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 APPEALS OF EAST VIRGINIA

BRIEF FOR RESPONDENT

TEAM W
Counsel for Respondent

QUESTIONS PRESENTED

1. When a suspect in a custodial interrogation does not manifest any outwardly observable signs of incompetency to the interrogating officer, but subsequent evaluation indicates a probability that she did not understand her rights or the consequences of waiver due to mental disease, is a suspect's waiver "knowing and intelligent" under the Self-Incrimination Clause?

2. Whether allowing evidence of insanity that is probative of a crime's defined *mens rea* element, but not allowing a separate insanity defense, violates the Fourteenth Amendment's Due Process clause or the Eighth Amendment right not to be subject to cruel and unusual punishment when the accused had the intent to commit the crime but did not understand the wrongfulness of her actions at the time.

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CONSTITUTIONAL PROVISIONS

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STATUTES

E. Va. Code. § 21-3439.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257 (2019). The Supreme Court of East Virginia is the highest court in the Commonwealth and entered its judgment on December 31, 2018. R. 9. The case involves Petitioner's rights and privileges claimed under the Fifth, Eighth, and Fourteenth Amendments of the Federal Constitution. This Court granted the petition for a Writ of Certiorari to the Supreme Court of East Virginia on July 31, 2019.

STATEMENT OF THE CASE

Christopher Smith, a poultry inspector for the U.S. Department of Agriculture, was found stabbed to death in his office in rural Campton Roads, East Virginia on June 16, 2017. R. at 2. The Campton Roads Police Department brought Linda Frost in for questioning in response to an anonymous tip. *Id*. Before questioning Ms. Frost, Officer Nathan Barbosa informed her of her *Miranda* rights and provided a written waiver that she acknowledged and signed. *Id.* At this point in the interrogation, nothing about Ms. Frost's demeanor gave rise to any suspicions in Officer

Barbosa's mind that she was incapable of making a legal waiver. *Id.* Ms. Frost nodded when Officer Barbosa asked if she wanted to talk about Mr. Smith. *Id.*

When Officer Barbosa asked if Ms. Frost knew who might be responsible for Mr. Smith's murder, she immediately admitted stabbing him to death and leaving the knife in the park. R. at 3. Ms. Frost didn't give any more details, but said that "voices in her head" were telling her to "protect the chickens at all costs." *Id.* She did not think that killing Mr. Smith was wrong because she thought he would be reincarnated as a chicken, which, according to her, was a good deed because "chickens are the most sacred of all creatures." *Id.* After Ms. Frost asked Officer Barbosa to help her "liberate all the chickens in Campton Roads," he asked if she would like a court appointed attorney. *Id.* Ms. Frost answered in the affirmative, and Officer Barbosa terminated the interrogation. *Id.*

The police then discovered a knife covered in the victim's blood that matched Ms. Frost's kitchen set in Campton Roads' Lorel Park. *Id.* The coroner's office found that Mr. Smith likely died between 9:00 p.m. and 11:00 p.m. on July 16. *Id.* Two eyewitnesses saw a woman matching Ms. Frost's description by Lorel Park late in the evening on the same date. R. at 2–3.

Ms. Frost was then charged and indicted in the United States District Court for the Southern District of East Virginia. R. at 3. Despite no prior history of mental illness or treatment, the court granted the defendant's preliminary motion for a psychiatric evaluation. R. at 3–4. Dr. Desiree Frain diagnosed Ms. Frost with paranoid schizophrenia and prescribed her medication. R. at 3. Ms. Frost told Dr. Frain that she believed she needed to kill Mr. Smith to protect the sacred chickens he endangered because of his job as a poultry inspector. R. at 4. Ms. Frost was deemed competent to stand trial in federal court in light of the medication prescribed by Dr. Frain. *Id.*

Dr. Frain's testified that it was "highly probable" that Ms. Frost was suffering from delusions and paranoia caused by her post hoc diagnosis of schizophrenia between June 16 and 17. *Id.* Dr. Frain testified that Ms. Frost intended to kill Mr. Smith and that she knew what she was doing at the time. *Id.* Dr. Frain also opined that Ms. Frost "was unable to control or fully understand the wrongfulness of her actions" during June 16 and 17. *Id.* Ms. Frost was acquitted on the basis of insanity. *Id.*

After Ms. Frost's acquittal in federal court, the Commonwealth prosecuted Ms. Frost. R. at 4. The Circuit Court of East Virginia, Judge Joshua Hernandez, also deemed Ms. Frost competent to stand trial in light of her medication. *Id.* Ms. Frost's attorney filed a motion to suppress her confession. R. at 5. Judge Hernandez denied the motion despite its finding that Ms. Frost did not understand the rights that Officer Barbosa informed her of nor the consequences of signing the provided waiver. *Id.* Judge Hernandez reasoned that nothing about Ms. Frost's behavior before her waiver would give Officer Barbosa any reason to know or infer her psychotic episode was operating under the guise of apparent lucidity. *Id.*

The defendant also moved to challenge E. Va. Code § 21-3439 under the Fourteenth and Eighth Amendments of the U.S. Constitution. R. at 5. The Commonwealth has joined an emerging minority of states in implementing a *mens rea* approach as a substitute for an insanity defense. *Id.* In 2016, the Commonwealth's legislature adopted E. Va. Code § 21-3439, preventing a defendant from asserting the inability to know right from wrong as an affirmative defense. *Id.* Instead, the statute allows evidence of a defendant's mental disease to dispute competency to stand trial or to disprove the *mens rea* element of a defined criminal offense. *Id.*

Judge Hernandez denied the defendant's second motion, holding that E. Va. Code § 21-3439 does not violate Ms. Frost's Eighth Amendment privilege against cruel and unusual

punishment or her Fourteenth Amendment right to due process. *Id.* The jury convicted Ms. Frost of murder and recommended a life sentence, which Judge Hernandez accepted. *Id.*

By a vote of four to one, the Supreme Court of East Virginia affirmed the conviction. R. at 9. The court held that Ms. Frost's waiver was valid and her confession admissible because the interrogating officer exercised due diligence and had no reason to question her competency until after she waived her rights and confessed. R. at 6. The court reasoned that law enforcement officers should be able to question individuals who appear to be lucid and cognitively aware. R. at 6–7. The court also upheld the constitutionality of E. Va. Code § 21-3439. R. at 7–9. The court found no indication from the U.S. Supreme Court that any insanity defense is a fundamental principle protected by Due Process and held that East Virginia's *mens rea* approach furthers the criminal law's goal of protecting society. R. at 7–8. The court also held that the *mens rea* approach does not criminalize mental disease and is not cruel or unusual punishment. R. at 8–9.

SUMMARY OF THE ARGUMENT

Waiver. Frost made a knowing and intelligent waiver because coercive police misconduct is a necessary prerequisite to finding an invalid waiver and because of the need to admit evidence obtained in good faith. Coercive police behavior is necessary to find that a waiver is not knowing and intelligent because of the *Miranda* rule's purpose, the Constitution's limited scope, and the Commonwealth's interest in law enforcement.

The *Miranda* rule serves to only deter abusive and coercive exercises of police power in custodial interrogations. When no coercion is present and a suspect appears entirely lucid and aware, the judicial suppression of statements contravenes the substance of *Miranda*'s protection. Because the rule of *Miranda* arises from constitutional rights, the scope of its protection is

limited to government action. The Constitution does not protect individuals from themselves, and it does not prohibit admission of Ms. Frost's confession given of her own accord.

The Commonwealth has a substantial interest in retaining the efficacy of custodial interrogations, applying the law uniformly, and acquiring reliable evidence. When a custodial interrogation produces an inculpatory confession from a culpable suspect, justice is served. Other cognitively impaired suspects can make a knowing and intelligent waiver. Therefore, attaching primary significance to an officer's objectively reasonable evaluation of a suspect's capability to make a knowing and intelligent waiver instills greater certainty in law enforcement.

Insanity defense. Limiting the use of evidence of a mental disease or defect to disproving the *mens rea* element of an offense does not violate Ms. Frost's Fourteenth Amendment right to due process of law or her Eighth Amendment right to not be subject to cruel and unusual punishment. It is the role of the individual states to demarcate the boundaries of criminal responsibility by reconciling society's religious, moral, philosophical, and medical views with the goals of the criminal justice system. A state's balancing thereof is only disturbed under the Due Process Clause if it has offended a principle of justice so rooted in our traditions and conscience that it is to be ranked as fundamental.

East Virginia has decided that evidence of mental illness or disease can only be used to disprove the defined *mens rea* element of a criminal offense and has abolished any affirmative insanity defense that the accused did not know right from wrong. Neither history nor practice show that an insanity defense is fundamental. From the Code of Justinian through Bracton, Hale, and into the twentieth century, criminal responsibility has been bound up with *mens rea* and intent. By comparison, the *M'Naghten* test of insanity—whether an accused knew right from wrong—is a relatively young innovation. A survey of present-day jurisdictions reveals a

kaleidoscope of varying formulations of the use of insanity evidence in criminal prosecutions. As this Court has already recognized, Due Process does not require any particular insanity defense.

Nor does East Virginia's *mens rea* approach to insanity evidence amount to cruel and unusual punishment. It is not even a punishment, only a means of establishing criminal liability. East Virginia's approach is not unusual—it has joined a growing number of states that allow insanity evidence only as it relates to an offense's *mens rea* element. Its approach furthers the goals of the criminal justice system: simply because a person believes her actions are justified does not mean she cannot be deterred by the prospect of criminal punishment. Finally, East Virginia does not punish the status of being insane. The prosecution must still prove every element of a criminal offense beyond a reasonable doubt, including that the accused commit a prohibited *actus reus* with the requisite *mens rea*. Here, Ms. Frost took another life and knew she was doing so. East Virginia has the authority to punish such conduct.

ARGUMENT

I. THE ABSENCE OF POLICE MISCONDUCT, THE PURPOSE AND SCOPE OF MIRANDA, AND THE COMMONWEALTH'S INTEREST IN ADMINISTERING JUSTICE SUPPORT THE FINDING THAT MS. FROST MADE A KNOWING AND INTELLIGENT WAIVER.

A suspect may knowingly and intelligently waive her *Miranda* rights if she reasonably appears capable of understanding the rights provided and the consequences of their abandonment, even though she may be under a schizophrenic delusion imperceptible to an objective observer. The issue before this Court is whether an officer's objectively reasonable evaluation of a suspect's comprehension capability may be annulled by later-developed psychiatric testimony. Considering precedent, the purposes of the *Miranda* rule, and the necessity of encouraging effective and legitimate law enforcement, this Court should find that Ms. Frost knowingly and intelligently waived her *Miranda* rights before her confession.

A. Coercive Police Misconduct is a Necessary Prerequisite to an Invalid Waiver.

Coercive police misconduct is necessary to invalidate a waiver of *Miranda* rights for three reasons: the original justification for the *Miranda* rule, the fact that the Constitution shields only infringing government action, and the effect that a contrary holding would have on legitimate law enforcement operations. *Miranda* extended an individual's protection under the Self-Incrimination Clause to the custodial interrogation setting as a means of deterring abusive and coercive police conduct in interrogations. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see Berghuis v. Thompkins*, 560 U.S. 370, 383 (2010). In doing so, *Miranda* requires that any waiver of a suspect's right to remain silent or to an attorney must be "voluntary, knowing, and intelligent." *Miranda*, 384 U.S. at 444.

However, the Constitution and prophylactic rule of *Miranda* protects suspects solely from abusive state action, not from themselves. *Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998). They do not protect an individual from psychological pressures to confess from causes other than police coercion. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986); *Oregon v. Elstad*, 470 U.S. 298, 304-05 (1985). Absent any police coercion, if the suspect "understands the Miranda warnings yet is moved by a crazy impulse to blurt out a confession, the confession is admissible*." Rice*, 148 F.3d at 750. In analyzing a suspect's ability to understand, *Miranda* compels attaching primary significance to the officer's objective determination. *Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir. 2009). In "close case[s]," evidence of a suspect's inability to understand may incline the fact-finder to determine that an officer should have known the defendant could not understand. *Id.*

It is undisputed that Ms. Frost appeared lucid to Officer Barbosa before expressly waiving her rights and confessing to Mr. Smith's murder. R. at 2. The record is devoid of any evidence from which a reasonable fact-finder could determine that Ms. Frost exhibited signs of

schizophrenia that Officer Barbosa should have recognized. Allowing post hoc psychiatric evaluations to invalidate an otherwise valid waiver for an mental illness unascertainable to a reasonable observer at the time would substantially diminish the utility of custodial interrogations in law enforcement. Coercive state action must be a prerequisite to invalidating a waiver for failure to understand because coercive state action is the very thing that the rule of *Miranda* protects against. Therefore, because Frost's confession was coerced only "by [her] own mental imbalance rather than by the state," her waiver was voluntary, knowing, and intelligent. *United States v. Bradshaw*, 935 F.2d 295, 299 (D.C. Cir. 1991).

1. Suppressing confessions obtained with due diligence oversteps the purpose of the *Miranda* rule to deter law enforcement from engaging in coercive interrogation methods to compel self-incriminating evidence.

The original purpose of this Court's decision in *Miranda* was to "reduce the likelihood that . . . suspects would fall victim to constitutionally impermissible practices of police interrogation." *New York v. Quarles*, 467 U.S. 649, 656 (1984); *see also Blackburn v. Alabama*, 361 U.S. 199, 207 (1960) ("[P]olice must obey the law while enforcing the law"). *Miranda* created prophylactic extensions of the privilege against compulsory self-incrimination and the right to counsel under the Fifth and Sixth Amendments. *Berghuis v. Thompkins*, 560 U.S. 370, 404 (2010) (Scalia, J., dissenting). The judicial augmentation of these rights requires law enforcement to explicitly provide suspects in custodial interrogations notice of their right to remain silent and right to counsel. *Miranda*, 384 U.S. at 444. But law enforcement's explicit provision of a suspect's rights is only a threshold matter in determining whether a suspect's waiver was valid—and resultant confession admissible.

A valid waiver of these rights is considered under a two-prong analysis: "voluntary" and "knowing and intelligent." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). If a waiver does not

satisfy both of these prongs, with few exceptions, the suspect's statements are suppressed. Suppression is a judicially imposed consequence of law enforcement's failure to adhere to proscribed procedures. *Michigan v. Tucker*, 417 U.S. 433, 445 (1974). A failure of the voluntary prong requires a finding of coercive police conduct, but this Court has not yet expressly held that police coercion is a prerequisite of an unknowing and unintelligent waiver. *E.g.*, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

The necessary prerequisite of police coercion has additional and appropriate utility in the knowing and intelligent prong of analysis. If law enforcement disregards any suspicions that the suspect may be incapable of making a knowing and intelligent waiver is necessarily coercive, then a suspect's waiver is involuntary as a matter of law. *Garner v. Mitchell*, 557 F.3d 257, 262 n.1 (6th Cir. 2009); *cf. Brewer v. Williams,* 430 U.S. 387, 404 (1977) ("[C]ourts indulge in every reasonable presumption against waiver"). Aligning with this Court's voluntary prong analysis in *Connelly*, lower federal and state courts have found that coercive police misconduct is a prerequisite to finding that a waiver was not knowing and intelligent. *E.g., Woodley v. Bradshaw*, 451 F. App'x 529, 540 (6th Cir. 2011); *Rice v. Cooper*, 148 F.3d 747, 752 (7th Cir. 1998). Construing *Connelly* to apply to the knowing and intelligent prong affords individuals protection from coercive police conduct and the original purpose of *Miranda* is upheld. *See Michigan v. Tucker*, 417 U.S. 433, 448 (1974) ("Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion").

Here, Officer Barbosa's conduct conformed to the requirements dictated by *Miranda* and its progeny. Barbosa's oral statements provided Ms. Frost with her *Miranda* warnings and the written waiver produced for her signature again informed her of her rights. R. at 2–3. Officer Barbosa also observed Ms. Frost's demeanor for signs of cognitive impairment to further evaluate

her appearance of comprehension. *Id.* at 2. Officer Barbosa's diligently executed steps in the interrogation process do not support any allegation of coercive misconduct. *Id.* at 2–3.

Requiring police misconduct to find that a waiver was not knowing and intelligent serves the original purpose of *Miranda*. It serves as a clearer rule to combat the blurry distinction, acknowledged by this Court, between permissible interrogatory practices and those offensive to the very nature of due process. *Miranda*, 384 U.S. at 502. If exemplary execution of the procedures mandated by *Miranda* fail to constitute legitimate law enforcement, it is unlikely that the interrogation process will serve any benefit to the administration of justice.

2. The scope of the Constitution's protection of individual liberties is limited to government infringement and does not extend to an individual's internal compulsions.

Miranda is a constitutional ruling. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). The individual guarantees embedded in the Constitution serve as protections from federal and state government action that infringes on those guarantees. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964) ("[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States . . . ."). Because the Constitution's guaranteed protections of individual liberties extends only to state action, the enforcement of the guarantee must be in response to its infringement by a state actor. *See Dickerson*, 530 U.S. at 449–50 (Scalia & Thomas, JJ., dissenting); *Rice v. Cooper*, 148 F.3d 747, 750-51 (7th Cir. 1998) ("The relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers."). Suppressing a defendant's admission that is the alleged product of mental illness serves no purpose in the enforcement of privileges afforded under the Constitution. *Connelly*, 479 U.S. at 166; *cf. Dickerson*, 530 U.S. at 443 (majority opinion) ("[S]ubsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement

. . . ."). Therefore, a knowing and intelligent waiver can be made by an individual who appears to comprehend, but later reveals she did not understand due to mental illness, because the Constitution affords no protection from the inner workings of one's own mind. *See United States v. Stanley*, 109 U.S. 3, 11 (1883) ("Individual invasion of individual rights" is not what is protected).

The purpose of excluding evidence obtained in violation of *Miranda* is "to substantially deter future violations of the Constitution." *Connelly*, 479 U.S. at 166. Excluding evidence because an individual infringes on her own privileges does not serve this purpose. As Justice Brandeis observed, "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)).

If the Court goes beyond *Miranda's* stated purpose of protecting against police abuse, it will formulate a constitutional law broader than what is required. The Constitution can restrict federal and state actors, but cannot prevent a suspect's peculiar neurological imbalances from compelling their own self-incrimination. *Dickerson*, 530 U.S. at 449 (Scalia & Thomas, JJ., dissenting). Because the *Miranda* rule's source in the Constitution limits its protection to coercive federal and state action, it does not extend protection to the inner compulsions of each suspect—"[e]ach is the prisoner of his own life." *Britt v. Kentucky*, 512 S.W.2d 496, 500 (Ky. 1974).

3. Admitting inculpatory statements furthers the Commonwealth's substantial interests in administering justice: retaining the efficacy of interrogations, applying the law uniformly, and acquiring certain and reliable evidence.

The Commonwealth has a substantial interest in administering justice. The decision in *Miranda* led to a hostility towards confessions *per se*, rather than only compelled confessions,

which are inherently abhorrent to the Constitution. *Dickerson*, 530 U.S. at 450. Furthering an aversion to evidence obtained with due diligence would substantially hinder the efficacy of lawful interrogations in producing inculpatory statements, which are advantageous in administering justice. *United States v. Washington*, 431 U.S. 181, 187 (1977) ("[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable"). It would equally be inconsistent with precedent of other cognitively impaired suspects. By attaching primary significance to an officer's determination of a suspect's comprehension level, there will be greater certainty in the law. Thus, the Commonwealth's interest in administering justice requires uncoerced confessions be free from critique under the *Miranda* rule.

Unreasonable extension of these protections would effectively dictate mandatory psychiatric evaluations by police to guard against the possibility of a mental impairment diagnosis at trial. *See Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir. 2009) ("At no point did the Supreme Court say 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."). Similar to analysis under the voluntary prong, it would be impractical to require law enforcement and courts to ascertain an inconceivable array of reasons for a suspect's admission of guilt. *Colorado v. Connelly*, 479 U.S. 157, 165–66 (1986).

The Constitution does not prohibit an internal compulsion that influences a suspect to make incriminating admissions. *Washington*, 431 U.S. at 187. Allowing a psychiatric evaluation to invalidate an evidently lucid suspect's waiver would afford mentally ill suspects an extended constitutional protection. This protection has not been recognized in waivers made by suspects with similar cognitive impairments.

Courts have continued to hold that mentally impaired, illiterate, and non-English speaking suspects are capable of knowingly and intelligently waiving their rights. *E.g.*, *Campaneria v. Reed*, 891 F.2d 1014 (2d Cir. 1989) (finding knowing and intelligent waiver despite suspect being foreign-born, speaking Spanish as his primary language, and only able to speak broken English); *United States v. Turner*, 157 F.3d 552 (8th Cir. 1998) (finding knowing and intelligent waiver despite suspect's low I.Q., PCP intoxication, and mental illness); *Moore v. Dugger*, 856 F.2d 129 (11th Cir. 1988) (finding knowing and intelligent waiver despite suspect's mental handicap, low I.Q., and functional intellectual capacity of an eleven-year-old).

In determining the validity of a cognitively impaired individual's waiver, an appearance of lucidity during interrogation weighs heavily in favor of a knowing and intelligent waiver. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1080 (9th Cir. 2000) (holding mentally retarded suspect made knowing and intelligent waiver due to evidence of coherence and articulation throughout the interrogation); *Turner*, 157 F.3d at 555–56. In *Turner*, the defendant was advised of his *Miranda* rights orally and in writing before confessing to crack cocaine and firearm possession. *Turner*, 157 F.3d at 554. Turner was cooperative with police, but following his interrogation, he began exhibiting "bizarre" behavior and was diagnosed with a psychotic disorder eight days later. *Id.* The court held that Turner made a knowing and intelligent waiver, reasoning that while evidence showed he may have exhibited signs of "mental illness" after waiving his *Miranda* rights, it did not show that he lacked the requisite mental capacity at the exact time of his waiver or confession. *Id.* at 556.

Here, Ms. Frost had no prior history of mental illness and no indicators of mental illness contemporaneous with her interrogation. R. at 2–4. Like the suspect in *Turner*, Ms. Frost appeared lucid and forthcoming to Barbosa at the time of her waiver and confession. *Id.* at 2–3. It was only

after her efforts in imploring Barbosa to join her chicken liberation movement that Barbosa had reason to suspect she was mentally ill. *Id.* at 3, 5.

Ms. Frost's ability to respond affirmatively to Barbosa's offer for court appointed counsel bolsters the finding that her waiver was knowing and intelligent. *Id.* Dr. Frain testified after having the benefit of a psychiatric examination that Frost did not understand either her *Miranda* rights or the consequences of their abandonment. *Id.* at 5. But at the time that Ms. Frost was possibly under schizophrenic episode, only Officer Barbosa was present in the interrogation room. *Id.* at 2. Frost's competency to invoke her right to counsel a short time after her waiver presents uncertainty as to when she was mentally incapacitated. Law enforcement does not have the luxury of adding a psychiatric examination to *Miranda*'s protective procedures.

To prevent this evidentiary morass, an officer's determination should be of primary significance in determining whether a waiver is made knowingly and intelligently. Allowing post hoc diagnosis of a mental illness to single-handedly invalidate a waiver can cause significant consequences for law enforcement and lead to inefficiency and uncertainty in the criminal justice system.

This Court should find that coercive police conduct is a necessary prerequisite to finding that a waiver is not knowing or intelligent, because the *Miranda* rule's protection of constitutional guarantees does not extend to the impulses of an individual's own mind. Moreover, restricting the holding in *Connelly* to only the voluntary prong would subject every single waiver, interrogation, and confession to uncertainty. To preserve certainty in the operations and duties of law enforcement, as well as the integrity and original purpose of *Miranda*, it is reasonable for an officer's perspective to weigh heavily in both the voluntary and the knowing and intelligent prongs of a waiver's validity. Suppressing statements made while a suspect appeared lucid, although

removed from reality due to paranoid delusions, serves no purpose in deterring police misconduct—particularly when the procedural safeguards of *Miranda* are fully and diligently complied with. Therefore, because Barbosa complied with the procedural safeguards of *Miranda*, and an absence of any coercive conduct, Ms. Frost is not protected from the inner compulsions of her own mind and thus, made a knowing and intelligent waiver.

B. If a Suspect's Waiver Is Not Knowing and Intelligent by Subsequent Revelation of Mental Illness, a Good Faith Exception to the Rule Is Necessary.

The State should not be deprived of evidence it has obtained lawfully and in compliance with the procedural requirements of *Miranda*. After an objectively reasonable determination of a suspect's ability to knowingly and intelligently waive her rights, custodial confessions should not be excluded based upon subsequent testimony that the suspect did not understand. *See United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (Applying a good-faith exception to an illegal search under the Fourth Amendment). A good-faith exception in cases where the suspect appears reasonably coherent to the investigating officer is appropriate because exclusion of evidence under the circumstances does not serve the exclusionary rule's purpose of deterring further constitutional violations. *See Colorado v. Connelly*, 479 U.S. 157 at 166 (1986). Without this exception, an officer's conduct can fully conform to the constitutional requirements of *Miranda*, yet be deemed a behavior necessary of deterrence because of subjective internal forces that are unmanifested to the officer.

The record is devoid of any evidence that Officer Barbosa employed abusive or coercive techniques as a means of securing Ms. Frost's confession. Here, Officer Barbosa exercised due diligence in interrogating of Ms. Frost by reading her *Miranda* rights, providing a written waiver, and establishing her ability to knowingly and intelligently waive her rights before beginning any

questioning. R. at 2–3, 5. Frost had the opportunity to consider her rights and the consequences of their abandonment. *Id.* at 2–3. Ms. Frost's later decision to revoke her waiver and invoke her right to counsel is evidence that she was indeed aware of her right to counsel. *Id.* at 3.

The undisputed evidence of Barbosa's procedural compliance and objective determination of Ms. Frost's lucidity provides no rational basis to conclude that her confession was obtained in violation of *Miranda*. Barbosa's objectively reasonable determination that Ms. Frost appeared lucid and able to make a valid waiver was made in good faith and in strict compliance with the mandates of the *Miranda*. Exclusion of a confession obtained in good faith and free from coercion does not deter any future constitutional violations. Rather, it deters law enforcement from employing legitimate means of securing admissible testimony in the pursuit of justice.

II. NARROWING THE USE OF INSANITY EVIDENCE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

Limiting the use of evidence of a mental disease or defect to disproving the *mens rea* element of an offense, as East Virginia has done, affords the defendant due process of law and respects her right to be free from cruel and unusual punishment.

It is the "business of the States" to "[p]revent[] and deal[] with crime," and this Court "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Montana v. Egelhoff*, 518 U.S. 37 (1996) (plurality opinion) (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977).

East Virginia has followed four other states in determining that insanity excuses criminal liability only when it creates reasonable doubt as to a defendant's intent, or *mens rea*, for the crime. *See State v. Searcy*, 798 P.2d 914 (Idaho 1990)*; State v. Bethel*, 66 P.3d 840 (Kan. 2003); *State v. Korell*, 690 P.2d 992 (Mont. 1984); *State v. Herrera*, 895 P.2d 359 (Utah 1995). It would be

"indefensib[le]" to "impos[e] on the States any particular test of criminal responsibility." *Powell v. Texas*, 392 U.S. 514, 545 (1968) (Black, J., concurring).

A. Limiting Insanity Testimony to the Issue of *Mens Rea* Affords the Defendant the Due Process of Law

A State's decision regarding the administration of justice does not violate the Fourteenth Amendment's 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." *Patterson v. New York*, 432 U.S. 197, 201–02 (1977) (citations omitted). To determine whether a principle is fundamental, the Court has looked primarily to "historical practice" as summarized by commentators such as Hale, Blackstone, and Coke; the Court also examines contemporary practice among the States. *Egelhoff*, 518 U.S. at 43–44, 48–49; *Clark v. Arizona*, 548 U.S. 735, 749–52 (2006). Examination of those headsprings reveals that an independent insanity defense is not so embedded in our legal history that it should be considered a fundamental right.

1. A moral incapacity test is not fundamental because there is no historical consensus of the excuse of insanity.

Prior to its current approach, East Virginia applied the *M'Naghten* rule for the insanity defense. R. at 4. The *M'Naghten* rule allows a defendant to assert an affirmative defense that a mental defect either "leaves a defendant unable to understand what he is doing" or "leaves a defendant unable to understand that his action is wrong." *Clark*, 548 U.S. at 747. But lessening the culpability of mentally ill offenders did not arise in 1843 with *M'Naghten's Case*. The development of the *mens rea* (literally "evil mind") doctrine preceded the formal insanity defense by centuries. *Korell*, 690 P.2d at 999.

In the sixth century, the Code of Justinian linked blameworthiness and intent: "There are those who are not to be held accountable, such as a madman and a child, who are not capable of

wrongful intention." Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. Kan. Bar Ass'n 38, 39 (1997) (citation omitted). Similarly, describing thirteenth-century English law, Bracton wrote, "[F]or a crime is not committed unless the will to harm be present," and compared a madman's culpability to that of a child. *Id.* For Bracton, a madman was a person "who does not know what he is doing, who is lacking in mind and reason, and who is not far removed from the brutes." Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1005 (1932). Hale, too, likened the criminal responsibility of an insane person with that of a child. *Id.* at 1006. Even when right and wrong began to be used as part of a test of culpability, it was closely linked to the matter of intent. Lord Mansfield said,

> If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. Such a man, so destitute of all power of judgment, could have no intention at all.

Searcy, 798 P.2d at 930 (citations omitted). Predating the introduction of an entirely separate insanity defense in the nineteenth century, "criminal law doctrines of *mens rea* handled the entire problem of the insanity defense." Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L. Rev. 477, 500 (1982).

Even after the *M'Naghten* test of insanity gained wider acceptance, a right-and-wrong measure of culpability did not become fundamentally rooted in the traditions and conscience of our people. A 1909 English treatise on the criminal responsibility of the insane says that "[t]he feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing." Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 535, 535 (1917). In 1916, the American Institute of Criminal Law and Criminology approved a recommendation that "[n]o person shall hereafter be convicted" if "he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must

accompany such act or omission in order to constitute the crime charged." *Id.* at 536. This 1916 proposal is substantially identical to the *mens rea* approach adopted by East Virginia. The *M'Naghten* test's recent development relative to that of *mens rea*, along with historic disagreement regarding its application, suffices to show that the defendant cannot carry her burden of showing that the *M'Naghten* test is fundamentally rooted in our people's traditions and conscience. *Egelhoff*, 518 U.S. at 47 (citing *Patterson*, 432 U.S. at 202).

2. Contemporary differences between states demonstrate that there is no fundamental test for criminal responsibility.

This Court has made clear that Due Process does not require a particular kind of insanity defense. In 1993, Arizona altered its implementation of the *M'Naghten* defense by eliminating the cognitive capacity part, leaving only the moral incapacity prong as its insanity defense. In *Clark v. Arizona*, the defendant challenged this change under the Due Process Clause. *Clark*, 548 U.S. at 748. This Court found that "[e]ven a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them." *Id.* at 749. The Court identified the cognitive incapacity and moral incapacity variants, deriving from the *M'Naghten* alternatives, as well as the volitional incapacity, or irresistible-impulse, and product-of-mental-illness tests. *Id.* The Court noted various degrees of implementation and combinations of these tests among the States and the Federal Government, and also the four states (East Virginia now making five) that disallow an affirmative insanity defense altogether but do allow evidence of mental illness that is relevant to an offense's defined *mens rea* element. *Id.* at 750–52. The Court concluded that "it is clear that 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 752.

This Court has made clear that defining the nature of criminal responsibility is a task best left to the States. In *Powell v. Texas*, this Court upheld a state law prohibiting public drunkenness against a constitutional challenge. *Powell*, 392 U.S. 514 (1968). The first four states adopting the *mens rea* approach to insanity quoted this passage from *Powell* in finding that their approaches did not violate the Due Process Clause:

> We cannot cast aside 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. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Korell, 690 P.2d at 999; *Searcy*, 798 P.2d at 918; *Herrera*, 895 P.2d at 364; *Bethel*, 66 P.3d at 846 (all quoting *Powell*, 392 U.S. at 535–36). Concurring with the plurality in *Powell*, Justice Black agreed wholeheartedly with that portion of the rationale: "The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime." *Powell*, 392 U.S. at 545.

East Virginia's adoption of the *mens rea* approach is precisely one of those adjustments referred to in *Powell*. It has decided that the act of killing a human being, with the intent to do so, is punishable regardless of whether the actor knew what she was doing was wrong. It does not matter whether the actor believed she was justified by a supernatural being, *Lord v. State*, 262 P.3d 855, 859 (Alaska 2011), or in order to "protect the chickens." R. at 3. East Virginia's treatment of insanity testimony lies well within its purview to establish the extent to which scientific knowledge should determine criminal responsibility. *Leland v. Oregon*, 343 U.S. 790, 800–01 (1952).

The one State high court finding that the *mens rea* approach violates the Due Process Clause is not applicable. In *Finger v. State*, the Nevada Supreme Court found that there is an

element of wrongfulness inherent in the *mens rea* of all crimes, and therefore eliminating a knowledge-of-wrongfulness test violates the right to due process. *Finger v. State*, 27 P.3d 66, 81 (Nev. 2001), *cert. denied*, 534 U.S. 1127 (2002). The Nevada court looked to two early-twentieth-century State court decisions finding that prohibiting any evidence of insanity was unconstitutional: *State v. Strasburg*, 110 P. 1020 (Wash. 1910) and *Sinclair v. State*, 132 So. 581 (Miss. 1931). However, those decisions are inapplicable because the state statutes at issue disallowed evidence of insanity even in regard to the *mens rea* element. *Finger*, 27 P.3d at 81. Additionally, Nevada's statutory definition of murder, under which the defendant in *Finger* was convicted, used the common-law language of "malice." Murder was defined by Nevada statute as the "*unlawful* killing of a human being, with malice aforethought"; "[e]xpress malice involves the deliberate intention to *unlawfully* take away take away the life of a fellow creature, while malice is implied when, for example, the circumstances of the killing show an abandoned and malignant heart." *Finger*, 27 P.3d at 83–84 (citations omitted) (emphasis in original). The crime's very definition of intent contained an element of wrongfulness, definitions not present in more modern statutory schemes using "purposely," "knowingly," and "recklessly" categories of intent.

This Court has traditionally recognized the role of the States in defining crimes and defenses. *Clark*, 548 U.S. at 749. The Due Process Clause requires that the prosecution prove all defined elements beyond a reasonable doubt and prevents a legislature from declaring an individual presumptively guilty. *Patterson*, 432 U.S. at 210. No such legislative declaration has occurred here: beyond a reasonable doubt, the defendant committed a prohibited *actus reus* with the requisite *mens rea*. Three Justices have stated, albeit in dicta, that the Constitution might not require any insanity defense at all. "[T]he States are free to recognize and define the insanity defense as they see fit." *Foucha v. Louisiana*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting).

"The Court does not indicate that States must make the insanity defense available." *Foucha*, 504 U.S. at 89 (O'Connor, J., concurring). "It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant." *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, C.J., dissenting). This Court should not divine a separate insanity defense within Due Process and thereby "freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Powell*, 392 U.S. at 537.

B. The *Mens Rea* Approach Does not Inflict Cruel and Unusual Punishment.

East Virginia's adoption of the *mens rea* approach does not violate the Eighth Amendment's proscription of cruel and unusual punishment. "[T]he Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" and also recognizes the "evolving standards of decency that mark the progress of a maturing society." *Ford v. Wainwright*, 477 U.S. 399 (1986) (citations omitted). The *mens rea* approach is not a "mode" or "act" of punishment, it is simply a definition of liability. The punishment of criminal liability itself for insane persons is not cruel and unusual, because the purposes of criminal punishment are still served.

1. Criminal liability for insane persons is not a categorically disproportionate punishment.

The question before this Court is not whether the life sentence imposed upon Ms. Frost is cruel and unusual, but whether the *mens rea* approach, in general, subjects Ms. Frost to cruel and unusual punishment in violation of the Eighth Amendment. R. at 12. This question falls outside the ambit of the typical Eighth Amendment challenge, which asks whether a particular punishment is disproportionate to the crime committed. *Graham v. Florida*, 560 U.S. 48, 59 (2010). Therefore, the punishment in question here is any form of criminal liability whatsoever imposed by the

Commonwealth of East Virginia; the crime is any offense whatsoever against the laws of East Virginia.

In *Graham*, the Court delineated three types of Eighth Amendment proportionality challenges. *Id.* at 59–61. First, a challenge to a term-of-years sentence given the circumstances in a particular case. *Id.* at 59. Second, a categorical restriction on the death penalty, establishing a bright line of proportionality. *Id.* Third, a category newly identified in *Graham* and the most applicable here: a categorical challenge to a term-of-years sentence, that is, "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Id.* at 61. Analysis of an Eighth Amendment challenge in the third category begins with objective indicia of national consensus (legislative and sentencing practice) and also necessarily includes independent judicial consideration of "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 62, 67.

In *Clark v. Arizona*, this Court surveyed national implementation of the insanity defense. *Clark*, 548 U.S. at 749–52. East Virginia is not alone in rejecting the moral incapacity test of *M'Naghten*. The Court noted that one State—Alaska—uses only *M'Naghten's* cognitive incapacity test, and that New Hampshire uses only the product-of-mental-illness test. *Id.* at 750. Additionally, four (now five) States allow evidence of mental illness as it relates to the *mens rea* element but not as a separate defense. *Id.* at 752. While these seven jurisdictions are in a minority, they are part of a growing consensus, and it is not "fair to say that a national consensus has developed against it." *Graham*, 560 U.S. at 67 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2005)).

Perhaps recognizing that "insanity as defined by the criminal law has no direct analog in medicine or science," East Virginia has restricted insanity evidence to purposes that are directly relevant to the crime. *Foucha*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting). It has chosen uniformly to punish criminal conduct coupled with criminal intent, regardless of motivation. Application of the *mens rea* approach does not impede any of the goals of criminal punishment. In the limited circumstance where an offender is entirely incapable of appreciating his conduct's criminality, then punishment will admittedly do little in the way of deterrence and prevention. *Korell*, 690 P.2d 1002. But it cannot be said that all who suffer from mental illness could not be deterred from criminal action by the prospect of criminal punishment, even if a potential offender does not believe that the prospective criminal act is "wrong." Furthermore, the *mens rea* approach does serve the goals of protection of society, education, and retribution, without qualification. *Id.* East Virginia has exercised its prerogative in the administration of justice and the result of its balancing is that a crime's defined *mens rea* is sufficient for conviction. In this case, the petitioner took the life of a human being and received a life sentence. This Court's categorical proscription against execution of insane persons is not offended. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

2. East Virginia does not punish the status of being insane.

Punishing a person who committed a crime because of mental illness is not the same as punishing a person because of mental illness. This Court has previously struck down under the Eighth Amendment a State statute that criminalized the status of narcotics addiction. *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the statute at issue never required the State to prove that an accused had ever used narcotics. *Id.* at 665–66. A plurality of this Court clarified *Robinson*'s novel application of the Eighth Amendment in *Powell v. Texas*: "criminal penalties

may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing." *Powell*, 392 U.S. at 533.

Here, the petitioner has committed the act of taking another life. The jury found that she had the intent to do so. Society has an interest in preventing such conduct, and society's interest wavers not a whit when the offender does not know such conduct is wrong.

CONCLUSION

Because Ms. Frost waived her *Miranda* rights before confessing and because neither the Eighth nor the Fourteenth Amendment requires a separate insanity defense, this Court should affirm the ruling of the Supreme Court of East Carolina.

Respectfully submitted,

Team W

Counsel for Respondent

APPENDIX

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VIII.

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

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATION OF SERVICE

I hereby certify that on this 13th day of September, 2019, I served a copy of the Brief for Respondent as required by Rule 3.9.

Team W

Team W
Counsel for Respondent