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 RESPONDENT

TEAM S

ATTORNEYS FOR RESPONDENT

ISSUES PRESENTED

I. Whether a defendant's voluntary waiver of *Miranda* rights is valid where the police advised the defendant of her rights, complied with all of *Miranda*'s requirements, and had no reason to believe the waiver was anything but knowing and intelligent.

II. Whether a state may reasonably decide to limit mental disease evidence relating to moral culpability under the Fourteenth and Eighth Amendments when holding a defendant responsible for intentional criminal conduct.

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The transcript of the record sets forth the unreported opinion of the Supreme Court of East Virginia. R. at 1–11.

JURISDICTION

The decision of the East Virginia Supreme Court was entered on December 31, 2018. The petition for Writ of Certiorari was granted on July 31, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (2019).

STATEMENT OF THE CASE

I. Statement of Facts

Christopher Smith was murdered on the evening of June 16, 2017. His body was found in his office the following morning. R. at 2.

Mr. Smith was a federal poultry inspector and was in a relationship with Linda Frost, the defendant. R. at 2. The same day as Mr. Smith's murder, Frost volunteered to cover a co-worker's shift at Thomas's Seafood Restaurant and Grill from 2 p.m. to 8 p.m. R. at 2. Frost then slipped out of the restaurant without speaking to anyone or clocking out of her shift. R. at 2. Much later in the evening, two eyewitnesses observed a woman matching Frost's description near the entrance of Lorel Park. R. at 2.

After Mr. Smith's body was discovered on June 17, 2017, the Campton Roads Police Department (hereinafter "the Department") initiated an investigation. R. at 2. Upon receiving an anonymous tip, the Department brought in Frost for questioning. R. at 2. Prior to any questioning, Officer Nathan Barbosa read Frost her *Miranda* rights, and she signed a written waiver of those rights. R. at 2. During Officer Barbosa's questioning, nothing about Frost's demeanor raised any concern or suspicion about her competency. R. at 2.

After waiving her rights, Frost indicated to Officer Barbosa that she wanted to talk about Mr. Smith's death. R. at 2. Within minutes, Frost confessed that she "killed [Mr. Smith]." R. at 3. She stated that she "stabbed [him], and left the knife in the park." Officer Barbosa testified that at the time of Frost's confession, she had done nothing to raise any concern about her competency. R. at 2.

After confessing to the crime, Frost referred to "voices in her head" and stated that she committed the murder "to protect the chickens." R. at 3. Officer Barbosa then asked Frost if she wanted a court appointed attorney. R. at 3. When she responded that she did, Officer Barbosa "promptly terminated the interrogation." R. at 3. In a subsequent search of Lorel Park, police found a steak knife covered with Mr. Smith's blood. R. at 3. The knife matched a knife set found in Frost's home, and the coroner confirmed that the knife was consistent with the puncture wounds on Mr. Smith's body. R. at 3. The coroner estimated that he died between 9 p.m. and 11 p.m.—the hours just following Frost's unusual departure from work. R. at 2, 3.

II. Nature of the Proceedings

Frost was charged and indicted for Mr. Smith's murder in both state and federal court. R. at 3. Prior to these proceedings, Frost's attorney filed a motion for a mental evaluation. During the evaluation with Dr. Desiree Frain, a clinical psychiatrist, Frost stated that "she believed Smith needed to be killed to protect the sacred lives of chickens that Smith endangered through his job." R. at 4. Dr. Frain diagnosed Frost with paranoid schizophrenia. R. at 3. Prior to this diagnosis, Frost had never been diagnosed with, or treated for, schizophrenia or any other mental disorder. R. at 3.

Federal Proceedings. Frost was deemed competent to stand trial for murder upon further evaluation. R. at 4. At trial, Dr. Frain testified that "even though Frost intended to kill Smith and

knew she was doing so, she was unable to control or fully understand the wrongfulness of her actions." R. at 4. In Dr. Frain's opinion, there was a high probability that Frost experienced "severe delusions and paranoia" between June 16 and June 17. R. at 2, 4. Due to this testimony, Frost was acquitted under 18 U.S.C. § 17(a) (2019), the federal insanity defense. R. at 4.

State Proceedings. Frost was subsequently prosecuted for Mr. Smith's murder in state court, where she was also deemed competent to stand trial. R. at 4. In 2016, East Virginia's legislature followed the lead of several states and modified its insanity defense in favor of a *mens rea* insanity defense. R. at 4. Under a *mens rea* insanity defense, a defendant may use "evidence of a mental disease or defect . . . to disprove competency to stand trial or to disprove the *mens rea* element of an offense, but the lack of ability to know right from wrong is no longer a defense." R. at 4.

Frost's attorney filed two motions with the trial court. R. at 5. The first motion was to suppress her confession to Officer Barbosa. R. at 5. The second motion argued that East Virginia's modification of its insanity defense deprived Frost of due process under the Fourteenth Amendment and subjected her to cruel and unusual punishment in violation of the Eighth Amendment. R. at 5. The court denied both motions. R. at 5. First, the confession was admissible because Frost "initially appeared to the interrogating officer to be objectively lucid and capable of waiving her rights, and the officer had no reason to know or suspect she was mentally unstable until after her waiver and confession." R. at 5. Second, the court found that East Virginia's insanity statute did not violate Frost's Fourteenth or Eighth Amendment rights. R. at 5. Thereafter, the jury convicted Frost of murder, and the court accepted the jury's recommended life sentence. R. at 5.

On appeal, the Supreme Court of East Virginia affirmed the trial court's ruling both on the admissibility of Frost's confession, and the constitutionality of East Virginia's insanity statute. R. at 5–9.

SUMMARY OF THE ARGUMENT

I.

The Fifth Amendment can be violated only by improper state action. Therefore, in order to fit with the Fifth Amendment, *Miranda*'s requirement that a waiver of rights be "knowing and intelligent" must mean that the government cannot exploit a defendant's lack of understanding to compel a confession. A defendant's subjective state of mind cannot by itself cause a constitutional violation without any police misconduct. Further, when applying *Miranda*'s prophylactic rules, which safeguard the Fifth Amendment, the Court applies a balancing test to determine whether the societal benefit of excluding relevant evidence outweighs the cost. Because the purpose of the exclusionary rule is to deter misconduct, there is nothing to be gained by excluding relevant evidence when the police behaved appropriately. Here, it would be senseless to suppress the confession, because the Department complied with all of *Miranda*'s requirements, and there is no evidence that the police intentionally exploited Frost's impaired mental state. Finally, a test that bases a waiver's validity on later psychiatric testimony, instead of objective indications at the time of waiver, would be unworkable for police who have to make difficult decisions in real time.

II.

An insanity defense that includes a determination of moral culpability has historically been criticized, reformulated, and rejected by society. Although some states have implemented a right-and-wrong defense to determine moral culpability, this defense is not required under the Due Process Clause of the Fourteenth Amendment because it is not a deeply rooted, fundamental principle of American law. Over the past millennium, insanity has often been related to a lack of

mens rea, not whether a person lacked the ability to discern right from wrong. Moreover, this Court has recently spoken directly to this issue, instructing states that a specific insanity defense is not required under substantive due process.

Neither does the Eighth Amendment interfere with a state's legislative power to define the acts and mental states for which a person may be held criminally liable. Traditional Eighth Amendment jurisprudence merely requires that a state's chosen punishment be triggered by a physical act and that the punishment be appropriate in light of modern standards. Even if criminal conviction of a defendant who feels morally justified in their conduct could be considered punishment, it does not violate traditional or modern standards of decency when such a person is judged guilty of a crime. Due to the complex issues that inherently arise with an insanity defense, combined with the powers granted to states to enact its criminal laws and defenses, a state's decision to include—or not include—an insanity defense consisting of a right-and-wrong determination must be deferred to.

STANDARD OF REVIEW

On appeal, the Supreme Court of East Virginia's legal ruling that a defendant knowingly and voluntarily waived her *Miranda* rights will be reviewed de novo. *United States v. Reed*, 522 F.3d 354, 358 (D.C. Cir. 2008). The trial court's factual findings as to the defendant's *Miranda* waiver, however, will be given a presumption of correctness and will be reversed only if clearly erroneous. *Woodley v. Bradshaw*, 451 F. App'x 529, 539 (6th Cir. 2011); *United States v. Guay*, 118 F.3d 545, 549 (4th Cir. 1997); *United States v. Alderdyce*, 787 F.2d 1365 (9th Cir. 1986). Additionally, the Supreme Court of East Virginia's constitutional interpretation of the Fourteenth and Eighth Amendments will be reviewed de novo. *United States v. Jones*, 231 F.3d 508, 511 (9th Cir. 2000).

ARGUMENT

I. FROST'S WAIVER OF *MIRANDA* RIGHTS WAS KNOWING AND INTELLIGENT BECAUSE SHE APPEARED LUCID TO THE INVESTIGATING OFFICER AND THE WAIVER WAS NOT COERCED.

Under the Fifth Amendment's Self-Incrimination Clause, which the Fourteenth Amendment applied to the States, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; U.S. Const. amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). In order to safeguard the privilege against self-incrimination, the landmark *Miranda v. Arizona* decision established prophylactic rules requiring police to warn a defendant of his rights prior to any questioning. 384 U.S. 436, 444 (1966). A suspect can waive these rights as long as the waiver is (1) voluntary and (2) knowing and intelligent. *Id.* at 467; *North Carolina v. Butler*, 441 U.S. 369, 372–76 (1979).

A. A *Miranda* Waiver Is Constitutionally Valid Where Police Made No Effort To Exploit The Defendant's Impaired Mental State, Because The Sole Concern Of The Fifth Amendment Is Government Coercion.

A waiver is "voluntary" if it is the product of a free and deliberate choice, and it is "knowing" if the defendant understands "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). However, "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege," as long as he is advised of "the critical advice that whatever he chooses to say may be used as evidence against him." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). To determine whether a waiver is voluntary and knowing, courts consider the "totality of the circumstances surrounding the interrogation," including "age, experience, education, background, and intelligence." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). The Court's holding in *Connelly v. Colorado* requires that the totality of the circumstances be viewed through the lens of what the police can objectively observe, because

"[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." 479 U.S. 157, 180 (1986). The object of the inquiry is to determine whether the police had reason to believe the defendant was mentally impaired at the time of the waiver and exploited that impairment to compel a waiver of rights. *Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir. 2009) (applying *Connelly* to determine a *Miranda* waiver's validity).

The Sixth and Seventh Circuits have properly interpreted *Connelly* to apply equally to both steps of the inquiry—voluntariness and knowledge. *Id.* (both the voluntary prong and the knowing prong must "be examined, in their totality, primarily from the perspective of the police"); *Woodley*, 451 F. App'x at 540 (the relevant inquiry is whether the police "disregard[ed] signs that a defendant is incapable of making a rational waiver in light of his age, experience, and background"); *Smith v. Mitchell*, 567 F.3d 246, 258 (6th Cir. 2009) (a *Miranda* waiver was knowing and intelligent where there was "no evidence that [the defendant's] conduct during the interrogation gave the police any indication of his alleged intoxication or failure to understand his repeated waivers"); *Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998) (police abuse was a prerequisite to invalidating a *Miranda* waiver); *Cuevas v. Charns*, 3 Fed. Appx. 528, 532 (7th Cir. 2001) (focusing on what officers "reasonably believed during the interrogation" to determine waiver's validity).

The Fourth Circuit and D.C Circuit, however, have taken the untenable position that *Connelly* is controlling only in reference to whether the waiver is voluntary. The result is a mismatched test in which the first prong, voluntariness, is analyzed according to what the police reasonably believed, while the second prong, knowledge, is analyzed according to the defendant's subjective state of mind—even if it was unknown to the police. *United States v. Bradshaw*, 935 F.2d 295, 299 (D.C. Cir. 1991) (reading *Connelly* "as holding only that police coercion is a

necessary prerequisite to a determination that a waiver was *involuntary* and not as bearing on the separate question whether the waiver was knowing and intelligent"); *United States v. Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002) (inquiring into the defendant's subjective mental state at the time of waiver to determine whether the waiver was knowing).

The Supreme Court has never said that "one of the two dimensions is to be examined from the perspective of the police while the other is to be examined from the perspective of later scientific inquiry," and there is no coherent legal distinction justifying such a convoluted test. *Garner*, 557 F.3d at 263. The defendant-focused framework is also misaligned with the Fifth Amendment's purpose and *Miranda*'s "explicitly stated rationale," which is to deter police from overpowering defendants—not to protect defendants from their own impulses. *Id.* It makes no sense to invalidate a *Miranda* waiver absent police coercion when the "sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Connelly*, 479 U.S. at 170. This Court should reaffirm the principles articulated in *Miranda* and *Connelly* by holding that a *Miranda* waiver's validity depends on the totality of the circumstances viewed from law enforcement's perspective and that police coercion is a prerequisite to invalidating a *Miranda* waiver.

1. Because *Miranda* protects Fifth Amendment rights through regulating police conduct, a *Miranda* waiver must be analyzed according to the totality of the circumstances, viewed from the perspective of the police.

The overarching purpose of the *Miranda* decision was to safeguard constitutional rights by reigning in police abuse. 384 U.S. at 442. The *Miranda* Court expressed at length that the object of its concern was the government's "temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions." *Id.* at 443, 447. The Court cited specific examples of unreasonable police tactics, such as beating and

kicking suspects and "plac[ing] lighted cigarettes" on witnesses until they offered incriminating confessions. *Id.* at 446. Concerned about these abuses, the Court established safeguards to prevent the police from using "irregular or improper means" to question suspects. *Id.* at 447.

The seminal *Connelly* case recognized that because *Miranda* was principally focused on abusive police conduct, a "mere examination of the *confessant's* state of mind" cannot conclude the constitutional inquiry. 479 U.S. at 165 (emphasis added). *Miranda*'s "underlying police-regulatory purpose" demands that courts conduct both the voluntary and knowing inquiries according to the totality of the circumstances as the police perceived them. *Garner*, 557 F.3d at 262, 263. It would be contradictory to focus primarily on the *defendant's* state of mind when regulating the conduct of the *police*. Instead, the objective indications observable by police are of "primary significance, given the original purpose underlying the *Miranda* decision," which was to curb unreasonable interrogation tactics. *Id.* Here, the only evidence purporting to show that Frost's waiver was not knowing and intelligent is the psychiatrist's testimony, which assessed Frost's subjective mental state based on a later examination. R. at 3. The psychiatrist testified that it was "highly probable that . . . Frost was in a psychotic state and suffering from severe delusions and paranoia" at the time of waiver. R. at 4. But invalidating Frost's confession based solely on her subjective mental state would allow "the confessant's state of mind" to conclude the inquiry—a proposition that *Connelly* entirely forecloses. 479 U.S. at 165.

This Court's *Miranda* precedent makes clear that the relevant inquiry is not what a suspect subjectively understands; it is "simply whether the warnings reasonably 'convey to a suspect his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361 (1981) (brackets omitted)). Neither the Fifth Amendment nor *Miranda* impose an affirmative duty on police to convey "the wisdom of a *Miranda* waiver"

or to assume the role of a psychiatrist. *Spring*, 479 U.S. at 577. Police are only able to make reasonable determinations based on the totality of the circumstances at the time of the waiver.

Considering the totality of the circumstances, Officer Barbosa reasonably believed that Frost knowingly and intelligently waived her *Miranda* rights. Frost's "age, experience, education, background, and intelligence" did not indicate that she was mentally unstable, as she had never been diagnosed or treated for schizophrenia or any other mental disorder prior to the murder. *Fare*, 442 U.S. at 725. At the time of the waiver, she "appeared to the interrogating officer to be objectively lucid and capable of waiving her rights." R. at 5. The Officer's uncontroverted testimony was that "nothing about Frost's demeanor at the beginning of the interrogation raised any concern or suspicions about her competency." R. at 2. Therefore, the totality of the circumstances gave police no reason to believe that Frost lacked "the capacity to understand the warnings . . . , the nature of [her] Fifth Amendment rights, and the consequences of waiving those rights." *Fare*, 442 U.S. at 725.

2. Government coercion is a prerequisite to invalidate a *Miranda* waiver.

While Frost frames her confession as "unknowing" and the defendant in *Connelly* framed his confession as "involuntary," both cases present the same core issue: whether a confession triggered by a defendant's schizophrenic mental state, rather than by police conduct, is valid. 479 U.S. at 163–64. In *Connelly*, the defendant approached the police in the street and expressed that he wanted to confess to a murder. *Id.* at 160. The police officer informed the defendant of his *Miranda* rights and explained that the defendant was under no obligation to offer a confession. *Id.* Nevertheless, the defendant, who "appeared [to police] to understand fully the nature of his acts," waived his rights and confessed to the crime. *Id.* The defendant later moved to suppress the confession, because he had been suffering from chronic schizophrenia and had confessed only

because he believed the voice of God commanded him to do so. *Id.* at 162. He argued that his waiver of *Miranda* rights should be invalidated "even if the compulsion [did] not flow from the police." *Id.* at 170.

The Court rejected this argument, however, holding that the Fifth Amendment and *Miranda* go "no further" than curbing government coercion. *Connelly*, 479 U.S. at 170. The police, who had engaged in no misconduct, could not have violated the Fifth Amendment. To invalidate the defendant's *Miranda* waiver without any government coercion would have required the invention of "a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated." *Id.* at 166.

There is simply nothing in the *Connelly* Court's rationale that would justify a constitutional distinction between a lack of *voluntariness* caused by mental impairment and a lack of *knowledge* caused by mental impairment. As the Seventh Circuit reasoned, the defendant's waiver of rights was upheld in *Connelly* despite the fact that it "was induced by madness rather than by remorse or calculation." *Rice*, 148 F.3d at 751. Thus, it would be squarely inconsistent with *Connelly* to find a waiver of rights constitutionally invalid "if prompted solely by the defendant's mental condition rather by anything the police did." *Id.* at 751. As the Seventh Circuit explained:

> From the standpoint of the policies that inform the self-incrimination and due process clauses of the Constitution, Connelly's action in blurting out a confession because of an irresistible impulse to confess is difficult to distinguish from a suspect's confessing *because of an inability (not known or apparent to his interrogators) to understand his right not to confess.* In neither case is there a responsible relinquishment of rights; in neither is there police misconduct; in both the government receives a windfall as a result of the suspect's mental abnormality.

Id. at 751 (emphasis added). Therefore, a framework that analyzes knowledge and intelligence according to the defendant's subjective state of mind and does not require police coercion as a prerequisite is irreconcilable with *Connelly*.

Assuming Frost acted upon the command of "voices in her head," her claim still suffers from the same fatal defect as the claim in *Connelly* that the defendant's confession was prompted by the voice of God. R. at 3. Like the defendant in *Connelly*, Frost asks the Court to invent a new right entitling her to confess a crime only when her subjective mental state reflects a perfectly sound knowledge of all her rights. No such right can be found in either the Fifth Amendment or this Court's jurisprudence.

B. Applying *Miranda*'s Prophylactic Rules To Invalidate A Confession Based On A Defendant's Subjective Mental State Would Impose A Substantial Cost On Society And Would Be An Unworkable Standard.

Because the nature of custodial interrogations creates a risk of coercion, "this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination." *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)). The *Miranda* Court "recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); *see Withrow v. Williams*, 507 U.S. 680, 690–91 (1993) (noting that the Court has repeatedly referred to *Miranda*'s safeguards as prophylactic); *United States v. Patane*, 542 U.S. 630, 639 (2004) (distinguishing *Miranda*'s "prophylactic rules" from the "actual protections of the Self-Incrimination Clause").

The Court has explained the distinction between true Fifth Amendment violations and violations of *Miranda*'s prophylactic rules: "[t]he Fifth Amendment . . . is violated whenever a truly *coerced* confession is introduced at trial," but the Court has "applied an exclusionary-rule balancing test" to determine the admissibility of evidence sought to be excluded by *Miranda*'s prophylactic rules. *Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (emphasis added). Whether a voluntary, *uncoerced* confession was knowing and intelligent necessarily falls into the latter

category. Therefore, the Court should apply an exclusionary balancing test and consider practical application when defining the scope of this rule.

1. The defendant-focused approach would disturb the careful balance *Miranda* strikes by disrupting law enforcement without furthering any societal interest.

The Court in *Miranda* balanced public safety against the need for prophylactic rules that protect the privilege against self-incrimination. *New York v. Quarles*, 467 U.S. 649, 657 (1984) (explaining the *Miranda* Court's rationale). In the years since *Miranda*, "[t]he Court has . . . repeatedly cautioned against upsetting the careful 'balance' that *Miranda* struck . . . ." *J.D.B.*, 564 U.S. at 289 (Alito, J., dissenting) (quoting *Moran*, 475 U.S. at 424). Because *Miranda*'s exclusionary rule "imposes a substantial cost on the societal interest in law enforcement" by suppressing relevant evidence, there must be a countervailing societal benefit to balance the scale and justify its application. *Connelly*, 479 U.S. at 166.

"[T]he purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Id.* at 166 (citing *United States v. Leon*, 468 U.S. 897, 906–13 (1984)). Excluding evidence when there is no misconduct to deter is counter to *Miranda*'s "own explicitly stated rationale." *Id.* at 170 (internal quotations omitted). Applying *Miranda*'s prophylactic rules to suppress a defendant's confession "would serve absolutely no purpose in enforcing constitutional guarantees" when the police have not acted coercively and there was no observable, objective factors leading the police to behave differently than they did. *Id.* (citing *Leon*, 468 U.S. at 906–13); *see Rice*, 148 F.3d at 750–51 (providing that "[t]he relevant constitutional principles [at issue in *Miranda* and *Connelly*] are aimed not at protecting people from themselves, but at curbing abusive practices by police"). Therefore, it is senseless to suppress relevant evidence when there is no misconduct to deter.

While proponents of the defendant-focused approach argue that suppressing confessions from psychotic individuals benefits the justice system by preventing the admission of unreliable evidence, this argument conflates constitutional protections with evidentiary rules. *Connelly*, 479 U.S. at 166. The Court in *Connelly* acknowledged that statements proffered by a defendant suffering from mental impairment might prove to be unreliable, but found that the issue is "governed by the evidentiary laws of the forum." *Id.* (holding that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false"). Frost's confession proved to be reliable in this case, as it led to recovery of the murder weapon. R. at 3. But even if there were any doubt as to the confession's reliability, that issue would be properly analyzed under the evidentiary rules of East Virginia, which is not an issue before this Court. Therefore, this argument is misplaced.

On the opposite side of the scale, suppressing Frost's confession would impose a "substantial social cost" by undercutting the truth-seeking process and undermining law enforcement's ability to protect the public. *Herring v. United States*, 555 U.S. 135, 144 (2009); *Collins v. Virginia*, 138 S. Ct. 1663, 1678 (2018). Frost's confession that she "stabbed [Mr. Smith] and . . . left the knife in the park," led investigators to recover the murder weapon—a knife that was missing from Frost's knife set. R. at 3. Invalidating Frost's waiver would pointlessly obstruct the prosecution of a brutal murder.

2. The defendant-focused approach is unworkable for police to apply in the field.

This Court's *Miranda* precedent underscores the importance of a workable rule that police can practically apply. *Quarles*, 467 U.S at 658. One of the "principal advantages of *Miranda* is the ease and clarity of its application." *Moran*, 475 U.S. at 425 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984)). Therefore, this Court "has 'refused to sanction attempts to expand

[the] *Miranda* holding' in ways that would reduce its 'clarity'" or practical applicability. *J.D.B.*, 564 U.S. at 269 (Alito, J., dissenting) (quoting *Moran*, 475 U.S. at 424).

This Court has emphasized that "[a]lthough the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect." *Davis v. United States*, 512 U.S. 452, 461 (1994). In *Davis*, the Court considered whether police must cease questioning a suspect who makes an ambiguous request for an attorney. *Id.* at 455. Recognizing the need for a "bright line that can be applied by officers in the real world of investigation and interrogation," the Court declined to make officers engage in a guessing game. *Id.* at 461. The Court explained:

> [I]f we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.

Id.

As in *Davis*, this Court should reject the defendant-focused approach, because it is unworkable. The test requires law enforcement to be mind-readers who are able to "divine" the defendant's state of mind during an interrogation. *Connelly*, 479 U.S. at 165–66. If police are unable to rely on objective indicia to determine whether a waiver is knowing and intelligent, they would have to read a defendant's mind to determine her mental state, "with the threat of suppression if they guess wrong." *Davis*, 512 U.S. at 461. The *Garner* case further illustrates why such an approach is untenable. *Garner*, 557 F.3d at 263. There, police had no indication that the suspect's "age, experience, education, background, and intelligence" prevented him from understanding the *Miranda* warnings. *Id.* at 262 (citing *Fare*, 442 U.S. at 725). While the suspect appeared "perfectly normal" at the time of waiver, he later moved to suppress the

confession, asserting that he was unable to understand his rights and the consequences of the waiver. *Id.* at 262. The Court upheld the waiver because even if the defendant could not subjectively understand his rights, it was impossible for the interrogating officers "to discern the misunderstanding in [his] mind." *Id.*

Determining a *Miranda* waiver's validity based on the objective factors observable by officers during an investigation is a standard that officers can practically apply in the field. In contrast, suppressing confessions where there was no contemporaneous indication that the waiver was anything but knowing and intelligent would require police to be mind-readers. *Id.* This Court should reject the defendant-focused standard, which asks law enforcement to do the impossible.

II. EAST VIRGINIA'S MODIFICATION OF ITS INSANITY DEFENSE DOES NOT VIOLATE THE CONSTITUTION BECAUSE A *MENS REA* INSANITY DEFENSE GUARANTEES DUE PROCESS AND DOES NOT VIOLATE THE EIGHTH AMENDMENT.

The Supreme Court of East Virginia correctly determined that East Virginia's modified insanity defense does not violate the Due Process Clause of the Fourteenth Amendment or the Eighth Amendment. Neither Amendment creates a substantive right entitling defendants to an insanity defense that includes an exculpatory moral component. U.S. Const. amend. VIII; U.S. Const. amend. XIV.

East Virginia's modification of its insanity defense does not violate Petitioner's due process rights because a moral defense is not a deeply rooted, fundamental principle of American law. *Clark v. Arizona*, 548 U.S. 735, 771–72 (2006). A *mens rea* insanity defense values the protection of society over an ambiguous determination of morality by allowing defendants to present mental disease evidence that directly negates an element of the crime. R. at 4. Neither does the Eighth Amendment control how states should balance moral blameworthiness with criminal guilt because it is concerned only with "cruel and unusual *punishment*." U.S. Const. amend. VIII

(emphasis added). Even if the stigma of conviction can be considered punishment, adjudicating a criminal who feels morally justified in their conduct does not violate any modern notion of human decency. *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). This Court should continue its historical practice of rejecting any particularized requirement for a state's formulation of its insanity defense because neither due process nor the Eighth Amendment place a prohibition on state power to define its substantive criminal law.

A. East Virginia's *Mens Rea* Insanity Defense Does Not Violate The Due Process Clause Of The Fourteenth Amendment.

States wield tremendous powers granted by the Constitution to define their criminal laws and defenses. *See Martin v. Ohio*, 480 U.S. 228, 232 (1987); *Patterson v. New York*, 432 U.S. 197, 201 (1977) (explaining that this Court "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states"). A state's adoption, modification, or removal of its own regulations are not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). To determine whether a principle in question is fundamental, this Court examines the historical practice of that principle's relationship with the common law and the traditions of the American people. *Id.* at 523; *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality op.).

East Virginia's modification in favor of a *mens rea* insanity defense does not violate the Due Process Clause. An insanity defense based on the ability to distinguish between right and wrong "is a creature of the 19th century and is not so ingrained in our legal system to constitute a fundamental principle of law" because of its constant evolution and criticism over centuries of practice. *State v. Bethel*, 66 P.3d 840, 851 (Kan. 2003). Further, East Virginia has reasonably determined that a *mens rea* insanity defense is the most effective measure to promote safety and

justice for its citizens. *See State v. Korell*, 690 P.2d 992, 1002 (Mont. 1984). Therefore, a state's decision to enact a *mens rea* insanity defense does not violate the substantive concepts of due process.

1. History proves that a right-and-wrong insanity defense is not required under the Due Process Clause because the defense is not a fundamental principle of American law.

"[E]ven a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them . . . to yield a diversity of American standards." *Clark*, 548 U.S. at 736–37. An analysis of the historical context of the insanity defense illustrates that no single formation of the defense has been established. *Id.* at 749 (analyzing history to determine whether a principle is deeply rooted within American law).

Dating back to the fifth and sixth centuries, ancient Greek and Roman philosophers' conception of criminal responsibility resembled the *mens rea* approach. Donald J. Hermann, *The Insanity Defense Philosophical, Historical and Legal Perspectives* 19 (1983). Building off Plato's recognition that responsibility results from "an element of free choice," Aristotle further refined the requirement to find a person criminally responsible "if he deliberately chooses to commit a specific act with knowledge of the circumstances and in the absence of external compulsion." *Id.* at 20.

In the sixteenth century, the English common law adopted the *mens rea* philosophy of the Greek and Roman systems to determine criminal intent for an insane defendant. *See* Nigel Walker, *Crime and Insanity in England, Volume One: The Historical Perspective* 27 (1968) (recognizing the *mens rea* concept that an individual must have the ability to develop an appropriate *mens rea* to be found guilty of a crime). Sir Edward Coke ingrained an analysis of the defendant's intent into England's jurisprudence when he wrote that "no felony murder can be committed without a

felonious intent and purpose." *Beverly's Case*, 4 Co. Rep. 123b, 124b (1603). Thus, the critical question was whether the defendant had a guilty mind—not whether the defendant could determine the act's wrongfulness. Sir Edward Coke, *The First Part of the Institutes of the Laws of England* 247b (1628).

A new mode of examination emerged in the early eighteenth century, but the defendant's criminal intent always remained central to the inquiry. In *Rex v. Arnold*, the court embraced an interpretation that determined guilt based on the defendant's ability to distinguish between "good and evil" while still analyzing intent. 16 How. St. Tr. 695, 764 (1724) (describing an insane person as "one deprived of his reason, and consequently of his *intention*") (emphasis added).

Using this new examination, the seminal *M'Naghten's Case* in 1843 looked at a criminal defendant's insanity through the lens of a newly formed right-and-wrong test. 8 Eng. Rep. 718 (1843). Under this test, a defendant could not be found guilty if 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; or, if he did know it, that he did not know he was doing what was wrong." *Id.* at 722. Thus, a defendant could be found legally insane if he could prove either that a mental defect prevented him from: (1) having the requisite *mens rea* for the crime; or (2) knowing right from wrong. *Id.* However, despite *M'Naghten*'s holding, the issue of determining legal insanity was far from settled.

Following the acquittal of the defendant in *M'Naghten*, Queen Victoria publicly challenged this new approach on the basis that only the defendant can know his true moral culpability at the time of his act, and, therefore, a jury's determination of his moral capacity could not be correct. *See United States v. Freeman*, 357 F.2d 606, 617 (2d Cir. 1966) (describing Lord Chief Justice Tindal's daunting task of articulating the rule of law "with the Queen's breath upon him"). The public severely opposed this rigid test because it was ultimately a "philosophical and moral

concept [that] assumes an inherent capacity in man to distinguish right from wrong and to make necessary moral decisions." Herbert Hovenkamp, *Insanity and Responsibility in Progressive America*, 57 N.D. L. Rev. 541, 551 (1981).

This controversial debate in England from the inception of a right or wrong test of insanity carried over into the American public following its first recognition in *Freeman v. People*. 4 Denio 9, 28–29 (1847) (applying the right-and-wrong test from *M'Naghten* to an insane defendant). Continuous debate over the next century pushed courts and legislatures back to focusing on a *mens rea* insanity defense following medical advancements and policy judgments. *See People v. Horton*, 123 N.E. 2d 609, 618 (N.Y. 1954) (Van Voorhis, J., dissenting) ("The development of psychiatry appears to have transferred the main professional attention from disorganization of the intellect to emotional disturbances."); Edwin R. Keedy, *Insanity and Criminal Responsibility*, 20 Harv. L. Rev. 535, 535 (1917) (quoting the American Institute of Criminal Law and Criminology's unanimously approved bill for a *mens rea* insanity defense).

Although the right-and-wrong test articulated in *M'Naghten* influenced some courts, it never rose to the level of fundamental principle that carries substantive due process implications. Courts continued to create diverse insanity tests over time because of the disagreement on the focus of a defendant's moral culpability. *Clark*, 548 U.S. at 750–52 (describing the various adoptions of the insanity defense between states and the federal government); *see, e.g.*, *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954) (establishing a broader and vaguer determination of insanity if the crime committed by the defendant was a "product of mental disease or defect"); *United States v. Brawner*, 471 F.2d 969, 991 (D.C. Cir. 1972) (overruling *Durham* to establish that a defendant can be acquitted if he lacked "substantial capacity to appreciate that his conduct is wrongful or . . . lack[ed] substantial capacity to conform his conduct to law"). And even these

early formulations that used language referring to moral culpability were closely intertwined with an absence of *mens rea*. *Clark,* 548 U.S. at 753.

The ambiguous right-and-wrong test—although adhered to by some—has been never been universally applied at any time throughout American history, and therefore illuminates that no single approach to insanity can be viewed as fundamental. *See Egelhoff*, 518 U.S. at 48. As the Court correctly recognized in *Clark* following Arizona's elimination of an insanity defense for cognitive incapacity, "[h]istory shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a state's capacity to define crimes and defenses." 548 U.S. at 789; *see Foucha v. Louisiana*, 504 U.S. 71, 88–89 (1992) (O'Connor, J., concurring) ("The Court does not indicate that states must make the insanity defense available."). This Court's consistent rejection of arguments that a particular insanity defense is required under the Constitution demonstrates that a right-and-wrong test is not deeply rooted in "the traditions and conscience of our people" and is therefore not required under Petitioner's due process rights. *Patterson,* 432 U.S. at 201–02.

2. The abolition of the right-and-wrong test by a state does not violate the Due Process Clause because a finding of moral culpability is an ambiguous and dangerous measure to determine criminal insanity.

This Court has repeatedly held that the Due Process Clause affords states the opportunity to determine the extent to which mental illness can excuse criminal liability. *See Powell v. Texas*, 392 U.S. 514, 545–46 (1968) (Black, J., concurring) (highlighting that "to impose constitutional and doctrinal rigidity" with regard to insanity "seems absurd where our understanding is even today so incomplete"); *Leland v. Oregon*, 343 U.S. 790, 801 (1952) (explaining the "choice of a test of legal insanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility"). Due to the complex

legal, moral, and medical questions involved, states are free "to determine whether, and to what extent, mental illness should excuse criminal behavior." *Foucha*, 504 U.S. at 88 (O'Connor, J., concurring). However, state legislation that narrows a "second avenue for exploring [a defendant's] capacity" must have a "good reason for confining the consideration of evidence." *Clark*, 548 U.S. at 772. Like East Virginia, a state's calculated decision to convict individuals who voluntarily and intentionally commit a crime using a *mens rea* insanity defense is a reasonable avenue in place of an ambiguous right-and-wrong test.

Proponents of the right-and-wrong test argue "that an insane person may not be held criminally responsible for his conduct" because a person unable to distinguish right from wrong cannot have criminal intent. R. at 11 (quoting *Ohio v. Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989)). However, this principle fails to account for ambiguous interpretations of a defendant's moral culpability, the inadequacy of scientific evidence to properly determine moral culpability, and the high risk of misusing mental illness evidence. *See Clark*, 548 U.S. at 773–79. Because of the inherent risks embedded in the right-and-wrong test, it is reasonable for states to adopt a *mens rea* insanity defense. *Id.* at 774.

A defendant's moral culpability through a right-and-wrong test can only be understood with a clear definition of what is considered "wrong"; however, courts have interpreted moral culpability inconsistently. *Id.* at 776. One approach focuses on the defendant's ability to know that an act was "legally wrong," while other approaches determine whether the defendant subjectively believed an action to be "morally wrong." *Compare State v. Andrews*, 357 P.2d 739, 747 (Kan. 1960) (establishing "wrong" to mean "prohibited by the law of the land"), *with* S.C. Code Ann. § 17-24-10(A) (2019) (asking whether the defendant could "distinguish moral or legal right from moral or legal wrong").

Both viewpoints fall short of a state's primary purpose of promoting safety. As the Court noted in *Clark*, there are "particular risks inherent in the opinions of the experts . . . on whether the mental disease rendered a *particular defendant* . . . incapable of understanding the wrongfulness of the conduct charged." 548 U.S. at 776 (emphasis added). These risks include two uncertain components: first, an expert to determine the defendant's state of mind, but more importantly, an uncertain estimation of the defendant's subjective understanding of what is "morally correct." *Id.* at 776–77.

The first risk carries a burden that the defendant must prove. *See, e.g.*, 18 U.S.C. § 17(b) (2019); Ariz. Rev. Stat. Ann. § 13-502(C) (2019); *Leland*, 343 U.S. at 798 (listing the number of states that place the burden of proof on the defendant to prove his insanity). This burden can be clouded with doubt as experts attempt to testify to a defendant's state of mind for what he thought was right or wrong at the time of the incident. *Clark*, 548 U.S. at 777 (describing an expert's testimony relating to a defendant's moral culpability as a "leap in logic" by inferring the "*probable relationship* between medical concepts and legal or moral constructs such as free will") (citation omitted).

This uncertainty leads to the second risk—an unworkable determination of the defendant's subjective view towards what is morally justified. At the core of the right-and-wrong test lies a concept of blameworthiness, which argues that a defendant cannot have the necessary intent because they are unable to understand what is "morally right." *Jones v. United States*, 463 U.S. 354, 374 n.4 (1983) (Brennan, J., dissenting) (citations omitted); *United States v. Leazer*, 460 F.2d 864, 866 (D.C. Cir. 1972). A terrorist who has the intent to commit a crime, while subjectively believing his actions are morally justified, demonstrates the fundamental flaw of including a measure of blameworthiness into a question of criminal responsibility. Although few would

consider a terrorist to be morally blameless, it is entirely possible under this test to argue that a terrorist is no less culpable than someone whose mental illness renders him unable to control his moral compass. *Cf. Delling v. Idaho*, 133 S. Ct. 504, 505 (2012) (Breyer, J., dissenting from denial of certiorari) (analogizing a defendant who believes that "a wolf . . . has ordered him to kill the victim" lacks the ability to "perceive that it is wrong" because of internal misguided thoughts; therefore, he should be found blameless under a right-and-wrong test). A right-and-wrong test creates a requirement for courts to determine degrees of a defendant's blameworthiness with no discernable standards from history or precedent. *Clark*, 548 U.S. at 768–69 (quoting D. Hermann, *supra*, at 4 ("A central significance of the insanity defense . . . is the separation of nonblameworthy from blameworthy offenders.")).

This test also creates avenues of opportunity for a defendant to manipulate; for example, a white supremacist who appears to commit a crime in the name of philosophy or racism can still have a masked belief that his action is morally wrong. *See id.* at 777 (noting that even Clark's expert stated "no one knows what was on his mind" during the criminal act). This allows defendants to manipulate the right-and-wrong test by appearing to objectively lack the requisite moral culpability due to a religious or philosophical belief, but secretly holding a hidden, clear understanding that their actions are morally wrong. *Id.* Determining guilt from a straightforward *mens rea* insanity defense removes this possibility for defendants and properly holds individuals with the proven criminal state of mind responsible. *Id.*; *Korell*, 690 P.2d at 1002.

Additionally, the risk of jurors misusing mental illness evidence will be eliminated or reduced substantially by removing a right-and-wrong test. Since moral incapacity can be proven by demonstrating cognitive incapacity, a finding of only a defendant's cognitive incapacity naturally serves both purposes. *Clark*, 548 U.S. at 753–54 (stating that "cognitive incapacity . . .

is a sufficient condition for establishing a defense of insanity, albeit not a necessary one"). This relationship between cognitive incapacity and moral incapacity demonstrates why a separate right-and-wrong test is unnecessary. *See, e.g.*, *Montgomery v. State*, 151 S.W. 813, 817 (Tex. Crim. App. 1912); *Jessner v. State*, 231 N.W. 634, 639–40 (Wis. 1930). Under a *mens rea* insanity defense, jurors can focus strictly on the elements of the crime when they are instructed to only consider evidence relating to a defendant's cognitive capacity. *Clark*, 548 U.S. at 776 ("Evidence of mental disease . . . can easily mislead . . . into doubting that [an individual] has the capacity to form *mens rea*, whereas that doubt may not be justified."). East Virginia's insanity defense eliminates the risk that jurors will misuse mental illness evidence relating to moral capacity because there is a clear avenue for defendants to present evidence of insanity only as to the *mens rea* element of the offense.

This Court has never held that a defendant is entitled to a specific insanity defense under the Due Process Clause. *Jones*, 463 U.S. at 364 n.13 (explaining that because there will be uncertainty with diagnosing a defendant's "insanity," a reasonable legislative judgment of its insanity defense must be afforded "particular deference" by the courts); *see Powell*, 392 U.S. at 536 ("Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms."). Thus, this Court should continue to wisely leave such determinations to the states because a *mens rea* insanity defense is a rational use of sovereign power within state boundaries to define the prerequisites for criminal responsibility.

B. East Virginia's *Mens Rea* Insanity Defense Does Not Violate The Eighth Amendment Because Affirmative Defenses Are Not Punishments And Holding A Person Responsible For Illegal Conduct Is Not Cruel And Unusual.

The core function of the Eighth Amendment is to protect human dignity when the government imposes a criminal punishment. *Roper v. Simmons*, 543 U.S. 551, 572 (2005); 3

Johnathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447 (2d ed. 1836) (recording Patrick Henry's argument during Virginia's Ratifying Convention that the purpose of the Eighth Amendment is to restrict Congress's power to impose punishment). It follows that practically all Eighth Amendment jurisprudence addresses the appropriateness of a state's chosen mode of punishment and not its criteria for criminal guilt. *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (clarifying competency requirements and procedures for executing prisoners with a mental disease or defect); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (same); *Ford*, 477 U.S. at 401 (same); *see also Roper*, 543 U.S. at 578 (prohibiting execution of juvenile offenders); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (prohibiting execution for rape of an adult woman); *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring) (prohibiting discriminatory imposition of punishment); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (prohibiting expatriation as punishment). The function of East Virginia's *mens rea* insanity defense as an affirmative criminal defense does not place it within the Eighth Amendment's realm of regulation because it is not a punishment. Further, East Virginia's *mens rea* insanity defense would not be prohibited as "cruel and unusual" under the requisite analysis. *Ford*, 477 U.S. at 406. A *mens rea* insanity defense is a reasonable method for states to regulate criminal conduct and better aid the retributive, deterrent, and most importantly, rehabilitative purposes of criminal punishment.

The Court has taken a strong position against expanding Eighth Amendment protection so far that it interferes with a state's sovereign right to define affirmative defenses or prerequisites for criminal guilt. *Powell*, 392 U.S. at 536–37. This Court should continue to honor state jurisdiction in the arena of substantive criminal law and decline to create an Eighth Amendment mandate for a right-and-wrong insanity defense.

1. The Cruel and Unusual Punishment Clause of the Eighth Amendment does not extend to a state's chosen affirmative defenses.

The Eighth Amendment's text, and its historical application, bar expanding its protection to affirmative defenses. Traditional Eighth Amendment challenges have properly resulted in the prohibition of disproportionately severe physical punishment and the unusual, arbitrary application of punishments to minority defendants. *Weems v. United States*, 217 U.S. 349, 366–67 (1910) (finding hard painful labor a disproportionately cruel punishment for falsifying public records); *Furman*, 408 U.S. at 249 (holding that because the Eighth Amendment's text mirrors the 1689 English Bill of Rights, it must also encompass its predecessor's concern for discriminatory imposition of punishment).

The Court in *Trop v. Dulles* recognized that society's methods and understanding of punishments will change over time and developed the Eighth Amendment's modern framework: a mode of punishment is prohibited if it violates "evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101 (explaining the Eighth Amendment's underlying function is the protection of human dignity when punishment is inflicted); *see also Roper*, 543 U.S. at 560 (prohibiting the execution of juveniles based on the Eighth Amendment's constitutional function, text, history, tradition, and precedent).

However, it is not in the purview of the Eighth Amendment to mandate what types of acts or motivations are acceptable targets for state punishment. This Court has never held that the Eighth Amendment categorically forbids states from convicting an individual—even one with "intellectual disability"—when due process requirements for criminal responsibility are met. *Hall v. Florida*, 572 U.S. 701, 709 (2014); *see also Atkins*, 536 U.S. at 306 (stating that individuals with mental defects "who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes"). Criminal culpability, empathy, and moral blameworthiness

are properly considered as mitigating factors in the punishment stage. *Korell*, 690 P.2d at 997 (requiring the sentencing judge to consider any evidence of moral incapacity due to mental disease or defect). Thus, the Eighth Amendment plays no role in East Virginia's decision to adopt a *mens rea* insanity defense to criminal conduct. The Eighth Amendment serves its intended purpose when it restricts punishment for criminal culpability rather than proscribes Constitutional prerequisites for criminal responsibility. This Court should continue to confine its application of the Eighth Amendment to its intended purpose of protection from unduly harsh punishment.

Modern attempts to expand the Eighth Amendment's reach into substantive law by defining prerequisites for criminal responsibility have failed because that duty is purely one for state legislatures. *Powell*, 392 U.S. at 536–37 (explaining that a constitutional rule on moral prerequisites for criminal responsibility would stifle jurisdictional experimentation); *see also State v. Kahler*, 410 P.3d 105, 129 (Kan. 2018) (noting the necessity of case-by-case assessments of the relationship between mental illness and criminal culpability); *Lord v. State*, 262 P.3d 855, 862 (Alaska Ct. App. 2011) (emphasizing that the ethical question of when a mental condition is exculpatory is one for the state legislature, not the court).

In *Robinson v. California*, the Court took a limited step outside its traditional application of the Eighth Amendment by striking down not a mode of punishment, but a penal statute that criminalized the status of narcotic addiction. 370 U.S. 660, 666–67 (1962) (holding that it is cruel and unusual to impose punishment without a specified criminal act). Six years later in *Powell*, the Court stressed that *Robinson*'s holding stood only for the concept that the Eighth Amendment bars the criminalization of a status or condition in place of an act committed. 392 U.S. at 532 (upholding Texas's statute criminalizing the act of public intoxication).

The Court distinguished between the Texas and California statutes, emphasizing that the Texas statute forbade the specific act of public intoxication, whereas the California statute in *Robinson* forbade a condition irrespective of an action. *Powell*, 392 U.S. at 532. The Court starkly refused to entertain the defendant's argument that the Eighth Amendment's restrictions should extend to the criminalization of acts that are side effects of a mental disease or otherwise "irresistible compulsion." *Id.* at 533 (recognizing that to venture further into states' sovereign jurisdiction of substantive criminal law would eliminate any barrier to the Court becoming the "ultimate arbiter of the standards of criminal responsibility"); *see also Bethel,* 66 P.3d at 852 (rejecting defendant's argument that the *mens rea* insanity defense punishes defendants for having a mental disease because the statute at issue did not criminalize an illness, only the act of murder).

Just as in *Powell* and *Bethel*, Frost was not convicted for being schizophrenic but for stabbing Mr. Smith multiple times with a steak knife. R. at 5. The fact that her conduct may have been the result of an "irresistible compulsion" to "protect the chickens at all costs" is simply not a defense required by the Eighth Amendment. *Powell*, 392 U.S. at 533; R. at 3. The Eighth Amendment does not touch states' chosen moral prerequisites for criminal responsibility as long as some specified criminal act has been committed. East Virginia is solidly within its right as sovereign, just as Texas was in *Powell*, to decide which acts are punishable in its jurisdiction and under what circumstances they may be excused. Thus, the reach of the Eighth Amendment stops short of prohibiting a state from making reasonable determinations about moral prerequisites for criminal responsibility.

2. East Virginia's *mens rea* insanity defense is not cruel and unusual because holding criminal offenders responsible for their conduct does not violate modern standards of decency.

If convicting someone afflicted by a mental disease based purely on criminal intent can be considered "punishment," it is still not barred by the Eighth Amendment for being cruel and

unusual. U.S. Const. amend. VIII. State action is considered cruel and unusual if it was prohibited by the common law at the adoption of the amendment, or if it offends human dignity by violating "evolving standards of decency." *Ford*, 477 U.S. at 406 (quoting *Trop*, 356 U.S. at 101); *see also Coker*, 433 U.S. at 597 (examining both objective evidence of contemporary values and the Justices' own judgement to determine standards of decency).

The Framers would not have considered conviction of offenders like Frost "cruel and usual" because their specific concern in adopting the amendment was as a "prohibition against torture or other cruel punishments." *Furman*, 408 U.S. at 319–20 (Marshall, J., concurring). As arduous as trials may be, a criminal conviction hardly rises to the level of cruelty contemplated by the Framers. *Id.* at 263 (Brennan, J., concurring) (mentioning whipping and earcropping as acceptable punishments when the Eighth Amendment was adopted). Further, the purpose of mental disease evidence in the Framers' time was primarily about if the defendant could form the requisite intent—the exact defense East Virginia allows today. *See Freeman,* 4 Denio at 28–29 (introducing *M'Naghten*'s right-and-wrong test to American jurisprudence fifty years after the Bill of Rights was signed).

Neither does objective evidence of modern standards support the idea that it is a cruel and unusual punishment to hold a person like Frost responsible for intentionally committing a crime. This Court analyzes whether a punishment violates evolving standards of decency by considering its acceptance by modern society and its relevance to serving the purposes of criminal punishment. *Furman*, 408 U.S. 271–77 (1972) (Brennan, J., concurring) (discussing two additional justifications for punishment based on the amendment's common law interpretation). Legislative action to adopt a *mens rea* insanity defense, like that of East Virginia, is "the clearest and most reliable evidence of contemporary values" signaling modern acceptance of state action. *Atkins*,

536 U.S. at 312. East Virginia's *mens rea* insanity defense is also in line with modern trends towards an emphasis on social control over moral retribution as the primary purpose of criminal punishment. *Lord*, 262 P.3d at 859; *Bethel*, 66 P.3d at 850; *State v. Herrera*, 895 P.3d 359, 368–69 (Utah 1995); *Korrell*, 690 P.2d at 1002; Craig A. Stern, *Mens Rea and Mental Disorder*, *in The Insanity Defense: Multidisciplinary Views on Its History, Trends, and Controversies* 61, 75 (Mark D. White ed., 2017).

Finally, East Virginia reasonably decided that a *mens rea* insanity defense justly serves principles of criminal punishment. *Atkins*, 536 U.S. at 313 (reserving the Court's right to exercise its own judgement regarding the legislature's purpose). When mental disease evidence is confined to the specific purpose of negating *mens rea*, states are better able to regulate the retributive, deterrent, and rehabilitative purposes of punishment. Conviction of the mentally diseased, even when they are unable to determine right and wrong, retains its retributive value because defendants are more likely to "recognize at last the gravity of [their] crime" while allowing the community to "affirm its own judgement." *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007). A *mens rea* insanity defense also strengthens the ability of a state to deter undesirable conduct by eliminating the risk that criminal acts will be excused under a right-and-wrong defense when offenders have an offensive, or even fabricated, subjectively justified moral perspective. *See supra*, at 8–9 (explaining that terrorists and white supremacists may be acquitted under a right-and-wrong test). Moreover, eliminating this risk supports rehabilitative interests, because while mentally ill defendants are incarcerated, states can oversee their recovery and ensure that they pose no threat to public safety.

A *mens rea* insanity defense allows states to control dangerous behaviors more precisely than does the right-and-wrong test. *Clark*, 548 U.S. at 775–77. The *mens rea* insanity defense

adopted by East Virginia did not stop Frost from presenting evidence that could raise reasonable doubt in the jury's mind as to her guilt. Under appropriate due process considerations, the jury ultimately found her evidence unconvincing. There is no substantive right found in the Constitution that protects Frost's interest to introduce evidence at trial of her subjective moral culpability when she intentionally brought a knife from her home to Mr. Smith's office to end his life. Neither the Eighth Amendment, nor due process considerations, require states to absolve Frost of all criminal responsibility merely because she believed her conduct was morally justified.

CONCLUSION

For the reasons stated above, this Court should AFFIRM the judgment of the Supreme Court of East Virginia.

Respectfully submitted,

ATTORNEYS FOR RESPONDENT

APPENDIX A

U.S. Const. amend. V. Rights of Persons.

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. Further Guarantees in Criminal Cases.

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

U.S. Const. amend. XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection.

Section 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such

State, being twenty-one years of age,15 and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.