CAUSE NO. 19-1409

IN THE

Supreme Court of the United States

LINDA FROST
Petitioner,

—v.—

COMMONWEALTH OF EAST VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF EAST VIRGINIA

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

Team V

Attorneys for Respondent

QUESTIONS PRESENTED

I. Provided police officers act reasonably and in good faith, should a mentally ill individual's voluntary waiver of *Miranda* be disregarded though no objectively indications of illness were displayed?

II. Despite precedent and various approaches by states when addressing insanity, should this Court require states to adopt a uniform standard, thereby barring a *mens rea* approach?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases: Page(s)

United States Court of Appeals Cases:

State Court Cases:

Statutory Provisions and Rules:

STATEMENT OF JURISDICTION

The petition for the writ of certiorari was granted by this Court on July 31, 2019. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1257 (2012).

STANDARD OF REVIEW

Challenges to the constitutionality of a statute are reviewed de novo. *United States v. Kiendra,* 663 F.2d 349, 351 (1st Cir.1981). The standard of review in evaluating a lower court's ruling in a suppression motion is 'clearly erroneous' as to that court's factual findings viewing the evidence in the light most favorable to" the government and *de novo* as to questions of law. *United States v. Brown,* 52 F.3d 415, 420 (2d Cir.1995). Additionally, "[c]redibility determinations are the province of the trial judges and should not be overruled on appeal unless clearly erroneous." *Fujitsu, Ltd. v. Federal Express Corp.*, 247 F.3d 423, 435 (2d Cir.2001).

STATEMENT OF FACTS

A. The Murder of Christopher Smith

On June 16, 2017, Christopher Smith, a poultry inspector at the U.S. Department of Agriculture office, was tragically murdered. R. at 2. The day following Smith's murder, Petitioner confessed to stabbing her boyfriend. R. at 2-3. After finding Smith's body in his office, the Campton Roads Police Department initiated an investigation. R. at 2. After receiving an anonymous type, Petitioner was subsequently brought in for questioning.[1] *Id.*

B. The Interrogation of Petitioner

Before the interrogation began, Officer Nathan Barbosa read Petitioner her *Miranda* rights and she subsequently signed a written waiver. *Id.* Officer Barbosa testified the Petitioner's demeanor at the beginning of the interrogation did not raise any concerns or suspicions about her competency. *Id.* Officer Barbosa informed Petitioner about the discovery of Smith's body and asked Petitioner who was responsible for Smith's murder. R. at 3. Petitioner stated, "I did it. I killed Chris. . . I stabbed him, and I left the knife in the park." R. at 3. Officer Barbosa attempted to ask more questions but Petitioner only replied "voices in her head" telling her to "protect the chickens at all costs." *Id.* Petitioner stated she did not believe killing Smith was wrong because he would be reincarnated as a chicken and she did him a "great favor." *Id.* Following these statements, Officer Barbosa did not attempt to ask any additional questions regarding the murder, but Petitioner implored him to join her cause "to liberate all chickens in Campton Roads." *Id.* Officer Barbosa asked Petitioner if she wanted an attorney and promptly terminated the investigation. *Id.*

[1] The sufficiency of the anonymous tip is not an issue before this Court. R. at 2.

Following the investigation, police found a bloody knife matching Smith's DNA under a bush in Lorel Park. *Id.* Petitioner was subsequently charged and indicted in Federal and State Court.[2] *Id.*

C. The Mental Evaluation of Petitioner

Petitioner's attorney filed a Motion for a mental evaluation in federal court, which was granted. R. at 3. Although previously never diagnosed with any mental disorder, Dr. Frain diagnosed Petitioner with paranoid schizophrenia and prescribed her with appropriate medication to aid in her treatment. *Id.* This was the first time Petitioner had received mental health treatment and medication. *Id.* Dr. Frain testified it was likely Petitioner was in a psychotic state and suffering delusions and paranoia between June 16 and June 17. *Id.* Additionally, Dr. Frain opined that, despite the inability of Petitioner to control or fully understand the wrongfulness of her actions, she intended to kill Smith and knew she was doing so. *Id.*

STATEMENT OF THE CASE

A. Federal Court Proceedings

Petitioner was indicted in federal court for murder and tried in the United States District Court for the Southern District of East Virginia under 18 U.S.C. § 1114 (2019). R. at 4. Petitioner was deemed competent to stand trial upon further evaluation of her current mental state and in light of her medication. *Id.* Petitioner was acquitted on the basis on insanity under 18 U.S.C. §17(a) (2019). *Id.*

[2] The Supreme Court of East Virginia recognized the federal and state officials are separate sovereigns and thus the subsequent state prosecution did not subject Petitioner to Double Jeopardy. Double Jeopardy is not an issue before this Court. R. at 1.

B. State Court Proceedings

The Commonwealth's attorney prosecuted Petitioner following her acquittal in federal court. *Id.* Petitioner was deemed competent to stand trial. *Id.* The Commonwealth provides a *mens rea* approach rather than an insanity defense: evidence of mental disease or defect is admissible to disprove competency to stand trial or to disprove the *mens rea* element of an offense. E. Va. Code §21-3439; R. at 4.

Previously, the Commonwealth recognized the *M'Naughten* rule for insanity defense, but the lack of ability to know right from wrong is no longer a defense. *Id.* Petitioner filed a motion to suppress her confession and a motion asking the trial court to hold that, by abolishing the insanity defense, E. Va. Code §21-3439 violated the Eighth Amendment right not to be subject to cruel and unusual punishment in the Fourteenth Amendment Due Process clause. R. at 5. The Circuit Court denied both motions and held the psychiatrist's testimony was inadmissible and E. Va. Code §21-3439 neither imposed cruel and unusual punishment upon Petitioner nor violated her Due Process rights. *Id.* A jury subsequently convicted Petitioner of murder and she received a life sentence. *Id.* Petitioner appealed to the Supreme Court of East Virginia. *Id.*

The Supreme Court of East Virginia held: 1) Petitioner's waiver of her *Miranda* rights was valid and her confession is admissible, and 2) the abolition of the insanity defense under East Virginia law does not violate her Eighth Amendment right to be free from cruel and unusual punishment and her Fourteenth Amendment right to Due Process. R. at 7, 9. The Petitioner appealed and the Supreme Court of the United States granted cert on July 31, 2019. R. at 12.

SUMMARY OF THE ARGUMENT

Inquiries into waiver of Miranda rights have been analyzed by this Court in term of the Fifth amendment's privilege against compelled self-incrimination. The Fifth Amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion. Thus, Petitioner's mental illness should only be one factor in determining whether her waiver is admissible. Instead, the primary focus of the inquiry should remain on whether the officer taking the confession acts in a manner that is coercive. When a suspect voluntarily waives his Miranda rights, the confession must be upheld. Moreover, whether a suspect's waiver is knowing and intelligent should be examined from the perspective of the officer. This Court and other circuits hold objective inquiries provide objective guidance to officers and help support the goal of criminal justice. Accordingly, suppression of a voluntary confession in Petitioner's circumstances would place a significant burden on society's interest in prosecuting criminal activity. Requiring officers to attempt to interpret the intent and mental health of a suspect, when a suspect does not manifest any overt indication that they are mentally impaired, would overwhelm the resources currently available to officers and run counter to the Fifth Amendment's purpose of preventing coercion.

This Court has repeatedly acknowledged that states, not the judiciary are best equipped to define and enforce criminal law. Accordingly, this Court has continued to deny any single approach to introducing an accused's evidence of insanity to prevent a criminal conviction. Although this Court may usurp power from the states when it finds a criminal procedure violates notions of due process or imposes cruel and unusual punishment, Petitioner fails to meet the required burden. There is no single, consistently held approach to insanity that is so fundamental to notions of justice, that would deny the use of a *mens rea* approach. Additionally, Petitioner does

challenge the punishment given to her but rather asserts that the procedure in itself is a violation of her Eighth Amendment. Even so, there is a growing trend towards abolishing the affirmative defense Petitioner requests, and the standards of decency do not indicate that barring a *mens rea* approach would be acceptable

ARGUMENT

I. PETITIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WAS NOT VIOLATED BECAUSE HER CONFESSION WAS MADE TO POLICE AFTER AN EFFECTIVE WAIVER OF HER *MIRANDA* RIGHTS.

The Fifth Amendment guarantees no person shall be *compelled* as a witness against himself in any criminal case. U.S. CONST. amend. V (emphasis added). The basis of this privilege against self-incrimination is to protect individuals against the use of government power to compel, force or coerce a confession. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966). This Court has consistently held "[a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States v. Washington*, 431 U.S. 181, 187 (1977). Accordingly, unless evidence reveals coercion, a accused's incriminating testimony is excluded from this constitutional privilege. *Washington*, 431 U.S. 181 at 187.

In *Miranda v. Arizona*, this Court extended the Fifth Amendment privilege against self-incrimination to include custodial police interrogation. *Id.* at 443. Because in-custody interrogation subjects accuseds to inherently compelling pressures which can undermine the choice between silence and speech, this Court created *Miranda* warnings to act as proper safeguards. *Id.* at 469. These warning require an officer inform a accused within their custody of his right to remain silent, that any statement made can be used as evidence against him, and that he has a right to the presence of an attorney. *Id.* at 476. Thus, any inquiry into the rights should consider whether the warnings

reasonably "conve[y] to [a accused] his rights as required by *Miranda*." *Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (quoting California v. Prysok, 453 U.S. 355, 361 (1981))*.

Moreover, a statement or confession is not "compelled" within the meaning of the Fifth Amendment if an individual voluntarily waives his constitutional privilege. *Miranda,* 384 U.S. at 476. Because *Miranda* rights serve only as a safeguard to compelled self-incrimination, a waiver is not involuntary when it does not result from government coercion. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). The privilege thus "is [not] concerned with moral and psychological pressures to confess" that are not the result of government coercion. *Oregon v. Elstad*, 470 U.S. 298, 303 (1985).

Here, Petitioner's decision to waive her *Miranda* rights was voluntary. There is no indication police coercion was present during the interrogation. Absent the requisite government coercion, Petitioner is not afforded the appropriate Fifth Amendment privilege for self-incrimination and her confession need not be suppressed. As such, this Court should affirm the decision of the Supreme Court of East Virginia.

A. Petitioner's Confession to Police was Properly Admitted Because Petitioner Voluntarily, Knowingly and Intelligently Waived Her *Miranda* Rights.

In *Miranda*, this Court held a statement made when an accused waives their Fifth Amendment rights is admissible in court. *Id.* at 479. To be admissible, the relinquishment of the right must be 1) voluntary in the sense it is the product of a free and deliberate choice rather than intimidation, coercion or deception; and 2) the waiver must be made with a knowing and intelligent relinquishment or abandonment of a known right or privilege. *Id.* at 444. The assessment of both prongs should be evaluated by the totality of the circumstances present at the time of waiver. *Washington*, 431 U.S. at 187. Additionally, a knowing and voluntary waiver does not require full

appreciation of all consequences flowing from the nature and the quality of the evidence in the case. *Miranda*, 384 U.S. at 445. Thus, while Petitioner will likely rely on mental illness to diminish her understanding of the outcome of her waiver, it is not sufficient to reverse the lower court's decision.

i. Petitioner's confession was absent any police coercion

A waiver of one's *Miranda* rights is voluntary when it is the product of a free and deliberate choice. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).[1] Specifically, any intimidation, coercion, or deception, either physical or psychological must be absent. *Id.* Thus, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary....' *Connelly*, 479 U.S. at 167. Here, Petitioner effectively waived her *Miranda* rights because there was no coercive police activity.

To determine whether coercion was present at the time of waiver, age, experience, education, background and intelligence of the accused, the length of the questioning, and other circumstances surrounding the interrogation are considered. *Fare v. Michael C.*, 442 U.S. 707, 727 (1979). Although a accused's mental condition may be a "significant factor in the 'voluntariness' calculus," the "mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness.' *Connelly*, 479 U.S. at 167. Moreover, this Court does not recognize ignorance of all consequences vitiates the voluntariness of a waiver. *Oregon*, 470 U.S. at 316. Therefore, weighed with other factors and absent police coercion, mental illness alone is not sufficient to determine voluntariness of a waiver.

[1] The issue of voluntariness is not presented for certiorari but its role in the waiver process and use by the lower court warrant proper analysis.

For example, in *Colorado v. Connelly*, this Court held a waiver is not involuntary merely because a accused is mentally ill or deranged. 479 U.S. at 167. Rather, an involuntary waiver occurs when an officer or agent acts improperly or coercively. *Id.* In *Connelly*, the accused claimed he lacked the ability to voluntarily waive his Fifth Amendment right because the voice of God compelled him to confess his crimes. *Id.* at 162. Despite his mental illness, this Court held the statements were admissible because the record was devoid of any evidence of physical or psychological pressure from police to elicit the accused's statements. *Id.* at 170.

Here, there is no evidence indicating any semblance of police coercion. R. at 5. Rather, Officer Barbosa diligently ensured Petitioner was aware of her *Miranda* rights. *Id.* at 6. Officer Barbosa testified Petitioner's *Miranda* rights were administered verbally and Petitioner signed a written waiver indicating her consent. *Id.* at 2. Thus, foul play or coercion on behalf of the officer is absent. Absent any physical or psychological pressure from the police, it is difficult for a accused to prevail on grounds of coercion. *Berkemer v. McCarty*,468 U.S. 420 (1984) n. 20. Here, Officer Barbosa strictly adhered to proper *Miranda* procedures, making Petitioner's burden difficult to obtain.

ii. Officer Barbosa made an objective determination Petitioner was competent

The proper standard for determining whether a waiver is knowing and intelligent is if the accused is "fully advised of [her] constitutional privilege[s]." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). To determine whether the accused is fully advised, the reviewing court must analyze the totality of the circumstances in a process similar to determining the voluntariness of a confession. *North Carolina v. Butler*, 441 U.S. 369, 374 (1979). Only if the totality of the circumstances surrounding the interrogation "reveal both an uncoerced choice and the requisite

level of comprehension, may a court conclude that the *Miranda* rights have been waived." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). Although mental capacity is one factor considered in the totality of the circumstance's analysis, diminished mental capacity alone does not prevent a accused from validly waiving his or her *Miranda* rights. *Spring*, 479 U.S. at 570.

When reviewing the totality of the circumstances this Court has recognized the analysis should weigh the objective evidence available to officers at the time of waiver. In *North Carolina v. Butler*, this Court held a waiver may be clearly inferred based on the objective actions and words of any accused being interrogated. 441 U.S. at 373. Typically, an objective inquiry based on the officer's perspective is given broad deference. *Oregon,* 470 U.S. at 315-316. Therefore, while the dissent admonishes the majority's opinion reviewing the knowing and intelligent test from an officer's perspective, it is clear this objective inquiry is appropriate. Under such inquiry, Petitioner knowingly and intelligently waived her *Miranda* rights.

Recently, this Court has advocated for an objective approach regarding other aspects of Miranda rights. For example, in *Davis v. United States*, this Court held the appropriate method of assessing whether a accused invokes his *Miranda* right to counsel is an objective inquiry. 412 U.S. 452, 459 (1994). This Court held an objective inquiry was best to avoid difficulties of proof and to provide guidance to officers conducting interrogations. *Id.* at 458-459. Similarly, in *Edwards v. Arizona*, this Court declined to extend Miranda to include a requirement that officers cease questioning when faced with an ambiguous request for an attorney. 423 U.S. 96, 102 (1975). This Court held this would require officers to cease questioning even if the officer did not reasonably know if a accused wanted a lawyer. *Id.* In *Michigan v. Mosley*, Justice Kennedy explained the decision in *Edwards* and clarified that the *Miranda* safeguards would be turned "into wholly irrational obstacles to legitimate police investigative activity" if this Court were to require officers

to cease questioning when they could not reasonably know if a accused wanted a lawyer. 423 U.S. 96, 102 (1975).

Additionally, many circuit courts require officers affirmatively disregarded signs indicating a accused did not understand their rights. *Woodley v. Bradshaw*, 451 F. App'x 529, 540 (6th Cir. 2011) (referencing *Rice v. Cooper*, 148 F.3d 747, 750–51 (7th Cir.1998); *United States v.* Bradshaw, 935 F.2d 295, 298–300 (D.C.Cir.1991). Specifically, in *Garner v. Mitchell*, the Sixth Circuit held a knowing and intelligent waiver focuses on what the interrogating officers *could have* concluded about a accused's ability to understand the warnings the time of the waiver. 557 F.3d 257 (6th Cir. 2009). The court examined whether a nineteen-year-old could knowingly and intelligently waive his *Miranda* rights when he had a troubled upbringing, poor education, and an IQ that placed him in the borderline range of intelligence. *Id.* at 263. The Sixth Circuit held the waiver was sufficient based on the accused's lucidity and ability to follow along with the officer's explanation of his *Miranda* rights. *Id.* at 270. Specifically, because the police had "no reason to believe that [the defendant] misunderstood the warnings, ... there [was] no basis for invalidating the *Miranda* waiver." *Id.* at 267. Thus, officers had no discernable way of inferring the accused did not understand the waiver and the confession was valid. *Id.*

While some courts have held accuseds unknowingly and unintelligently waived their rights, the circumstances differed significantly from the facts before this Court. Significantly, in each of those cases, the court found objective indications should have alerted officer's to a accused's inability of to understand his rights. *See, e.g.*, *United States v. Turner*, 157 F.3d 552, 555 (8th Cir.1998) (accused exhibited bizarre behavior and may have exhibited signs of mental illness); Smith v. Mullin, 379 F.3d 919, 933 (2004) (accused's borderline mental retardation was apparent).

Petitioner will likely rely on her mental impairment to show that she did not understand her rights. Because Officer Barbosa evaluated Petitioner's objective behavior, evidence of her mental illness should not be weighed heavily. Petitioner nodded when asked whether she wanted to talk about Smith. R. at 2. Petitioner lucidly signed the waiver when advised of her *Miranda* rights by Officer Barbosa. *Id.* Subsequently, she answered questions with little hesitation indicating she understood her *Miranda* rights. *Id.* at 2-3. Therefore, because Officer Barbosa made an objective inquiry of Petitioner's competence at the time of the waiver and reasonable determined she understood her *Miranda* rights, this Court should affirm the decision below.

B. Suppression of A Voluntary Statement Would Place A Burden On Prosecuting Criminal Activity.

Suppression of a accused's statement or confession is warranted when an officer does not properly afford a accused their *Miranda* rights. This exclusionary rule serves to deter lawless conduct by both the police and prosecution. ***Duckworth, 492 U.S. 195, 207 (1989)*** (O'Connor, S.D., concurring). Accordingly, a rule's utility must be weighed against other important values in its application. *Id.* When a rule's deterrent effect has been marginal or offended other values central to the judicial process, this Court has declined to extend or enforce it. *See, e.g., United States v. Leon,* 468 U.S. 897, 920-21 (1984) (refusing to exclude evidence when police presented in good faith an incorrect search warrant); *U.S. v. Calandra, 414 U.S. 338, 339 (1974) (refusing to apply the exclusionary rule* when it would frustrate the public's interest in the fair and expeditious administration of the criminal laws); *Harris v. New York*, 401 U.S. 222, 225 (1971) (rejecting the notion accused's inadmissible confession allowed to deny every fact disclosed in statement a 'fruit of the poisonous tree').

Expanding Miranda to include suppression of a properly warned, uncoerced confession when there is no objective indication of misunderstanding would offend the values of the judicial process. Therefore, this Court should affirm the decision below and hold Petitioner's confession is admissible.

i. Miranda harmonizes conflicting concerns of self-incrimination

A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored" by police. *Mosley*, 384 U.S. at 479. Requiring the police to perform a mental evaluation for each interrogation following valid *Miranda* warnings inappropriately shifts the balance this Court established in *Miranda v. Arizona*. *Miranda* rights were not intended to 'create a constitutional straight jacket,' but to provide practical reinforcement for the right against compulsory self-incrimination. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

This Court highlighted two conflicting concerns in *Schneckloth v. Bustamonte*. First, the need for police questioning is a tool for effective enforcement of criminal laws. 412 U.S. 218, 225 (1973). Second, the interrogation process is "inherently coercive" with potential risk police will inadvertently cross the line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Id*. *Miranda* reconciles these concerns by giving the *accused* the power to exert control over the course of the interrogation. *Moran v. Burbine*, 475 U.S 412, 427 (1986). After ensuring a accused is informed of his rights, police questioning can continue as its essential role in the investigatory process. *Id*. By reversing the lower court's decision, this Court would undermine the *Miranda* decision's central principle of balancing these competing concerns.

In *Moran v. Burbine*, this Court refused to interpret *Miranda*'s procedural safeguards in a manner which could alter "the subtle balance struck in that decision" between

society's interest in law enforcement and the need to protect a accused from "constitutionally impermissible compulsion." *Id.* at 426. Typically, this Court evaluates whether suppression of a confession in these circumstances would aid the accused in protection of his Fifth Amendment rights. In *Moran*, this Court held police officers were not required to inform a accused of telephone calls from an attorney prior to obtaining a waiver of his *Miranda* rights. *Id*. at 433. This Court reasoned suppressing the confession would contribute "only incidentally, if at all" to the protection of a accused's privilege against self-incrimination and would exact "a substantial cost [in terms of] society's legitimate and substantial interest in securing admissions of guilt" *Id*. at 427. More significantly, because the officer's conduct failed to rise to a level of coercion, suppressing the confession would not comport with *Miranda's* purpose. *Id.*

Here, the suppression of Petitioner's confession would be insignificant to satisfy a accused's privilege against self-incrimination. Specifically, suppression would do little to deter officers from violating the constitutional safeguards when the officers are already following proper procedures. Here, Officer Barbosa followed all necessary proper procedure. R. at 6. He exercised due diligence to assure Petitioner was informed of her *Miranda* rights. *Id.* Without any overt signs Petitioner had a mental illness, it would likely be impossible for an officer, or anyone lacking psychological training, to identify symptoms of a mental disease. Thus, the only way officers could be certain an otherwise lucid accused was not mentally ill would be to have a mental health professional with them. Requiring a mental health professional to be present during every interrogation for each accused's questioning would undoubtedly strain both the medical community and law enforcement's resources. Because provision of a health professional during every interrogation is unrealistic, it is reasonable for police to rely only on obvious signs of mental illness, otherwise their investigatory efforts would be severely hampered.

Moreover, requiring the suppression of a confession here would not comport with the overall balance established in *Miranda*. Suppression of properly rendered, voluntary *Miranda* rights would do little to curb police coercion. Instead it would tie the hands of law enforcement and deprive officers of their most effective tool. The *Miranda* waiver standard should not be construed in a manner which would impose an "additional handicap on otherwise permissible investigatory efforts" when the handicap is unrelated to the protection of a accused's privilege against compelled self-incrimination. 475 U.S at 427. Thus, based on this imbalance alone, this Court should deny Petitioner's request.

ii. Suppression of a voluntary statement would place a burden on prosecuting criminal activity.

"The extraordinary protections afforded a person in custody accuseded of criminal conduct are not without a valid basis, but as with all 'good' things they can be carried too far." *Edwards*, 423 U.S. 477 at 487-88 (Berger, W., concurring). This Court has cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers on "truthful and probative evidence." *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972). When evidence of criminal activity is volunteered freely by the accused, there is no justification for requiring the police to ignore highly probative evidence. *Duckworth, 492 U.S. 195, 207 (1989)* (O'Connor, S.D., concurring). Generally, unambiguous confessions are crucial to prosecuting criminals. *Arizona v. Mauro*, 481. U.S. 520, 529 (1987). Ignoring this probative evidence would hinder criminal prosecution and pose grave burdens on police officers.

Recently, this Court reiterated the importance of requiring an invocation of a *Miranda* right be unambiguous. *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). Specifically, this Court held if a accused does not unequivocally invoke the right to remain silent, officers cannot be faulted for

continuing an interrogation, thus making a accused's confession admissible. *Id*. at 382. Further, this Court explained requiring officers to interpret a accused's internal intent would impose detrimental consequences by forcing officers to guess whether to proceed in unclear circumstances; *Id*. Such an unclear standard would inevitably lead to the suppression of voluntary confessions. Because this would place a significant burden on society's interest in prosecuting criminals, this Court refused to expand *Miranda* to ambiguous invocations. *Id*.

Similarly, requiring officers to presume a accused's mental health status would undermine police efforts to prosecute criminals. If a accused displayed no outward or objective signs of mental impairment, it would likely force officers to hypothesize mental capacity without any guiding criteria. Suppressing a voluntary confession based on information solely within the knowledge of the accused would render numerous confessions inadmissible and result in an inconsistent application of *Miranda* rights. Moreover, where a accused displays no concerns of mental illness, allowing ambiguous invocations of *Miranda* rights would place an unwarranted burden on police officers. R. at 3. Thus, allowing unknown, unobservable mental illness to warrant overturning a voluntary confession would create an inconsistent criminal justice system and burden the resources of an already taxed justice system.

II. ABOLITION OF THE INSANITY DEFENSE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO DUE PROCESS OR THE EIGHTH AMENDMENT RIGHT OF CRUEL AND UNUSUAL PUNISHMENT BECAUSE MENS REA APPRAOCHES HAVE BEEN HISTORICALLY RECOGNIZED BY THIS COURT

Our federal system recognizes states hold the independent power to articulate societal norms through criminal law." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Pointedly, states—not the

judiciary—possess primary authority for defining and enforcing criminal law for its citizens. *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993). State legislatures consider societal protections, medical science, and their citizens' concerns when adapting criminal laws. Moreover, the bedrock of the democratic election process lies in citizens choosing representatives based on individual preferences for politics and policies, including criminal law. Thus, the Constitution provides the ability to define and enforce criminal law almost exclusively to State legislatures. (cite).

In 2016, the East Virginia legislature, adopted E. Va. Code §21-3439, implementing a *mens rea* approach to murder. R. at 4. Under the new statute, evidence of mental impairment is admissible to disprove competency to state trial or to disprove the *mens rea* element of an offense. *Id.* Evidence of an accused's mental impairment is no longer inadmissible to establish an insanity defense. *Id.* Under the statute, suspects of a crime are not barred from admitting evidence of insanity to prove their innocence. *Id.* Instead, suspects are given the opportunity to admit evidence of a mental impairment to disprove the *mens rea* element of an offense rather than presenting the evidence post plea. *Id.*

Petitioner inaccurately asserts the adoption of the *mens rea* approach violates both her Fourteenth Amendment right to Due Process and her Eight Amendment right to be free from cruel and unusual punishment. Specifically, Petitioner contends E. Va. Code §21-3439 violates due process because it offends a "principle of justice so rooted in traditions and conscience of the people as to be ranked as fundamental." *Clark v. Arizona*, 548 U.S. 735, 748 (2006). Additionally, punishing individuals suffering from mental illness who commit murder violates fundamental dignity and fails to reflect the evolving standards of decency that mark the progress of a maturing society. *Trop v. Dulles,* 356 U.S. 86 (1958). Petitioner is effectively asking this Court to implement

a bright line rule requiring states, regardless of individual legislative concerns, to adopt an affirmative insanity defense based on whether an individual can understand immoral actions.

Markedly, this Court has consistently rejected implementing a uniform insanity test. *Powell v. Texas*, 392 U.S. 514, 535-36 (1968). Instead, this Court recognizes a State's "insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Clark*, 548 U.S. at 752. Historically, it has been "the province of the States" to set the standards for "assess[ing] the moral accountability of an individual for his antisocial deeds." *Powell*, 392 U.S. at 535-36. Thus, States have the "freedom to determine whether, and to what extent, mental illness should excuse criminal behavior." *Foucha v. Louisiana,* 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring). Moreover, the right to an insanity defense is not a fundamental principle required by due process nor does it violate the Eight Amendment proscription against cruel and unusual punishment. R. at 8. Accordingly, this Court should affirm the decision below.

A. Insanity as an Affirmative Defense is Neither Historically Fundamental Nor Consistently Implemented.

To violate due process, a state must "offend 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, 202 (1977). A principal is fundamental when there are settled usages and modes of proceeding under common and statute law. *Powell v. Alabama*, 287 U.S. 45, 65 (1932). Satisfying that standard "entails no light burden." *Clark v. Arizona*, 548 U.S. 735 (2006). Here, the burden falls on the Petitioner to demonstrate the affirmative defense of insanity is fundamental. *Patterson, 432 U.S.* at 202.

Far from being "woven into the criminal jurisprudence of English-speaking countries", an affirmative insanity defense based on the ability to distinguish right from wrong "is a creature of the 19th century and is not so ingrained in our legal system to constitute a fundamental principle

of law." R. at 10; *State v. Bethel*, 66 P.3d 840, 851 (Kan. 2003).This is demonstrated by the myriad of state approaches in weighing evidence of insanity criminal convictions. Accordingly, there is no test of insanity so deeply rooted in our history and tradition as to render a *mens rea* approach to insanity unconstitutional. As this Court recognized in *Clark v. Arizona*, "even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them." 548 U.S. at 749. After reviewing various approaches to insanity, this *Court* held because no baseline for an insanity rule has ever been formulated, states retain the ability to implement insanity approaches as they see fit. *Id.* at 753. Thus, East Virginia's *mens rea* approach to insanity does not violate the Due Process Clause.

i. This Court has never recognized an affirmative insanity defense as fundamental

East Virginia's *mens rea* approach is consistent with early articulations of an insanity standard and predates the insanity as an affirmative defense. Similar to East Virginia's statute, early articulations of the insanity standard required total cognitive impairment preventing a defendant from forming criminal intent. Historically, both England and the United states recognized criminal law doctrines of *mens rea* to satisfy prosecuting those claiming insanity. Norval Morris, *The Criminal Responsibility of the Mentally Ill,* 33 SYRACUSE L.R. 477, 500 (1982); AM. MED. ASS'N, *THE INSANITY DEFENSE IN CRIMINAL TRIALS AND LIMITATIONS OF PSYCHIATRIC TESTIMONY* 27 (1983). Additionally, in 1983 the American Civil Liberties Union addressed insanity in congressional hearings: "Early English history treated insanity as the equivalent of a complete lack of reason, thus merging concepts of *mens rea* and insanity …. Therefore, the framers of the Constitution would not have been likely to recognize or appreciate an issue based on a distinction between *mens rea* and insanity." *Reform of the Fed. Insanity*

Defense: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary, 98th Cong. 527 (1983) (statement of Professor Susan N. Herman on behalf of the American Civil Liberties Union).

Thus, while Petitioner asserts that an affirmative insanity defense is a fundamental part of this country's criminal law tradition, historical approaches and precedent show the *mens rea* approach predates the affirmative defense' of insanity. *Id.* Indeed, for centuries evidence of mental illness was admitted to show the accused was incapable of forming criminal intent. Francis Bowes Sayre, *Mens Rea,* 45 HARV. L. REV. 974, 1005 (1932). Moreover, insanity was not recognized as the right-and-wrong affirmative defense until the late nineteenth century. Norval Morris, *The Criminal Responsibility of the Mentally Ill,* 33 SYRACUSE L.R. 477, 500 (1982); AM. MED. ASS'N, *THE INSANITY DEFENSE IN CRIMINAL TRIALS AND LIMITATIONS OF PSYCHIATRIC TESTIMONY* 27 (1983).

For example, the Wild Beast Test ("WBT") was frequently used throughout common law and widely accepted in the eighteenth century. *People v. Horn*, 158 Cal. App. 3d 1014, 1022 (1984). Notably, the WBT identified insanity and *mens rea* as inextricably linked. Henry Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era,* 18 U. FLA. J.L. & PUB. POL'Y 7 (2007). The test required an accused to show he was devoid of understanding, or intent, to be acquitted of a crime. *Id.*

Recently, states have applied the *M'Naghten* test, which requires the accused to show the mental disease or defect which existed a the time of offense must have caused one of two things: 1) the cognitive incapacity—inability to know the nature and the quality of the act committed; or 2) moral capacity—the inability to know the act committed was wrong. *Id.* The cognitive incapacity part of the test relieves the defendant of liability when the defendant is incapable of

forming *mens rea. Id.* Subsequently, states have the power to determine whether a defendant can invoke an insanity defense if they prove one of the prongs. Obviously, if a state determines it is sufficient for a defendant to invoke the defense because of cognitive incapacity, the defendant lacks *mens rea.* This is the same standard the Commonwealth affords suspects.

Varying applications of the *M'Naghten* test demonstrate the fluidity of the test. Therefore, because this Court has recognized no specific test must be applied, the *mens rea* approach of the Commonweath should be upheld.

ii. *States vary significantly in approaches to insanity*

To broaden the scope of due process, a rule must also achieve "uniform and continuing acceptance." *Egelhoff,* 518 U.S. at 48. Approaches to mental impairment and criminal liability are continuously evolving rather than forming an uniform application needed for due process. This Court has recognized "even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them," with "a diversity of American standards" across the states. *Clark*, 548 U.S. at 749. The broad scope of insanity approaches illustrate that no single approach is considered "fundamental." *Egelhoff,* 518 U.S. at 48.

Generally, states have adopted diverging approaches to insanity. A majority of states apply different variations of the *M'Naghten* test while others have adopted variations of the Model Penal Code definition. Additionally, six states apply the "irresistible impulse" test, and four states apply the *mens rea* approach. *Id.* This Court does not favor a superior approach to introducing evidence of insanity. Rather, this Court has held individualized adaptations are acceptable to best serve state interests. *Powell*, 392 U.S. at 535-36.

Further broadening the scope of approaches to insanity, several legislatures require an accused to prove a heightened level of mental illness to invoke insanity as a defense. For example,

the federal standard requires an accused to have a "severe" mental disease or defect. 18 U.S.C. § 17(a) (2019). *See also e.g.* ARIZ. REV. STAT. ANN. § 13-502 (2010) (excluding specific types of disorders from excusing criminal liability, such as psychosexual disorders); ARIZ. REV. STAT. ANN. § 13-502 (2010) (personality disorders); OR. REV. STAT. § 161.295(2) (2017) (mental illnesses caused by long-term substance abuse); *Bieber v. People,* 856 P.2d 811, 818 (Colo. 1993), *cert. denied*, 510 U.S. 1054 (1994) (mental illnesses caused by long-term substance abuse). Furthermore, the Model Penal Code provides the insanity defense cannot be based on "abnormality manifested only by repeated criminal or otherwise antisocial conduct." MODEL PENAL CODE § 4.01(2). These varying approaches contradict the notion that an insanity defense is a fundamental or consistent principle of law. Thus, while Petitioner may argue an insanity defense is mandated by constitutional due process, "[h]istory shows no deference to [a test] 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." *Clark*, 548 U.S. at 749. Therefore, because states have wide discretion in approaches to insanity, the *mens rea* approach is not unconstitutional.

B. This Court has Consistently Refused to Recognize a Uniform Test for Insanity.

When a justifiable policy reason behind a rule for enactment exists, this "alone casts doubt upon the proposition that the opposite rule is a 'fundamental principle.'" *Montana v. Egelhoff,* 518 U.S. 49 (1996). Indeed, this Court has refused to recognize several challenges to state-backed approaches towards insanity in the criminal capacity: states do not need to recognize the affirmative defenses of cognitive incapacity. *Clark*, 548 U.S. at 779. *See also Egelhoff*, 518 U.S. at 56) (voluntary intoxication); *(Patterson,* 432 U.S. at 201) (extreme emotional disturbance); (*Leland*, 343 U.S. at 800-01) (irresistible impulse). This is partly due to unclear standards on the proper formulation of insanity, conflicting opinions regarding mental health and differing state

policy concerns. For these reasons, this Court should hold the power for defining and enforcing criminal law should remain with the states.

In *Clark v. Arizona*, this Court refused to recognize that the "*M'Naghten* test was the minimum a government must provide in recognizing an alternative to criminal responsibility on grounds of mental illness or defect." 548 U.S. at 748. Arizona's defense statute included only part of the *M'Naghten* test. *Id. at 743. Effectively, the statute excused individuals who could not understand their actions were morally wrong but excluded individuals lacking understanding of the nature and quality of their act. Id. at 748. Despite the removal of an element of the M'Naghten test, this Court held the statute did not violate due process. Id. at 748. This* Court explained "[h]istory shows no deference to [the] *M'Naghten* [rule] that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a [s]tate's capacity to define crimes and defenses." *Id.* at 749. Additionally, this Court remarked "it is clear no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Id.* at 753.

Moreover, in *Leland v. Oregon*, this Court held due process did not require Oregon to adopt the irresistible-impulse test in lieu of *M'Naghten* because determinations of insanity tests were best left to the states. 343 U.S. at 800-01. This Court held choosing a test of legal insanity involved not only scientific knowledge but also questions of basic policy about the extent that knowledge should determine criminal responsibility. *Id.* at 801. Additionally, this Court reasoned the science of psychiatry is not yet so accurate courts can formulate a standard to appropriately quantify the mental health of individuals. *Id.* Thus, no single method of addressing mental impairment is so scientifically reliable as to amount to a constitutional prohibition on the use of another by mandate of due process.

Similarly, in *Powell v. Texas*, this Court reiterated "nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." 392 U.S. at 536. Further, "the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds." *Id.* at 535-56. Further, "the range of problems created would seem totally beyond our capacity to settle at all, much less to settle wisely, and even the attempt to define these terms and thus to impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete." *Id*. at 546 (Black, H., concurring).

Additionally, several state courts have held a *mens rea* approach constitutional. For example, In *State v. Searcy*, the Idaho Supreme Court reviewed the state's insanity defense under both state and federal due process clauses. 798 P.2d 914 (Idaho 1990). Specifically, the defendant claimed the Idaho law unconstitutionally denied him due process of law because it prevented him from pleading insanity as a defense. *Id.* at 916. The court held, "neither the federal nor the state Constitution contains any language setting forth any such right." *Id.* Additionally, in *State v. Korell*, the Montana Supreme Court held that although Montana abolished the traditional use of insanity as a defense, alternative procedures were enacted to deal with insane individuals who commit criminal acts. 690 P.2d 992, 997 (1984).

States have also refused to recognize abolition of the affirmative defense of insanity is tantamount to punishing an accused for mental illness. In *State v. Kahler*, the Kansas supreme court held a *mens rea* approach to the affirmative insanity defense did not expressly or effectively make mental disease a criminal offense. 410 P.3d 105 (2018). Hence, punishing a defendant who committed murder due to a mental disease was not equivalent to punishing him because he had a mental disease.

Although the dissent referenced cases where state courts held *mens rea* approaches were unconstitutional, the statutes in those varied drastically than in the case before this Court. *See Nevada v. Finger*, 27 P.3d 66, 84 (Nev. 2001); *Sinclair v. Mississippi*, 132 So. 581, 582 (Miss. 1931). Markedly, all *mens rea* approaches which have been deemed unconstitutional "precluded any trial testimony of mental condition, including trial testimony which would have rebutted the state's evidence of the defendant's state of mind." *State v. Herrera*, 895 P.2d 395, 361–62 (1995). This left the accused with no opportunity to introduce evidence of a mental illness. In contrast, the statutes in the three states mentioned above and East Virginia expressly permit evidence of mental illness or disability to be presented at trial. While evidence of mental illness is not used in support of an independent insanity defense, it can be used to aid the accused to rebut the state's evidence of the requisite criminal intent, or *mens rea.* Therefore, East Virginia's *mens rea* approach affords an accused adequate means to rebut *mens rea* with evidence of their mental health, but does so in a way that best represents the morals and policies that remain best for its people. Thus, while Petitioner urges this Court to disregard the inconsistent application of affirmative defenses, diversity of test standards, and differing policy evaluations, it urges this to adopt a bright line rule for admitting evidence of insanity when none exists. This Court should adhere to its wise jurisprudence and that of the majority of state courts who have addressed the issue.

The Eighth Amendment does not encompass sentencing. While inherent within the Eighth Amendment is "cruel and unusual *punishments,*" this Court has not broadened its scope to include substantive liability. U.S. CONST. amend. VIII. The primary purpose of the Eighth Amendment "has always been considered to be directed at the method or kind of punishment imposed for the violation of criminal statutes, not the method of obtaining such punishment." *Powell*, 392 U.S. at

531-32. Thus, while the Eighth Amendment specifically applies to bar certain punishments it does not constrain the procedural undertakings of state criminal liability, including what affirmative defenses States must make available. This is consistent with the history of the provision. *Additionally, while* this Court's Eighth Amendment jurisprudence forbids "*modes or acts of punishment* that have been considered cruel and unusual at the time that the Bill of Rights was adopted, *Ford v. Wainwright*, 477 U.S. 399, 405 (1986), or that are excessive in light of "evolving standards of decency," *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Petitioner's claims are unfounded. Rather than articulating an unconstitutional punishment, Petitioner claims the Eighth Amendment prevents her conviction.

i. *Petitioner failed to challenge excessive punishment*

A criminal punishment may be cruel and unusual when it is barbaric, excessive, or disproportional to the offense committed. *Solem v. Helm,* 463 U.S. 277, 284 (1983). Here, neither Petitioner nor the dissent challenge Petitioner's life sentence as being excessive or disproportional to her crime of murder. Instead, both assert that *any* punishment for the mentally impaired is cruel and unusual. To hold that a legislature could not constitutionally hold murderers, who knew what they were doing, accountable but not impose and punishment on them would run counter to this Court's jurisprudence.

Despite Petitioner's mental illness, she was aware of the murder she committed. Petitioner fully intended to carry out murder on the evening of June 16th. R. at 3. Although Petitioner may have suffered from mental illness, this Court has recognized diminished moral culpability does not preclude the intellectually disabled from "meet[ing] the law's requirements for criminal responsibility." *Clark*, 548 U.S. at 767-68. Moreover, this Court held, when an individual meets these requirements, the accused should be tried and punished accordingly. *Id.*

Though this Court has recently extended leniency for punishment of those with diminished mental capacity, this Court does not absolve those individuals of their culpability. *See Roper v. Simmons*, 543 U.S. 551 (2005) (exempting juveniles from capital punishment); *see also Graham v. Florida*, 560 U.S. 48 (2010) (exempting juveniles from life without parole for non-homicide crimes); *Miller v. Alabama*, 567 U.S. 460 (2012) (exempting juveniles from mandatory life without parole). Though this Court recognized juveniles have a diminished culpability, it refused to excuse an individual from his crime. *Graham*, 560 U.S. at 68. While defendants with lessened culpability should enjoy a less severe punishment, this Court should uphold precedent and refuse to excuse an individual of crime.

ii. Current jurisprudence is evolving towards abolishment of an affirmative insanity defenses.

The "Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Harris v. Alabama*, 513 U.S. 504, 510 (1995) (quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)). Constitutionalizing a criminal law standard based on a majority approach would impede future evolution of the law. This should be of particular concern in the complex and ever developing area of insanity because as Justice Marshall explained in *Powell v. Texas*, "formulating a constitutional rule [for insanity] would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Powell*, 392 U.S. at 536-37.

The Eighth amendment is derived in part "from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 100-01. These "evolving standards

should be informed by objective factors to the maximum possible extent." *Harmelin v. Michigan,* 501 U.S. 957, 1000 (1991). Typically, this Court has evaluated objective factors from state legislatures. This is primarily because, as this Court indicated, "[i]t is the power and responsibility of the Legislature to enact laws to promote the public health, safety, morals and general welfare of society ... and this Court will not substitute our judgment for that of the Legislature with respect to what best serves the public interest." *Id.*

Reviewing the objective evidence provided by the federal and state legislatures, this Court should refuse to adopt Petitioner's proposed rule for two reasons. First, though a majority of States makes a version of an affirmative insanity defense available in some circumstances, "[i]t is not so much the number of the States" taking a given approach "that is significant, but the consistency of the direction of change." *Atkins,* 536 U.S. at 315. Since the late 1970s, the direction of change surrounding evidence of insanity in criminal proceedings has grown more stringent. Even considering Congress's adoption of *M'Naghten* in the early 1980s, 18 U.S.C. § 17, legislative momentum favors the approach employed by East Virginia. *Id.*

Second, this movement of the states also reflects the consensus of our society as a whole. Although mental health has become a more prominent topic in living rooms across America, and advocates have increasingly moved to step up protections, the reality is that this nation is uneasy with acquitting a defendant based on an insanity defense. One reason for this may be that when it comes to the policies behind criminal punishment, especially for heinous crimes such as murder, the public refuses to disregard the age-old notions of retribution, punishment, and rehabilitation. While Petitioner argues today that East Virginia's statute lacks decency, this Court has indicated that "a decent society protects the innocent from violence, including removing those guilty of the most heinous murders from its midst." *Miller,* 567 U.S at 494 (Roberts, J., dissenting).

CONCLUSION AND PRAYER

For the forgoing reasons, Respondent respectfully request this Court affirm the judgment of the East Virginia Supreme Court on [inser] issues.

Respectfully submitted this 13 day of September 2019.

/s/ *Team V*

Team V
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

Counsel for Respondent certifies that the foregoing brief complies with Rules of the United States Supreme Court, and with the most recent edition of The Bluebook: A Uniform System of Citation. This brief has been prepared in accordance with all Leroy R. Hassell, Sr. National

Constitutional Law Moot Court Competition Rules and is the work product solely of Team V members.

/s/ *Team V*

Team V
Counsel for Respondent