NO. 19-1409

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

LINDA FROST,

Petitioner,

v.

THE COMMONWEALTH OF EAST VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of East Virginia

BRIEF FOR RESPONDENT

TEAM T

Attorneys for Respondent

QUESTIONS PRESENTED

I. Where the police act in good faith, comply with all of *Miranda*'s requirements, and a suspect makes what objectively and reasonably appears to be a valid *Miranda* waiver, should that suspect's subsequent voluntary statement be suppressed simply because she did not subjectively understand the *Miranda* warning?

II. Does the Eighth or Fourteenth Amendments permit a State to channel evidence of a criminal defendant's moral capacity to the punishment phase unless it overcomes the defendant's free will by causing her not to understand the nature and quality of her acts?

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The opinion of the United States District Court for the Southern District of East Virginia is unreported. The opinion of the East Virginia Circuit Court is unreported. The opinion of the Supreme Court of East Virginia appears in the record at pages 1–11.

JURISDICTIONAL STATEMENT

After the Supreme Court of East Virginia entered final judgment, Petitioner timely filed a petition for a writ of certiorari, which this Court granted on July 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions: the Fifth Amendment, which provides: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ," U.S. Const. amend. V; the Eighth Amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," U.S. Const. amend. VIII; and the Fourteenth Amendment, which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ," U.S. Const. amend. XIV.

This case also involves provisions of E. Va. Code § 21-3439 (2016), which abolished the traditional *M'Naghten* rule for a *mens rea* approach. R. at 4.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This appeal addresses Linda Frost's challenge to her conviction for murder. R. at 1. She contends that the admission of her confession violated her Fifth Amendment right against self-

incrimination. R. at 1. Additionally, she argues that East Virginia's decision to adopt a *mens rea* approach to insanity violated both her Eighth Amendment right to be free from cruel and unusual punishment and her Fourteenth Amendment right to Due Process. R. at 1.

The Murder and Subsequent Interrogation. On the night of June 16, 2017 between the hours of 9 p.m. and 11 p.m., a coworker found Christopher Smith dead inside his office at the U.S. Department of Agriculture in Campton Roads, East Virginia. R. at 2. The following day, Frost—Mr. Smith's girlfriend—was brought in for questioning after the Campton Roads Police Department received an anonymous tip. R. at 2. Once inside the interrogation room, Officer Nathan Barbosa read Frost her *Miranda* rights. R. at 2. She then signed a written waiver. R. at 2. Nothing about Frost's demeanor indicated to Officer Barbosa she lacked the competency to waive or fully understand her rights. R. at 2. Shortly after the interrogation began, Frost blurted out: "I did it. I killed Chris." R. at 3. When Frost was asked for details, she replied, "I stabbed him, and I left the knife in the park." R. at 3.

After confessing, Frost made statements about the "voices in her head" imploring her to "protect the chickens at all costs." R. at 3. Frost claimed she did not think killing Smith was wrong because she assumed he would be reincarnated as a chicken. R. at 3. Frost asserted that she had done Smith a "great favor" because "chickens are the most sacred of all creatures." R. at 3. After Frost mentioned her goal to "liberate all chickens in Campton Roads," Officer Barbosa asked her if she wanted a court appointed attorney. R. at 3 Frost answered affirmatively, and the interrogation promptly ended. R. at 3.

Following the interrogation, police officers recovered a bloody steak knife under a bush in Lorel Park. R. at 3. Though the knife had no identifiable fingerprints, DNA tests confirmed the blood on it belonged to smith, and the knife matched a set Frost had at her house. R. at 3. The

coroner later determined that Smith died after suffering multiple puncture wounds from a knife like the one found in Lorel Park. R. at 3.

The Indictments and Mental Evaluation. Frost was charged and indicted in both federal and state court for the murder of Christopher Smith. R. at 3. While in jail pending the outcome of both trials, her attorney filed a motion in federal court for a mental evaluation. R. at 3. Dr. Desiree Frain—a clinical psychiatrist—diagnosed Frost with paranoid schizophrenia and prescribed Frost the appropriate medication to aid in her treatment. R. at 3. During the evaluation, Frost told Dr. Frain she killed Smith to protect the lives of the chickens he endangered through his job. R. at 3. This was the first time Frost had been diagnosed with schizophrenia or any other psychiatric disorder. R. at 3. She had never received any mental health treatment or medication for any mental disease. R. at 3.

II. NATURE OF THE PROCEEDINGS

The Federal District Court. Frost was indicted in federal court for murder under 18 U.S.C. § 1114 (2018). R. at 4. She was found competent to stand trial after a further evaluation of her mental state and given the medication Dr. Frain prescribed. R. at 4. Dr. Frain testified that it was "highly probable" that Frost was in a psychotic state and suffering from severe delusions and paranoia between June 16 and June 17. R. at 4. Dr. Frain opined that—although Frost could not understand the wrongfulness of her actions or control her behavior during those few days—she intended to kill Smith and knew she was committing the murder. R. at 4. Nonetheless, Frost was acquitted based on a viable defense under federal law under 18 U.S.C. § 17(a) (2018), which incorporates the traditional *M'Naghten* insanity formulation.[1] R. at 4.

[1] The federal law provided an insanity defense based on the two-part test announced in *M'Naghten's Case* (1843) 8 Eng. Rep. 718 (H.L.). *See Clark v. Arizona*, 548 U.S. 735, 756 (2006). The first part of the *M'Naghten* test points to cognitive capacity: "whether a mental

The Campton Roads Circuit Court. After Frost's acquittal in federal court, the Commonwealth prosecuted her for the murder of Smith. R. at 4. Frost was again deemed competent to stand trial. R. at 4. This time, however, Frost was tried under East Virginia Code § 21-3439, a law the state legislature adopted in 2016 that abolished the traditional *M'Naghten* rule for insanity for a *mens rea* approach. R. at 4. Under this new legislation, evidence of a mental disease or defect is admissible to disprove competency to stand trial or the *mens rea* element of an offense, but defendants could no longer assert the lack of ability to know right from wrong as a defense. R. at 4. The evidence is admissible to assess the appropriate punishment.[2] R. at 4.

Frost's attorney—Noah Kane—moved to suppress her confession alongside a motion asking the trial court to hold that East Virginia's abolition of the insanity defense violated the Eighth and Fourteenth Amendments. R. at 5. Circuit Court Judge Joshua Hernandez denied both motions. R. at 5. He determined that—although Frost did not understand either her *Miranda* rights or the consequences of signing the waiver form—she initially appeared to the interrogating officer to be objectively lucid and capable of waiving her rights. R. at 5. Judge Hernandez also determined that East Virginia's new *mens rea* approach to murder convictions violated neither the Eighth nor Fourteenth Amendments. R. at 5. The jury convicted Frost of murder and

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defect leaves a defendant unable to understand what he is doing." *Id.* at 747. The "second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong." *Id.*

[2] The new legislation follows the approach of other states. Kansas was the cited example. R. at 4 (citing *State v. Kahler*, 410 P.3d 105, 124 (Kan. 2018), *cert. granted*, 139 S. Ct. 1218 (2019) (No. 18-6135)). Under Kansas law, the extent of a criminal defendant's moral culpability is still be relevant in determining the appropriate punishment. *See* Kan. Stat. Ann. § 21-6815(c)(1)(C) (West 2017); Kan. Stat. Ann. § 21-6625(a)(6) (West 2017).

recommended she be sentenced to life in prison. R. at 5. Judge Hernandez accepted the jury's recommendation. R. at 5.

The East Virginia Supreme Court. Frost appealed her murder conviction, contending that her Fifth, Eighth, and Fourteenth Amendment rights had been violated. R. at 1. The court affirmed the judgment of the circuit court. R. at 1.

In affirming the circuit court's denial of the motion to suppress Frost's confession, the state supreme court reasoned that the focus is not whether Frost's mental impairment prevented her from understanding her *Miranda* rights but instead whether a reasonable officer would believe Frost appeared to understand her rights and subsequently interrogated her based on that objective understanding. R. at 6. The court held that Frost's waiver of her *Miranda* rights was valid, and her confession was admissible. R. at 7.

The court also held that the state's adoption of a *mens-rea*-based insanity defense violated neither the Eighth Amendment nor the Fourteenth Amendment to the Constitution. R. at 9. The majority concluded that East Virginia's statute did not expressly make mental disease a criminal offense. R. at 9. It held that the statute furthered the goal of protecting society and did not violate the fundamental principles of justice, due process, or the cruel and unusual punishment provisions of the Eighth Amendment. R. at 8.

Chief Justice Evans dissented to the decision to affirm the judgment of the circuit court on both grounds. R. at 9.

SUMMARY OF THE ARGUMENT

I.

Frost's confession was properly admitted for a number of reasons.

First, Frost was not in custody, meaning the validity of her waiver is inconsequential because the administration of *Miranda* warnings is only required in a custodial setting. She was brought into the Campton Roads Police Department after officers received an anonymous tip. The record does not indicate that Frost was detained or arrested until after she spoke with police. Officer Barbosa's decision to administer Frost's *Miranda* warnings does not transform a routine police questioning into a custodial-interrogation that invokes the privileges of the Fifth Amendment. Accordingly, Frost's statements were admissible.

Second, even if Frost was in custody, her statements were volunteered and thus not the product of a custodial interrogation. *Miranda* does not protect volunteered statements. General questioning about the details of criminal activity is not considered coercive police conduct, nor is asking a non-specific question about a recent criminal event. Frost's unprompted response of "I did it" following Officer Barbosa's generic line of questioning was not elicited by police intimidation. It was spontaneously volunteered, meaning it was admissible regardless of whether Frost's *Miranda* waiver was valid.

Finally, even if Frost participated in a custodial interrogation invoking the privileges of the Fifth Amendment, her *Miranda* waiver was valid. Because the underlying purpose of *Miranda* was to deter constitutionally impermissible police practices, the question involving a *Miranda* waiver is whether a police officer believed a suspect understood their rights and was competent enough to waive them. Officer Barbosa testified that Frost showed no signs of lessened mental

capacity and appeared capable of competently understanding and waiving her rights. Therefore, Frost's *Miranda* waiver was valid.

II.

East Virginia's decision to channel evidence of a criminal defendant's ability to appreciate the morally blameworthiness of her conduct to the punishment phase of a criminal trial—as opposed to allowing it as an affirmative defense in the guilt-innocence phase—did not violate Frost's constitutional rights.

Frost's conviction does not violate the Due Process Clause because the right-from-wrong aspect of the *M'Naghten* insanity standard is not so rooted in the traditions and conscience of the American people to where it has become fundamental. For that reason, it is not constitutionally required in determining criminal liability.

Forcing states to adopt an affirmative defense adhering to the two-part insanity standard set out in *M'Naghten* would override the well-recognized sovereign authority to decide what is classified as criminal conduct, hindering the ability of citizens and legislatures to adapt to new developments in psychiatric science. It would also ignore the fact that mental culpability is not inherently required to impose criminal liability on an individual, as evidenced by the swathe of strict liability legislation that states have passed in recent decades. Additionally, it would be the first time this Court has ever held that affirmative defenses are protected by the Due Process Clause.

East Virginia's *mens rea* model still provides an effective defense for those suffering from mental disorders. Criminal defendants may present evidence of mental illness, and, if that mental illness had prevented Frost from understanding the nature and quality of her act, her actions would have been excused as she lacked the requisite intent to be held liable for her actions. Here,

however, Frost knew she was stabbing Smith. The reason why she did it, under East Virginia law, is considered when assessing punishment. Nothing in the Due Process Clause prohibits the State of East Virginia from channeling moral capacity evidence in this manner.

Nor does Frost's conviction violate the Cruel and Unusual Punishment provision in the Eighth Amendment. Depriving a criminal defendant of an affirmative defenses is not a "punishment" and therefore falls outside the Eighth Amendment's scope. Nonetheless, neither line of Eight Amendment jurisprudence would be implicated. This is not the rare circumstance where East Virginia's *mens rea* model goes against evolving standards of decency because no particular approach to an insanity defense has emerged over the last half-century. Likewise, this was not a common law right at the time of the nation's founding. In fact, the *M'Naghten* decision itself was not handed down until 1843.

Accordingly, this Court should affirm the judgment of the Supreme Court of East Virginia.

ARGUMENT AND AUTHORITIES

This appeal involves constitutional challenges to a murder conviction. Because the issues involve purely legal questions, a reviewing court applies a de novo standard of review. *See Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966) (Fifth Amendment); *Clark v. Arizona*, 548 U.S. 735, 756 (2006) (Fourteenth Amendment); *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Eighth Amendment).

I. THE ADMISSION OF FROST'S CONFESSION DID NOT VIOLATE HER FIFTH AMENDMENT RIGHTS.

Frost first challenges her murder conviction based on the use of her confession. She does not contend that the police engaged in coercive activities to obtain her confession. Nor does she complain that police failed to properly warn her of her *Miranda* rights. She does not even dispute

that she appeared lucid, that she signed a written waiver, and told the officer she understood her rights. R. at 2. Nonetheless, she asserts—based upon a subsequent diagnosis of schizophrenia—that her volunteered statements should have been suppressed at trial. In her view, when she blurted out "I did it" to police, she could not fully understand the consequences of her statements even though she received *Miranda* warnings and alleges no police coercion. The East Virginia Supreme Court correctly found no constitutional violation under the circumstances.

A. *Miranda* Rights Were Not Required Because Frost Did Not Participate in a Custodial Interrogation.

To be sure, individuals taken into custody or otherwise deprived of their freedom and subjected to questioning should have certain procedural safeguards including the "right to remain silent, that anything [they] say can be used against [them] in a court of law, that [they] have the right to the presence of an attorney, and that if [they] cannot afford an attorney one will be appointed for [them] prior to any questioning if [they] so desire." *Miranda*, 384 U.S. at 478–79 (citing U.S. Const. amend. V). Unless those warnings and a waiver of those Fifth Amendment privileges are demonstrated by the prosecution at trial, "no evidence obtained as a result of interrogation can be used . . . ." *Id.* at 479.

But the obligation to administer *Miranda* warnings only "attaches . . . where there has been such a restriction on a person's freedom as to render him in custody." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curium)) (internal quotation marks omitted). This Court need not address whether Frost validly waived her *Miranda* rights before Officer Barbosa interviewed her because she was not entitled to *Miranda* warnings—she was not "in custody" for purposes of *Miranda*. A law enforcement officer is obligated to give a suspect *Miranda* warnings before interrogating them only they she is "in custody." *Thompson v. Keohane*, 516 U.S. 99, 102 (1995).

Frost was not. She was brought in "for questioning" by the Campton Roads Police Department. R. at 2. Therefore, Officer Barbosa was not required to administer Frost's *Miranda* warnings in the first place, as there was no "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury*, 511 U.S. at 322.

Initial custody determinations depend on the objective circumstances of the interrogation, "not on the subjective views harbored by either the interrogating officers or the person being questioned. *Id.* at 323. For example, the defendant in *Beckwith v. United States*—without being read his *Miranda* rights—made incriminating statements to officers during an interview in a private home. 425 U.S. 341, 342–43 (1976). He subsequently asked that *Miranda* "be extended to cover interrogation in non-custodial circumstances after a police investigation has focused on the suspect." *Id.* at 345. This Court refused the petitioner's proposition, ruling that "although the focus of an investigation may indeed have been on Beckwith at the time of the interview . . . he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding." *Id.* at 347 (internal quotation marks omitted).

This Court's opinion in *Berkemer v. McCarty* reaffirmed the *Beckwith* decision. 468 U.S. 420 (1984). *Berkemer* involved the roadside questioning of a motorist detained in a traffic stop. *Id.* at 424. Even though the traffic officer "apparently decided as soon as [the motorist] stepped out of his car that [the motorist] would be taken into custody and charged with a traffic offense," *Id.* at 442, this Court ruled that the motorist was not in custody for *Miranda*. *Id.* The officer "never communicated his intention" to the motorist during the questioning, a crucial aspect of the situation considering that under *Miranda* "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time." *Id.* This Court

determined that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.*

Frost—like the petitioners in *Berkemer* and *Beckwith*—was not in custody when she made incriminating statements about Mr. Smith's death. The Campton Roads Police brought her in for questioning after the Department received an anonymous tip. The record does not suggest that her freedom of movement was restrained. In fact, no formal arrest of Frost took place until after police officers discovered a bloody steak knife in Lorel Park that matched a knife set in Frost's home. R. at 3. Even if Frost or Officer Barbosa subjectively believed she was in custody at the time of the alleged interrogation, this Court and several circuit courts have held that the subjective views harbored by either the interrogating officer or the person being questioned are irrelevant in determining whether a person is in custody for *Miranda* purposes. *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011); *United States v. Ortiz,* 781 F.3d 221 (5th Cir. 2015); *United States v. Hughes*, 640 F.3d 428, 437 (1st Cir. 2011).

Moreover, Officer Barbosa's decision to read Frost her rights did not transform her non-custodial questioning into a custodial interrogation. *See United States v. Charles*, 738 F.2d 686, 693 (5th Cir. 1984) (recognizing that, although the investigator "had to feel that the circumstances were such that *Miranda* warnings were required," the court ruled the appellants were not in custody at the time of their confessions). Administering *Miranda* rights out of an abundance of caution in what is thought to be a non-custodial interview "should not be deterred by interpreting the giving of such rights as a restraint on the suspect, converting a non-custodial interview into a custodial interrogation for *Miranda* purposes." *United States v. Lewis*, 556 F.2d 446, 449 (6th Cir. 1977); *see also United States v. Bautista*, 145 F.3d 1140, 1143–44 (10th Cir.

1998) (holding that reading of *Miranda* warnings to a suspect does not create a custodial interrogation).

Because she was not in custody when she confessed to killing Smith, the admission of Frost's statement did not violate her Fifth Amendment rights. The motion to suppress was properly denied on this basis alone.

B. Frost's Confession Was Admissible Because Her Statements to Officer Barbosa Were Volunteered and Not the Product of Interrogation.

The spontaneous nature of Frost's statements also provides an independent justification for admitting her confession without evaluating the voluntariness of her waiver. In *Miranda*, this Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. The Court expanded upon this definition in *Rhode Island v. Innis*, where it held that the term "interrogation" under *Miranda* refers "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. 291, 301 (1980).

When she blurted out, "I did it. I killed Chris," she volunteered those statements. And the Fifth Amendment does not require suppression of such incriminating statements because they are not the product of police interrogation. *Miranda*, 384 U.S. at 478. Frost's sudden declaration of guilt was not elicited by police coercion. As such, it is beyond *Miranda*'s protections. *Id.* ("Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.").

The fact that Officer Barbosa asked who might be responsible for Smith's murder does not change the analysis. R. at 3. The question did not suggest her involvement in the murder. It was

neutral. A question that is not likely to elicit an incriminating response is not inherently coercive and therefore does not "trigger the protections of *Miranda*." *Bogle v. United States*, 114 F.3d 1271, 1275 (D.C. Cir. 1997) (refusing to suppress confession to murder spontaneously made in response to question about defendant's brother). General questioning about the details of criminal activity does not rise to the level of "compulsion above and beyond that inherent in custody itself." *Innis*, 466 U.S. at 299; *see also United States. v. Castro*, 723 F.2d 1527, 1533 (11th Cir. 1984) (refusing to suppress the defendant's attempted bribery of an officer in response to query regarding what was going on inside house); *State v. Riggs*, 987 P.2d 1281 (Utah Ct. App. 1999) (refusing to suppress admission that he had stolen the car he was driving when officer asked only about details of an automobile accident). And there is no per se rule that the fact that a defendant is in custody requires excluding responses to all questions. *Bogle*, 114 F.3d at 1275.

Accordingly, Frost's statements were either volunteered or not responsive, meaning they cannot be considered to be obtained through coercive police tactics. Because volunteered and non-responsive statements are not protected by *Miranda*, this Court need not consider whether Frost's waiver was valid.

C. Frost's Waiver Was Proper Because Officer Barbosa Did Not Knowingly Disregard Signs That She Did Not Understand Her Rights.

Alternatively, if this Court determines that Frost's statements were made during a custodial interrogation and were not volunteered, Frost validly waived her *Miranda* rights. "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment, it goes no further than that." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

For a waiver to be valid, a suspect must make a voluntary, knowing, and intelligent waiver of her rights. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). The inquiry into whether a waiver was voluntary, knowing, and intelligent is twofold:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver 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. 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.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

The link between voluntariness and due process guarantees was explained in *Connelly*, 479 U.S. 157. There, a psychotic man approached police and declared that he had committed a murder and wanted to talk about it. *Id.* at 161. After the man was advised of his *Miranda* rights twice, he told his story, offering many details about a murder. *Id.* Ultimately, the state courts suppressed his confession on the ground that the man's psychosis precluded him from making free and rational choices. *Id.*

In the Colorado Supreme Court's opinion, such circumstances rendered the suspect's confession involuntary, even though the police did nothing coercive. *Id.* at 162–63. The root concern was not police misconduct but the arrestee's mental condition. *Id.* at 163. The state supreme court found that the arrestee's condition prevented him from choosing not to make a statement because his condition prevented her from understanding the *Miranda* warning. *Id.*

This Court reversed. *Id.* at 167. Specifically, this Court declared that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id. Connelly* sets a clear

constitutional baseline for determining whether a confession is involuntary for due process purposes—there must be "coercive police activity"—at a minimum. The presence or absence of coercive police activity is not simply one factor among many that courts are to consider. While courts may consider a variety of factors in determining whether police coercion occurred, police coercion is the ultimate inquiry, not just a factor in a "voluntariness" analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 288 n.3 (1991) (recognizing that the terms "coerced confession" and "involuntary confession" interchangeably as "convenient shorthand").

Of course, while *Connelly* involved the Fourteenth Amendment, this case involves *Miranda*. But both are simply procedural safeguards, not rights in and of themselves. *See Michigan v. Tucker*, 417 U.S. 433, 444 (1974) ("The Court recognized [in *Miranda*] that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected . . . ."). The sole concern of the Fifth Amendment, upon which *Miranda* was based, is governmental coercion. *United States v. Washington*, 431 U.S. 181 (1977). The voluntariness of a waiver of the Fifth Amendment privilege "has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Connelly*, 479 U.S. at 170.

The underlying purpose of *Miranda* was to "reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation." *New York v. Quarles*, 467 U.S. 649, 656 (1984). Thus, the administration of *Miranda* rights to those subjected to custodial interrogation curbs police malfeasance, meaning that the question is not "whether if [the defendant] were more intelligent, informed, balanced, and so forth he would not have waived his *Miranda* rights, but whether the police believed he understood their explanation of those rights; more precisely, whether a reasonable state court judge could have found that the

police believed this." *Rice v. Cooper*, 148 F.3d 747, 750–51 (7th Cir. 1998). Accordingly, this Court should find that—because of the police-regulatory purpose of *Miranda*—the circumstances surrounding a waiver of rights be "examined, in their totality, primarily from the perspective of police." *Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir. 2009).

Frost's waiver of her *Miranda* rights—properly analyzed through the lens of Officer Barbosa's objective testimony—was valid. Officer Barbosa testified "that nothing about Frost's demeanor at the beginning of the interrogation raised any concern or suspicions about her competency." R. at 2. Moreover, Officer Barbosa did not engage in questioning that was overtly coercive or intimidating. Law enforcement officers are not trained in psychiatric science, and they should not be expected to complete a comprehensive mental health evaluation every time they read a person the *Miranda* rights. If an officer objectively determines—through non-coercive tactics—that a person is mentally competent enough to waive their rights, the requirements of *Miranda* are satisfied.

Judge Posner of the Seventh Circuit explained that Connolly does not permit the police to knowingly disregard obvious signs the defendant does not understand her rights. *Rice*, 148 F.3d at 750. In describing the rule, he stated that the

> relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers. From this it might be argued that officers are free to recite the standard *Miranda* warnings to anyone they arrest, regardless of the person's evident mental condition, and to accept the person's waiver. But this has to be wrong, though we cannot find a case that says so.

Id. Here, Officer Barbosa ignored nothing. To the contrary, he testified that Frost appeared lucid, heard her *Miranda* warnings, she signed a written waiver, and stated she understood her rights

before blurting out a confession. Any reasonable officer would have reached the conclusion Officer Barbosa did—that Frost understood and waived her rights.[3]

D. Because Officer Barbosa Acted in Good Faith and Fully Complied with *Miranda*, the Voluntary Statement Should Not Be Suppressed Due to Later Statements or Subsequent Psychiatric Evidence That Frost Did Not Subjectively Understand the *Miranda* Warnings.

Frost's statements about chickens and the fact a psychiatrist later determined she suffered from schizophrenia do not alter the analysis. The critical focus is on what Officer Barbosa knew and that knowledge is evaluated when he gave the *Miranda* warnings.

This Court required police to issue the now famous *Miranda* warnings because it was concerned that the police were using psychological—and sometimes physical—coercion to obtain statements from the accused. 384 U.S. at 447–54 (discussing techniques employed by police departments). The *Miranda* warnings are designed to remind the accused of her Fifth Amendment right to remain silent and to provide the accused with tools to combat the inherently compelling pressures of custodial interrogations. *Id.* at 467. These warnings limited a police officer's ability to coax incriminating statements, thus ensuring that any future trial would be

[3] Other courts have applied *Connelly* in the same manner. *See Garner v. Mitchell*, 557 F.3d 257, 262 (6th Cir. 2009) (finding no *Miranda* violation because "police officers had no indication that Garner's age, experience, education, background, and intelligence may have prevented him from understanding the *Miranda* warnings"); *United States v. Annis*, 446 F.3d 852, 856 (8th Cir. 2006) (finding police did not violate *Miranda* by interviewing suspect in significant pain where police did not know about the suspect's physical condition); *Smith v. Mullin*, 379 F.3d 919, 934–35 (10th Cir. 2004) ("Mr. Smith's mental impairments are nonetheless relevant to our scrutiny of his interrogation because they enhance his 'susceptibility to police coercion.' . . . Police may not 'exploit this weakness with coercive tactics.'"); *United States v. Cristobal*, 293 F.3d 134, 141 (4th Cir. 2002) (finding no *Miranda* violation in interviewing suspect on morphine where police engaged in significant efforts to ensure that the suspect understood his rights and was a willing participant in the conversation); *United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995) (holding statement would be found involuntary if "agents took advantage of [a suspect's] mental illness"); *United States v. Raymer*, 876 F.2d 383, 386–87 (5th Cir. 1989) ("Police exploitation of the mental condition of a suspect, using 'subtle forms of psychological persuasion,' could render a confession involuntary.").

consistent with due process. *Connelly*, 479 U.S. at 167 ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.").

In determining if a waiver was the product of a free and deliberate choice as opposed to the product of police coercion, the relevant time for purposes of determining police coercion is when the *Miranda* warnings are administered. The facts of *Connelly* illustrate this point. There, a mentally ill man experiencing command hallucinations approached a police officer and volunteered that he had murdered someone. 479 U.S. at 160. After receiving *Miranda* warnings from two different police officers, the suspect admitted to murdering a young girl nine months earlier and he showed the police the location of the crime. *Id.* at 160–61. The Court held that the defendant's statement did not violate *Miranda*'s voluntariness requirement because the police did not know—and had no way of knowing—that the suspect suffered from a mental illness that interfered with his ability to make "free and rational choices." *Id.* Therefore, the Court refused to suppress the statements. *Id.*

The Fifth Amendment does not protect a defendant from a confession which is the product of her mental state. Frost is not entitled to suppress a statement under *Miranda* merely by claiming—after the fact—that her mental problems vitiated her knowledge or understanding rather than her voluntariness. Frost cannot claim that the police somehow prevented her from understanding, or should have known she did not understand the *Miranda* warnings.

II. SECTION 21-3439, WHICH ADOPTS A *MENS REA* APPROACH TO CAPACITY DETERMINATIONS IN PLACE OF THE TRADITIONAL *M'NAGHTEN* FORMULATION, IS CONSTITUTIONAL.

Frost next challenges her murder conviction because East Virginia law permits convictions of a defendant who killed a person and meant to do so but believed due to mental illness that the killing was morally justified. The State of East Virginia has decided to treat mental illness as an excuse for criminal conduct only when it creates reasonable doubt as to the defendant's criminal *mens rea*. *See* R. at 4. Evidence regarding Frost's comprehension of right and wrong was not irrelevant. That evidence was considered in determining *why* she committed the murder, not in determining *whether* she committed the murder. The jury could have considered the evidence in determining that a life sentence was the appropriate punishment.[4] But during the guilt-innocence phase, her inability to appreciate the wrongfulness of her actions was not a defense to criminal liability under East Virginia law. R. at 4.

[4] This appeal focuses on East Virginia's decision to limit the type of evidence Frost could introduce during the guilt-innocence portion of her trial, and, for that reason, the record is largely silent as to what occurred during the punishment phase. It simply provides that the jury recommended a life sentence and that the trial court followed that recommendation. R. at 4. It does not state whether Dr. Frain's testimony was considered during sentencing, much less whether it was offered. Likewise, the record only contains portions of East Virginia law but specifically notes that it "follows the lead" of the other states using the *mens rea* approach. R. at 4. Each of those state statutory schemes permits the defendant to introduce evidence during the punishment phase regarding a claim that mental illness caused a belief the prohibited conduct was morally justified. Alaska Stat. § 12.47.020 (West 2018); Idaho Code Ann. § 18-2523 (West 2016); Kan. Stat. Ann. § 21-6815(c)(1)(c) (West 2017); Mont. Code Ann. § 46-14-311 (West 2017); Utah Code Ann. § 76-3-207 (West 2017). This is consistent with this Court's recognition that a defendant's motive for committing the offense is an "important factor" at sentencing. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (citing 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.6(b), at 324 (1986) ("Motives are most relevant when setting the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives")).

Frost contends that States are constitutionally required to measure insanity based on whether she could tell right from wrong. *See* R. at 5. They are not.

A. Section 21-3439 Does Not Violate Due Process.

Frost argues that East Virginia's decision not to use the traditional *M'Naghten* formulation of the insanity defense violates her rights guaranteed by the Fourteenth Amendment's Due Process Clause. R. at 5; U.S. Const. amend. XIV ("No person may be deprived of life, liberty, or property without due process of law."). The first part of the *M'Naghten* test points to cognitive capacity: "whether a mental defect leaves a defendant unable to understand what he is doing." *Clark*, 548 U.S. at 747. The "second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong." *Id.* Thus, the question is whether the second moral capacity aspect of *M'Naghten*—which East Virginia does not consider in the guilt-innocence phase—is mandated by the Due Process Clause to be considered in determining criminal liability.

To prevail on such a constitutional challenge, Frost must show that the consideration of moral capacity evidence in determining guilt is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted). She cannot meet that burden.

1. *Clark* held that due process does not require States to use the traditional *M'Naghten* formulation in making capacity determinations.

Thirteen years ago, this Court rejected an attempt to create a constitutional right to a particular insanity or mental illness defense. In *Clark v. Arizona*, a paranoid schizophrenic killed a law enforcement officer who had responded to a noise complaint in a residential neighborhood. 548 U.S. at 742. The defendant "thought Flagstaff was populated with aliens (some

impersonating government agents), the aliens were trying to kill him, and bullets were the only way to stop them." *Id.* at 745. At trial, the defendant wanted to introduce evidence he did not appreciate what he was doing as a basis for excusing his criminal conduct. *Id.*

But Arizona law no longer provided for an insanity defense based on "the two-part insanity test announced in *M'Naghten's* Case." *Id.* at 746. The Arizona insanity statute provided:

> A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.

Ariz. Rev. Stat. Ann. § 13-502 (2019). Because the Arizona Legislature amended its statute on insanity by "dropp[ing] the cognitive incapacity part" and "leaving only moral incapacity as the nub of the stated definition," the defendant alleged that he was denied due process because the full *M'Naghten* test was constitutionally required. *Clark*, 548 U.S. at 748. This Court held it was not. *Id.* at 779. The Court determined this "channeling of mental disease and capacity evidence" to the punishment phase does not violate due process, nor does it offend any "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*

Clark relied on the traditional recognition that each state can define crimes and defenses. *Id.* at 749; *see McClesky v. Zant*, 499 U.S. 467, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law."). For centuries, states have determined what constitutes criminal conduct through the "doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress" to account for adjustments resulting from "the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." *Clark*, 548 U.S. at 774–75 (quoting *Powell v. Texas*, 392 U.S. 514, 536 (1968) (plurality opinion)). That process is the province of state legislatures. *Id.*

Allowing these adjustments not only honors federalism principles, it also permits "fruitful experimentation" and continued evolution. *Id.* at 536–37. "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment." *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983). As a result, the Due Process Clause provides no basis to adopt the traditional *M'Naghten* two-part formulation as a uniform standard and freeze "into a rigid constitutional mold" the balance struck by the House of Lords in 1843. *Powell*, 392 U.S. at 537 (plurality opinion).

Frost cannot succeed where Clark failed. The two cases differ only as to which aspect of the *M'Naghten* test is at issue. In *Clark*, Arizona law excused criminal conduct of those defendants who could not distinguish right from wrong—the first *M'Naghten* prong. 548 U.S. at 745. Here, East Virginia law excuses criminal conduct of those who cannot understand what they are doing—the second *M'Naghten* prong. R. at 4. If Arizona has the discretion to deviate from the traditional *M'Naghten* formulation, so too does East Virginia.

2. The moral capacity aspect of the *M'Naghten* standard is not so fundamental it is a constitutional requirement when determining criminal liability.

Constitutionalizing the moral-capacity aspect of the *M'Naghten* standard is also unwarranted because it has not had "the uniform and continuing acceptance we would expect for a rule that enjoys fundamental principle status." *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996) (plurality opinion). Frost and the dissent contend that legal insanity is a well-established and fundamental principle of the law. R. at 5, 10. That may be true. But the question is not whether the concept of legal insanity is fundamental under the Due Process Clause, but instead whether the right-from-wrong aspect of the *M'Naghten* rule is constitutionally protected. The defense's lack of uniform adoption and consistent application among the states shows it is not.

Establishing that a fundamental principle exists places a "heavy burden" on the defendant and is primarily guided by historical practice. *Egelhoff,* 518 U.S. at 43. While judicial systems have always considered mental illness in determining criminal responsibility, a historical analysis of the insanity defense reveals no fundamental definition. Indeed, the United States inherited a variety of insanity defenses from the English common law before jurisdictions settled on a right-and-wrong approach. *See* Henry Weihofen, *Insanity as a Defense in Criminal Law* 20–24 (1933) (noting that America inherited the "right and wrong test" that was later articulated in *M'Naghten*, the "wild beast test," and the "irresistible impulse" test). English courts in the Eighteenth and early Nineteenth centuries focused on whether a criminal formed the requisite understanding of his crime, not whether they could decipher right from wrong. *See, e.g., Arnold's Case* (1724) 16 How. St. Tr. 695. In *Arnold's Case,* the court ruled that to obtain an exoneration by reason of insanity, "it must be plain and clear, before a man is allowed such an exemption . . . that [he] is totally deprived of his understanding and memory, and doth not know what he is doing; no more than an infant, than a brute, or a wild beast." *Id.* at 764. Though the justice referenced to Arnold's ability to distinguish "good" and "evil," he did "not make it clear whether inability either to know what he was doing or to know that it was wrong would have excused Arnold; he speaks as if the two went together. It was not until the nineteenth century that they became clearly separate alternative tests." 1 Nigel Walker, *Crime and Insanity in England: The Historical Perspective* 27, 57 (1968).

As the years went on, the terms "right" and "wrong" wove their way into English decisions, but the focus remained on whether individuals could form criminal intent. In 1812, the chief justice in *Bellingham's Case* informed the jury:

> if a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could

> certainly do an act against the law. Such a man, so destitute of all power of judgment, could have no intention at all.

1 Collinson on Lunacy 636, 671 (1812). Until the early 1800s, varying doctrines of *mens rea*—not a right-and-wrong test—"handled the entire problem of the insanity defense" in both English and American courts. Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L. Rev. 477, 500 (1982).

The *M'Naghten* rule was not uniformly followed in the United States either. The first American case to cite *M'Naghten* also referenced the irresistible impulse test,[5] which gained increasing popularity throughout the nineteenth century. *See* Donald H.J. Hermann, *The Insanity Defense: Philosophical, Historical and Legal Perspectives* 38 (1983) (citing *Commonwealth v. Rogers*, 48 Mass. 500, 502 (1844)). Congress did not codify the *M'Naghten* standard into federal law until 1984. *See* 18 U.S.C. § 17(a) (2018). And states use a variety of tests—including the right-and-wrong and *mens rea* approaches—to determine if a mental illness excuses criminal conduct. Some states that follow *M'Naghten* require that a mental disease or defect be "severe." *See, e.g.*, 18 U.S.C. § 17(a) (2018); Ala. Code § 13A-3-1(a) (2019); Ind. Code Ann § 35-41-3-6(b) (West 2019); Ohio Rev. Code Ann. § 2901.01(A)(14) (West 2019); Tenn. Code Ann. § 39-11-501(a) (West 2010). Other states exclude specific conditions like personality disorders. *See* Or. Rev. Stat. § 161.295(1) (West 2018).

This disharmony extends to the centuries-long debate among psychiatrists and legal scholars regarding the "correct" application of the insanity defense. An early Twentieth-century

[5] Under the irresistible-impulse test, an accused, who knew the nature and quality of his act and knew that what he was doing was wrong, could still be excused from criminal responsibility if, because of mental disease or defect, he was irresistibly impelled to do the wrong. *Irresistible Impulse*, 2 *Wharton's Criminal Law* § 102 (15th ed. 2018).

treatise on the criminal responsibility of the insane highlighted the ongoing debate on the applicability and validity of the *M'Naghten* standard:

> The feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing. More than one authority on either side has tried to bring about a reconciliation between the contending parties. But their endeavors have been crowned with very little success. For though it cannot be denied that the strife and warfare has of late lost much of its former bitterness, a *modus vivendi* satisfactory to both parties has not been found.

Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev 535, 535 (1917) (quoting Heinrich Oppenheimer, *The Criminal Responsibility of Lunatics: A Study in Comparative Law* Preface (1909)). In 1916, the American Institute of Criminal Law and Criminology enlisted a committee of law professors, judges, and physicians to agree about the relationship between insanity and criminal responsibility. *Id.* The committee ultimately recommended a *mens rea* approach to insanity. *Id.* Its proposed bill stated:

> No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease or defect and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission to constitute the crime charged.

Id. at 536. In the early 1980s, the American Medical Association advocated for "the abolition of the special defense of insanity in criminal trials, and its replacement by statutes providing for acquittal when the defendant, as a result of mental disease or defect, lacked the state of mind (mens rea) required as an element of the crime charged." American Medical Association, Committee Report, *Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony*, 251 J. Am. Med. Ass'n 2967, 2967 (1984). The association reversed course 20 years later. *See AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 J. Am. Acad. Psychiatry & L. at S6 (2014 Supp.).

This Court's noted in *Clark* that "[h]istory shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle." 548 U.S. at 749. Thirteen years of disagreement has not changed that fact, particularly regarding the right-and-wrong component of the *M'Naghten* rule. The right-and-wrong test of *M'Naghten* has neither been uniformly adopted nor consistently applied. It is by no means a principal 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).

B. Section 21-3439 Does Not Violate the Eighth Amendment's Ban on Cruel and Unusual Punishments.

Frost also contends that East Virginia's decision not to use the traditional *M'Naghten* formulation violates the Eighth Amendment's prohibition of cruel and unusual punishment. R. at 5; U.S. Const. amend. VIII. But her claim fails because she satisfies neither of the two tests this Court has used to evaluate Eighth Amendment claims. She can neither establish that convicting a defendant without moral capacity was among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1789. *Ford v. Wainwright*, 477 U.S. at 405, nor that it violates "fundamental human dignity" as reflected in "evolving standards of decency." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

1. Frost's challenge to the substantive scheme under which she was convicted does not implicate the Eighth Amendment's ban on "punishments."

As a threshold matter, Frost's challenge fails because she is complaining about the substantive law used to convict her, not a "mode or act[] of punishment" that could trigger the Eighth Amendment. Specifically, her claim relates to East Virginia's decision to adopt a *mens rea* approach to capacity determinations. The opinion below only mentions her sentence to

explain what the jury determined was the appropriate sentence. R. at 5. None of the substantive arguments involve the resulting punishment.

The Eighth Amendment "has always been considered . . . to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed." *Powell*, 392 U.S. at 531–32 (plurality opinion). The Eighth Amendment in its entirety reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual *punishments* inflicted." U.S. Const. amend. VIII. Thus, the text speaks only to the end result of Frost's prosecution, not the underlying criminal law used to warrant it. *See Harmelin v. Michigan*, 501 U.S. 957, 978 (1991) (opinion of Scalia, J., in which Rehnquist, C.J., joined) (analyzing the evidence reflecting the original intent of the Cruel and Unusual Punishments Clause and concluding that the clause merely prohibits certain "modes of punishment").

Because Frost's punishment is not at issue, her appeal does not implicate the Eighth Amendment's ban on cruel and unusual punishments.

2. The *M'Naghten* standard did not exist when the Bill of Rights was adopted.

Even if the Eighth Amendment did apply here, Frost cannot establish a sentence resulting from application of the *mens rea* approach to insanity determinations would not have been considered cruel and unusual at the time of the Founding—the analysis used in the first line of Eighth Amendment cases. The Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment considered cruel and unusual when the Bill of Rights was adopted because the Framers took the Eighth Amendment's language from the language of the English Bill of Rights. *See Solem v. Helm*, 463 U.S. 277, 286 (1983) ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its

English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection . . . ."). But the standard Frost asks this Court to adopt was the product of the 1843 murder trial of Daniel M'Naghten. The standard was not part of English law when the Framers adopted the English Bill of Rights in 1789.

There, M'Naghten acted under a delusion that a political party was persecuting him when he shot and killed the private secretary to the British Prime Minister. *See* Richard Moran, *Knowing Right from Wrong: The Insanity Defense of Daniel McNaughtan* 1 (1981). M'Naghten claimed he could not be found guilty of "any act committed while he was labouring under a delusion, regardless of whether the act was a direct product of that delusion." *Id.* The jury acquitted M'Naghten, finding him "not guilty on the grounds of insanity." *Id.* After the public outrage that followed the verdict, the House of Lords asked the "Queen's Bench to answer five questions regarding the proper formulation of the insanity defense." *Id.* Those answers became known as the *M'Naghten* Rules, and the following instruction was codified as the legal standard in England for the insanity defense:

> [To] establish a defense on the grounds of insanity, it must be clearly proven that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 8 Eng. Rep. at 722.

M'Naghten's right-and-wrong test did not develop until the Nineteenth Century, over 50 years after the Bill of was ratified. Thus, sentencing a murderer who intentionally killed a person but believed due to mental illness that her acts were morally justified was not considered cruel and unusual at common law.

3. The evolving standards of decency require no particular approach to determine when mental illness excuses criminal liability.

The analysis from the second line of Eighth Amendment cases is equally unavailing. Frost cannot show that punishing her under East Virginia's statutory scheme—which permits convictions for intentional criminal acts even when mental illness causes her to believe the conduct was morally justified—violates this society's "evolving standards of decency." *Trop*, 356 U.S. at 101 (plurality opinion). She cannot meet that onerous burden.

As an initial matter, Frost's argument mistakenly presupposes that East Virginia has "abolished" the insanity defense and that she is an "insane" person. Neither premise is true. East Virginia has not abolished the insanity defense. Rather, as Kansas did, East Virginia simply moved the consideration of moral capacity evidence—other than what proves a lack of cognitive capacity—to the punishment phase of the trial. A trial under East Virginia law still encompasses both aspects of the *M'Naghten* standard, just at different times. Cognitive capacity is considered during guilt-innocence. Moral capacity, like other motivating factors, is considered during sentencing.

East Virginia may define the parameters of its criminal laws as it sees fit. *See Powell*, 392 U.S. at 535–36 (plurality opinion); *id.* at 545 (Black, J., concurring) (observing that it would be "indefensib[le]" to "impos[e] on the States any particular test of criminal responsibility"). And it did so. This knowing and voluntary act is properly subject to prosecution just as it would be for the conduct of terrorists who believe their intentional acts are morally justified for religious reasons or the conduct of those shooting abortion doctors who believe their intentional acts are morally justified to protect the unborn. A defendant who killed a person and meant to do so but believed due to mental illness that the killing was morally justified is not "insane" under East Virginia law.

But even accepting her faulty premise, Frost's claim still fails the two-pronged proportionality test this Court articulated in *Graham v. Florida*:

> The Court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of 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.

560 U.S. 48, 61 (2010) (internal citations and quotation marks omitted).

As to the first prong of the *Graham* test, no national consensus forecloses the use of a *mens rea* approach to capacity determinations. State legislatures have adopted various standards for when mental illness excuses criminal liability. Six state legislatures—in East Virginia, Alaska, Idaho, Kansas, Montana, and Utah—use a diminished capacity failure of proof approach, under which criminal defendants may introduce evidence relating to mental disease or defect only insofar as it relates to negating the specific intent of the charged crime.[6] The North Dakota Legislature adopted a standard under which the insanity determination turns whether the defendant's conduct resulted from "a serious distortion of the [defendant's] capacity to recognize reality." N.D. Cent. Code Ann. § 12.1-04.1-01(1)(a) (2012). Nine state legislatures adopted the American Law Institute's Model Penal Code, which dictates that individuals cannot be criminally liable for their actions if they lacked "substantial capacity either to appreciate the criminality of [their] conduct or to conform [their] conduct to the requirements of law."[7] I Model

[6] E. Va. Code § 21-3439 (2016); *see also* Alaska Stat. § 12.47.010(a) (West 2018); Idaho Code Ann. § 18-207 (West 2016); Kan. Stat. Ann. § 21-5209 (West 2017); Mont. Code Ann. § 46-14-102 (2017); Utah Code Ann. § 76-2-305 (West 2017).

[7] Ark. Code Ann § 5-2-312 (West 2017); Conn. Gen. Stat. Ann § 53a-13 (West 2019), Haw. Rev. Stat. Ann § 704-400 (West 1993); Ky. Rev. Stat. Ann. § 504.020(1) (West 2012); Md. Code Ann. Crim. Proc. § 3-109(a) (West 2019); Mich. Comp. Laws Ann. § 768-21a(1) (West 2014);

Penal Code and Commentaries § 4.01(1), at 163 (Am. Law Inst. 1985). And sixteen state legislatures adopted the *M'Naghten* standard.[8]

Beyond that, a showing of evolving standards of decency requires more than merely observing that most states have legislation leaning for one viewpoint as opposed to another. This Court recognized as much in its decision in *Atkins v. Virginia*, when it stated that "[i]t is not so much the number of . . . States that is significant, but the consistency of the direction of change." 536 U.S. 304, 315 (2002). *Atkins* was decided 12 years after this Court first ruled in *Penry v. Lynaugh* that the execution of mentally ill persons convicted of capital offenses did not stand in contrast to evolving standards of decency at the time and thus did not violate the Eighth Amendment. 492 U.S. 302, 340 (1989). Over that time span, "much [had] changed" regarding the nation's consensus on sentencing mentally ill convicts to death. *Atkins*, 536 U.S. at 315. This Court recognized that more than a dozen states outlawed the practice, which had "become truly unusual" to where "a national consensus [had] developed against it." *Id.* at 316.

Here, East Virginia's *mens rea* approach follows the trend of legislative change. Since the 1960s, five states have refused to apply both prongs of the *M'Naghten* standard. *See* Alaska Stat. Ann. § 12.47.010(a) (West 2018) (adopted in 1982); Idaho Code Ann. § 18-207 (West 2016) (adopted in 1982); Kan. Stat. Ann. § 22-3220 (West 2017) (adopted in 1995); Mont. Code Ann.

Or. Rev. Stat. Ann. § 161.295(1) (West 2018); Vt. Stat. Ann. tit. 13, § 4801(a)(1) (West 2019); Wyo. Stat. Ann. § 7-11-305(b) (West 2019).

[8] Ala. Code § 13A-3-1 (2019); Ariz. Rev. Stat. Ann. § 13-502 (2019); Cal. Penal Code § 25 (West 2019); Fla. Stat. Ann. § 775.027 (West 2019); Iowa Code § 701.4 (West 2019); La. Code Civ. Proc. Ann. art. 14 (2018); Minn. Stat. Ann. § 611.026 (West 2018); N.J. Stat. Ann. § 2C:4-1 (West 2016); Okla. Stat. tit. 22, § 1176 (2014); 18 Pa. Cons. Stat. Ann. § 315 (West 2014); S.C. Code Ann. § 17-24-20 (2014); S.D. Codified Laws § 22-5-10 (2013); Tenn. Code Ann. § 39-11-501 (West 2010); Wash. Rev. Code Ann. § 9A.12.010 (West 2018); Wis. Stat. Ann. § 971.15 (West 2019). Other states have adopted the *M'Naghten* standard through court decisions. *See, e.g.*, *White v. Commonwealth*, 636 S.E.2d 353, 356 (Va. 2006).

§ 46-14-102 (West 2017) (adopted in 1967); Utah Code Ann. § 76-2-305(1) (West 2017) (adopted in 1983). Moreover, all jurisdictions—including those with a moral capacity defense—have adopted strict liability criminal offenses that apply despite a defendant's moral capacity. *See, e.g.*, Colo. Rev. Stat. Ann. § 18-3-106 (West 2019) (vehicular homicide). If anything, this uniform statutory movement emphasizes that states are more than willing to impose criminal liability regardless of whether someone understands the morality of their actions.

East Virginia does not have the burden to establish a "national consensus approving what their citizens have voted to do." *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989). Frost has the "heavy burden to establish a national consensus against it." *Id.* She cannot satisfy it because state legislatures cannot agree to a single standard for determining when mental illness excuses criminal conduct. The divergent standards are products of each State's right to set its own criminal law standards. Thus, the evolving standards of decency do not weigh against the approach East Virginia chose.

As to the second prong of the *Graham* test, the analysis weighs against Frost's Eighth Amendment claim as well because Frost cannot meet the onerous burden of showing that East Virginia has no legitimate basis for implementing the standard it did.

The East Virginia Legislature could reasonably conclude that defendants who voluntarily and intentionally kill another are not entirely blameless, even if they cannot recognize the criminal acts as wrong. In this circumstance, some punishment is appropriate to protect the public and to serve the purpose of retribution. Undoubtedly, a defendant's mental illness may affect the extent of her culpability and is rightfully considered at sentencing in East Virginia. And a state may determine that the appropriate punishment includes mental health treatment

during the term of incarceration. *See, e.g.*, Kan. Stat. Ann. § 22-3430 (West 2017) (granting judge discretion to commit mentally ill prisoner to mental institution).

Additionally, the legislature could reasonably conclude that the goal of deterrence would be furthered if people are held responsible for what they intentionally do. *Powell*, 392 U.S. at 531 (plurality opinion) (rejecting notion that "the validity of the deterrence justification for penal sanctions . . . are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts."). East Virginia's "adoption of a consistent philosophy of criminal responsibility—according to which all individuals found to have committed forbidden acts with the requisite criminal intent would be held liable—would enhance the credibility and enhance the credibility and acceptance of the criminal justice system." William French Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 Mo. L. Rev. 605, 616 (1982).

Finally, the legislature could reasonably conclude that the *mens rea* approach avoids jury confusion. Allowing evidence relating to claims of mental illness—but unrelated to *mens rea*—injects "nebulous and extraneous issues from the determination of guilt." S. Rep. No. 97-307, at 104 (1981). Fact-specific inquiries are required to discern the underlying condition and how it affected the defendant. And those inquiries have to consider the often subtle and varied ways each person is affected by a particular illness. *See Atkins*, 536 U.S. at 317–18 (recognizing "mental illnesses present less discernable common characteristics" than other characteristics receiving categorical treatment under the Eighth Amendment). Even in the medical community, "psychiatrists disagree widely and frequently on what constitutes mental illness . . . [and] on the appropriate diagnosis to be attached to given behavior and symptoms." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). Symptoms often go unnoticed, as they did with Frost. At the time of her

crime and arrest, she had not been diagnosed and appeared lucid. R. at 2. Later Dr. Frain attempted to offer evidence that she was insane at the time of the murder. R. at 4. But insanity is a legal conclusion, not a medical diagnosis. East Virginia's *mens rea* model defers this "harder and broader enquiry whether the defendant knew [the] actions were wrong" to the punishment phase of the trial—only after the jury has determined that the defendant in fact met the elements of the charged offense. *Clark*, 548 U.S. at 755 n.24.

Frost's intentional murder rendered her worthy of punishment, regardless of whether she subjectively believed the killing was morally justified. East Virginia has the right and responsibility to choose not to categorically exempt from any punishment mentally ill individuals who voluntarily and intentionally commit crimes.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of East Virginia.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT