REGENT UNIVERSITY SCHOOL OF LAW

19TH ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

**No. 19-1409**

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

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LINDA FROST,

*Petitioner*,

v.

COMMONWEALTH OF EAST VIRGINIA,

*Respondent*.

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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF EAST VIRGINA

**THE SUPREME COURT OF EAST VIRGINIA**

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| LINDA FROST,<br><br>*Appellant*,<br><br>v.<br><br>THE COMMONWEALTH OF EAST VIRGINIA,<br><br>*Appellee*. | **No. 18-261** |

Opinion by Associate Justice Capra, joined by Associate Justices Hitchcock, Kinney, and Reed:

Linda Frost appeals from the judgment of the Circuit Court of Campton Roads convicting her of the murder of Christopher Smith and sentencing her to life in prison.[1] We address two issues on appeal. First, Ms. Frost contends that her confession was admitted in violation of her right under the Fifth Amendment to the United States Constitution not to incriminate herself.[2] Second, she argues that the abolition of the insanity defense under East Virginia law violates her Eighth Amendment right to be free from cruel and unusual punishment and her Fourteenth Amendment right to Due Process.[3] We affirm.

[1] In East Virginia, like its sister state of West Virginia, the Circuit Court is the State's trial court of general jurisdiction and there is no intermediate appellate court.

[2] Although Ms. Frost also cites parallel provisions of the East Virginia Constitution, we defer to United States Supreme Court precedent construing analogous provisions of the United States Constitution on all matters of parallel construction. *Duane v. Jacob*, 299 E. Va. 407, 422 (1993).

[3] Ms. Frost also argued below and before this Court that her prosecution in state court after she was acquitted in federal court violated her Fifth Amendment right not to be subject to Double Jeopardy. The Supreme Court of the United States recently granted review in *Gamble v. United States*, No. 17-646, which will definitively resolve this issue. We simply state our belief that the federal and state officials are separate sovereigns and thus the subsequent state prosecution did not subject Frost to Double Jeopardy, and we limit our opinion to the two other issues Ms. Frost raised.

## Facts and Procedural History

Christopher Smith was murdered on the evening of June 16, 2017 between the hours of 9 p.m. and 11 p.m. On June 17, 2017, Ms. Frost confessed to killing Smith, her boyfriend who was a federal poultry inspector employed at a U.S. Department of Agriculture office in rural Campton Roads, East Virginia. The events leading up to the murder are as follows.

One week before Smith was found dead, Smith had a heated argument on the phone with Ms. Frost while he was having dinner with his sister, Christa. Christa observed but could not clearly hear the conversation because her brother was out of earshot. Smith was very upset after his phone call with Ms. Frost. On June 16, 2017, the night of the murder, Ms. Frost picked up an extra shift from 2 p.m. to 8 p.m. at her job at Thomas's Seafood Restaurant and Grill. It was a Friday, one of the restaurant's busiest nights, and no one observed Ms. Frost's exact time of departure from work. Ms. Frost did not clock in or out because she was covering a co-worker's shift as a last-minute favor. However, two eyewitnesses saw a woman matching Ms. Frost's description near the entrance of the nearby Lorel Park very late that evening. As both eyewitnesses observed the woman from a distance, neither could definitively identify Ms. Frost.

On the morning of June 17, 2017, one of Smith's co-workers found Smith's body in his office. The Campton Roads Police Department initiated an investigation, and Ms. Frost was subsequently brought in for questioning after the Department received an anonymous tip.[4] While in an interrogation room, Officer Nathan Barbosa read Ms. Frost her *Miranda* rights, and she signed a written waiver. Officer Barbosa testified that nothing about Ms. Frost's demeanor at the beginning of the interrogation raised any concern or suspicions about her competency. Officer Barbosa asked Ms. Frost if she wanted to talk about Smith, and she nodded. A few minutes into

[4] The sufficiency or reliability of the anonymous tip is not an issue before us.

the interrogation, Officer Barbosa told Ms. Frost about the discovery of Smith's body and asked if she knew who might be responsible. Ms. Frost blurted out, "I did it. I killed Chris." When Officer Barbosa asked Ms. Frost if she could state more details about the murder, she replied, "I stabbed him, and I left the knife in the park." As Officer Barbosa tried to ask more questions, Ms. Frost began making several statements about the "voices in her head" telling her to "protect the chickens at all costs." She then said that she did not think that killing Smith was wrong because she believed that he would be reincarnated as a chicken, and so she did Smith a "great favor" because "chickens are the most sacred of all creatures." Ms. Frost did not tell Officer Barbosa more details of the murder but implored him to join her cause "to liberate all chickens in Campton Roads." Officer Barbosa then asked Ms. Frost if she wanted a court appointed attorney, and when she answered yes, he promptly terminated the interrogation.

Afterwards, the police searched all parks in Campton Roads and eventually found a bloody steak knife under a bush in Lorel Park. The knife had no identifiable fingerprints, but DNA tests confirmed the blood on it belonged to Smith, and the knife matched a set found in Frost's home. The coroner determined that, due to multiple puncture wounds from a knife like the one found in Lorel Park, Smith died between 9 p.m. and 11 p.m. on June 16, 2017.

Ms. Frost was subsequently charged and indicted both in federal and in state court for Smith's murder. While Ms. Frost was in jail pending both trials, her attorney filed a motion in federal court for a mental evaluation. Dr. Desiree Frain, a clinical psychiatrist, diagnosed Ms. Frost with paranoid schizophrenia and prescribed Ms. Frost the appropriate medication to aid in her treatment. Ms. Frost had not previously been diagnosed with schizophrenia or any other mental disorder, and she had not been given any mental health treatment or medication for any mental

condition. During her evaluation, Ms. Frost told Dr. Frain that she believed Smith needed to be killed to protect the sacred lives of chickens that Smith endangered through his job.

Ms. Frost was first indicted in federal court for murder and tried in the United States District Court for the Southern District of East Virginia under 18 U.S.C. § 1114 (2019). Ms. Frost was deemed competent to stand trial upon further evaluation of her current mental state and in light of the medication Dr. Frain prescribed. Dr. Frain testified on behalf of Ms. Frost that it was highly probable that between June 16 and June 17 Ms. Frost was in a psychotic state and suffering from severe delusions and paranoia. Dr. Frain accordingly opined that, even though Ms. Frost intended to kill Smith and knew she was doing so, she was unable to control or fully understand the wrongfulness of her actions over the course of those few days. Due to the testimony of Dr. Frain, Ms. Frost was acquitted on the basis of insanity, which remains a defense under federal law pursuant to 18 U.S.C. § 17(a) (2019).

The Commonwealth's Attorney waited until after the federal proceedings ended to prosecute Ms. Frost for murder. As in federal court, in state court, Ms. Frost was deemed competent to stand trial. East Virginia law previously applied the *M'Naghten* rule for the insanity defense. However, in 2016, the legislature adopted E. Va. Code § 21-3439, which abolished the traditional rule in favor of a *mens rea* approach. Under the new statute, evidence of a mental disease or defect is admissible to disprove competency to stand trial or to disprove the *mens rea* element of an offense, but the lack of ability to know right from wrong is no longer a defense. In other words, evidence of an accused's mental defect is inadmissible to establish an insanity defense. Our legislature followed the lead of other states when enacting this law. *See, e.g., State v. Kahler*, 410 P.3d 105, 124 (Kan. 2018) (upholding the adoption of a *mens rea* approach that

provides "a defense . . . that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged").

Ms. Frost's attorney, Noah Kane, filed a motion to suppress her confession and a motion asking the trial court to hold that, by abolishing the insanity defense, E. Va. Code § 21-3439 violated the Eighth Amendment right not to be subject to cruel and unusual punishment and the Fourteenth Amendment Due Process clause.

Circuit Court Judge Joshua Hernandez ruled that Dr. Frain's testimony was inadmissible in light of E. Va. Code § 21-3439 and denied both motions. The Circuit Court determined that the evidence was undisputed that Ms. Frost did not understand either her *Miranda* rights or the consequences of signing the waiver form. Judge Hernandez nevertheless denied the suppression motion because Ms. Frost initially appeared to the interrogating officer to be objectively lucid and capable of waiving her rights, and the officer had no reason to know or suspect she was mentally unstable until after her waiver and confession. Further, Judge Hernandez held that E. Va. Code § 21-3439 neither imposed cruel and unusual punishment upon Ms. Frost nor violated her Due Process rights.

The jury convicted Ms. Frost of murder, and Judge Hernandez accepted the jury's recommended life sentence. This appeal followed, with Ms. Frost raising the matters discussed above.

## Discussion

I. Waiver

The circuit court correctly held that Ms. Frost's confession was voluntary, knowing and intelligent as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). This case is governed by *Colorado v. Connelly*, 479 U.S. 157 (1986), which held that coercive police activity is necessary to find that a confession is not voluntary. Because a suspect does not

need to understand "every possible consequence of a waiver of a Fifth Amendment privilege" to make a knowing and intelligent waiver, *Colorado v. Spring*, 479 U.S. 564, 574 (1986), *Connelly*'s holding applies to the knowing and intelligent prongs of a *Miranda* waiver. *See, e.g., Woodley v. Bradshaw*, 451 F. App'x 529, 540 (6th Cir. 2011) (holding that evidence of police abuse, such as "disregarding signs that a defendant is incapable of making a rational waiver in light of his age, experience, and background," is necessary to conclude that a waiver was unknowing and unintelligent). The question is not whether a defendant's mental impairment prevented her from understanding her *Miranda* rights. Rather, the focus is on whether a reasonable officer would believe Ms. Frost appeared to understand her rights and thus proceed to interrogate her based on that objective understanding. *See Garner v. Mitchell*, 557 F.3d 257, 262 (6th Cir. 2009) (holding that the fact the officers could not discern the misunderstanding in the defendant's mind when waiving his *Miranda* rights was of "primary significance"). Unless law enforcement knowingly disregarded signs that the defendant did not understand her rights, a defendant's waiver is knowing and intelligent. *Id.* at n.1.

Here, Ms. Frost is evidently mentally ill, and the trial court found that she in fact did not understand her *Miranda* rights. However, Officer Barbosa exercised due diligence in performing the interrogation lawfully. Nothing in the record suggests the officer had reason to question Ms. Frost's mental competency before she waived her *Miranda* rights. Ms. Frost showed signs of mental impairment only later in the interrogation, after she waived her *Miranda* rights and confessed. Given that Officer Barbosa did not know, or have reason to know, about Ms. Frost's mental illness at the time of her waiver, he was not attempting to take advantage of her weakened state of mind. Law enforcement officers are not mind readers or psychiatric soothsayers and should

not be precluded from interrogating individuals who appear to be lucid and cognitively aware during questioning, up to and including a *Miranda* waiver and subsequent confession.

Based on the objective circumstances surrounding the interrogation, including the lack of police coercion and Ms. Frost's initially lucid and calm behavior, *Connelly* controls. Thus, Ms. Frost's waiver of her *Miranda* rights was valid, and her confession was admissible.

II. Insanity

"In a very real sense, the confinement of the insane is the punishment of the innocent; [but] the release of the insane is the punishment of society." *Montana v. Korell*, 690 P.2d 992, 1002 (Mont. 1984) (quoting *Tennessee v. Stacy*, 601 S.W.2d 696, 704 (Tenn. 1980) (Henry J., dissenting)). We affirm the trial court's holding that E. Va. Code § 21-3439 does not violate the Eighth or the Fourteenth Amendment.

The United States Supreme Court has expressly rejected the argument that Due Process requires a state to recognize both the cognitive and the moral capacity factors of the *M'Naghten* test. *Clark v. Arizona*, 548 U.S. 735, 748–56 (2006). Further, "it is clear that no particular formulation [of the insanity defense] has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Id.* at 753. States accordingly have significant and broad discretion in defining crimes and permitting affirmative defenses. *See Montana v. Egelhoff*, 518 U.S. 37, 58 (1996) (Ginsburg, J., concurring) ("States enjoy wide latitude in defining the elements of criminal offenses"). A state's insanity rule violates the Due Process Clause only if the rule offends a "principle of justice so rooted in the traditions and conscience of [the] people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201–02 (1977) (internal quotation marks omitted) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958) (holding that a state's authority to "regulate procedures under which its laws are carried out" will not be questioned under the Due Process Clause unless state

action offends a "fundamental" principle that is rooted within the traditions of the American people). The right to an insanity defense is not so "rooted in the traditions" of our people. *See Clark*, 548 U.S. at 749–53 ("Even a cursory examination of historical practice shows that no particular formulation of the insanity rule enjoys widespread use or acceptance").

Notably, every appellate court to have addressed this issue since *Clark v. Arizona* has held that a *mens rea* approach does not violate the Due Process clause. *See, e.g., Utah v. Herrera*, 895 P.2d 359, 366 (Utah 1995) (holding that there is no constitutional right to have an independent insanity defense because the basic principles of ordered liberty are not offended by the *mens rea* model); *Korell*, 690 P.2d at 998–1002 (holding that the Montana legislature's enactment of a *mens rea* approach was a "conscious decision to hold individuals who act with a proven criminal state of mind accountable for their acts, regardless of motivation or mental condition"). This approach furthers the goal of protecting society and does not violate fundamental principles of justice. *Korell*, 690 P.2d at 1002.

Likewise, a *mens rea* statute does "not expressly or effectively make mental disease a criminal offense." *See Kansas v. Bethel*, 66 P.3d 840, 852 (Kan. 2003) (rejecting defendant's argument that "punishing a person who committed an offense as a result of mental disease is tantamount to punishing the person because he has a mental disease"). Several states have accordingly held that the abolition of the insanity defense is not cruel and unusual punishment under the Eighth Amendment. *See id.* ("[Kansas's *mens rea* statute] does not violate the Eighth Amendment to the United States Constitution"); *Korell*, 690 P.2d at 1002 ("Montana's abolition of the insanity defense neither deprives a defendant of his Fourteenth Amendment right to due process nor violates the Eighth Amendment proscription against cruel and unusual punishment");

*Lord v. Alaska*, 262 P.3d 855, 862 (Alaska Ct. App. 2011) (a "[s]tate may constitutionally eliminate a separate insanity defense" without violating the Eighth Amendment).

East Virginia's *mens rea* statute similarly does not violate Ms. Frost's Eighth or Fourteenth Amendment rights. Even though Ms. Frost had the delusional belief that she needed to kill Smith to protect chickens, she clearly intended to kill Smith and knew that she was doing so. The decision of whether to extend additional criminal protections to offenders like Ms. Frost is best left to the State legislature. If the people of East Virginia want to exonerate offenders like Ms. Frost, they can do so through their elected officials, but the Constitution does not mandate such a result.

The decision of the circuit court is hereby **AFFIRMED**.

Dated: December 31, 2018.

Evans, Chief Justice, dissenting:

I respectfully dissent from the majority's grave error that imposes a life sentence on a psychotic, paranoid schizophrenic offender.

First, the majority errs in upholding the admission of Ms. Frost's confession. In holding that Ms. Frost made a knowing waiver, the majority improperly focused on the officer's conduct before and during the interrogation. However, the officer's perception that Ms. Frost understood her rights and knowingly waived them is irrelevant. *United States v. Bradshaw*, 935 F.2d 295, 300 (D.C. Cir. 1991) (rejecting the "notion that a *Miranda* waiver must be caused by police misconduct to be deemed non-knowing"); *see also United States v. Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002) (holding that "[u]nlike the issue of voluntariness, police overreaching (coercion) is not a prerequisite for finding that a waiver was not knowing and intelligently made").

Ms. Frost's waiver was not knowing and intelligent just because Officer Barbosa did not perceive Ms. Frost to be mentally incompetent. An individual's mental capability is relevant to

determine her understanding of rights and ability to waive them. *See Bradshaw*, 935 F.2d at 300 (finding that the defendant's mental capability is relevant to the validity of his waiver). A person in Ms. Frost's psychotic state could not comprehend her rights, regardless of how deceivingly lucid she may have appeared at the inception of the interrogation. Because Ms. Frost's waiver was not knowing and intelligent under any reasonable definition, her confession should have been excluded.

Second, by enacting a *mens rea* approach to evidence of insanity, East Virginia has violated both the Eighth and Fourteenth Amendments. Denying an insane person the full benefit of an insanity defense is a clear deprivation of Due Process. *See Nevada v. Finger*, 27 P.3d 66, 84 (Nev. 2001) ("[L]egal insanity is a well-established and fundamental principle of the law of the United States"); *Sinclair v. Mississippi*, 132 So. 581, 582 (Miss. 1931) ("So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English-speaking countries that it has become a part of the fundamental laws thereof").

Similarly, E. Va. Code § 21-3439 (2016) violates the Eighth Amendment prohibition against cruel and unusual punishment—criminal punishment that was either "condemned by the common law in 1789" or that violates "fundamental human dignity" as reflected in "evolving standards of decency that mark the progress of a maturing society." *Ford v. Wainwright*, 477 U.S. 399, 405–06 (1986). Punishing individuals, like Ms. Frost, for crimes for which they are not morally culpable is cruel and unusual. *See Sinclair*, 132 So. at 584 (it is cruel and unusual "to impose life imprisonment or death upon any person not intelligent enough to know that the act was wrong or to know the consequences that would likely result from the act").

The majority tiptoes around the gaping holes in its analysis, holding that our new statute does not deny Ms. Frost her Due Process or Eighth Amendment Rights. The majority blithely

dismisses the fact that the right to raise an insanity defense is constitutionally guaranteed. *See Finger*, 27 P.3d at 84 (holding that the legislature may not abolish the insanity defense because legal insanity is a fundamental principle of the United States and is therefore protected by the Due Process Clause). Allowing evidence as to *mens rea* alone does not preserve the insanity defense because criminal intent is not the sole focus of the insanity inquiry. *See Ohio v. Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989) ("[T]he insanity defense goes to the very root of our criminal justice system and is founded on the broader principle that an insane person may not be held criminally responsible for his conduct"). Instead, the insanity defense protects against the discriminatory treatment of insane individuals in the criminal justice system. If the insanity defense is abolished, an individual capable of forming intent will be guilty even if she cannot distinguish right from wrong. Notwithstanding the majority's mental gymnastics, it has crossed a bright line by making it possible to punish individuals even though they are insane, thereby punishing the "innocent" as historically and commonly understood.[5]

This Court should reverse Ms. Frost's conviction and remand for a new trial excluding her confession and allowing her to present the time-honored insanity defense.[6]

[5] The majority correctly notes that the United States Supreme Court has granted review in *Gamble v. United States*, No. 17-646, and the Court's decision will resolve Frost's additional contention, with which I agree, that her subsequent prosecution in state court violates her right to be free from Double Jeopardy,

[6] Although I disagree with the rule, the remedy for an improperly obtained confession is to exclude only the confession, not evidence derived from the confession. *See United States v. Patane*, 542 U.S. 630, 643 (2004) (a majority of justices agreeing that "[t]here is simply no need to extend (and therefore no justification for extending) the prophylactic rule of *Miranda* to" the fruit of an involuntary statement).

**THE SUPREME COURT**
**OF THE UNITED STATES**
**OCTOBER TERM 2019**

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| LINDA FROST,<br><br>*Petitioner*,<br><br>v.<br><br>THE COMMONWEALTH OF EAST VIRGINIA,<br><br>*Respondent.* | **No. 19-1409** |

Order

The petition for a Writ of Certiorari to the Supreme Court of East Virginia is hereby granted in part.

IT IS ORDERED that the above captioned cause be set down for argument in the October Term of 2019, limited to the following issues:

1. Whether an individual's waiver of her *Miranda* rights is knowing and intelligent when, due to a mental disease, the accused did not understand her rights even though she appeared lucid to the investigating officer at the time of her waiver.

2. Whether the abolition of the insanity defense and substitution of a *mens rea* approach to evidence of mental impairment violates the Eighth Amendment right not to be subject to cruel and unusual punishment and the Fourteenth Amendment right to Due Process where the accused formulated the intent to commit the crime but was insane at the time of the offense.[7]

Dated: July 31, 2019

[7] This Court's opinion in *Gamble v. United States*, No. 17-646, 587 U.S. ___ (2019) affirming the Separate Sovereigns Doctrine resolves the Double Jeopardy claims in this case, and thus the request in the Petition requesting review of that issue is hereby denied.