must consider what mind (animo) or with what intent (voluntate) a thing is done . . . a crime is not committed unless the intent to injure (nocendi voluntas)” is present. *Id.* (quoting Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 985 (1932)).

This emphasis on mental state continued to evolve so that “[b]y the eighteenth century, moral blameworthiness as an essential component of *mens rea* was firmly rooted in English criminal law.” *Id.* at 466. William Blackstone, a well-known legal scholar, stated, “to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.” *Id.* (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON

THE LAWS OF ENGLAND 20–21). Blackstone did not specifically address the insanity defense. *Id.* at 467, n. 74. However, Blackstone emphasized that "lunatics suffered a deficiency in will that rendered them unable to tell right from wrong." *Id.* at 467. Therefore, even though the insanity test in its current reiteration did not exist during Blackstone's era, Blackstone's writings indicate that the mentally ill could have achieved the same result by asserting the defense that they lacked moral blameworthiness.

The first formal legal definition of the affirmative insanity defense was adopted by the English House of Lords in the *M'Naghten* case in 1843, several decades before the ratification of the Fourteenth Amendment. *Finger*, 27 P.3d at 72; Phillips & Woodman, *supra*, at 468. In that case, Daniel M'Naghten suffered from a paranoid delusion that made him believe England's prime minister was planning to kill him. *Finger*, 27 P.3d at 72. Therefore, M'Naghten decided to kill the prime minister before the prime minister could kill him. In exercising his plot, M'Naghten killed the prime minister's secretary, but he "was acquitted of the crime based upon the definition of insanity which was given to the jury." *Id.* Upon review, the English House of Lords formulated what came to be known as the *M'Naghten* test:

> [I]t must be clearly proved that, at the time of the committing of the act, the party accused 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.

Id. (quoting *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843)). Since various insanity defenses had been in use before *M'Naghten*, the case merely represents the crystallization of historic common law practices that acquitted insane defendants who lacked moral blameworthiness. Under the *M'Naghten* test and other traditional reiterations of the insanity defense, Ms. Frost

would likely be acquitted because her schizophrenia prevented her from understanding the wrongfulness of her actions.

Some supporters of the *mens rea* approach emphasize that the insanity defense was not formally adopted until the 19th century and, therefore, argue that it is not a fundamental principle of the Due Process Clause. *See Kansas v. Bethel*, 66 P.3d 840, 851 (2003). However, focusing only on the formal adoption of the insanity defense ignores the historic Judeo-Christian doctrine and Anglo-Saxon legal practices that evolved into the *M'Naghten* test. Several less common forms of the insanity defense have developed since *M'Naghten*; but, these variations merely incorporate different public policy preferences while retaining the same protected, fundamental component: moral blameworthiness. *See generally Finger*, 27 P.3d at 66 (describing the elements of the main insanity defenses used by the states).

Admittedly, the Supreme Court has previously recognized that "the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Clark v. Arizona*, 548 U.S. 735, 752 (2006). However, the Supreme Court has never authorized the states to go so far as to completely eliminate the insanity defense. While a state legislature may determine the scope of the insanity defense within constitutional bounds, it may not "simply abolish it" as some states have done via the *mens rea* approach. *See Herrera*, 895 P.2d at 372 (Stewart, J., dissenting). Supporters of the *mens rea* approach improperly assume that state legislatures may go beyond establishing insanity defense procedural rules to actually eliminating the insanity defense. This misguided belief is based upon a few sentences in the Supreme Court plurality opinion of *Powell v. Texas* that have been subjected to conflicting interpretations by lower courts. 392 U.S. 514, 536 (2000).

In *Powell*, the Court affirmed the public drunkenness conviction of a professed alcoholic. *Id.* at 516, 537. However, a four Justice opinion delivered by Justice Marshall went further to discuss the insanity defense. *Id.* at 516, 535–37. Justice Marshall opined:

> The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Id. at 536. Supporters of the *mens rea* approach place considerable emphasis on this statement because they believe it indicates that the Due Process Clause does not establish a minimum protected affirmative insanity defense. *See Montana v. Korell*, 690 P.2d 992, 999–1000 (Mon. 1984); *Herrera*, 895 P.2d 359 at 364–65. However, this position overreaches the clear, limited language of the Court in *Powell*.

Although the *Powell* Court did not hold that the Due Process Clause required the use of a specific insanity defense, such as the *M'Naghten* test, the *Powell* Court also did not hold that the Supreme Court would defer to any insanity definition chosen by a state. 392 U.S. at 536–37 ("Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms . . . It is simply not yet the time."). As recognized by the Nevada Supreme Court, *Powell* suggests that state law governs how a state chooses to present the insanity defense, but "*Powell* cannot be read to stand for the proposition that the concept of legal insanity . . . is not a fundamental principle of our jurisprudence entitled to protection under the Due Process Clause." *Finger*, 27 P.3d at 82. Admittedly, no single definition of the insanity defense has dominated the common law; however, this Court should recognize, based on the

historical evidence, that an insanity defense rooted in moral blameworthiness is a fundamental principle protected by the Due Process Clause.

2. Under the Due Process Clause, the *mens rea* approach is not reasonable because it arbitrarily limits the ability of mentally ill defendants to present evidence relevant to culpability.

The Fourteenth Amendment's Due Process Clause protects citizens' rights from infringement by state action. For a statute to survive a Due Process challenge, "[T]here must be a reasonable relation to some purpose of government, and the statute must reasonably tend to serve that purpose." *See Sinclair*, 132 So. at 586. This standard prevents a state legislature from imposing an arbitrary statute, especially if the arbitrary statute infringes on a fundamental principle. *Id.* Therefore, this analysis focuses on whether the elimination of the insanity defense for the *mens rea* approach relates to a reasonable government purpose and reasonably promotes that purpose. Since the insanity defense is supported by centuries of common law tradition, this Court should not merely defer to the state legislatures' judgment.

Although the East Virginia legislature's precise reason for adopting E. Va. Code § 21-3439 is unknown, it is presumed that the legislature was influenced by concerns of promoting justice and judicial economy. *See id.* at 590 (explaining that the Mississippi legislature completely abolished the insanity defense due to its concern that the defense was being misused by defendants feigning mental illness). Even though these are legitimate concerns, eliminating the insanity defense for *mens rea* approach fails to reasonably promote the government's interests. E. Va. Code § 21-3439 arbitrarily prohibits only one of the many affirmative defenses that are subject to misuse and, therefore, fails to actually promote justice or judicial economy. *Id.*

Specifically, the *Sinclair* majority compared the insanity defense to self-defense. *Id.* at 586. In *Sinclair*, the Mississippi Supreme Court analyzed the constitutionality of a statute that

abolished the insanity defense to promote the state's goal of justice and judicial economy. *Id.* at 581–82. The majority held that the insanity defense ban violated the Due Process Clause because "[t]here is no sufficient basis for the enactment of the statute under review related to any purpose of government that will justify its enactment." *Id.* at 586. The statute was unreasonable because it banned only this one affirmative defense even though all affirmative defenses are subject to misuse. The majority emphasized that "[c]ertainly the amount of perjury in establishing . . . [self-defense], or in attempting to do so, exceeds that in cases of insanity." and, therefore, it was arbitrary to ban the insanity defense. *Id.*

Like the *Sinclair* statute, E. Va. Code § 21-3439 violates the Due Process Clause by arbitrarily abolishing the separate affirmative defense of insanity. Since very few defendants successfully utilize the traditional insanity defense, it is unreasonable to argue that eliminating the insanity defense promotes the state's goals of justice and judicial economy. *Finger*, 27 P.3d at 73. In this case, Ms. Frost was arbitrarily denied the right to assert an insanity defense because other defendants *might* falsely testify about having a mental illness; East Virginia seems unconcerned that some defendants will falsely testify about all kinds of affirmative defenses, especially self-defense.

Eliminating the insanity defense for the *mens rea* approach not only arbitrarily discriminates between types of affirmative defenses, but also arbitrarily discriminates between types of mentally ill defendants. Under the traditional insanity defense, a mentally ill defendant may demonstrate she lacked the intent to kill by introducing evidence that she believed she was "squeezing a lemon rather than strangling" the victim. *Id.* at 75 (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 330 (2d ed.1995)). However, under the *mens rea* approach, a defendant may not introduce evidence showing "she did not realize that taking a life is morally

or legally wrong, that she acted on the basis of an irresistible impulse to kill, or even that she killed V [victim] because she hallucinated that V [victim] was trying to kill her." *Id.* Like the second defendant, Ms. Frost was able to form the intent to kill Mr. Smith but was unable to recognize that the act was wrong because she experienced hallucinations instructing her to "protect the chickens at all costs."

The *mens rea* approach allows the first defendant to be found not guilty because her mental illness prevented her from forming the intent to kill. However, the *mens rea* approach considers the second defendant to be guilty because she had the intent to kill, even though she, like the first defendant, lacks moral blameworthiness. *Id.* This differentiation among types of mentally ill defendants is a distinction without a difference because it ignores the historic, fundamental principle of moral blameworthiness that is incorporated in the traditional insanity affirmative defense. *See e.g.*, *Finger*, 27 P.3d at 72; *Sinclair*, 132 So. at 583. Under the various reiterations of the insanity affirmative defense, including the *M'Naghten* test and the irresistible impulse test, the defendants in both scenarios would have been appropriately deemed not guilty. Therefore, E. Va. Code § 21-3439 violates the Due Process Clause because it ignores historical precedent and creates arbitrary distinctions that fail to reasonably promote reasonable government objectives.

B. The categorical elimination of the insanity defense subjects Ms. Frost to cruel and unusual punishment in violation of her Eighth Amendment rights because it ignores historic and evolving concepts of human decency and prevents individualized sentencing

Subjecting mentally ill defendants to traditional modes of punishment without the opportunity to plead insanity violates their Eighth Amendment right to freedom from cruel and unusual punishment. The Eighth Amendment guarantees that defendants will be punished according to their crime. *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (holding that the Eighth

Amendment "guarantees individuals the right not to be subjected to excessive sanctions . . . [and] flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned.'"). This right is especially important in cases involving capital punishment or life imprisonment, like this case, because both result in a permanent deprivation of life and liberty that is cruel and unusual when applied to the mentally ill. *See Graham v. Florida*, 560 U.S. 48, 60–61 (2010) (comparing life imprisonment to the death penalty when considering its severe effect on persons with lessened culpability, like children). In this case, East Virginia's elimination of the insanity defense for the *mens rea* approach is cruel and unusual because it violates both historic and evolving standards of decency regarding the treatment of mentally ill defendants and fails to account for their diminished culpability.

When analyzing an Eighth Amendment claim, the guarantee to freedom from cruel and unusual punishment can be separated into two independent protections: one of which is available to all defendants, while the other is available only to defendants with diminished culpability in cases involving the death penalty or life imprisonment. *Miller v. Alabama*, 567 U.S. 460, 470 (2012) ("Two strands of precedent reflecting the concern with proportionate punishment come together here. The first has adopted categorical bans on sentencing practices. . . . [The second] require[s] sentencing authorities to consider the characteristics of a defendant and the details of his offense.").

Under the first line of precedent, all defendants are categorically protected from punishments that were deemed cruel and unusual at the time the Bill of Rights was enacted, or that are cruel and unusual according to evolving standards of human decency. *See e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 405 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Second, defendants with special attributes that reduce their culpability must receive an "individualized"

sentencing determination that accounts for these attributes. *See Miller*, 567 U.S. at 479. East Virginia violated both of these protections when Ms. Frost was categorically stripped of the insanity defense, subjecting her to traditional modes of punishment that are cruel and unusual when applied to the mentally ill and deprived her of an individualized sentencing determination.

1. Historic and contemporary considerations of human decency urge that defendants be allowed to assert the insanity defense because traditional forms of punishment are cruel and unusual if applied to a mentally ill defendant.

The Eighth Amendment mandates that defendants be protected from punishments considered cruel and unusual. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") At a minimum, this protection prohibits punishments that were considered cruel and unusual when the Bill of Rights was adopted. *Ford*, 477 U.S. at 405; *Penry*, 492 U.S. at 330–31; *Atkins v. Virginia*, 536 U.S. 304, 339 (2002) (Scalia, J. dissenting) ("[A] punishment is 'cruel and unusual' if it falls within . . . 'those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'"). The protection also extends to punishments that are considered cruel and unusual as a result of evolving standards of human decency. *Atkins*, 536 U.S. at 311–12 ("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.") (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)); *Penry*, 492 U.S. at 330–31. Accordingly, East Virginia's elimination of the insanity defense for the *mens rea* approach results in the cruel and unusual punishment of Ms. Frost because the mentally ill are categorically protected from traditional criminal punishment under historic and evolving standards of human decency.

In *Penry*, this Court held that "[i]t was well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities." 492 U.S. at 331; *see supra* Section II-A (discussing the deeply rooted tradition of the insanity defense in Western common law). Since "idiots" and "lunatics" could not be subject to traditional criminal punishment, the threshold question in *Penry* became what class of defendants qualified as "idiots" or "lunatics." 492 U.S. at 331. At common law, an "idiot" was an individual who could not distinguish between good and evil and, therefore, lacked moral blameworthiness. *Id.* The inability to make such distinctions was said to excuse criminal acts because the act "arises . . . from a defective or vitiated understanding." *Id.* (quoting 1 WILLIAM HAWKINS, PLEAS OF THE CROWN 1-2 (7th ed. 1795)). This common law understanding of moral blameworthiness served as the precursor for the development of the modern insanity defense. *Id.* at 332. Thus, history demonstrates that the insanity defense is a cornerstone of the right to freedom from cruel and unusual punishment.

Here, Ms. Frost falls within the historic protection of mentally ill defendants from cruel and unusual punishment. Ms. Frost was acquitted in federal court on the basis of insanity and the briefing order presumes for purposes of appeal that Ms. Frost was criminally insane. However, East Virginia law no longer allows the "lack of ability to know right from wrong . . . [as] a defense." Accordingly, E. Va. Code § 21-3439 stripped Ms. Frost of her right to a defense based upon her inability to distinguish right from wrong, even though moral blameworthiness is the cornerstone of the common law understanding of punishment. Given the existence of an insanity defense when the Bill of Rights was signed, East Virginia violated the Eighth Amendment's protection from cruel and unusual punishment when it eliminated the insanity defense for the *mens rea* approach.

Evolving standards of human decency also demand that the insanity defense be available as a protection from cruel and unusual punishment. *See Atkins*, 536 U.S. at 311; *see also Trop*, 356 U.S. at 100–01 ("[T]he words of the [Eighth] Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society."); *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (analyzing an Eighth Amendment challenge according to "evolving standards of decency") (Scalia, J. concurring).

In *Atkins*, this Court considered whether executing mentally retarded prisoners amounted to cruel and unusual punishment. *Atkins*, 536 U.S. at 311. At the time of the ratification of the Bill of Rights, there was not a strong tradition against executing mentally retarded prisoners. *Id.* Therefore, the Court had to find evidence of evolving standards of human decency to extend Eighth Amendment protection. *Id.* The Court emphasized that recent state legislative enactments demonstrated convincing and objective evidence of an evolving moral standard. *Id.* at 312. At that time, approximately 33 states had adopted legislation banning capital punishment for the mentally retarded; fifteen of these states had adopted this legislation in just the twelve years before the *Atkins* decision. *Id.* The Court held that while 33 states was less than a unanimous shift in human decency, the consistency and direction of change was sufficient to extend Eighth Amendment protection. *Id.* (holding that 33 states moving in the direction of greater protection from cruel and unusual punishment was sufficient).

Here, the present standards of human decency demand that the Eighth Amendment guarantee an insanity defense. Like the 33 states in *Atkins* that established a standard of human decency, 46 states continue to provide an insanity defense. *The Insanity Defense Among the States*, FindLaw (last visited Sept. 5, 2019) (https://criminal.findlaw.com/criminal-procedure/

the-insanity-defense-among-the-states.html) (finding that only four states, in addition to East Virginia, do not provide the insanity defense). Despite these five outlier states, the insanity defense's consistent existence since early Judeo-Christian tradition and English common law show that human decency widely accepts the insanity defense as a cornerstone to protection from cruel and unusual punishment. Moreover, while societal standards can shift, it is an absurd result to allow only five misguided states to strip mentally ill defendants of their constitutional right to freedom from cruel and unusual punishment by subjecting them to the same standard as morally blameworthy offenders. As a result, historic and contemporary prevailing standards of human decency continue to require the insanity defense as a protection from cruel and unusual punishment.

2. Elimination of the insanity defense in this case violates the Eighth Amendment because it inhibits Ms. Frost's right to individualized sentencing that considers her mental illness

The Eighth Amendment requires that both the guilt and sentencing phases of a criminal judgment satisfy the Eighth Amendment's protection from cruel and unusual punishment. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development."); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) ("[A] sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination . . . required by the Eighth and Fourteenth Amendments. . . . A jury must be allowed to consider . . . relevant evidence.")

Inherent in this protection is the principle that punishment must be tailored to the culpability of the defendant. *Miller*, 567 U.S. at 471 (expanding the requirement for individualized sentencing from death penalty cases to cases involving children receiving life

sentences because "juveniles have diminished culpability"). Here, because East Virginia law only allowed testimony related to insanity to be considered at the fitness for trial and *mens rea* phases, the sentencing hearing was not adequately individualized to Ms. Frost's personal culpability, violating the Eighth Amendment.

In order to ensure that a mentally ill person is not subject to a cruel and unusual punishment, the sentencing process must include an "individualized assessment" as to the appropriateness of the punishment to the defendant's personal culpability. *Lockett v. Ohio*, 438 U.S. 586, 597–608 (1978) (plurality opinion) (requiring individualized sentencing in capital cases); *Miller*, 567 U.S. at 471 (expanding *Lockett* from the context of the death penalty to situations involving children). The requirement that the punishment fit the crime extends from the Eighth Amendment's categorical ban on certain cruel and unusual practices. *See Miller*, 567 U.S. at 464.

In *Miller*, this Court held a sentencing scheme unconstitutional because it "prevent[ed] the sentence from considering youth and from assessing whether the law's harshest term of imprisonment (life without parole) proportionately punishes a juvenile offender." *Id.* In making its determination, the Court first likened life without parole to the death penalty because of the former's permanence and severity when applied to a defendant with reduced culpability. *Id.* Next, the court considered whether children were less culpable than adults, such that they deserve an individualized assessment of culpability. *Id.*

Answering in the affirmative, the Court considered the traditional justifications for punishment and held that they demand an individualized assessment before imposing a traditional adult sentence on a child defendant. *Id.* First, the retribution rationale for punishing adults is based on blameworthiness, but children's immaturity reduces their blameworthiness. *Id.*

("[T]he case for retribution is not as strong with a minor as with an adult."). Next, deterrence is not an adequate justification for imposing an adult sentence without assessing a defendant's age because juveniles are "less likely to consider potential punishment." *Id.* ("Nor can deterrence do the work in this context because . . . [juvenile's] immaturity, recklessness, and impetuosity make them less likely to consider potential punishment."). Incapacitation is also an ineffective justification for children because the determination that a child is a permanent danger to society is incongruent with the developing and formidable minds of children. *Id.* ("[I]ncorrigibility is inconsistent with the youth."). Finally, rehabilitation serves no purpose when the sentence imposed is life without parole. *Id.*

These justifications are relevant in this case because the same concerns of moral blameworthiness that are present in children apply equally, if not to a greater extent, to the mentally ill. Like children, the mentally ill are unable to distinguish right from wrong due to their impaired mental state. Thus, retribution is an ineffective justification for punishment. Deterrence also serves no purpose when punishing mentally ill defendants like Ms. Frost because their inability to distinguish right from wrong makes them unable to consider or understand potential punishment. Next, incapacitation assumes that the person will remain a constant danger to society merely because of mental disease and ignores the possibility of medication and treatment. Finally, rehabilitation cannot justify life imprisonment for defendants like Ms. Frost because they will never have the opportunity to return to society.

The Eighth Amendment mandates that a sentence be proportional to the culpability of the offense and the offender. A sentencing scheme that does not allow evidence regarding a defendant's insanity is unconstitutional because it fails to account for the offender's lessened culpability compared to a traditional defendant. Therefore, E. Va. Code § 21-3439 is an

unconstitutional violation of the Eighth Amendment because it violates historic and evolving standards of human decency and proscribes individualized sentencing determinations.

CONCLUSION

The judgment of the Supreme Court of East Virginia should be reversed.

Respectfully submitted.

Team R

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