No. 19-1409

In The

SUPREME COURT OF THE UNITED STATES

October Term 2019

LINDA FROST,

Petitioner,

v.

COMMONWEALTH OF EAST VIRGINIA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Appeals of East Virginia

BRIEF FOR PETITIONER

Team H
Counsel for Petitioner

QUESTIONS PRESENTED

1. Under the Fifth Amendment, does a defendant knowingly and intelligently waive her *Miranda* rights when the trial court finds, based on undisputed evidence, that she did not understand her rights or the consequences of the waiver?

2. Under the Eighth and Fourteenth Amendment, does a state deprive a criminal defendant of due process of law and impose cruel and unusual punishment by abolishing the insanity defense and excluding evidence of insanity not relevant to the mens rea element of the crime when the vast majority of state legislatures and the national legislature have established, retained, and reaffirmed that there can be no criminal liability absent meaningful mental capacity?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Linda Frost. Respondent is the Commonwealth of East Virginia. Neither party is a corporation.

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The East Virginia Supreme Court of Appeal's opinion has not yet been published, but is contained in the record. R. at 1-11. The pertinent orders of the trial court have not been published.

JURISDICTION

The Supreme Court of Appeals of East Virginia issued an opinion affirming Ms. Frost's conviction and sentence on December 31, 2018. R. at 9. On July 31, 2019, this Court granted Ms. Frost's petition for a writ of certiorari. R. at 12. This Court has appellate jurisdiction under 28 U.S.C. § 1257(a) (2012). This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, as relevant: "No person . . . shall be compelled in a criminal case to be a witness against himself." U.S. Const. amend. V. The Fourteenth Amendment Provides, as relevant: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. E. Va. Code § 21-3439 abolished the insanity defense, providing that "the lack of ability to know right from wrong is no longer a defense." R. at 4.

The federal insanity defense, 18 U.S.C. §17(a), provides, as relevant: "It is an affirmative defense . . . [that] the defendant, as a result of a severe mental disease or defect, was unable to appreciate the . . . the wrongfulness of his acts." The North Dakota Code provides, as relevant: "An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect . . . [,] the individual lack[ed] substantial capacity to comprehend the harmful nature or consequences of the conduct." N.D. Cent. Code 12.1-04.1-01(1).

STATEMENT OF THE CASE

Whether under the Fifth Amendment a person knowingly and intelligently waives her *Miranda* rights when she was suffering from severe delusions and paranoia and the trial court found that she understood neither her rights nor the consequences of waiving them. Whether under the Eighth and Fourteenth Amendments a state legislature may abolish the insanity defense when the vast majority of state legislatures and the national legislature have established, retained, and reaffirmed that there can be no criminal liability absent meaningful mental capacity.

I. Factual Background

Linda Frost worked at Thomas's Seafood and Grill and had never been diagnosed with mental illness. R. at 2-3. One or before June 16, 2017, Linda Frost entered a psychotic state and began suffering severe delusions and paranoia. R. at 4. Christopher Smith, Linda's boyfriend and a federal poultry inspector in rural Campton Roads, East Virginia, was murdered on the night of June 16. R. at 2. On June 17, while Ms. Frost was still experiencing severe delusions and suffering from paranoid schizophrenia, the police received an anonymous tip and brought her in for questioning. *Id.*

Before interrogating Ms. Frost, the officer had her sign a written waiver of her *Miranda* rights and then asked if she wanted to talk about the victim. *Id.* When told that her boyfriend's body had been discovered, Ms. Frost babbled that voices in her head told her to "protect the chickens at all costs." R. at 3. She said that she stabbed Mr. Smith and left the knife in the park. *Id.* She then voiced her conviction that she had done Smith a "great favor" because he would be reincarnated as a chicken, "the most sacred of all creatures." *Id.* She then implored the officer to join her crusade to "liberate all chickens in Campton Roads." *Id.* The officer asked her if she wanted an attorney and when she said yes, he "promptly terminated the interrogation." *Id.*

Following the interrogation, clinical psychiatrist Dr. Desiree Frain evaluated Ms. Frost and diagnosed her with paranoid schizophrenia. *Id.* Ms. Frost was found competent to stand trial after being prescribed psychiatric medication. R. at 4. At the federal trial, Dr. Frain testified that from June 16 to June 17 it was "highly probable" that Ms. Frost was "in a psychotic state and suffering from severe delusions and paranoia." *Id.* According to Dr. Frain, Frost was "unable to *control* or to fully *understand* the wrongfulness of her actions *over the course of those few days*." *Id.* (emphasis added).

II. Procedural Background

Ms. Frost was charged with murder and tried in federal court in the Southern District of East Virginia. R. at 4. She was found competent to stand trial only in light of her medication and the resulting mental improvement. *Id.* Based on Dr. Frain's testimony, Ms. Frost was acquitted by reason of insanity under the moral incapacity prong of 18 U.S.C. § 17(a) (2012). *Id.*

Following Ms. Frost's federal acquittal, the local prosecutor charged her in East Virginia state court. *Id.* During trial, the prosecutor presented evidence that Smith's sister overheard an argument on the phone between Smith and Frost, that police found a knife in Laurel Park that matched the set in Ms. Frost's home and was covered with the victim's blood, and that several people saw a woman near the park where the knife was found. R. at 2-3. The investigators could not identify any fingerprints on the knife and the witnesses could not identify Ms. Frost as the woman they saw. R. at 3. To connect these pieces of evidence to Ms. Frost, the prosecutor relied on a delusional woman's statements that she had been following the orders of a higher power whose greatest concern was the fate of the sacred chickens.

Following E. Va. Code § 21-3439, which abolished the insanity defense in favor of a mens rea approach, the trial judge suppressed all evidence related to Ms. Frost's mental illness. R. at 4-5. However, he allowed her statements to police into evidence, holding that she did not understand

her *Miranda* rights or the consequences of waiving them but had nonetheless knowingly and intelligently waived their protections. R. at 5. The jury convicted Ms. Frost of murder and recommended a life sentence, which the court imposed. *Id.*

Ms. Frost appealed to the East Virginia Supreme Court of Appeals. *Id*. The court affirmed the trial court, holding that the *Miranda* waiver had been knowing and intelligent and that E. Va. Code § 21-3439 did not violate the Eighth and Fourteenth Amendments. R. at 7, 9. This Court granted certiorari to assess (1) whether Ms. Frost knowingly and intelligently waived her *Miranda* rights, and (2) whether East Virginia deprived Ms. Frost of due process of law and subjected her to cruel and unusual punishment by abolishing the insanity defense. R. at 12.

III. Relief Requested

Petitioner respectfully submits this brief on the merits, requesting this Court to reverse the judgment of the Supreme Court of Appeals of East Virginia and grant a new trial. At the new trial, Petitioner's statements during her interrogation should be excluded under the Fifth Amendment. Petitioner also respectfully requests this Court to declare that E. Va. Code § 21-3439 is unconstitutional and invalid under the Eighth and Fourteenth Amendments, and on remand to instruct the trial court to allow her to present an insanity defense.

SUMMARY OF ARGUMENT

A person does not knowingly and intelligently waive her *Miranda* rights unless she understands those rights and the consequences of waiving them. A person cannot knowingly and intelligently do that which she does not understand. The Court should adopt a two-part test based on the mental state and level of comprehension of the suspect to determine whether the suspect has knowingly and intelligently waived her rights. This test will protect persons with mental illness who cannot distinguish the adversarial nature of a criminal confession from the restorative nature of a confession in a personal, religious, or therapeutic context. Persons with mental illness are

frequently encouraged to divulge personal and incriminating information to ministers and mental health professionals. In these contexts, the confessions are protected by a high level of confidentiality and are used as tools by the confessor to help the confessant arrive at a place of mental, spiritual, and relational healing. Conversely, confessions to law enforcement are not kept in confidence and frequently become public record through the trial process. More importantly, a confession to the police becomes a weapon with which they strike at the confessant, using everything they say against them in court. Because people with mental illness are uniquely vulnerable to misunderstanding this profound and critical difference, the Court should hold that trial courts must specifically analyze and determine whether the waiver has been made knowingly and intelligently before admitting the confession of a person with mental illness.

Implementing this test will bolster the integrity of the justice system by vitiating false confessions made by the mentally ill. Because they respond agreeably to authority figures, people with mental illness are far more likely than those without it to confess to crimes that they did not commit, especially if they do not understand what is being said to them. False confessions frequently result in the moral travesty of convicting the innocent. Implementing this test would exclude the vast majority of these illness-induced false confessions.

Even if the Court does not adopt this test, the Court should recognize that *Miranda* implicitly requires a person to understand the right to remain salient and the consequences of a *Miranda* waiver for the waiver to be valid. Ms. Frost is the only defendant Petitioner could find, in any jurisdiction, who has been held to have simultaneously *not* understood her *Miranda* rights, and also to have waived those rights knowingly and intelligently. Ms. Frost is a minority of one. In every case Petitioner has been able to discover, the defendant's understanding or lack thereof was the dispositive factor in whether the *Miranda* waiver was held to be knowing and intelligent.

Under either standard, Ms. Frost should be granted a new trial with her statements suppressed because the trial court found that she did not understand her rights. The waiver, therefore, cannot have been knowing and intelligent. Furthermore, the trial court's error was not harmless because it is highly probable that Ms. Frost's statements were the definitive link between the physical evidence and herself, which resulted in her conviction and life sentence. Therefore, the error was not harmless and Ms. Frost is entitled to a new trial with her statements suppressed.

Abolishing the insanity defense in favor of a mens rea approach, which allows only evidence of cognitive incapacity, imposes criminal punishment without fault. Imposing criminal punishment absent fault is cruel and unusual and violates the substantive guarantees of the Due Process Clause. The insanity defense, as it is loosely termed, is more aptly termed the insanity excuse because it appears in numerous forms and need not be an affirmative defense. The insanity excuse includes four categories of mental deficiency or incapacity: cognitive incapacity, moral incapacity, volitional incapacity, and a conglomerate concept of mental incapacity that causes the conduct in question. A person is cognitively incapacitated if she is unable to know the nature and quality of her act, such as a psychotic person who believes that her target is a hostile alien. A person is morally incapacitated if her mental deficiency renders her unable to know that what she is doing is evil or wrong, such as a person who believes that God told her to kill her victim. A person is volitionally incapacitated if a mental deficiency deprives the person of control of her actions such that she does not act voluntarily. An act is the product of a mental illness or defect if the illness or defect caused the act. Since the cognitive incapacity excuse alone is constitutionally inadequate, the it must be paired with another excuse to constitution an adequate insanity excuse.

Freedom from physical restraint and the right to be free from criminal liability unless at fault are fundamental liberty interests based on fundamental principles of justice rooted in the

American tradition and conscience. The history of the insanity defense in English and American cases and early common law legal texts show that an insanity excuse that includes moral incapacity—or is at least substantially broader than mere cognitive incapacity—is fundamentally rooted in the American legal tradition. Criminal responsibility does not exist or is diminished where moral culpability is absent or partial, as this Court has repeatedly recognized in its Eighth Amendment jurisprudence on juvenile offenders. *See, e.g., Graham v. Florida*, 560 U.S. 48 (2010).

Modern practice, thought slightly less uniform, weighs overwhelmingly in favor of a broader insanity excuse. The decision of a few legislatures to revert to an early medieval insanity excuse is a symptom of reaction against perceived abuse of the criminal justice system, not a change in the underlying principles of freedom and justice or a shift in the views of the American people. Almost all the states and the national government have an insanity excuse broader than the cognitive incapacity excuse. Imposing criminal liability absent fault is therefore cruel and unusual, was considered cruel and unusual at the Founding, and contradicts a fundamental principle of justice rooted in our tradition and public conscience.

Even if a broader insanity excuse is not a fundamental principle of justice, the government still must prove that its infringement on Ms. Frost's physical liberty is narrowly tailored to achieve a compelling governmental interest by targeting only the exact source of the problem the legislature sought to remedy. The government cannot satisfy this burden. Even if it did, it cannot cruelly and unusually impose a life sentence on a severely mentally deficient defendant.

STANDARD OF REVIEW

The denial of a motion to suppress is reviewed under a dual standard: legal conclusions are reviewed de novo, while factual findings are reviewed for clear error. *United States v. Howard*, 883 F.3d 703, 707 (7th Cir. 2018). A ruling that evidence is inadmissible is reviewed for abuse of

discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). A district court abuses its discretion if it applies the wrong legal standard. *Koon v. United States*, 518 U.S. 81, 100 (1996). Where the legal issue is constitutional, strict scrutiny is appropriate where the government interferes with a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). Fundamental liberty interests include physical liberty and the right to be free from criminal liability absent fault. These interests can only be interfered with by government action "narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The outright prohibition on cruel and unusual punishment admits no exceptions. Therefore, on the issues raised here, the trial court's evidentiary rulings are subject to de novo review. As it pertains to the due process claim, East Virginia's attempt to abolish the insanity defense is subject to strict scrutiny.

ARGUMENT

I. The Court should order a new trial with Ms. Frost's statement suppressed.

For two reasons, this Court should reverse the ruling of the lower court, remand the case for a new trial, instruct the trial court to suppress Ms. Frost's statements to the police. First, *Miranda* and its progeny require that a suspect understand her *Miranda* rights in order to knowingly and intelligently waive those rights. Second, the trial court found that when Ms. Frost waived her rights, she did not understand them or the consequences of waiving their protection.

A. The *Miranda* standard requires a knowing and intelligent waiver.

"No person . . . shall be compelled in a criminal case to be a witness against himself." U.S. Const. amend. V. In the seminal case *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court ruled that, in order to effectively secure the Fifth Amendment privilege against self-incrimination in the notoriously coercive environment of custodial interrogations, statements made by a suspect in such settings may not be introduced into evidence at the suspect's trial unless investigating officers have effectively advised the suspect of certain rights prior to interrogation. Those rights

include the right to remain silent and to know the consequences of waiving that right, particularly that the suspect's statements can and will be used against her in court; the right to consult with a lawyer and have the lawyer present during interrogation; and the right to have an attorney appointed to represent her if the suspect is indigent. *Id.* at 444. A defendant's self-incriminating statements cannot be used against her in court unless the Government shows by a preponderance of the evidence that she waived these rights. *Berghuis v. Thompkins*, 560 U.S. 370, 382–84 (2010). For the waiver to be valid, the waiver must have been made voluntarily, knowingly and intelligently. *Miranda*, 384 U.S. at 444. A voluntary and knowing and intelligent waiver has two components. First, a waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Second, the waiver is knowing and intelligence if it was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Id*. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court find that *Miranda* rights have been waived. *Id*.

B. A suspect cannot knowingly and intelligently waive her *Miranda* rights when she does not understand those rights.

A waiver cannot be knowing and intelligent if the suspect does not understand what she is doing. In order to ensure the security and continuing stability of the *Miranda* doctrine, this Court should establish a new rule requiring a separate inquiry into the suspect's understanding of her rights when mental illness is raised as an issue. Alternatively, this Court should recognize that *Miranda* and its progeny already require the suspect to understand her rights before she gives a valid waiver. Ms. Frost is the only defendant Petitioner could find, in any jurisdiction, who has been held to have simultaneously *not* understood her *Miranda* rights, and also to have waived those rights knowingly and intelligently. Ms. Frost is a minority of one. In every case Petitioner

has discovered, the defendant's understanding or lack thereof was the dispositive factor in whether the *Miranda* waiver was held to be knowing and intelligent.

1. The Court should require a distinct inquiry into the suspect's level of understanding when mental illness is raised as an issue.

In the most recent Supreme Court case to address *Miranda* and mental illness, the Court held that the voluntariness of a *Miranda* waiver depends on the "absence of police overreaching" and not on internal compulsions that may have motivated the defendant to confess, including mental illness. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). However, that same year, the Court reaffirmed its statement in *Miranda* that a valid waiver must not only be voluntary, but also knowing and intelligent. *Moran*, 475 U.S. at 421.

These two decisions have caused confusion in the lower courts. Different standards have been applied and in some cases the question is ignored entirely. To rectify this problem, the Court should hold that "a *Miranda* waiver is valid if the [government] proves that the waiver was made knowingly, intelligently, and in all respects, voluntarily, notwithstanding a defendant's mental illness." *Commonwealth v. Zagrodny*, 819 N.E.2d 565, 573 (Mass. 2004). To implement this rule, the Court should adopt a two-part test.

First, if a suspect is so affected by mental illness that she does not understand what her criminal confession will be used for—does not understand that the context of a criminal confession is very different from other confessional contexts—then she cannot knowingly waive her *Miranda* rights. Claudio Salas, *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 16 Yale J.L. & Human. 243, 263 (2004). Second, if a suspect understands the police context in which she is confessing, but is suffering from a mental illness such that she completely disregards, or otherwise makes irrational decisions with respect to, this context, then she cannot "intelligently"

waive her *Miranda* rights. *Id.* In keeping with current practice, the burden of proof would be the preponderance of the evidence.

There are two primary reasons for adopting the Salas two-part test. First, it will eliminate the confusion of the lower courts and establish a uniform and readily applicable standard for examining *Miranda* waivers by suspects with mental health issues. Second, this test more closely comports with the standards of justice and ethical responsibility which undergird the Constitution and the republic.

To the first point, the Salas test would eliminate confusion among the lower courts and provide a uniform and readily applicable standard for this thorny issue. In the wake of *Connelly*, lower courts have had difficulty applying its principles while addressing the nuances of specific cases. Under the current standards, there is a discrepancy in the differing standards of relevance that the various courts attach to mental illness as it relates to the waiver. Most courts recognize mental illness as one of the factors to consider when examining a waiver. *Daoud v. Davis*, 618 F.3d 525, 530 (6th Cir. 2010); *Hanna v. Price*, 245 F. App'x 538, 543 (6th Cir. 2007); *People v. Davis*, 352 P.3d 950, 955 (Colo. 2015) (en banc), *as modified on denial of reh'g* (Aug. 3, 2015); *Brewer v. State*, 646 N.E.2d 1382, 1385 (Ind. 1995). Some courts see mental illness as a specific and important issue that must be addressed if raised. *Commonwealth. v. Druce*, 905 N.E.2d 70, 81 (Mass. 2009); *State v. Thompson*, 429 So.2d 862, 865 (La. 1983). Others minimize the issue or even dismiss it entirely. *United States v. Cristobal*, 293 F.3d 134, 141 (4th Cir. 2002). This discrepancy means that the *Miranda* protections afforded to a mentally ill defendant depend on the jurisdiction in which she is arrested. By adopting the Salas test, the Court would remove this unequal treatment under the law.

To the second point, adoption of the Salas test would bring the national standards in closer conformity to the standards of justice and ethical responsibility which undergird the *Constitution* and the republic. Confessions interwoven with mental illness are inherently problematic. Confessions are more than mere statements of fact. They contain elements that deeply connect with religion, psychology, and relationship. In religion, confession of sin is a means of obtaining forgiveness and absolution. Salas, *supra*, at 251. In relationships, confessions often lead to reconciliation and healing between the two parties and reintegration into society. *Id.* Psychotherapists use the patients' confessions to help them achieve mental healing. *Id.* at 252. In each context, confession is a means by which a guilty party receives healing for herself and reconciliation with the aggrieved party, and by which the effects of the wrongdoing are diminished.

In a law enforcement context, however, the effects of the confession are exactly the opposite. Rather than receiving healing and reconciliation, the guilty party is judged and punished. While a confession in a religious, relational, or psychotherapeutic context results in positive outcomes for the confessant, a confession in a law enforcement context can only result in a slightly less negative outcome for the confessant.

> This crucial change of context makes all the difference if the mentally ill suspect's cognitive impairment makes it impossible for him to understand, or alternatively makes him completely disregard, that his confessors are his enemies and are ready to use his words to hurt him rather than help him.
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> . . . .
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> The police, in interrogating suspects, often usurp the role of priests and psychotherapists and promise relief and absolution, but instead deliver punishment. Such fraud is even more devastating to the mentally ill person already accustomed to depending on others and, most likely, being questioned on the therapist's couch.

Id. at 247, 265.

A person with a healthy or at least coherent mind can grasp the difference between a priest who will hold her confession in confidence and a police officer who will use that it against her.

This is the understanding that must be present for a waiver of *Miranda* rights to occur knowingly and intelligently, and it is the critical understanding that many mentally ill persons cannot grasp at all or at least without substantial help.

The other major problem with confessions by the mentally ill is that many of those confessions are simply false. Data compiled by the National Registry of Exonerations indicates that eighty-one percent of the people who falsely confessed to crimes for which they were later exonerated had reported mental health issues. National Registry of Exonerations, *Age and Mental Status of Exonerated Defendants Who Falsely Confess* (Feb. 26, 2019), http://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf. The high rate false confessions by the mentally ill has been thoroughly documented. American Psychological Association, A.D. Redlich, *Double Jeopardy in the Interrogation Room for Youths with Mental Illness*, American Psychol., Oct. 2007, at 609, 611 (discussing the prevalence of mental illness among youths in the judicial system). False confessions are "one of the most prejudicial sources of false evidence that lead to wrongful convictions." Richard A Leo, *False Confessions: Causes, Consequences, and Implications*, J. of the American Acad. of Psychiatry and the L., Sept. 2009, at 332, 332 (discussing the impact of false confessions on finders of fact). *See* Viviana Alvarez-Toro & Cesar A. Lopez-Moralez, *Revisiting the False Confession Problem*, J. of the America Acad. of Psychiatry and the L., Mar. 2018, at 34, 36 (discussing the prevalence of false confessions). Schizophrenics especially struggle with a "compromised" ability to distinguish facts from interrogator-supplied narratives. William C. Follette et al., *Mental Health and False Confessions*, 33 (Elizabeth Kelley ed., 2017).

False confessions unintentionally forced from the mentally ill by the weight of circumstances a stronger person could withstand undermine the foundations of justice and the

integrity of the criminal justice system. Adopting the Salas test would greatly reduce the number of false confessions entered into evidence and would ensure that an innocent person's mental state would not cause her to be incarcerated for a crime she did not commit. Because the mentally ill often cannot recognize the difference between confessions for their benefit and confessions that will be used against them, and because the mentally ill are at great risk of making a false confession, this Court should require that the Salas test be employed whenever statements to the police are potentially compromised by the mental illness of the detainee.

2. Even under the current standard, mental illness is a factor and understanding is required.

Even if the Court declines to adopt the Salas test, the Court should recognize that mental illness is a factor that *must* be considered in the totality of the circumstance analysis when it is raised. In *Moran*, this Court held that a *Miranda* waiver must be both voluntary, and knowing and intelligent. *Moran*, 475 U.S. at 421. In *Connelly*, this Court ruled that mental illness does not precluded a voluntary *Miranda* waiver because the focus is on the conduct of the interrogating officers. *Connelly*, 479 U.S. at 164. Despite reaffirming the separate and distinct nature of the voluntary prong from the knowing and intelligent prong in *Colorado v. Spring*, 479 U.S. 564, 573 (1987), this Court has yet to clearly define a knowing and intelligent waiver. The Court has merely held that "only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Spring*, 479 U.S. at 573. Exactly what constitutes the "requisite level of comprehension" is the heart of the issue.

In *Connelly*, the Court focused on the conduct of the officers. This is the approach employed by the lower court when deciding that Ms. Frost's lack of understanding was irrelevant. While in the distinct minority, the East Virginia Supreme Court is not alone in effectively merging

the voluntary prong and the knowing and intelligent prongs to focus almost exclusively on the police conduct. *See State v. Jones*, 467 S.E.2d 12 (N.C. 1996) (focusing entirely on the conduct of the police when the defendant's mental state at the time was raised as an issue). However, the appropriate focus for *knowing and intelligent* is not the conduct of the police, but rather the understanding of the defendant. This is the analysis relied upon either explicitly or implicitly in nearly all of the decisions of both the federal appellate courts and the state supreme courts decisions on this issue. *See Thompson*, 429 So.2d at 865 (holding a *Miranda* waiver valid because the defendant was rational, coherent and able to comprehend the meaning and significance of his confession to his crimes.); *Brewer*, 646 N.E.2d 1382; *State v. Chester*, 208 So.3d 338 (La. 2016); *United States v. Morris*, 287 F.3d 985 (10th Cir. 2002) (holding, like *Chester*, that a *Miranda* waiver was valid for lack of evidence the defendant did not understand). *See also People v. Bernasco*, 562 N.E.2d 958 (Ill. 1990) (holding that the defendant did not make a knowing and intelligent *Miranda* waiver because the defendant did not understand). In each case, the courts believed that the defendant's understanding of her rights and the consequences of a waiver were dispositive as to whether the waiver was knowing and intelligent. This is the correct analysis and is the standard that this Court should recognize.

3. Under either standard, this Court should find Ms. Frost's waiver was invalid.

A waiver cannot be knowing and intelligent if the suspect does not understand what she is doing. In order to ensure the security and continuing stability of the *Miranda* doctrine, this Court should establish a new rule requiring a separate inquiry into the suspect's understanding of her rights when the issues of mental illness are raised. Alternatively, this Court should recognize that *Miranda* and its progeny already require the suspect to understand her rights before she gives a knowing and intelligent waiver.

C. This Court should remand the case for a new trial.

The trial court erred when it held that Ms. Frost knowingly and intelligent waived her *Miranda* rights, despite the fact that she did not understand those rights or the consequences of waiving them. The trial court's failure to suppress the statement was not harmless error, and this Court should order a new trial with the confession suppressed.

1. The trial court erred by holding the waiver was knowing and intelligent when Frost did not understand her rights or the consequences of the waiver.

When reviewing a ruling on a motion to suppress a confession, the appellate court accepts the trial court's findings of fact unless they are clearly erroneous. However, a determination of the validity of a *Miranda* waiver is a question of law reviewed de novo. *United States v. Cardenas*, 410 F.3d 287, 292 (5th Cir. 2005); *United States v. Scott*, 731 F.3d 659, 663 (7th Cir. 2013).

The issues here were raised in two key cases, one state and one federal. In *People v. Bragg*, a woman with a severe mental disability was charged with first-degree murder. 810 N.E.2d 472, 475 (Ill. 2003), *as modified on denial of reh'g* (Apr. 15, 2004). The defendant filed a motion to suppress her statements to law enforcement. *Id*. The court held that the defendant had not knowingly and intelligently waived her *Miranda* rights. *People v. Braggs*, 810 N.E.2d 472, 488 (Ill. 2003), *as modified on denial of reh'g* (Apr. 15, 2004). The court reasoned, based in large part on the testimony of the defendant's psychologist, that it was "highly unlikely" that defendant ever had the ability to comprehend or waive her *Miranda* rights. *Id.* at 479. Because the defendant did not understand her rights, she could not have knowingly and intelligently waived them

In *Daoud*, the defendant was convicted of first-degree murder after confessing to law enforcement. *Daoud*, 618 F.3d at 527 (6th Cir. 2010). On a federal habeas corpus petition, the defendant alleged he had not knowingly and intelligently waived his *Miranda* rights. *Id*. The court held that the waiver was knowing and intelligent, and therefore valid. *Id.* at 531. The court

reasoned, based on the testimony of three mental health professionals, that the defendant had "an intellectual understanding" of his rights. *Id.* Because the defendant understood the rights, the waiver was knowing and intelligent and therefore valid.

Here, the trial court erred in holding that Ms. Frost had knowingly and intelligently waived her *Miranda* rights. The trial court based its ruling on a misunderstanding of the law. Rather than focusing on the defendant's comprehension of her rights, the court denied the motion to suppress based on the law enforcement officer's understanding of the situation. R. at 5. Despite the officer's perceptions, the court found that Ms. Frost did not understand her *Miranda* rights or the consequences of their waiver. *Id*. Just as the defendant in *Bragg* did not understand her rights, Ms. Frost did not understand hers. While in *Daoud* the defendant appeared lucid and coherent to law enforcement like Ms. Frost did, the expert testimony of the mental health professionals demonstrated that Daoud *did* understand his rights. *Daoud*, 618 F.3d at 529. Conversely, Ms. Frost's psychologist diagnosed her as a paranoid schizophrenic and testified in Ms. Frost's federal trial that it was "highly probable" that Ms. Frost was in a psychotic state and was unable to understand her actions or the consequences thereof on June 17, the day the interrogation took place. R. at 3-4. Because Ms. Frost did not understand her *Miranda* rights or the consequences of the waiver, the trial court erred by denying the motion to suppress her statements to the police.

2. Failure to exclude the statement was not harmless error.

"Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). A mistake by the trial court cannot be considered harmless error unless it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained or the sentence imposed. *United States v. Ibarra*, 493 F.3d 526, 532 (5th Cir. 2007); *United States v. Cordero*, 465 F.3d 626, 632 (5th Cir. 2006). The standard of review for violations of constitutional rules is more stringent than for violations of non-constitutional

rules. *United States v. Novaton*, 271 F.3d 968, 999 n.5 (11th Cir. 2001). The burden is on the government to prove that the error in question was harmless. *United States v. Sepulveda-Contreras*, 466 F.3d 166, 171 (1st Cir. 2006). *Miranda* violations in particular are not harmless error unless there is "overwhelming independent evidence" of the defendant's guilt. *United States v. Hogan*, 539 F.3d 916, 922 (8th Cir. 2008); *Jones v. Davis*, 927 F.3d 365, 371 (5th Cir. 2019).

This case is analogous to an Eleventh Circuit case. *Hart v. Attorney General*, 323 F.3d 884 (11th Cir. 2003). In *Hart*, the defendant's statements to law enforcement officers were improperly admitted into evidence in violation of his *Miranda* rights. *Id.* at 895 (11th Cir. 2003). The only evidence the prosecution presented besides the defendant's statements to connect the defendant with the murder was the defendant's fingerprint outside the door to the murder scene. *Id*. The court held that there was a "reasonable possibility" that the defendant's statement contributed to his conviction. *Id*. The court reasoned that without the defendant's statements, the fingerprint only established that the defendant had touched the door at some time. *Id*. Because the defendant's statement was necessary to connect the defendant to that specific event, its improper inclusion was not harmless error. *Id*.

Similarly, the trial court's failure here to suppress Ms. Frost's statement to law enforcement was not harmless error. Unlike in *Hart* where fingerprints placed the defendant at the crime scene, here there were not even fingerprints linking Ms. Frost to the murder. R. at 3. The only substantial evidence the state had besides Ms. Frost's statements was that the knife was from the same kind of kitchen set that Ms. Frost had in her home. *Id*. Just as in *Hart*, the only substantial link between the physical evidence and the defendant is the defendant's own statement. Without that statement, there is a reasonable possibility that the defendant would not have been convicted. Therefore, the inclusion of her statement in violation of her *Miranda* rights was not harmless error.

D. *Miranda* guarantees Ms. Frost a new trial with her statements suppressed.

This Court should reverse the ruling of the lower court and remand the case for a new trial with Ms. Frost's confession suppressed for two reasons. First, *Miranda* and its progeny require that a suspect understand her *Miranda* rights in order to knowingly and intelligently waive those rights. Second, Ms. Frost's paranoid schizophrenia and severe delusions kept her from understanding her *Miranda* rights when she agreed to speak with police.

II. By abolishing the insanity defense, East Virginia deprived Linda Frost of due process of law and subjected her to cruel and unusual punishment.

By abolishing the insanity defense, East Virginia eliminated the moral incapacity prong of the insanity excuse and began imposing criminal liability absent fault. This Court has recognized that "no particular formulation [of the insanity excuse] has evolved into a baseline for due process," *Clark v. Arizona*, 548 U.S. 735, 752 (2006), but there is an articulable constitutional minimum. In the modern American legal system, an insanity excuse no broader than cognitive incapacity would negate the mens rea element of a crime but would not excuse many who cannot be justly faulted because they are not free moral agents. The Eighth and Fourteenth Amendments forbid imposing criminal punishment absent fault and therefore prohibit East Virginia from limiting the insanity excuse to cognitive incapacity. In making its decision, the Court does not sit in judgment on the policy decisions of the legislature, but merely interprets and applies constitutional guarantees. *State v. Herrera*, 895 P.2d 359, 362 (Utah 1995).

A. The Constitutional right to substantive due process guarantees Linda Frost the right to defeat the charges brought against her by presenting evidence of mental deficiency other than cognitive incapacity.

"No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Substantive due process precludes imposing criminal liability absent fault. "Fault" is "responsibility for a mistake or an offense." *Fault*, American Heritage

Dictionary, 5th ed. (2019). A person is at fault if she is "deserving of blame." *Id.* A person deserves blame only if she consciously, knowingly, and voluntarily commits a wrongful act. The East Virginia legislature deprived Linda Frost of her liberty by prosecuting, convicting, sentencing, and imprisoning her without giving her an opportunity to present credible evidence that she was not a culpable moral agent. Within broad boundaries, states may define crimes and establish criminal procedures. *Montana v. Egelhoff*, 518 U.S. 37, 58 (1996) (Ginsburg, J., concurring). But due process is inconsistent with limiting the determination of fault to cognitive ability.

Dr. Desiree Frain, a clinical psychiatrist, testified that on the night of the murder Ms. Frost was "in a psychotic state and suffering from severe delusion and paranoia. . . . Ms. Frost was unable to control or fully understand the wrongfulness of her actions." R. at 4. This evidence is sufficient for a reasonable jury to conclude that Linda Frost was cognitively capable but satisfied each of the other three insanity excuses. She was morally incapable because she could not understand the wrongfulness of her actions, which led to her acquittal in federal court. *Id.* She was volitionally incapable because she "was unable to control . . . her actions." *Id.* Her acts were the product of mental deficiency because her delusions and paranoia destroyed her ability to understand reality and to control her response to her delusions.

The Due Process Clause prohibits the states from defining crimes and establishing criminal procedures in ways that "offends [a] 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) (citations and quotation marks omitted). These fundamental principles are implicit in the concept of ordered liberty. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Fundamental liberty interests are founded upon these implicit principles and may be interfered with only by government action "narrowly tailored to serve a compelling state interest." *Id.* at 721. Government action is

narrowly tailored if it targets no more "than the exact source of the 'evil' it seeks to remedy." *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

Because East Virginia has infringed Linda Frost's physical liberty and her right to be free from punishment absent her fault, it has the burden of proving that it has narrowly tailored its action to achieve a compelling state interest. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). The government must therefore prove that abolishing the moral incapacity excuse is narrowly tailored to achieve a compelling governmental interest without unnecessarily infringing on Ms. Frost's physical liberty or her right to be free from criminal punishment absent fault.

The principle that criminal liability cannot be imposed absent fault is deeply rooted in the American tradition and conscience. The contours of the concept of fault are difficult to ascertain precisely, but the American ideas of fault and of the mental prerequisites to criminal liability are and have been broader than cognitive capacity. An insanity excuse comprised solely of the cognitive incapacity test is therefore constitutionally deficient. Any legislative action that strictly limits the insanity excuse to the cognitive incapacity test is not narrowly tailored, and the East Virginia legislature's decision to abolish the insanity defense is an egregious example of unbridled infringement on fundamental liberties.

1. That criminal punishment cannot be imposed absent fault is a fundamental principle rooted in the American tradition and conscience.

The Court has discovered and announced many principles implicit in the concept of ordered liberty and rooted in the tradition and conscience of the American people:

> Without doubt, [fundamental liberties include] freedom from bodily restraint . . . [,] the right to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted).

The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Egelhoff*, 518 U.S. at 43. Early and modern American views on fault and criminal responsibility may not be susceptible of concise *and* comprehensive definition. But baked into the American legal tradition and public conscience is the principle that cognitive capacity is not the only mental prerequisite to fault and to criminal liability. This idea has been embodied in concrete legal protections for centuries, and the historical case for the insufficiency of the cognitive incapacity excuse is overwhelming. The American legal tradition and public conscience have always demanded proof of fault for criminal liability.

William Blackstone, the celebrated legal scholar of the eighteenth century, wrote that idiots and lunatics were not held responsible for acts committed while their understanding was defective; moral, legal, and cognitive incapacity fit within this broad formulation. 4 William Blackstone, Commentaries *25 ("[W]here there is no difcernment, there is no choice."). Blackstone recounted two incidents in which young boys were hanged for killing other children because their responses proved "a difcretion to difcern between good and evil." *Id.* at *24-25. Blackstone explained that lack of understanding (cognitive or moral or legal incapacity, or a combination) negates fault because "he . . . that has no underftanding, can have no will [to] guide his conduct," implying that volitional incapacity also renders a person faultless. *Id.* at *22.

Earlier that century, William Hawkins's treatise on English law formulated the insanity excuse as the moral incapacity test. Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 Cal. L. Rev. 105, 113 (1924). A seventeenth century legal manual gave the moral incapacity test as the accepted insanity excuse. Anthony Platt & Bernard L. Diamond, *The Origins of the Right and Wrong Test of Criminal Responsibility and Its Subsequent*

Development in the United States: An Historical Survey, 54 Cal. L. Rev. 1227, 1235 (1966). Renowned legal scholar Matthew Hale defined the insanity excuse as moral incapacity. *Id.*

Before Blackstone, the fault requirement sparked the evolution of the mens rea requirement and several excuse doctrines, including infancy, insanity, and compulsion. Phillips & Woodman, *supra*, at 465-67. Subsequently, the mens rea element evolved into the requirement of intent (which could be defeated by proving cognitive incapacity) and separate mental incapacity doctrines emerged. Martin R. Gardner, *The Mens rea Enigma: Observations on the Role of Motive in the Criminal Law, Past and Present*, 1993 Utah L. Rev. 635, 668, 671 (1993).

The mens rea element no longer required an evil motive, but the moral incapacity excuse lived on. In *Rex v. Arnold* (1724), 16 St. Tr. 695 (Eng.), the jury was instructed that either cognitive or moral incapacity would relieve the defendant of criminal liability. *See* Crotty, *supra*, at 114-15. The English common law of the eighteenth century hewed to the moral incapacity test. *Id.* at 114-18; Francis Bowes Sayre, *Mens rea*, 45 Harv. L. Rev. 974, 1006 (1932). "In the eighteenth century, the 'good and evil' test was regularly used in both insanity and infancy cases." Platt & Diamond, *supra*, at 1236 (citing eight cases and explaining a short-lived aberration). Children and the insane were not held criminally responsible if incapable of understanding the evil of their actions because the inability to discern right and wrong removes an essential ingredient of fault.

The American colonial courts and early United States decisions largely followed English common law. Crotty, *supra*, at 113. The early United States jurist Joseph Story in 1828 affirmed an acquittal because "insanity is an excuse . . . because the party has not the possession of that reason, which includes responsibility." *United States v. Drew*, 25 F. Cas. 913, 913 (C.C.D. Mass. 1828). He explained that courts may not punish acts that are not those of a "reasonable being." *Id.* at 913. Story's formulation includes cognitive and moral incapacity.

In a case closely parallel to that of Linda Frost, a man who believed he was the King of England and that the United States was part of Great Britain attempted to murder President Andrew Jackson. *United States v. Lawrence*, 26 F. Cas. 887, 891 (C.C.D.C. 1835). He was found not guilty by reason of insanity. *Id.* From a Pennsylvania case from 1843: "Where [a man] labours under an insane delusion in regard to a particular subject, . . . the offense with which he is charged must have a connection with that subject, and must thus seem to have grown out of the delusion itself, or he will be convicted." *In re McElroy*, 1843 WL 5177, at *4, 9-10 (Pa. 1843) (recounting the stories of several persons delusional on certain subjects but otherwise lucid). The crime Ms. Frost stated she committed was directly related to the subject of her delusions.

In 1916, a committee of the America Institute of Criminal Law and Criminology recommended limiting the insanity excuse to cognitive incapacity, but the idea was dropped on account of widespread "dissatisfaction and adverse criticism." Crotty, *supra*, at 122. At that time, every state's insanity excuse was broader than the cognitive incapacity excuse and all included the moral incapacity excuse. *Id.* at 121-22.

The idea that "an injury [is] a crime only when inflicted by intention is . . . as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morisette v. United States*, 342 U.S. 246, 250 (1952). This idea was firmly in place by the American founding and in early American jurisprudence. It is a principle of justice deeply rooted in the American tradition and conscience. S*ee* Robert M. Ireland, *Insanity and the Unwritten Law*, 32 American J. of Legal Hist. 157, *passim* (1988) (discussing ten famous cases from during the years 1843 and 1885 in which the moral incapacity excuse was employed); Platt & Diamond, *supra*, at 1237-58 ("The culpability of the criminally insane in American law during the nineteenth century was determined according

to the traditional principles of English law, reinforced by the ideas and emerging expertise of medical jurisprudence.").

The moral incapacity excuse is required because it incorporates "that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." Brief for Petitioner at 24, *Kahler v. Kansas*, No. 18-6135 (pending) (citing H.R. Rep. No. 98-577, at 7-8 (1983)). The cognitive incapacity excuse is not enough; supplemented by the moral incapacity test, it forms a constitutionally adequate insanity excuse. Because the volitional incapacity and product-of-insanity tests have been employed to define the boundaries of fault and criminal liability, the core principle is that cognitive capacity alone does not entail fault.

The principle of no criminal liability absent fault is also implicit in the concept of ordered liberty. "It is as universal and persistent in mature systems of law as belief in freedom of the human will." *Morissette v. United States*, 342 U.S. 246, 250 (1952). The common law and modern defenses of duress and necessity demonstrate that acts that are not truly voluntary are not considered criminally punishable in American law. *See United States v. Bailey*, 444 U.S. 394, 409-10 (1980). Two centuries of anti-miscegenation laws did not disqualify racial equality or the right to freely marry as fundamental principles of justice rooted in the American tradition and conscience. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Similarly, the erstwhile failure of our society to recognize that the volitional and product-of-insanity excuses do not prevent this Court from discovering and announcing the fundamental principle that imposing criminal punishment on cognitively, morally, or volitionally incapacitated people violates a fundamental principle of justice implicit in the concept of ordered liberty.

This Court has been hesitant to recognize specific protections of substantive due process that reach beyond the bare minimum of the cognitive incapacity excuse, but clarified in *Clark* that

it has never held that cognitive incapacity excuse alone is enough. *Clark*, 548 U.S. at 752 n.20. Focusing primarily on the question of a due process right to an affirmative insanity defense, *Herrera*, 895 P.2d at 363-66, extrapolated from this Court's jurisprudence that abolishing the insanity defense was acceptable because the Supreme Court has expressly allowed states to determine burdens of proof for prongs of the insanity excuse and has not yet adopted a constitutionally required minimum insanity defense. The Supreme Court of Idaho made the same mistake. *State v. Searcy*, 798 P.2d 914, 634-37 (Idaho 1990). Neither decision accounted for the concerns highlighted in this Court's developing jurisprudence on the connection between the mental capacity and moral and criminal culpability of juvenile offenders, rendering those decisions incomplete and obsolete. *See, e.g., Graham v. Florida*, 560 U.S. 48 (2010). Different states, different philosophers, and different legal and medical experts have come to different conclusions on the scope of fault as applied to criminal responsibility in the context of the insanity excuse. *See* Brief for Respondent at 26-34, *Kahler v. Kansas*, No. 18-6135 (pending). But the existence of "profound disagreements" on how to implement the moral incapacity excuse, *Id.* at 34, does not mean that the cognitive incapacity excuse alone is constitutionally adequate.

Historical thought and practice are an important part of substantive due process analysis, but rights imperfectly recognized in American history may yet be based on principles of justice rooted in the American tradition and conscience if they are foundational to our society and embedded in the ideas underlying our institutions. In fact, "[t]he nation's laws and traditions in the past half century are most relevant" if they "show an emerging awareness that liberty gives substantial protections" to classes of person whose liberty was not previously respected. *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

For instance, marriage and procreation are "fundamental to our very existence and survival," and therefore cannot be arbitrarily limited consistent with ordered liberty. *Loving*, 388 U.S. at 12 (citation omitted) (holding that states have no legitimate interest in forbidding interracial marriages); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that certain sterilization laws were not narrowly tailored). The right to marry and to procreate, though attacked by means of sterilization and anti-miscegenation laws, are also firmly grounded in the Anglo-American legal tradition. *Loving*, 388 U.S. at 12; *Skinner*, 316 U.S. at 541. This Court announced in 2015 that although same-sex marriage was long illegal in America, it was properly included in the right to marry that is embedded in the principles on which America was founded and which it ought to more and more perfectly translate into practice over time. *Obergefell v. Hodges*, 135 S. Ct. 2584, 1602 (2015). Equal treatment under the law is also rooted in the American traditions and conscience, even though the principle was blatantly disregarded for over two centuries of American history. *Loving*, 388 U.S. at 11. This is because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

The past half century has seen an explosion of awareness of mental illness and its deleterious effects on its victims. The seeds of Dorothy Dix's work are blossoming into a fuller understanding of the extent to which mental illness deprives people of their ability to actively control their lives. The insanity excuse of the Model Penal Code, first published in 1962 and currently in force in fourteen states, includes the moral and volitional incapacity excuses. Model Penal Code § 4.01 (Am. Law Inst., 1962). The modern federal insanity defense includes the cognitive and moral prongs. Pub. L. 98-473, Title II, § 402(a) (codified at 18 U.S.C. § 17(a) (2012)). "The *M'Naghten* Rules were not a statement of new law; they were merely an official

pronouncement of the contemporary state of the insanity defense, which focused on the defendant's ability to distinguish right from wrong." H.R. Rep. No. 98-577, at 33 (1983).

Five states, including East Virginia, have reacted to perceived abuse of the insanity defense by limiting its scope and application, Robert Kinscherff, *Proposition: A personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. Med. & Ethics 745, 746 (2010), but at least one state legislature (Kansas) may not have understood that limiting the insanity excuse to cognitive incapacity would "exclude an entire category of defendants who had historically been in the insanity defense's heartland." Brief for Petitioner at 4 (citing legislative history and Raymond Spring, *Farewell to Insanity: A Return to Mens rea*, 66 J. Kan. B. Ass'n 38, 38 (1997)). One of the themes of this Court's Eighth Amendment jurisprudence on juvenile offenders is that America recognizes that criminal liability cannot exist or is diminished where there is no or reduced moral culpability, such as in people whose minds are not fully developed or, as here, deficient. *See, e.g., Graham*, 560 U.S. 48 (2010).

At a minimum, the evidence supporting the volitional incapacity excuse and the product-of-mental-deficiency excuse proves that the cognitive incapacity excuse alone is insufficient—that some additional insanity excuse must be added to constitute a constitutionally adequate insanity excuse. Linda Frost can present evidence on which a reasonably jury could acquit on any of the three additional incapacity excuses, and she must not be deprived of a fair trial before an impartial jury on constitutionally adequate legal theories.

2. Limiting the insanity excuse to cognitive incapacity is not narrowly tailored to serve a compelling government interest.

Fundamental liberty interests can be interfered with by government action only if the government proves its solution is "narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Government action is narrowly tailored if it

targets no more "than the exact source of the 'evil' it seeks to remedy." *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). Linda Frost's due process right to be free from criminal punishment absent fault and her right to be free from physical restraint are fundamental liberty interests, *Id.* at 719, and therefore to satisfy due process the government must prove abolishing the insanity defense was a narrowly tailored solution. *See id.* at 719.

The East Virginia legislature has a compelling interest in criminally punishing the blameworthy and committing dangerous mentally ill people to mental institutions, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), but not in imposing criminal punishment without fault. The legislature may believe that its previous insanity excuse was being abused and that blameworthy criminals were being acquitted. A legislature may adjust the procedural requirements such as the burden of proof. *See Leland v. Oregon*, 343 U.S. 790 (1952). Instead, East Virginia abolished the defense entirely. Keeping dangerous people off the street is a compelling government interest, but slapping a life sentence on a person who may recover her wits and become harmless is not designed to eliminate only the "exact source of the 'evil' it seeks to remedy." *See Ward*, 491 U.S. at 801.

B. The Constitutional right to be free from cruel and unusual punishment guarantees Linda Frost the right to defeat the charges brought against her by presenting evidence of insanity other than cognitive incapacity.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. These sweeping prohibitions were intended to nationalize protections against injustice. The Founders understood that state and local officials might use the justice system to repress their political rivals and that popular overreaction to heinous crimes could turn punishment into an instrument of revenge. The Founding Fathers adopted the Eighth Amendment to draw a hard line between justice and vengeance. Imposing criminal punishment absent fault crosses that line.

1. Imposing criminal punishment absent fault is considered cruel and unusual.

Two broad categories of punishments are prohibited by the Cruel and Unusual Punishment clause: "inherently barbaric punishments" and punishments grossly disproportionate to the crime. *Graham*, 560 U.S. at 59 (citations omitted). Unlike torture, a life sentence is not inherently barbaric. But a criminal conviction and sentence must pass muster under two different proportionality tests: it must not impose punishment that is disproportionately severe given all the circumstances of the crime, and it must not impose punishment that would be disproportionately severe under any circumstances. *Id.* at 59-60. A punishment is disproportionately severe if it is excessive given the nature of the offense or the characteristics of the offender. *Id.* at 60-61.

When determining the constitutionality of a punishment based on the characteristics of the offender, such as mental illness, the Court employs a two-prong analysis. First, the Court considers the standards of contemporary American society, as evidenced by "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Id.* at 61 (citation and quotation marks omitted). Then, relying on "controlling precedents and . . . [the] Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.* (citations and quotation marks omitted). In exercising its own judgment, the "Court also considers whether the challenged . . . practice serves legitimate penological goals." *Id.* at 67.

Objective indicia demonstrate that society disapproves of imposing criminal liability absent fault and that fault cannot be adequately tested by the cognitive incapacity test alone. The vast majority of United States jurisdictions have adopted and maintained insanity excuses broader than the cognitive incapacity excuse. Shortly after it was founded in 1959, Alaska adopted the M'Naghten rule, which includes the cognitive and moral incapacity excuses, but later recognized only the cognitive incapacity excuse. *Hart v. State*, 702 P.2d 651, 657 (Alaska Ct. App.). Five

other states have abolished the insanity defense in favor of a mens rea approach. Although five state courts—and now a sixth—have declined to nullify their respective legislatures' decisions, the Supreme Courts of Nevada, Washington, and Missouri each declared similar state statutes unconstitutional and reinstated the moral incapacity excuse. *Finger v. State*, 27 P.3d 66, 84-85 (Nev. 2001); *Sinclair v. State*, 132 So. 581 (Miss. 1931); *State v. Strasburg*, 110 P. 1020 (Wash. 1910). Forty-four states, plus the federal government and the United States military, have adopted an insanity excuse that includes moral incapacity. New Hampshire follows the *Durham* test, a product-of-mental-illness excuse. *State v. Fichera*, 903 A.2d 1030, 1034 (N.H. 2006). North Dakota adopted a defense that includes both cognitive and moral incapacity. N.D. Cent. Code Ann. 12.1-04.1-01(1) (West 2019). The evidence of state legislation and practice is overwhelming—the cognitive incapacity excuse is not enough.

Popular outrage at perceived abuse of the insanity defense followed John Hinckley, Jr's trial and acquittal for attempting to assassinate President Ronald Reagan. *Herrera*, 895 P.2d at 361; Valeri P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: the Public's Verdict*, 47 Pub. Opinion Q. 202, 202-03 (1983). Ignorance of the nuances of the insanity defense compounded Americans' tendency to believe that the insanity defense is a golden opportunity to abuse the system. *Id.* at 205-07. A study of public perception shortly after the Hinckley trial found eighty-seven percent of American believed that "the insanity defense is a loophole that allows too many guilty people to go free." *Id* at 207. Though several states abolished the insanity defense, the underlying opposition to imposing criminal punishment absent fault did not die with the Hinckley verdict—many just believed that the current insanity excuse had loopholes that allowed blameworthy defendants to escape punishment. Views on the efficacy of the criminal justice system changed. Despite the action of a few state legislatures, views on fault remained stationary.

The Constitution is worthless unless it protects the most vulnerable against government actions that violate the fundamental principles of freedom and justice. It is noteworthy that the federal insanity defense adopted by the national legislature in the wake of the Hinckley shooting retains the moral incapacity excuse under which Ms. Frost was acquitted in federal court. Pub. L. 98-473, Title II, § 402(a) (codified at 18 U.S.C. § 17(a) (2012)). Similarly situated criminal defendants have rights that are rooted in our common values and must be protected.

The Eighth Amendment's text, history, meaning, and purpose cannot support the view that criminally punishing the insane is neither cruel nor unusual. "[P]unishment considered cruel and unusual at the time the Bill of Rights was adopted" violates the Eighth Amendment. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002)). Early American legal traditions precluded punishing the insane, as discussed in *supra* section I.A.1. In 1916, the idea of a committee of the America Institute of Criminal Law and Criminology to limit the insanity excuse to cognitive incapacity was dropped on account of widespread "dissatisfaction and adverse criticism." Crotty, *supra*, at 122. At that time, every state's insanity excuse was broader than the cognitive incapacity excuse. *Id.* at 121-22.

Imposing criminal punishment absent fault does not serve any of the legitimate penological goals: retribution, deterrence, incapacitation, and rehabilitation. *See Graham*, 560 U.S. at 71-74. Criminal punishment is not retributive unless it is "directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). Mental capacity is a critical component of culpability. *Id.* at 156. Three facts led the Court in *Roper v. Simmons*, 543 U.S. 551, 553 (2005), to conclude that imposing the death penalty on juveniles was cruel and unusual: their "susceptibility to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult," "their own vulnerability and comparative lack of control

over their immediate surroundings mean" they should be more readily forgiven, and they "struggle to define their identity." Similarly, severely delusional people like Ms. Frost are susceptible to irrational behavior brought on by their failure to grasp reality. Because Ms. Frost completely lost her grasp on the reality of the nature of chickens, her decisions stemming from the delusion take her conduct out of the realm of reprehensible. She was not a free moral agent. She was less free than an impressionable, irresponsible teenager coming to her own in the world. "Mentally retarded persons . . . [have] diminished personal responsibility for [their] crimes," *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008), and in some cases the mental deficiency is so severe that it vitiates personal responsibility. Ms. Frost is such a person. She was "unable to control or to fully understand the wrongfulness of her actions." R. at 3. There is therefore no great moral evil to condemn, but a mental deficiency that requires treatment.

Deterrence is likewise not advanced by criminally punishing the insane. This Court has held that some sentences imposed on juveniles are too harsh because they will not deter other immature juveniles. *Johnson v. Texas*, 509 U.S. 350, 367 (1993). Similarly, punishing a delusional person will not prevent another delusional person from acting on her delusion. Reality has already taken a back seat in newly minted psychotics. Incapacitation is critical for mentally deficient defendants accused of violent crimes, but they can be effectively restrained in mental institutions. Because juveniles are not necessarily incorrigible recidivists, lengthy sentences imposed to keep them off the streets are inappropriate. *Graham*, 560 U.S. at 72. Similarly, mentally ill persons can have lucid intervals. Or, like Ms. Frost, they can be significantly helped by medication. They may even recover altogether and no longer be a danger, imposing punishment, especially a life sentence, cannot be justified by incapacitation. Rehabilitation is possible in jail, but unlikely for the mentally ill. Mental institutions are designed to offer the environment and treatment necessary to rehabilitate

the patient. Jails are designed to restrain regular offenders. Like the life sentence imposed on a juvenile in *Graham*, this life sentence cannot be justified because it gives no incentive for the offender to rehabilitate and "forswears altogether the rehabilitative ideal." *Id.* at 74.

Because the legislative practice of almost every state—and of the nation as a whole—is objective indication that modern Americans consider imposing punishment on the truly insane to be cruel and unusual, Ms. Frost is under the protection of the Eighth Amendment. Punishing her, or any other person cognitively capable of committing a crime but otherwise mentally incapacitated, cannot serve any legitimate penological goal and would have been considered cruel and unusual from the Founding and to today. Ms. Frost was not a free moral agent. She may be restrained if dangerous, but she cannot justly be punished.

2. Imposing criminal punishment absent fault entails punishing a person for her status or characteristics.

Ms. Frost is insane through no fault of her own. Unlike those who become voluntarily intoxicated and then commit heinous crimes under the influence, she was controlled by a mental illness should could not control. Mental illness, like drug addiction, "may be contracted innocently or involuntarily." *Robinson v. California*, 370 U.S. 660, 667 (1962). Punishing a person for their status, rather than for the choices they make voluntarily and knowingly, is cruel and unusual. *See Id.* If this Court allows East Virginia to unhitch criminal liability and substantial criminal punishments from moral culpability, our population will become more and more disillusioned with a justice system divorced from common sense and our shared moral foundation. Ms. Frost would only be the first victim of the new "justice" system of which this law is the ominous harbinger.

CONCLUSION

Linda Frost did not knowingly and intelligently waive her *Miranda* rights because she did not understand her rights, or the consequences of waiving them. In order to ensure the security and

continuing stability of the *Miranda* doctrine, this Court should adopt the two-part Salas test and require that trial courts definitively rule on a defendant's understanding when mental illness is raised as an issue. In the alternative, the Court should recognize that, *Miranda* and its progeny require that a suspect understand her *Miranda* rights in order to knowingly and intelligently waive those rights. Because Ms. Frost did not understand her *Miranda* rights, or the consequences of their waiver, she cannot have knowingly and intelligently waived those rights. Therefore, Ms. Frost's statements to law enforcement should have been suppressed.

By abolishing the insanity defense and restricting the insanity excuse to cognitive incapacity, East Virginia subjected Ms. Frost to cruel and unusual punishment and deprived her of due process of law. In refusing to admit evidence probative of Ms. Frost's moral and volitional incapacity and tending to prove that her acts were the product of insanity, the trial court applied the wrong legal standard and therefore abused its discretion. The error was prejudicial because a reasonable jury could have acquitted Ms. Frost under any of the three additional insanity excuses.

For the foregoing reasons, Petitioner respectfully requests this Court to reverse the judgment of the Supreme Court of Appeals of East Virginia and grant a new trial. Petitioner also respectfully requests this Court to declare E. Va. Code § 21-3439 is unconstitutional and invalid, and to instruct the trial court to allow Petitioner to present an insanity defense and to suppress the statements she made to police while being interrogated.

Respectfully submitted,

Team H

Counsel for Petitioner
Linda Frost

CERTIFICATE OF SERVICE

We, Team H, counsel for the Petitioner, hereby certify that on this 13th day of September, 2019, we caused three copies of the Brief on the Merits for Petitioner to be served by overnight delivery on the following counsel:

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We further certify that all parties required to be served have been served.

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