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 FROM THE SUPREME COURT OF EAST VIRGINIA

## BRIEF FOR RESPONDENT

TEAM I
COUNSEL FOR THE RESPONDENT

## QUESTIONS PRESENTED

The petition for a Writ of Certiorai to the Supreme Court of East Virginia is granted on the following questions:

1. Is an individual's waiver of her Miranda rights knowing and intelligent when, the accused appeared lucid to the investigating officer at the time of the waiver, but did not understand her rights due to a mental disease?

2. Does the abolition of an insanity defense in place of a *mens rea* approach to mental impairment evidence violate the due process clause of the Fourteenth Amendment or the Eighth Amendment?

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## STATEMENT OF FACTS

The Petitioner, Linda Frost, murdered Christopher Smith on June 16, 2017. R. at 2. After finding that the Commonwealth of East Virginia had proven all elements of the crime beyond a reasonable doubt, the jury found the Petitioner guilty of murder. R. at 5.

Mr. Smith was a poultry inspector in East Virginia, who was dating the Petitioner at the time of his murder. R. at 2. On the morning of June 17th, he was found dead in his office at the Department of Agriculture by a co-worker. *Id.* A week prior, Mr. Smith's sister had observed her brother having an upsetting phone call with the Petitioner. *Id.*

The Petitioner was initially brought in for questioning for Mr. Smith's murder after the Campton Roads after the police received an anonymous tip. R. at 2. In an interrogation room, Officer Nathan Barbosa read the Petitioner her Miranda rights. *Id.* The Petitioner then signed a written waiver. *Id.* Officer Barbosa asked the Petitioner if she wished to talk about Mr. Smith, she agreed. *Id.* When asked about the Petitioner's demeanor, Officer Barbosa testified that, at the beginning of the interview, her behavior raised "no concern or suspicions" about her competency. *Id.*

Officer Barbosa informed The Petitioner that Smith's body had been discovered and asked if she knew who might be responsible. *Id.* at 3. The Petitioner confessed stating, "I did it. I killed Chris." *Id.* Officer Barbosa then asked the Petitioner if she knew any other details about the murder. *Id.* In reply, the Petitioner said, "I stabbed him, and I left the knife in the park." *Id.* When Officer Barbosa attempted to ask follow-up questions, the Petitioner made statements about the "voices in her head" that told her to "protect the chickens at all costs. *Id.* The Petitioner told Office Barbosa that she did not think killing Mr. Smith was wrong because she believed that Mr. Smith would be reincarnated as a chicken. *Id.* In fact, she said that she did him a "great favor" as "chickens are the most sacred of all creatures." *Id.* The Petitioner did not provide any

further details of the murder but encouraged Officer Barbosa to join her in her movement "to liberate all chickens in Campton Roads." *Id.* Officer Barbosa asked the Petitioner if she would like an attorney. *Id.* When she said that she did, Officer Barbosa immediately ended the interrogation. *Id.*

Acting on the Petitioner's confession, the police searched the parks in Campton Roads and found a bloody steak knife under a bush that matched a set in the Petitioner's house *Id.* DNA tests confirmed that the blood on the knife was Mr. Smith's. *Id.* The coroner also confirmed that Mr. Smith died from puncture wounds from a knife similar to the one found in Lorel Park. *Id.* Therefore, the Petitioner was charged and indicted in both federal and state court for Mr. Smith's murder. *Id.* at 3.

Prior to her trial, the Petitioner's attorney filed a motion in federal court requesting a mental evaluation. *Id.* Clinical Psychologist, Desiree Frain, diagnosed the Petitioner with paranoid schizophrenia and prescribed her medication to assist in her treatment. *Id.* Prior to her confession, the Petitioner had no history of mental disorder or schizophrenia and had never been treated for any mental condition. *Id.* at 3-4. The Petitioner reiterated to Dr. Frain that she believed Mr. Smith's job as a poultry inspector endangered the lives of chickens and he needed to be killed in order in order to protect them. *Id.* at 4.

The Petitioner was deemed competent to stand trial for murder in the United States District Court for the Southern District of East Virginia under 18 U.S.C. § 1114 (2019). *Id.* Dr. Frain testified that it was highly probable that the Petitioner was in a psychotic state at the time of Mr. Smith's murder and was suffering from delusions and paranoia. *Id.* Dr. Frain further opined that despite her inability to control or fully understand the wrongfulness of, the Petitioner

intended to kill Mr. Smith and knew that she was murdering him. *Id.* The Petitioner was acquitted on the basis of insanity under 18 U.S.C.§ 17(a) (2019). *Id.*

Following the acquittal of her federal case, the Commonwealth of East Virginia prosecuted the Petitioner for murder. *Id.* In 2016, the legislature adopted E. Va. Code § 21-3439, which abolished East Virginia's *M'Naghten* insanity defense and replaced it with the *mens rea* approach. *Id.* Under the *mens rea* approach, the inability to know right from wrong is not a defense. However, evidence of mental disease is admissible to disprove the *mens rea* element of the offense. *Id.* Therefore, in East Virginia the evidence of the accused's mental condition tis only admissible to disprove intent. *Id.* This new approach is consistent with other states who have adopted similar statutes. R. at 4-5.

The Petitioner's attorney filed a motion to suppress The Petitioner's confession and a motion challenging E. Va. Code § 21-3439 on both Eighth Amendment and Fourteenth Amendment grounds. *Id.* at 5. Circuit Court Judge Hernandez denied both motions. *Id.* While the Circuit Court acknowledged that The Petitioner did not understand her Miranda rights or the consequences of her waiver, Judge Hernandez concluded that the confession should not be suppressed as the Petitioner appeared objectively lucid and capable of waiving her rights at the time of the confession. *Id.* Additionally, Judge Hernandez held that E. Va. Code § 21-3439 did not impose cruel and unusual punishment or violate the Due Process Clause. Furthermore, because section 21-3439 does not permit a defense of the defendant's inability to know right from wrong, Judge Hernandez found Dr. Frain's testimony is inadmissible.

At trial, the jury found the Petitioner guilty of the murder of Christopher Smith, giving her a life sentence. *Id.* The Petitioner appealed to the Supreme Court of Virginia, who affirmed the Circuit Court's decision. R. at 9. On July 31, 2019 this Court granted Certiorari. R. at 12.

## SUMMARY OF THE ARGUMENT

The Petitioner's *Miranda* waiver was knowing and intelligent, despite her later diagnosis of a mental illness. Under this Court's precedent, an evaluation of a *Miranda* waiver requires an inquiry into the totality of the circumstances, including the background, conduct, and characteristics of the suspect. Courts assess how the suspect acted, what the interrogating officers knew about the suspect, and any other circumstances surrounding the interrogation. Prior to and at the time of her confession, the Petitioner's conduct did not raise any "concern or suspicions" that she was incapable of understanding the nature of her rights. The interrogating officer, Officer Barbosa, testified to the Petitioner's demeanor, which did not raise any concerns about her competency.

While mental illness is a factor in evaluating the totality of the circumstances surrounding the interrogation, the primary focus is on the interrogating officer's perspective, which indicates that the Petitioner was competent to understand and waive her rights at the time of her waiver and interrogation. Further, excluding the Petitioner's testimony would not further the purpose of *Miranda* or serve any constitutional objectives, as there was no coercive police behavior and law enforcement acted appropriately to inform the Petitioner of her constitutionally protected rights, which she knowingly and intelligently waived.

Additionally, the *mens rea* approach for evidence of mental impairment does not violate the constitution. First, it does not violate the due process clause of the Fourteenth Amendment because the "right and wrong" insanity defense is not a fundamental right. Historically, the insanity defense has been too inconsistent for one test to be ingrained in the United States' history and tradition. The *mens rea* approach would therefore survive a rational basis review because it is rationally related to a legitimate government purpose.

Finally, the *mens rea* approach does not violate the Eighth Amendment. The Eighth Amendment applies to punishments, not convictions. In the single instance where the Eighth Amendment overturned a conviction, it was because the conviction was based on the defendant's status, not an actual act. In this case, the Petitioner was convicted based on her act of murdering Christopher Smith. Finally, if the Court chooses to apply the Eighth Amendment to the Petitioner's conviction, it still would not meet the standard of cruel & unusual because the Petitioner's arrest serves several penological purposes.

## ARGUMENT

### I. The Petitioner knowingly and intelligently waived her *Miranda* rights.

The totality of the circumstances of the Petitioner's interrogation and confession show that her *Miranda* waiver was knowing and intelligent, despite her later being diagnosed with a mental illness. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In order to protect the Fifth Amendment rights of criminal suspects, the Supreme Court has formulated procedural safeguards in the form of warnings to inform criminal suspects of their rights. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). A suspect may waive these rights, so long as "the waiver is made voluntarily, knowingly and intelligently." *Id.* at 475.

The validity of a *Miranda* waiver has two "distinct dimensions," leading to separate inquiries: first, whether the waiver was voluntary, and second, whether it is knowing and intelligent. *Colorado v. Spring*, 479 U.S. 564, 573 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). There is no dispute that the defendant's confession was voluntary. *See* R. at 2-3. There is no evidence in the record that suggests coercive, or otherwise improper, police behavior. *Spring*, 479 U.S. at 573; *see Moran*, 475 U.S. at 421 (holding voluntariness of waiver not at issue where the record did not indicate any police pressure). Thus, in regards to the defendant's *Miranda* waiver, the sole issue before this Court is whether it was knowing and intelligent, in the context of her post-confession diagnosis of a mental condition.

This is an issue of first impression for this Court. While this Court has evaluated mental illness in the context of a waiver being involuntary, *see Colorado v. Connelly*, 479 U.S. 157, 164 (1986), it has not evaluated it in the context of a *Miranda* waiver being knowing and intelligent. *See Moran*, 475 U.S. at 421. In *Connelly*, this Court held that a "defendant's mental condition, by itself and apart from its relation to official coercion," should not "dispose of the inquiry into

constitutional voluntariness." *Id.* As this Court has not evaluated whether a waiver is knowing and intelligent in regards to a mental illness, lower courts focus on the totality of the circumstances of the interrogation, including the suspect's intelligence, background, conduct, experience, and whether she has the capacity to understand her Fifth Amendment rights and the consequences of waiving them. *See Garner v. Mitchell*, 557 F.3d 257, 260 (6th Cir. 2009); *United States v. Turner*, 157 F.3d 552, 554 (8th Cir. 1998); *United States v. Gaddy*, 894 F.2d 1307, 1312 (11th Cir. 1980).

**a. The totality of the circumstances of the interrogation demonstrate that the Petitioner's waiver was knowing and intelligent.**

The Petitioner's waiver was knowing and intelligent because the totality of the circumstances demonstrates that there were no suspicions or concerns about her competency to waive her rights at the time of her waiver or confession.

For a waiver to be knowing and intelligent, it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran*, 475 U.S. at 421. However, a suspect need not "know and understand every possible consequence of a waiver" of a Fifth Amendment privilege for the waiver to be knowing and intelligent. *Spring*, 479 U.S. at 574. Rather, the waiver is knowing and intelligent where the totality of the circumstances demonstrates "both an uncoerced choice and the requisite level of comprehension." *Moran*, 475 U.S. at 421.

An "intelligent waiver" depends, in each case, "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Thus, whether the waiver was knowing and intelligent involves an inquiry into the totality of the circumstances surrounding the interrogation, including the suspect's "age, experience, education, background, intelligence, and

into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *see also Moran*, 475 U.S. at 421.

Additionally, lower courts focus on the objective observations of the interrogating officers, in addition to other factors, including mental illness. In following with the purposes of *Miranda* to regulate police behavior, courts examine the circumstances largely from the perspective of the interrogating officers. *See Garner*, 557 F.3d at 263. It is the "primary focus" of the court's analysis of the "defendant's ability to understand the warnings at the time of the interrogation." *Id.* This is not to say that mental illness is not considered. *See id.* (noting that "later-developed evidence of defendant's actual mental ability to understand" may be considered). However, mental illness is merely one factor to be considered in evaluating the circumstances surrounding the interrogation. *See Daoud v. Davis*, 618 F.3d 525, 530 (6th Cir. 2010) ("Most courts have recognized that mental illness is a factor in determining whether a waiver was knowing and intelligent."); *Gaddy*, 894 F.2d at 1312 ("[M]ental illness is only a factor to be weighed in determining the validity of the waiver."). In focusing on the totality of the circumstances of the interview, circuit courts heavily weigh the suspect's conduct during the interview and the police officers' impression of the suspect. *See Garner*, 557 F.3d at 261, 264; *United States v. Turner*, 157 F.3d 552, 554, 556 (8th Cir. 1998). Even where the suspect later exhibited strange behavior, was found to have a diminished mental capacity, or was diagnosed with a mental illness, courts have found that the suspect's *Miranda* waiver was knowing and intelligent based on the suspect's competent conduct during the interview. *See Garner*, 557 F.3d at 261, 264 (holding waiver valid where the suspect was "very coherent" at the time of the waiver, but was later found to have a diminished mental capacity); *Turner*, 157 F.3d at 556

(holding that "bizarre" behavior post-confession and a later diagnosis of mental illness did not invalidate the suspect's *Miranda* waiver).

**i. Officer Barbosa's objective observations of Petitioner behavior indicated that she was knowing and intelligent when she waived her *Miranda* rights.**

Circuit courts consistently give significant weight to the interrogating officers' objective observations of the suspect at the time of the waiver and confession, even where there are concerns regarding the defendant's mental condition. *See, e.g.*, *Garner*, 557 F.3d at 260; *United States v. Rojas-Tapia*, 446 F.3d 1, 7 (1st Cir. 2006); *Reinert v. Larkins*, 379 F.3d 76, 89 (3d Cir. 2004). The Sixth Circuit has noted that the "underlying police-regulatory purpose of *Miranda* compels that these circumstances be examined, in their totality, primarily from the perspective of the police." *Garner*, 557 F.3d at 263. Where the police have no reason to believe that the suspect misunderstands or could not comprehend the warnings that have been given, there is no basis for invalidating the suspect's waiver of their *Miranda* rights. *See id.*

In *Garner*, after examining the totality of the circumstances of the interrogation, the Sixth Circuit determined that the defendant's waiver was knowing and intelligent. *Id.* at 260. The questioning officers testified that the defendant appeared "perfectly normal" and "very coherent" when he waived his rights and confessed to his crimes. *Id.* at 261. After the defendant's confession, three psychology experts evaluated him. *Id.* at 264. All three experts noted that the defendant suffered from a diminished mental capacity and a troubled upbringing. *Id.* The court noted the importance of considering this "later-developed evidence," but focused its analysis on the objective observations of interrogating officers. *Id.* at 263-264. In doing so, the court found that the defendant had knowingly and intelligently waived his *Miranda* rights. *Id.* The Sixth Circuit concluded by noting that the defendant did not exhibit "any outwardly observable indications" that he did not understand the *Miranda* warnings or the circumstances of his

interrogation. *Id.* at 266. The focus on the interrogating officers' impressions of the suspect, despite a later finding of diminished mental capacity, informed the court's conclusion that the defendant's waiver was knowing and intelligent. *Id.* at 270.

This approach is not unique among circuit courts. In *Padgett v. Sexton*, the court held a *Miranda* waiver to be knowing and intelligent when the interrogating officers testified that the bipolar suspect "was not displaying noticeable effects of his mental illness" during the interrogation and confession. *Padgett v. Sexton*, 529 Fed. App'x 590, 598 (6th Cir. 2013). During the interrogation, the defendant informed the officers that he had bipolar disorder but denied needing treatment. *Id.* at 592. The officers testified that the defendant "looked fine" and "appeared normal" during the interrogation. *Id.* At a later hearing, a psychologist testified that the defendant had bipolar disorder and was abusing drugs, and that such conditions raised questions as to whether the defendant could have waived his rights. *Id.* Despite this later-introduced evidence, the court determined that the defendant's "coherent" conduct and lack of "noticeable effects" of his mental condition during the interrogation supported a finding that his *Miranda* waiver was knowing and intelligent. *Id.* at 598. Even where a mental condition was known to the defendant and officers before the waiver and confession, the interrogating officer's observations that the suspect appeared normal control.

Similarly, the Third Circuit determined that a waiver was knowing and intelligent where the officers testified that the suspect was "lucid and coherent" and "that his answers to questions…were responsive and pertinent." *Reinert*, 379 F.3d at 89. The defendant argued that his waiver could not be knowing or intelligent due to his mental condition being altered via post-surgery drugs. *Id.* at 92. However, the interrogating detectives testified that the defendant was "conscious, oriented, alert, and responsive" during the time of the questioning. *Id.* The court

found that this "solid phalanx of evidence" was sufficient to show that the defendant knowingly and intelligently waived his *Miranda* rights, even in the face of two psychiatrist affidavits that determined that the defendant's mental condition was not clear enough for him to have waived his rights. *Id.* at 92-93. The detectives' observations of the defendants provided significant evidence that the defendant had the capacity at the time of the waiver to waive his *Miranda* rights. *See id.* at 92.

Furthermore, the First Circuit held that where law enforcement officers testified to the suspect being "lucid and articulate" during the interrogation, the suspect's waiver was properly knowing and intelligent. *Rojas-Tapia*, 446 F.3d at 8. In a motion to suppress, the defendant alleged that his waiver was not knowing as he did not have the intellectual capacity to waive his rights. *Id.* at 7. The court noted that intellectual limitations are not dispositive and that the interrogating officers testified to the defendant being "lucid and articulate" during questioning. *Id.* at 8. Despite an evaluation that showed defendant's intellectual limitations, the court nevertheless held that the waiver was knowing and intelligent, heavily based on the testimony of the interrogating officers. *Id.* (citing cases to demonstrate the relevancy of the interrogating officers' perceptions to the inquiry of whether the defendant's waiver was knowing and intelligent).

Likewise, the Fifth Circuit has held waivers to be knowing and intelligent based on the interrogating officers' observations of the conduct of the defendant. *See United States v. Solis*, 299 F.3d 420, 439-40 (5th Cir. 2002); *United States v. Garcia Abrego*, 141 F.3d 142, 171 (5th Cir. 1998). In *Garcia Abrego*, the court concluded that the interrogating officers' observations that the defendant was not impaired, along with similar testimony from a doctor, were a sufficient evidentiary basis for the conclusion that the defendant was not impaired and that the

waiver was knowing and intelligent. *Id*. In *Solis*, the court relied on *Garcia Abrego* in holding that the defendant's wavier was knowing and intelligent based on the defendant's conduct in the interrogation. *Solis*, 299 F.3d at 239. The officer testified that the defendant, despite testimony regarding an altered mental condition due to drugs, was "responsive" and was "aware of questions asked." *Id.* at 440. In holding that the waiver was knowing and intelligent, the Fifth Circuit discussed how the District Court had watched the video of the confession, and found that the defendant was "lucid and responsive" and "quite articulate" during the interrogation. *Id.* Based "[o]n the strength of these findings," the Fifth Circuit held that the waiver was knowing and intelligent. *Id.* The officer's observations of the defendant's conduct during the interrogation, coupled with video evidence of the conduct, were highly determinative in the court's conclusion that the waiver was knowing and intelligent. *See id.* In all of these cases, the circuit courts, while weighing other factors of the interrogation, focused in on the suspect's conduct through the eyes of the interrogating law enforcement officers.

The Petitioner's conduct during her waiver and confession demonstrates that her waiver was knowing and intelligent. Officer Barbosa testified that "nothing" about the Petitioner's conduct "raised any concerns or suspicions about her competency." R. at 2; *see Padgett-Sexton,* 529 Fed. App'x at 598. And, such testimony, that of the law enforcement officer regarding the lucid and coherent conduct of the defendant during the interrogation, is highly relevant to the determination that the waiver was knowing and intelligent. *See Solis*, 299 F.3d at 440. She confessed to the murder and her answers to questions about it were "responsive and pertinent." *Reinert*, 379 F.3d at 89; *see* R. at 2. The Petitioner later made some statements concerning voices in her head encouraging her to protect chickens and her beliefs regarding chickens being sacred creatures, but at no time did she display "outwardly observable indications" that she did not

comprehend the warnings or the circumstances of the interrogation. R. at 3; *see Garner*, 557 F.3d at 266. Later developed evidence of mental conditions are important, but are not dispositive. The Petitioner, like the defendants in *Padgett*, *Garner*, *Rojas-Tapias*, *Reiner*t, and *Solis*, outwardly appeared competent and coherent, indicating that her *Miranda* waiver was knowing and intelligent. *See R. at 2; see also Padgett*, 529 Fed. App'x at 598; *Rojas-Tapia*, 446 F.3d at 7; *Reinert*, 379 F.3d at 89; *Solis*, 299 F.3d at 440.

**ii. The Petitioner's later behavior does not retroactively invalidate her *Miranda* waiver.**

The Petitioner's change in behavior during the interrogation does not impact the conclusion that her waiver was knowing and intelligent. While she did have a noticeable change in behavior, from competently confessing and answering questions about the murder to discussing her beliefs on protecting chickens, the relevant inquiry is into the defendant's conduct before and during the interrogation. *See Turner*, 157 F.3d at 554.

In *Turner*, the Eighth Circuit confronted this question, when the officers read the defendant his *Miranda* warnings, the defendant waived the warnings, and subsequently confessed to the crime. *Id.* However, after his confession, the defendant began acting "bizarre" and was later diagnosed with a mental illness. *Id.* An evaluating psychiatrist diagnosed the defendant with PCP-induced psychosis and testified that the defendant was incapable of forming an intelligent and knowing waiver of his *Miranda* rights. *Id.* The court acknowledged that the defendant later exhibited strange behavior and may have demonstrated signs of mental illness, but concluded that "the change in behavior does not show that at the time of his confession he lacked the mental capacity to waive his rights." *Id.* at 556. The court held that the defendant's waiver was knowing and intelligent based on the defendant's conduct at the time of the waiver and confession, despite an evaluating psychologist testifying to the defendant's inability to do

waive his rights. *Id.* The court also noted the importance of the defendant's behavior prior to the interrogation. *Id.* at 555. During his initial interaction with police, the defendant lied about his identity and other personal information. *Id.* at 554. The court, in support of its conclusion that the defendant's waiver was knowing and intelligent, determined that the defendant acted in a way that was more consistent with a person "attempting to avoid being caught" than a person who was incapable of knowing what he was doing. *Id.* at 555.

In this case, the Petitioner similarly experienced a change in behavior. *Compare* R. at 3 *with id.* at 554. At the beginning of the interrogation, Officer Barbosa read the Petitioner her Miranda rights and she executed a signed waiver. *Compare* R. at 3 *with Turner*, 157 F.3d at 554. Officer Barbosa testified that nothing about the Petitioner's demeanor raised any concerns or questions regarding her competency. R. at 3. Much like in *Turner*, it was only after the confession when the Petitioner began acting in a strange manner, referencing her beliefs about chickens. *Compare* R. at 3 *with Turner*, 157 F.3d at 554. While the Petitioner acted strangely and was later diagnosed with a mental illness, she appeared capable and competent at the time of her *Miranda* waiver. *Compare* R. at 3 *with Turner*, 157 F.3d at 556. The change in behavior was drastic, but it does not show that at the time that she confessed, she was incapable of understanding and waiving her rights. *See Turner*, 157 F.3d at 556. Further, the Petitioner, prior and during the interrogation, acted in a manner that was far more consistent with a person attempting to avoid being caught, than a person who was incapable of knowingly and intelligently waiving her rights. *See* R. at 3. As the bloody knife was found in the bushes in Lorel Park, the Petitioner clearly had the wherewithal to dispose of the murder weapon. *Compare* R. at 3 *with Turner*, 157 F.3d at 555. The Petitioner's conduct before and during her interrogation

indicate that she knowingly and intelligently waived her *Miranda* rights, regardless of any later shifts in her behavior.

Because the Petitioner's mental illness is only one factor in determining the knowing and intelligence of her waiver; other factors, including the Petitioner's conduct in the interview, as observed by the officers are of primary importance. *See Garner*, 557 F.3d at 263. When asked about the Petitioner's demeanor, Officer Barbosa testified that, at the beginning of the interview, her behavior raised "no concern or suspicions" about her competency. R. at 2. Much like in *Garner*, the Petitioner's conduct leading up to and during her confession did not indicate that she lacked the ability to waiver her rights. *See Garner*, 557 F.3d at 270.

Under the totality of the circumstances, the Petitioner's waiver was knowing and intelligent. At the time of the waiver and confession, the Petitioner was acting competently, and was able to responsively and coherently answer questions about the murder. R. at 3. While there was a shift in her behavior, that does not negate her competent conduct during her waiver and confession. In evaluating the totality of the circumstances, mental illness is a consideration, but it is not dispositive. The interrogating officers' objective observations are another important factor in evaluating the circumstances of the defendant's waiver. Here, Officer Barbosa properly *Mirandized* the Petitioner and did not have any concerns or suspicions about her competence to knowingly and intelligently waive her *Miranda* rights. Thus, the Petitioner's waiver, under the totality of the circumstances, including, in particular, Officer Barbosa's objective observations of her conduct, was knowing and intelligent.

**b. The exclusion of the Petitioner's confession would not further the purpose of *Miranda*.**

In addition to the Petitioner's waiver being knowing and intelligent, its exclusion would not further the purpose of *Miranda* or serve any constitutional objectives. *Miranda* warnings are

intended to reduce the inherent compulsion that exists in an interrogation and protect against the abridgement of the suspect's Fifth Amendment rights. *Moran*, 475 U.S. at 425; *see also Connecticut v. Barrett*, 479 U.S. 523, 528 (1986) (noting that the "fundamental purpose" of *Miranda* was to ensure the existence of the suspect's right to choose between speech and silence during the interrogation). In other words, the underlying intent behind the *Miranda* decision is 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). Where the suspect appears to understand the information presented and questions asked, the interrogating officers have "no way to discern [a] misunderstanding in [the suspect's] mind." *Garner*, 557 F.3d at 262. And, when interrogating officers have no knowledge or reason to believe that the suspect does not understand her rights, their actions are not contrary to *Miranda*, as the officers are not acting in a "constitutionally impermissible" manner. *Quarles*, 467 U.S. at 656; *see Garner*, 557 F.3d at 262 (stating that it is of "primary significance" what the officers observed given that the underlying purpose of *Miranda* is to reduce impermissible police behavior). The purpose of *Miranda*, in this case, is not served by excluding the Petitioner's confession.

The Petitioner's rights, as intended under *Miranda*, were sufficiently protected. Officer Barbosa had no "concern or suspicions" about the Petitioner's competency at the time of her waiver or confession and he, following with *Miranda's* holding, read the Petitioner her rights. R. at 2; *see Miranda*, 384 U.S. at 436. She then signed a written waiver and agreed to speak; shortly thereafter she confessed to the murder of Christopher Smith. R. at 2-3. At the time of her waiver and confession, there was absolutely no reason to question her competency to waiver her rights. *Id.* at 2. Much as the *Miranda* decision intended, Officer Barbosa ensured that the Petitioner was

aware of her rights, and only proceeded with the interrogation upon the Petitioner waiving her right to remain silent.

Throughout her interrogation, the Petitioner's rights were ensured, as *Miranda* intended. *See Barrett*, 479 U.S. at 528. When Petitioner's answers were no longer responsive to Officer Barbosa's questions, he again asked if she would like the assistance of counsel. R. at 3. Upon her accord, Officer Barbosa promptly terminated the interview. R. at 3. What the officers observe during the interrogation is of "primary significance," and in this case, upon Officer Barbosa's observations of a change in Petitioner's behavior, he again offered the assistance of counsel. *Garner*, 557 F.3d at 262; *see* R. at 3. Officer Barbosa's actions indicate that the Petitioner's rights were ensured throughout the entire interrogation and that law enforcement's behavior was the opposite of coercive: re-offering the assistance of counsel when the Petitioner's answers were no longer responsive. *See* R. at 3.

Excluding the Petitioner's confession would not further the purpose of *Miranda*, which is to limit government coercion and overbearing police practices. *See Connelly*, 479 U.S. at 170. In *Connelly*, the defendant argued that his mental condition, including being schizophrenic and hearing the voice of God which told him to confess, prevented his waiver from being voluntary. *Id.* at 161. As noted by this Court in *Connelly*, the *Miranda* protections serve to protect defendants "against government coercion, leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Id.* This Court determined that suppressing the defendant's statements would serve "absolutely no purpose in enforcing constitutional guarantees." *Id.* at 166. Further, the "Fifth Amendment privilege is not concerned with 'moral and psychological pressures to confess emanating from sources other than official coercion.'" *Id.* at 161 (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). Other pressures, such as suspect's

unknown psychological conditions, are matters "to which the United States Constitution does not speak." *Connelly*, 479 U.S. at 170.

In this case, the record is devoid of any governmental coercion. In fact, Officer Barbosa followed the procedures set forth in *Miranda*. Any unknown, and later discovered, mental conditions that might have impacted the Petitioner's decision to waive her rights are "psychological pressures," "to which the United States Constitution does not speak." *Id.* The purpose of Miranda is served by limiting coercive and overreaching police behaviors, none of which exists in this case. Thus, this purpose would not be served by excluding the Petitioner's confession, which was not the result of coercive police behavior, but the result of a knowing and intelligent waiver of her rights. Excluding the Petitioner's confession would serve "no purpose in enforcing constitutional guarantees" as there was no coercive police behavior and any mental conditions from which she was suffering are psychological pressures not covered by the Fifth Amendment. *Id.* at 161, 166. Requiring law enforcement to fully evaluate a suspect's mental state before accepting a *Miranda* waiver as knowing and intelligent creates a duty that extends far beyond the constitutional guarantees of the Fifth Amendment and the intent of *Miranda* to limit "government coercion." *See Connelly*, 479 U.S. at 170; *Barrett*, 479 U.S. at 529.

Further, there is no "constitutional objective that would be served by suppression in this case." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1986). Officer Barbosa sufficiently administered the "procedural safeguards" in an effort to protect The Petitioner's Fifth Amendment privilege. *See Miranda*, 384 U.S. at 478. The Petitioner's Fifth Amendment rights were "scrupulously honored" when she was read her rights, acted in a competently while waiving them and confessing, and when the interrogation was promptly terminated upon her indications that she wanted an attorney. *See id.* at 479. Officer Barbosa's actions fully align with

the Fifth Amendment and the standards set forth by this Court in *Miranda* and subsequent cases. Therefore, suppression would not serve to deter future police activity, as law enforcement acted appropriately, but would hamper law enforcement efforts in their pursuits of lawfully obtaining confessions and efficiently solving crimes.

## II. Replacing the insanity defense with the *means rea* approach does not violate the substantive due process clause nor the cruel and unusual clause of the Constitution.

The Commonwealth of East Virginia did not violate the Constitution by passing E. Va. § 21-3439. Abolishing the *M'Naghten* insanity defense and replacing it with a *mens rea* approach does not violate a person's due process rights protected under the Fourteenth Amendment because the due process clause only protects fundamental rights that are rooted in the history and tradition of the United States. The insanity defense has never been consistently applied throughout history, and therefore cannot be considered a fundamental right.

Additionally, the *mens rea* approach does not violate the Eighth's Amendment's prohibition on cruel and unusual punishment. Because the Petitioner is appealing a conviction, not a punishment, the Eighth Amendment would only apply if the Petitioner was convicted because of her status. However, in this case, she was convicted for murdering Christopher Smith. Section 21-3439 does not create a status-based conviction, and therefore does not violate the Eighth Amendment.

The Commonwealth of East Virginia created a constitutionally permissible change to their insanity defense by passing E. Va. § 21-3439. It does not violate neither the Eighth Amendment nor the Fourteenth Amendment.

### a. Replacing the *M'Naghten* insanity defense does not violate the Fourteenth Amendment's due process clause.

The insanity defense is not a fundamental right that is founded in the history and tradition of the United States. Under the Fourteenth Amendment, "[n]o State shall . . . deprive any person

of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment "forbids the government [from infringing on] certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). In order to be protected under the Fourteenth Amendment, the insanity defense must be a fundamental right that is explicitly or implicitly guaranteed by the Constitution. *Rochin v. California*, 342 U.S. 165, 169 (1952). The right must be based on "principle[s] 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).

Fundamental rights are "objectively 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977)). Therefore, the court turns to the country's "history, legal traditions, and practices" to serve as "guideposts for responsible decision making." *Glucksberg*, 521 U.S. at 721 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

Unfortunately, the record does not reflect the language of East section 21-3439; however, it does state that it is in line with other *mens rea* approach statutes, like Kansas'. R. at 4. The Kansas statute provides: "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense." KAN. STAT. ANN. § 22-3220 (2010). This replaced the *M'Naghten* insanity defense:

> [T]he defendant is to be held not criminally responsible (1) where he does not know the nature and quality of his act, or, in the alternative, (2) where he does not know right from wrong with respect to that act. Under the 'right and wrong' test of criminal insanity, it must be proved that at the material time the accused did not know that what he was doing was contrary to law.

*State v. Kahler*, 410 P.3d 105, 125 (Kan. 2018) (quoting *State v. Baker*, 819 P.2d 1173, 1187 (Kan. 1991)). Comparing these statutes, the only difference between the two is the alternative defense in the *M'Naghten* defense, "where [the defendant] does not know right from wrong with respect to that act." *Compare id.*, *with* KAN. STAT. ANN. § 22-3220.

The petitioner must therefore demonstrate that an insanity defense with specifically a "right and wrong" defense is a fundamental right rooted in history and tradition. While it might be argued that the history and tradition of the United States has created a general right for an insanity defense, no one specific insanity defense could be a fundamental right. Because the history of the insanity defense has constantly changed and evolved throughout history, the "right and wrong" defense is not a fundamental right.

**i. The "right and wrong" insanity defense is not deeply rooted in America's history and tradition.**

Historically, the insanity defense has never been one standardized test, instead it has been constantly changing and evolving. Therefore, the "right and wrong" defense cannot be a fundamental right.

In *Powell v. Texas*, the Supreme Court stated that it had never defined an insanity defense because it could not "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." 392 U.S. 514, 535-36 (1968). The Court continued stating that "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 religions, moral, philosophical, and medical views of the nature of man." *Id.*

Furthermore, in *State v. Korell*, the Montana Supreme Court similarly held that the *mens rea* approach preceded the insanity defense. *State v. Korell*, 690 P.2d 992, 999 (Mont. 1984). Going back to opinions from Thirteenth Century England, that Court determined that the intent principle "has played a central role in all subsequent considerations of capacity, insanity, and moral and legal culpability." *Id.*

Looking back to the founding of the American legal system, Blackstone's Commentaries state that an "to make a complete crime, cognizable by human laws, there must be both a will and an act." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. IV, at 21(Clarendon Press, 1886). When a mentally incapacitated person commits a crime, Blackstone argues that there is a "deficiency in will" which "derives from a defective understanding." *Id.* Blackstone argues that it is the lack of *mens rea* that makes a defendant incapable of committing a crime. *Id.* ("In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities.").

Because early English legal writers used a *mens rea* approach, "the framers of the Constitution would not have been likely to recognize or appreciate an issue based on a distinction between *mens rea* and insanity." Statement of Professor Susan N. Herman on Behalf of the American Civil Liberties Union, *Reform of the Federal Insanity Defense: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 98th Cong., 1st Sess. 527 (1983). In fact, "[u]ntil the nineteenth century, criminal-law doctrines of *mens rea* (criminal intent) handled the entire problem" of insanity. NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW, 54 (1982).

The predominant case that the Petitioner will rely on is *Finger v. State.* 27 P.3d 66 (Nev. 2001). In that case, the Nevada Supreme Court held that the "right and wrong" defense found in

*M'Naghten* is a constitutionally necessary part of the insanity defense. *Id.* at 86. The court begins its historical analysis with the *M'Naghten* case in 1843. *Id.* at 72. Even the Nevada Court admits that the definition of legal insanity has been debated for centuries. *Id* at 73-75 ("As can be seen from the above discussion, federal and state laws regarding the insanity defense cover a broad spectrum of theories with respect to the treatment accorded to a mentally ill defendant."). However, the court concludes that *mens rea* includes the ability to distinguish between right and wrong and therefore, preventing defendants from presenting evidence that they lacked the ability to tell right from wrong, they cannot properly defend themselves. *Id.* at 80.

However, the Supreme Court has held that the insanity defense "is substantially open to state choice." *Clark v. Arizona,*548 U.S. 735, 752 (2006); *see also Leland v. Oregon*, 343 U.S. 790, 800-801 (1952); *Powell*, 392 U.S. at 536. This was in part due to the consistently inconsistent history of the insanity defense. *Clark*, 548 U.S. at 752. The Court identifies four different strands of traditional Anglo-American approached to insanity which created "a diversity of American standards." *Id.* at 749 They are "the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests." *Id.* Because there has been historically so many different standards of the insanity defense, the Supreme Court ruled that "no particular formulation has evolved into a baseline for due process" *Id.*at 752.

Similarly, since 1984, there have been several state supreme courts have held that the insanity defense is not deeply rooted in America's history. *See State v. Delling*, 267 P.3d 709, 714 (Idaho 2011) (noting further that the Supreme Court has declined to grant certiorari on the constitutionality of Idaho's *mens rea* approach, despite being given multiple opportunities) ; *State v. Bethel*, 66 P.3d 840, 851-52 (2003) (affirmed by *Kahler*, 410 P.3d at 401); *Korell*, 690

P.2d at 999; *State v. Herrera*, 895 P.2d 359, 363-65 (Utah 1995). Instead, all of these cases have held that the *mens rea* approach was sufficient to satisfy the Fourteenth Amendment.

The Kansas Supreme Court in *State v. Bethel* held that abolishing the insanity defense and replacing it with the *means rea* approach did not violate the due process clause because the insanity defense was not a fundamental right. 66 P.3d at 851-52. In that case the defendant, Bethel¸ shot and killed three people, including his father. *Id.* at 842-43. The defendant admitted that he intended to kill all three of his victims but argued that he was psychotic at the time and could not distinguish right from wrong. *Id.* However, like East Virginia, Kansas uses a *mens rea* approach for evidence of mental incapacitation after abolishing the insanity defense. *Id.* at 841. Therefore, because he had the requisite intent, the defendant, was convicted of murder and sentenced to death. *Id.* The Kansas Supreme Court held that the insanity defense is a "creature of the 19th century and is not so ingrained in our legal system to constitute a fundamental principle of law." *Id.* at 851.

The Montana Supreme Court distinguished itself from cases where courts held that abolishing the insanity defense was unconstitutional. *Korell*, 690 P.2d at 999. In those cases, the legislature abolished the insanity defense, but did not supplement it with a *mens rea* approach. *Id.* (citing *Sinclair v. State*, 132 So. 581 (Miss. 1931); *State v. Lange*, 123 So. 639 (La. 1929); *State v. Strasburg*, 110 P. 1020 (Wash. 1910)). Therefore, defendants in those cases could not enter any evidence of their mental impairment to prove a lack of intent, completely depriving them of a defense. Conversely, the *mens rea* approach does not prohibit the use of a defendant's mental impairment. *See Korell*, 690 P.2d at 999; *Bethel*, 66 P.3d at 851.

Although the insanity defense may be a fundamental right, there are too many iterations of the insanity defense for any one test to be a fundamental right. Therefore, the "right and wrong" test is not a fundamental right under the Fourteenth Amendment.

**ii. Because East Virginia has a legitimate government interest in convicting people who have intentionally committed violent crimes, E. Va. § 21-3439 survives rational basis review.**

Because the "right and wrong" defense is not a fundamental right, this Court should apply the rational basis test. In cases where no fundamental right is being violated, the statute should be upheld as long as the statute can be rationally related to a legitimate government interest. *Glucksberg*, 521 U.S. at 728; *F.C.C. v. Beach Comm., Inc.*, 508 U.S. 307, 313-14 (1993).

For rational basis review, the law in questions benefits from a "strong presumption of validity. *F.C.C.*, 508 U.S. at 315 (citing *Lyng v. Auto. Workers*, 485 U.S. 360 (1988)). Furthermore, the Supreme Court has applied rational basis review to issues affecting mentally ill people. *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) (citing *Cleburne v. Cleburne Living Ctr.*, Inc., 473 U.S. 432 (1985); *Schweiker v. Wilson*, 450 U.S. 221 (1981)). The *mens rea* approach is rationally related to the government's legitimate interest of public safety because it allows the government to arrest dangerous people who intended to harm others.

Section 21-3439 approach promotes public safety because it convicts violent criminals who intentionally harmed someone thereby removing a dangerous person from the general population. Additionally, courts have regularly held that public safety is a compelling state interest. *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation . . . . The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."); *Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017) ("To be sure, Maryland's interest in the protection

of its citizenry and the public safety is not only substantial, but compelling."); *Doe v. Department of Public Safety*, 444 P.3d 116, 131-32 (Alaska 2019); *State v. Webb*, 144 So.3d 971, 978 (La. 2014); *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990). Because public safety is a compelling state interest, it is also a legitimate state interest.

Alternatively, should the Court hold that the insanity defense is a fundamental right, the *mens rea* approach would still survive a strict scrutiny review. Under strict scrutiny, the government may still restrict the interested as long as the restriction is narrowly tailored and advances a compelling state interest. *See Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2231 (2015).

The *mens rea* approach is narrowly tailored to achieve East Virginia's compelling interest of convicting defendants who intentionally committed a crime. The "right and wrong" defense acts as an affirmative defense, where a guilty party is excused of her conduct because a mental deficit prevents her from comprehending the morality of her actions. However, because East Virginia's goal is to ensure that those who intentionally commit crimes are convicted, it is necessary to abolish the insanity defense. Furthermore, East Virginia has not prohibited the admission of mental impairment. The Petitioner could still enter evidence of her mental illness as evidence that she could not form the requisite *mens rea* to be convicted of murder. Finally, her mental state can be taken into consideration when determining a proper punishment.

The *mens rea* approach replacing the "right and wrong" defense does not violate the due process clause. Because the "right and wrong" defense is not a fundamental right, E. Va. § 21-3439 need only survive a rational basis review by having a legitimate government interest that is rationally related to the statute. Here East Virginia has both a legitimate and compelling state interest in public safety which is rationally connected to abolishing the "right and wrong" defense. Furthermore, replacing the insanity defense with the *mens rea* approach narrowly tailors

the government's compelling interest by preserving the defendant's ability to use mental incapacitation to disprove the requisite intent element of a crime.

**b. Abolishing the "right and wrong" defense does not create an Eighth Amendment violation.**

The Commonwealth of East Virginia did not violate the Eighth Amendment's cruel and unusual punishment clause. The Eighth Amendment forbids "cruel and unusual *punishments*." U.S. CONST. amend. VIII (emphasis added). The Petitioner is arguing that her conviction violates the Eighth Amendment, not that a punishment she experienced was cruel and unusual. R. at 5. Therefore, Md. The Petitioner's Eighth Amendment complaint should be dismissed. Furthermore, even if this Court applies the Eighth Amendment to E. Va. § 21-3439, the statute is not cruel and unusual because sending the Petitioner to jail serves a penological purpose.

**i. The Petitioner was not convicted for being mentally ill, she was convicted for her act of murdering Christopher Smith.**

There has only been one case where the Eighth Amendment has overturned a conviction, *Robinson v. California*. 370 U.S. 660, 667 (1962). There, the Supreme Court held that punishment for the status crime of drug addiction violated the Eighth Amendment prohibition. *Id.* In that case, the police arrested Robinson after examining needle marks on Robinson's arm. *Id.* at 661. Robinson was convicted under a California law that prohibited "being addicted to the use of narcotics." *Id.* at 662. The Supreme Court declared that the law violated the Eighth Amendment because Robinson was arrested for the "'status' of narcotic addition" and not an actual act. *Id.* at 666. The Court declared that a law which made being mentally ill a crime "would doubtless be universally thought to be an infliction of cruel and unusual punishment." *Id.*

Conversely, in *Powell v. Texas*, the Court upheld a statute which read: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars." 392 U.S. at 517 (citation omitted) .

In that case, Powell was arrested under that statute and appealed his conviction using the logic of *Robinson*. *Id.* at 532. However, the Court refused to extend *Robinson* to *Powell* because Powell was arrested for being drunk in public, not being an alcoholic. *Id.*

In *Korell*, the Montana Supreme Court similarly held that abolishing the insanity defense does not convict the mentally ill for being mentally ill. 690 P.2d at 1001. The Court is convicting a mentally ill defendant for an intentional act. *Id.* ("The Montana Criminal Code does not permit punishment of a mentally ill person who has not committed a criminal act."). Additionally, the Kansas Supreme Court stated that the *mens rea* approach "does not expressly or effectively make mental disease a criminal offense. It does not violate the Eighth Amendment to the United States Constitution." *Bethel*, 66 P.3d at 852.

In the present case, the Petitioner was not convicted for being mentally ill. R. at 5. She was, however, convicted for the *act* of murdering Christopher Smith. Furthermore, East Virginia permitted the Petitioner to use her mental illness as evidence to negate the *mens rea* element, which the prosecution was required to establish in order to get a conviction. R. at 4; *See Korell*, 690 P.2d at 1001. ("Prior to sentencing, the court is required to consider the convicted defendant's mental condition at the time the offense was committed."). Unfortunately for the Petitioner, Dr. Frain opined that the Petitioner had the requisite intent. R. at 3. Because the Petitioner was properly convicted of the act of murder after the jury found that her mental illness did not impair her intent, East Virginia did not violate the Eighth Amendment by convicting her.

**ii. Even if The Petitioner's conviction fell under the Eighth Amendment Standard, it would still not be considered cruel and unusual because it serves a penological purpose.**

The Eighth Amendment does not prohibit all punishments, only cruel and unusual punishments. U.S. CONST. amend. VIII. The Supreme Court has defined "cruel and unusual" to mean punishments that "involve the unnecessary and wanton infliction of pain." *Gregg v.*

*Georgia*, 428 U.S. 153, 173 (1976). Although some extreme punishments have been declared unconstitutional for the mentally incapacitated, the mere act of imprisoning a mentally incapacitated person has not. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of a mentally incapacitated prisoner was cruel and unusual, commuting the death sentence to life in prison). Cruel and unusual punishments are "totally without penological justification." *Gregg*, 428 U.S. at 183.

The American Bar Association has listed five societal purposes: "to foster respect for the law and deter criminal conduct," "to incapacitate offenders," "to punish offenders," and "to rehabilitate offenders." ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING 18-2.1 (3d ed. 1994). Sentencing the Petitioner to life in prison would serve all five of those purposes. First, because the *mens rea* approach holds everyone accountable for intentional acts which both fosters a respect for the law and deters criminal conduct. Second, sending the Petitioner to prison prevents her from murdering anyone else to save the chickens, incapacitating her. Third, sending the Petitioner to prison obviously punishes her. Finally, prisons often offer therapy programs and psychological aid, which can help rehabilitate the Petitioner.

The *mens rea* approach does not violate the Eighth Amendment. The Eighth Amendment applies to punishments, not convictions. In the single instance where the Eighth Amendment overturned a conviction, it was because the conviction was based on the defendant's status, not an actual act. Finally, if the Court chooses to apply the Eighth Amendment to the Petitioner's conviction, it still would not meet the standard of cruel & unusual because the Petitioner's arrest serves several penological purposes.

## CONCLUSION

An evaluation of the totality of the circumstances of The Petitioner's interrogation clearly demonstrates that her *Miranda* waiver was knowing and intelligent. The Petitioner's behavior at the time of her waiver and confession raised no "concern or suspicions" about her competency. She was later diagnosed with a mental illness, but the focal point of the totality of the circumstances inquiry is on the objective observations of the interrogating officers, which show that the Petitioner's conduct at the time of her waiver and confession was competent to execute the waiver of her rights. Further, there is no constitutional objective to be served by excluding the Petitioner's confession as there was no coercive law enforcement behavior and the Petitioner was appropriately informed of her rights, which she subsequently knowingly and intelligently waived.

Additionally, the *mens rea* approach for evidence of mental impairment does not violate the constitution. First, it does not violate the due process clause of the Fourteenth Amendment because the "right and wrong" defense is not a fundamental right because the insanity defense historically has been inconsistent. Since the "right and wrong" defense is not a fundamental right, the *mens rea* statute need only survive a rational basis review. Here, East Virginia has successfully advanced the government interest of public safety by convicting defendants who had the intent to commit a violent crime.

Finally, the *mens rea* approach does not violate the Eighth Amendment. The Eighth Amendment applies to punishments, not convictions. In the single instance where the Eighth Amendment overturned a conviction, it was because the conviction was based on the defendant's status, not an actual act. In this case, the Petitioner was convicted based on her act of murdering Christopher Smith. Finally, if the Court chooses to apply the Eighth Amendment to the

Petitioner's conviction, it still would not meet the standard of cruel & unusual because the Petitioner's arrest serves several penological purposes.