

1957

State of Utah v. Barton Kay Kirkham : Brief of Appellant

Utah Supreme Court

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Case No. 8684

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IN THE SUPREME COURT
of the
STATE OF UTAH

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STATE OF UTAH,

Plaintiff and Respondent,

vs.

BARTON KAY KIRKHAM,

Defendant and Appellant.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

WAYNE L. BLACK
LAMAR DUNCAN

Counsel for Appellant

530 Judge Building
Salt Lake City, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

BARTON KAY KIRKHAM,

Defendant and Appellant.

} Case No. 8684

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The defendant and appellant will be referred to as defendant. The plaintiff and respondent will be referred to as the State. All italics are ours.

The complaint charging defendant with the crime of murder in the first degree was filed on August 13, 1956. The preliminary hearing was held on August 22, 1956 and defendant was bound over to the Third Judicial District Court in and for Salt Lake County, State of Utah. (R. 2, 3). In the District Court defendant entered a plea of not guilty by reason of insanity (R. 50). The case was tried before the Honorable Martin M. Larson, Judge, commencing on the 12th day of December, A.D. 1956 and at the conclusion of the case, after two and one-half

hours of deliberation, the jury returned a verdict of guilty of murder in the first degree without recommending leniency (R. 267). Thereafter, an appeal was perfected to this Court (R. 275, 276).

THE FACTS

The facts pertaining to the killing of David Avon Frame are largely undisputed. Briefly, they reveal that on the night of August 11, 1956, at approximately 11:30 P.M. the defendant Barton Kay Kirkham entered a grocery store known as Nibley Park Market located on the north east corner of 27th South and 5th East Street in Salt Lake County, Utah, and while in the commission of an armed robbery required David Avon Frame and Ruth Holmes Webster to lay face downward on the floor in the back of the store and shot and killed them (R. 60, 61). Events of the evening leading up to the robbery and killing were as follows: The defendant had met a friend Sterle Pierce, in the lobby of the Hotel Utah where Pierce worked. Defendant was wearing certain clothing which he had worn in a robbery at Pueblo, Colorado. He had previously informed Pierce he would wear said clothing again if he ever performed another holdup (R. 33). After leaving the hotel, defendant drove aimlessly around town and at approximately 11 o'clock P.M. encountered a group of young men in another automobile. He followed the automobile for some distance until the young men pulled over to the curb and stopped. Defendant drove up alongside and said "You fellows looking for a beef?" He had a gun in his hand (R. 47).

One of the boys asked him if the gun was loaded and in response he ejected a shell (R. 47). One of the young men testified that he “made us nervous and wondered about him” and, “Well, his words were quite — well, not right; I’ll put it that way; for the circumstances, it didn’t seem right” (R. 52, 57). As defendant was driving away the boys took his license number and reported the incident to the Police (R. 52).

Following the robbery and killing, as defendant was driving away he inadvertently shot a hole in his windshield. Thereafter he abandoned the automobile and next appeared shortly after midnight at the home of a Mrs. Bonnie Christean. He brandished the gun in her face and told her that he had just shot two people (R. 91, 92). He asked if Mrs. Christean had an automobile. She informed him her son, Arthur, had an automobile and would return home shortly (R. 92). Before the son arrived her daughter, Shawna, came home from a date. He required Mrs. Christean and Shawna to remain in his presence until Arthur arrived (R. 95). During the waiting period he told the Christeans that he had been an inmate of a Colorado prison (R. 95). When the son arrived, defendant ordered the son and daughter to get in the automobile. He told Mrs. Christean he would kill them both if she called the police. The Christeans at no time crossed defendant or offered any resistance to his instructions (R. 98, 105). Arthur drove the automobile and Shawna rode in the front seat while defendant rode in the back seat with his gun pointed at their heads.

Arthur talked quietly to him as they proceeded south toward Provo, Utah. At one point defendant stopped and purchased five dollars worth of gas. Defendant had Arthur turn the radio on and commented "that they didn't have the guts to put it on the radio." He also said he had killed two people, that "the woman had been hysterical and the man had tried to play hero" (R. 104). Eventually, defendant directed Arthur from the main highway up Provo canyon for a distance where he ordered Arthur to stop and get out of the automobile and start walking. Arthur obeyed. He fired a shot over Arthur's head and told Shawna "That is just to show you I am not fooling around" (R. 106). Defendant then ordered Shawna to drive the automobile. She was alone with the defendant for approximately an hour and a half (R. 106). During this time she did not attempt to argue or remonstrate with the defendant about anything but was submissive to him (R. 112). A short time thereafter, defendant and Shawna drove out of the canyon and defendant voluntarily gave himself up to the police. Deputy Sheriff Reed L. Rigtrup, who brought the defendant to Salt Lake, testified that defendant said he did it for an anniversary celebration which should have happened a week later, but "that things came up suitable for it and I did the job that night." Officer Hunsaker testified that at no time did defendant show any remorse or shame, that he almost enjoyed telling the story (R. 139). His father testified that at the city jail after the shooting, defendant demonstrated no remorse or feeling of guilt or sorrow (R. 180).

While incarcerated at the Salt Lake County jail awaiting trial, at the instance of the Court, defendant was given a psychiatric examination by Dr. Clarence Craig Nelson, a licensed medical doctor and psychiatrist. The examination was made jointly with Dr. Gordon Johnson who did not testify (R. 148). Dr. Nelson testified that mental and emotional disorders fall into four groups, first, psychotic reactions; second, character disorders; third, psychosomatic disorders; fourth, psycho-neurotic disorders (R. 142). He testified that when any one of the four above-mentioned types of disorders are of a serious nature, such condition can be readily determined by a psychiatric examination (R. 143). He further testified that character disorders ordinarily develop in childhood and that when such disorder is of a severe type, the individual suffering therefrom will feel no remorse or guilt over things that he does (R. 147). This condition is termed an emotional or mental illness. In this connection he testified "Q. Would you speak of a severe character disorder as a mental illness? A. Yes." Dr. Nelson emphasized the fact that defendant "demonstrated no remorse" in describing the crime and that his comment was that he "wasn't going to risk his neck over such a paltry sum" (R. 149).

He stated that defendant was suffering from a mental illness consisting of a character disorder of the severest type (R. 150). He testified that there are forms of treatment recognized for this condition and that without treatment said condition would never change except

for the worse (R. 150, 151, 156). Dr. Nelson also testified that considering the type of character disorder and mental illness defendant was suffering from, he would not expect defendant to have a feeling of ~~some~~^{shame} or remorse over commission of the crime (R. 158). He testified that a person suffering from this type of mental illness, when an obstacle is placed in his path, will usually respond with some anti-social reaction (R. 158). On redirect examination the following questions were asked:

“Q. Now, counsel has also asked you some questions concerning the patient’s ability to distinguish or to determine right from wrong; I will ask you whether that ability, in view of his lack of conscience — lack of remorse — is the ability which the normal person possesses.

A. From *strictly a thinking point of view*, the ability would have to be thought of as the same. It would be done on the basis of his knowledge of right or wrong, and not on the basis of a conscience or automatic control.

Q. From the point of view of his own justification within himself of his own actions, what would you say?

* * *

A. Well, he would feel that he was — though he knew this was wrong — *he would feel, under his way of viewing it, it was justified, in my opinion*” (R. 168, 169).

There was an abundance of lay testimony to substantiate Dr. Nelson's diagnosis of mental illness. Barton Kay Kirkham was the oldest child in a family of five (R. 171). As a very young child he displayed a lack of emotion. His father testified that when he was 6 or 7 he would not cry when he was spanked (R. 172). His mother testified that as a child defendant had no remorse or feeling of guilt about anything. He undertook school lessons with the utmost reluctance and frequently sluffed. "He just couldn't stand to have people talk to him and tell him what to do" (R. 172). When he quit high school, the excuse he gave his father was that he couldn't stand the "yakkety yak" (R. 173). He tried several different jobs and also spent a short time in a vocational school with mediocre success (R. 173). Thereafter, he enlisted in the Army Air Corps, first undergoing basic training at San Antonio, Texas, and then being assigned to the Mountain Home Air Base, Idaho (R. 174). While at Mountain Home he was given a temporary assignment to England. In England he met a girl. After returning to Mountain Home he asked his father and mother to make arrangements to bring the girl to the United States. They put him off and this caused him to go AWOL (R. 175, 186). He proceeded by bus to Pueblo, Colorado, and purchased a gun from a pawn shop and stole an automobile at gunpoint. He was almost immediately apprehended and spent a number of months at the Buena Vista, Colorado, reformatory. This was his only criminal record prior to the offense here involved. His parents visited him at the reformatory. He had abso-

lutely no remorse or shame for his conduct (R. 175). Following his release from Buena Vista on probation, and a dishonorable discharge from the Army, he returned to Salt Lake City to live with his parents (R. 177). He arrived June 1, 1956. From that date until August 11, 1956, the date of the robbery and killing, a number of abnormalities were noticed by his parents. He was highly agitated and easily excited. He would go to extremes in his voice, sometimes shouting tremendously at the other children (R. 177). On occasions he would come up behind one of the children, grab the child and give "a tremendous shout, scaring everybody" (R. 177). There was no humor attached to this conduct. He was suffering from a severe abscess on the end of the spine which caused him constant irritation and pain (R. 177). In addition, he was suffering from a number of cavities in his teeth (R. 178).

His mother observed that he wasn't adjusting to home life and discussed the need for psychiatric care with the family doctor, Stanley Neff, who was taking care of the cyst on defendant's spine (R. 189).

A short time prior to the robbery and killing, defendant had met a Salt Lake girl and after going with her for a period of time had told her about his criminal record. Thereafter, she refused to have anything to do with him and this disappointment caused him to become very morose and restless (R. 191, 192).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS INSTRUCTION NO. 9 WHEREIN IT ADVISED THE JURY THAT THE TEST OF INSANITY WAS WHETHER DEFENDANT DID NOT KNOW HIS ACT WAS WRONG IN THE SENSE THAT SUCH ACT WAS CONDEMNED BY MORALS OR LAW.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS INSTRUCTION NO. 9 WHEREIN IT ADVISED THE JURY THAT THE TEST OF INSANITY WAS WHETHER DEFENDANT DID NOT KNOW HIS ACT WAS WRONG IN THE SENSE THAT SUCH ACT WAS CONDEMNED BY MORALS OR LAW.

A portion of Instruction No. 9 reads as follows:

Instruction No. 9

“Insanity is an element in determining questions of guilt of, or punishment for crime only when it renders the person so affected irresponsible or partly irresponsible, that is the defendant cannot be convicted of a crime, if, at the time of the act he was insane to such an extent that he did not know the nature of the act; that is did not know he had a revolver, that it may be loaded or that, if discharged, it may injure or kill; or that when he fired the shot, he did not know it was

wrong, in the sense that such act was condemned by morals *or* law; or that he was unable, by reason of mental disease, to control his actions or impulses to injure or kill David Avon Frame."

Counsel for defendant took exception to the foregoing portion of Instruction No. 9 and called attention to the error contained therein where he stated as follows at Record 240: "The foregoing quoted portion of the instruction carries with it the implication that, if defendant was aware of the definition of murder, and of the fact that there was a law against murder and robbery, * * * he could not be insane, even though, although knowing the definitions of those offenses and the fact that there were laws against them, within his own mind, he was convinced that the acts he was performing were justified and proper.

It is our position that, if he felt the acts were justified and proper, and had no remorse for them, then, by necessary implication, he would not have sufficient knowledge of the rightness or wrongness of his actions to be legally sane."

Where the trial court used the term "in the sense that such act was condemned by morals *or* law," it clearly instructed the jury that even though defendant's sense of morals was so perverted and distorted that he felt justified in doing the act which he did and had no remorse for doing said act, nevertheless if he had sufficient intellect to know that the law forbid said act, he was legally sane. That such instruction is incorrect as an

abstract proposition of law will be clearly pointed out by the authorities hereinafter cited. That said error was prejudicial to the defendant becomes clear when viewed in the light of the facts.

An eighteen year old boy in commission of an armed robbery lays two people on the floor and shoots them. He harbors no ill will against them. In fact, he has never seen them before. No real or apparent necessity of self defense requires the killing. No motive for the robbery exists except that the robbery is an anniversary celebration for a similar rash and nonsensical act that occurred a year before, and no motive for the killing is suggested except his statement to Dr. Nelson that he wasn't going to risk his neck over such a paltry sum. Yet Dr. Nelson testified that defendant felt perfectly justified within himself in committing the killings and that in his opinion defendant *genuinely* experienced no remorse for his action (R. 168, 169). The testimony of the police officers and defendant's parents substantiated the fact that defendant was so utterly incapable of understanding the moral implications of his conduct that he suffered no remorse or conscience whatsoever. The trial court removed this whole body of both medical and lay testimony from the consideration of the jury where it instructed in effect that the sole and only requirement of legal sanity was that defendant have sufficient mentality to know that his act was against the law.

The origin of the right and wrong test for determining legal sanity is the old *M'Naghten's Case*, (1843),

10 Clark & F, 200. A part of the M’Naghten opinion applicable here reads as follows:

“Lord Chief Justice Tindal in his charge: ‘The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws *both* of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.’ ”

A most scholarly discussion of M’Naghten’s rule and the necessity of moral responsibility in application of the right and wrong test is to be found in the case of *People vs. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (decided November 23, 1915). In the Schmidt case defendant was accused of killing a woman and dismembering her body. He confessed to the killing but entered a plea of not guilty by reason of insanity. He told the physicians who examined him that he had heard the voice of God calling upon him to kill the woman as a sacrifice and atonement and that he had committed the killing in the visible presence of God. The jury found him guilty of murder in the first degree. Thereafter, in a motion for new trial, his counsel filed his affidavit stating that his story pertaining to heavenly visitations was a sham, that the woman had actually died from a criminal operation, that

her body had been dismembered and he had told a false story in order to conceal the illegal operation. The court, speaking through Mr. Justice Cardozo, found that certain instructions pertaining to the test of legal insanity were error but that in view of the fact that defendant had now conceded that the defense of insanity was without merit, defendant was in no position to complain of the error on appeal. Justice Cordozo stated:

“The learned trial judge said to the jury that ‘wrong’ in this definition means ‘contrary to the law of the state.’ The jury was instructed in pointed and impressive terms, that even if the defendant believed in good faith that God had appeared to him and commanded the sacrifice of Anna Aamuller, and this belief was a delusion, the result of a defect of reason, the defendant must none the less answer to the law if he knew the nature and quality of the act, and knew that it was wrong, in the sense that it was forbidden by the law of the state.”

* * *

“We are unable to accept the view that the word ‘wrong’ in the statutory definition is to receive so narrow a construction.”

Justice Cordozo then outlined the history of the right and wrong test. In discussing the M’Naghten case, he stated:

“The definition here propounded is the one that has been carried forward into our statute. The judges expressly held that a defendant who knew nothing of the law would none the less be responsible if he knew that the act was wrong, by

which, therefore, they must have meant, if he knew that it was morally wrong. Whether he would also be responsible if he knew that it was against the law, but did not know it to be morally wrong, is a question that was not considered. In most cases, of course, knowledge that an act is illegal will justify the inference of knowledge that it is wrong. *But none the less it is the knowledge of wrong, conceived of as moral wrong, that seems to have been established by that decision as the controlling test.* That must certainly have been the test under the older law when the capacity to distinguish between right and wrong imported a capacity to distinguish between good and evil as abstract qualities. There is nothing to justify the belief that the words ‘right and wrong,’ when they became limited by M’Naghten’s Case to the right and wrong of the particular act, cast off their meaning as terms of morals, and became terms of pure legality.”

The court continues:

“We have still another guide to help us to a sound construction of M’Naughten’s Case and of the statutory rule derived from it. That guide is found in the practice of judges by whom the decision has been applied. We refer to a few instances among many. In *Reg. v. Townley*, 3 Fost. & F. 839, Martin, B., left it to the jury to say whether the prisoner knew that the act was ‘contrary to the law of God and punishable by the law of the land.’ In *Reg. v. Layton*, 4 Cox, C.C. 149, Rolfe, B., said that the jury must determine whether the prisoner’s delusion ‘had the effect of making him incapable of understanding the wickedness of murdering his wife.’ See also

Reg. v. Law, 2 Fost. & F. 836. In many cases, both in our own courts and in those of sister states, the language of Lord Mansfield in *Bellingham's Case*, 27 How. St. Tr. 636, is adopted with trifling changes, and the test is said to be whether the defendant understood that the act was forbidden 'by the laws of God and man.' *People v. Waltz*, 50 How. Pr. 204, 232; *People v. Pine*, 2 Barb. 566, 570; *Casey v. People*, 31 Hun, 158, 161. In *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458, Shaw, Ch. J., in expounding the rule, assumed for illustration an insane delusion that God had commanded a crime. He told the jury that a defendant, to be responsible, 'must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty;' and then, to explain the delusions that will relieve a man from criminal liability, he said: 'A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature.' "

"In *Guiteau's Case* (D.C.) 10 Fed. 161, these words were quoted approvingly, and supplemented by other illustrations. The court instanced the case of a man known to be an affectionate father, who 'insists that the Almighty has appeared to him and commanded him to sacrifice his child.' Of these and like cases, the court said (p. 182): 'If a man insanely believes

that he has a command from the Almighty to kill, it is difficult to understand how such a man can know that it is wrong for him to do it.'

"'Such a man is no less insane because he knows that murder is prohibited by human law. Indeed, it may emphasize his insanity that, knowing the human law, he believes that he is acting under the direct command of God.'

"'Cases may be found where, in explaining what is meant by knowledge that an act is wrong the courts have blended the elements of legal and moral wrong, but none, we believe, can be found in which the element of moral wrong has been excluded * * *'

"To the reported cases in which the word 'wrong' in the statutory definition has been used as importing a moral wrong, there may be added a multitude of unreported cases. *As an illustration we may refer to a case recently decided by this court. People v. Purcell*, 214 N.Y. 693, 109 N.E. 1087. *There the trial judge (Nott, J.) in a careful and able charge told the jury that knowledge of the nature and quality of the act has reference to its physical nature and quality, and that knowledge that it is wrong refers to its moral side; that to know that the act is wrong, the defendant must know that it is 'contrary to law, and contrary to the accepted standards of morality,' and then he added, with a slight variation of the words of Lord Mansfield, that it must be known to be 'contrary to the laws of God and man.'*

"In the light of all these precedents, it is impossible, we think, to say that there is any

decisive adjudication which limits the word 'wrong' in the statutory definition to legal as opposed to moral wrong. The trend of the decisions is indeed the other way. The utmost that can be said is that the question is still an open one. We must, therefore, give that construction to the statute which seems to us most consonant with reason and justice. The definition of insanity established by the statute as sufficient to relieve from criminal liability has been often and harshly criticised. See e.g., *State v. Pike*, 49 N.H. 399, 6 Am. Rep. 533; *State v. Jones*, 50 N.H. 369, 9 Am. Rep. 242; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266. Some states reject it altogether. *Parsons v. State*, *supra*, and cases there cited. A recent case in Massachusetts (*Com. v. Cooper*, 219 Mass. 1, 5, 106 N.E. 545) says that an offender is not responsible if he was 'so mentally diseased that he felt impelled to act by a power which overcame his reason and judgment, and which to him was irresistible.' That is not the test with us. *Flanagan v. People*, 52 N.Y. 467, 11 Am. Rep. 731; *People v. Taylor*, 138 N.Y. 398, 34 N.E. 275; Penal Law, para. 34. Whatever the views of alienists and jurists may be, the test in this state is prescribed by statute, and there can be no other. *People v. Silverman*, 181 N.Y. 235, 240, 73 N.E. 980. We must not, however, exaggerate the rigor of the rule by giving the word 'wrong' a strained interpretation, at war with its broad and primary meaning, and least of all, if in so doing we rob the rule of all relation to the mental health and true capacity of the criminal. The interpretation placed upon the statute by the trial judge may be tested by its consequences. A mother kills her infant child to

whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong. If the definition propounded by the trial judge is right, it would be the duty of a jury to hold her responsible for the crime. We find nothing either in the history of the rule, or in its reason and purpose, or in judicial exposition of its meaning, to justify a conclusion so abhorrent. No jury would be likely to find a defendant responsible in such a case, whatever a judge might tell them. But we cannot bring ourselves to believe that in declining to yield to such a construction of the statute, they would violate the law."

"We hold, therefore, that there are times and circumstances in which the word 'wrong' as used in the statutory test of responsibility ought not to be limited to legal wrong."

* * * * *

The case of a mother killing her infant child, hypothesized in a slightly different manner by Justice Cardozo in the Schmidt Case, became a reality in *People vs. Sherwood*, 271 N.Y. 427, 3 N.E. (2d) 581 (decided July 8, 1936). In the Sherwood case a mother, after suffering a series of adversities, drowned her infant child. She carried the dead child to police headquarters. In answer to questioning as to why she killed the child she stated: "I couldn't take care of him any longer and I thought he would be better off dead." At no

time was there any show of emotion on her part. At no time was there any sign of regret. The defense of criminal insanity was interposed in the case. The court held that the trial court committed error by imposing the requirement not only that defendant did not know the nature and quality of the act committed but also that she did not know said act was wrong. The court stated:

“In the main charge it was not made clear that a defect of reason which inhibited a knowledge *either* of the nature and quality of the act *or* that the act was wrong excused a person from criminal liability. At various points the two matters were referred to in the conjunctive, with the word ‘and’ instead of the word ‘or’. The error was called to the attention of the court at the close of the main charge, and the court said merely: ‘If I made that error, I so charge.’ Left in that way, the distinction might doubtfully be considered as having been made clear. But thereafter—and it was the court’s last word before the jury retired—the court upon request charged that a mere false belief would not be sufficient to excuse her, ‘unless it was the result of some mental disease which prevented her from knowing the nature and quality of the act *and* that it was wrongful.’ Here was a repetition of the same error, complicated with a reference to ‘some mental disease,’ i.e., some pathological condition, instead of a ‘defect reason,’ as the statute reads. No disease, no pathological condition, existed or was claimed to exist. It may be doubted whether the jury had a clear conception of when a person is or is not criminally liable under section 1120.”

In the case at bar the jury was bound to find that “from strictly a thinking point of view” defendant was capable of understanding that the law forbid murder (R. 168, 169). However, the evidence would also support a finding that defendant was incapable of understanding the moral implications of the offense. In this connection we call attention to the language in the case of *People vs. Purcell*, 214 N.Y. 693, 109 N.E. 1087, cited in the *Schmidt case*, supra, where it is pointed out that the nature and quality of the act test has reference to its physical nature and quality and that knowledge of wrong test refers to its moral side; that to know the act is wrong the defendant must know that it is contrary to law, *and* contrary to the accepted standards of morality. Here the trial court has eliminated entirely the morality concept. The jury is told in effect that if defendant knew that his acts were against the law he is legally sane. This is accomplished simply by use of the conjunctive *or* rather than the conjunctive *and*. But this error, as it did in the *Sherwood Case*, supra, eliminated all moral considerations from the right and wrong test and left solely the I.Q. test of whether defendant was well enough oriented to understand that there was a law against murder.

In *Kearney vs. State*, 68 Miss. 233, 8 So. 292, an instruction that the defendant was responsible for his act if the jury believed at the time of the killing that “the mind of the defendant was capable of knowing that if he shot the deceased not in his own self-defense,

he was committing an offense against the law of the land, and it will not matter what the jury believes was the moral conception of the defendant of the act at the time," was held to be such a departure from the right and wrong test as to be reversible.

Although we have discovered no Utah case specifically discussing the subject we believe that Utah adheres to the morality concept in application of the right and wrong test of sanity.

In *State vs. Brown*, 36 Utah 46, 102 Pac. 641, defendant was accused of forgery. His defense was insanity. This court reversed a conviction and as a matter of law held that the defense of insanity had been established. The facts of the case reveal a remarkable similarity in mental condition between Brown and the defendant here.

"In detailing his conduct at the time of, and after, his arrest all the witnesses say that *he did not seem to realize that he had done anything wrong; that he would insist in all apparent sincerity that he had done nothing wrong or to be ashamed of, and that his friends and family ought to be proud of him.* It is further shown that after his arrest, and before his trial, and even after having been convicted, he insisted that there was nothing to the whole matter; that he '(presumably meaning the officers) had them on the run,' or that he 'had them under his thumb.' After his conviction he said that he 'had them now where he wanted them; that they would now have to come to him.' It was also made to appear

that during the first and the last trial he did not seem to care anything about the matter; that he was wholly indifferent with respect to the result of the case, and when the jury found him guilty, he apparently was oblivious to what had occurred, and that he was in no way concerned."

The court then discusses the test of insanity as follows:

"But if we assume that defendant intended to forge the checks, which he no doubt did, this is not alone sufficient to make an insane person guilty of a crime. As was well said by Mr. Justice Sullivan, *Knights v. State*, 58 Neb. 228, 78 N.W. 509, 76 Am. St. Rep. 80: 'Such is not the law * * * Ordinarily insane persons comprehend the nature of their acts. When they take life or destroy property, they usually know what they are doing, and often choose means singularly fitted to accomplish the end in view.' *The true test is whether the defendant, at the time of the commission of the offense, had the mental capacity to know that in doing the act he was doing wrong.* As was said in *Haw v. State*, 11 Neb. 537, 10 N.W. 452, 38 Am. Rep. 375: 'And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible'."

In *State vs. Green* (decided February 9, 1935) 40 P. 2d 961, rehearing denied April 6, 1935, 86 Utah 192, it is interesting to note that even though defendant requested an instruction containing the words "he did not know it was wrong in the sense that such act was

condemned by morals *or* law” the trial judge changed the language and submitted the case to the jury containing the words “he did not know it was wrong in the sense that such an act was condemned by morals *and* law.”

See also *State vs. Hadley*, (Utah 1925) 234 Pac. 940, where the test is said to be whether defendant was “in such a mental state as to deprive him of the capacity to understand that the act committed constituted an offense *and* was wrong.”

It is interesting to note that Instruction No. 9, of which we here complain, includes the words “condemned by morals” but deprives them of their meaning by use of the conjunctive “or.” So even here we have an implied recognition of the morality requirement in application of the right and wrong test.

We submit that in the great majority of cases discussing the right and wrong test the distinction between knowledge of the immorality of the act and knowledge of the illegality of the act is not discussed. Justice Cardozo’s persuasive opinion in the *Schmidt Case*, *supra*, remains as the leading authority on the subject. Numerous courts, inferentially at least, are lined up with the *Schmidt* case, by the manner in which they state the right and wrong test. For example, see the following: *McAllister vs. State* 17 Ala., 434, 52 Am. Dec. 180; *Bosell vs. State*, 63 Ala. 307, 35 Am. Rep. 20: “against the laws of God *and* his country”; *Blackburn vs. State*,

23 Ohio St. 146: "against the laws of God *and* man." *State vs. Branto* 33 Or. 533, 56 Pac. 268 "wrong *and* unlawful"; *State vs. Brumfield*, 104 Or. 506, 209 P. 120, "wrong *and* unlawful"; *Com. vs. De Marzo*, 223 Pa. 573, 72 Atl. 893, "wrong *and* criminal"; *Adair vs. State*, 6 Okl. Cr. 284, 118 Pac. 416, "competent to distinguish between right and wrong, or to understand the nature of the act he was committing."

The modern trend of thought concerning the roll of moral understanding in application of the right and wrong test is clearly set forth in an annotation entitled "Modern Status of the M'Naghten "right and wrong" test of Criminal Responsibility" appearing at 45 ALR (2) 1447, 1450 where the editor states:

"It seems clear, however, in the light of current medical and psychiatric information, that the ability to "know" right from wrong should no longer be presented to jury or witness in the exclusively intellectual sense in which that word has ordinarily been used in the application of the rule in the past, but *that the test should be the accused's ability to emotionally and intellectually realize and appreciate, as an integrated personality, the nature and consequences of the moral choice presented*, and that the mere ability to verbalize a correct answer to questions about the distinction should not be accepted as conclusive on the issue of criminal responsibility. And, by the same token, the tendency of some of the courts to hold opinion testimony on the question to the narrow issue of strictly intellectual capacity should be corrected, and experts should be per-

mitted to make freely available to court and jury the benefit of their technical information upon the issue.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3.

Anticipating the district attorney might claim that a verdict of not guilty would result in defendant being turned loose, defense counsel made the following request:

Requested Instruction No. 3

“The State of Utah has a mental hospital where patients who are suffering from mental illness may be incarcerated and treated for such time as is considered by a court of competent jurisdiction to be necessary.” (R. 266)

The District Attorney did in fact state in his opening argument to the jury: “Should you acquit him, he would be turned loose” (R. 204). Again in his rebuttle argument Mr. Anderson belabored at great length the proposition that defendant would be turned loose if found not guilty by reason of insanity (R. 231, 232).

The District Attorney's statement was made not as an opinion, but as a statement of the law governing the case. It was not founded on any evidence introduced by either party. Neither was it founded on any instruction of the court. Furthermore, it was incorrect and

misleading for two obvious reasons. First, it carries the implication that the court would have no further jurisdiction over defendant after a not guilty verdict, and second that a not guilty verdict would result in defendant's freedom. With regard to the first inaccuracy we call attention to the procedure for determining whether an individual should be subjected to involuntary hospitalization in a mental institution as set forth at Utah Code Annotated 1953, 64-7-36 (Sub-section G):

“If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient (1) is mentally ill, and (2) because of his illness is likely to injure himself or others if allowed to remain at liberty * * * it shall order his hospitalization for an indeterminate period or for a temporary observational period not exceeding six months; otherwise, it shall dismiss the proceedings.”

From the foregoing statute it is clear that the District Court has jurisdiction to determine whether a mentally ill person is likely to injure himself or others and may upon a proper showing, order that a person be incarcerated in the state mental hospital for an indeterminate period which may be for life. It is our belief that juries have great faith in our judicial system. If this jury had known of the existence of the foregoing court procedure in determining whether an individual should be incarcerated in the state mental hospital they would have had utmost confidence that defendant would not have been turned loose by the court. They would

have realized that the court could, and unquestionably would have protected society against such an eventuality. This brings us to the second inaccuracy of the District Attorney's statement. We are confident that the District Court would not have turned defendant loose on a finding of not guilty by reason of insanity. Dr. Nelson's testimony regarding the severe mental illness from which defendant is suffering and his inability to refrain from anti-social behavior should set the matter forever at rest. In this connection we also call attention to a number of cases holding that a court in determining whether one charged with insanity is likely to injure himself or others may consider the history of that individual including any homicide he has committed.

See in this connection *Orencia vs. Overholson* (District of Columbia 1947) 163 F. (2) 763, where it is held that where insanity has been responsible for murder, evidence must be such as to make the court reasonably certain that the patient has been restored to mental health before discharge will be justified. See also *Barry vs. White* 64 F. (2) 707; *People Ex Rel Thaw vs. Lamb*, 118 NYS 389; *in re Ostatter* 103 Kan. 487, 175 Pac. 377; *in re Palmer* 26 R.I. 486, 59 Atl. 746.

Nevertheless the jury was here led to believe that no further proceeding would be had in the event of a not guilty verdict, and that in the event of a not guilty verdict defendant would be turned loose.

The cases uniformly hold that it is error for a prosecuting attorney to misstate the law of the case

in his argument. See *State vs. O'Keefe*, 23 Nev. 127, 43 Pac. 918. It is also error for a prosecuting attorney to misstate the facts. See *State vs. Martinez* (Utah 1920) 191 Pac. 214 where the district attorney stated in his argument that defendant had admitted he fired the shot that killed decedent and the record revealed that the defendant had never made such an admission. Likewise, it is error for a prosecuting attorney to appeal to the passion or prejudice of the jury regarding extraneous matters. See *Robinson vs. U. S.* (CCA8) 32 F (2) 505 where in a prosecution of a government prohibition agent for accepting a bribe, the court held that it was reversible error for the prosecuting attorney to state that a failure to convict would impair the efficiency of agents employed in the government service and would result in irreparable injury to the public. In *Bunell vs. State* (Tex.) 138 S.W. 707, the court held that it was reversible error for the trial court to refuse to instruct the jury to disregard statements of the prosecuting attorney in his argument that if the jury did not convict they might as well wipe the local option law off the statute book and tear down the courthouse. In *Oakley vs. State* (Tex. 1934) 68 S.W. (2) 204 an argument by the prosecution containing a misstatement somewhat similar to that in the case at bar was held to be reversible error.

“It is contended by the appellant, and we think correctly so, that this argument was a direct appeal to religious prejudice and calculated to arouse the emotions and disregard the charge

of the court and the testimony authorizing an acquittal even if he was insane at the time of the commission of the offense. The argument was an appeal to the jury to convict him of murder because, if they acquitted him and turned him loose, a jury in the county court may find him sane; besides the district and county attorneys could not stand before one jury one day and contend that he was sane and the next day stand before another jury and plead that he was insane. The further argument that, if the jury convicted him and he was insane, they could get a writ of habeas corpus and get him out of the penitentiary, was an appeal to the jury to disregard their oath and shift their responsibility of determining whether he was insane at the time of the commission of the offense."

See also *Weige vs. State* (Tex. 1917) 196 S.W. 524 where the following argument was held to be reversible error:

"Gentlemen, you can go out and find this defendant guilty of murder and send him to the penitentiary, and the law is, if you send him to the penitentiary, he and his folks can call for a trial charging him with lunacy in the county court, and put him in the asylum if the jury find he was insane, because you cannot put an insane man in the penitentiary; but if you should turn him loose, how do you know he will ever be tried for insanity, and he might go back up where he lives and do the same thing over again, or kill his children."

In *Estepp vs. Commonwealth* 185 Ky. 156, 214 S.W. 891 it was declared highly improper for a prosecuting

attorney to go outside the record in an attempt to influence the jury by stating that unless the maximum penalty was inflicted defendant might escape sentence in part by being parolled. In *State vs. Little*, 228 N.C. 417, 45 S.E. (2) 542 it was held that the solicitor's statement to the jury that if defendant were convicted there would be an appeal and in event the decision of the lower court should be affirmed there would be an appeal to the governor to commute the sentence and that no more than 60% of prisoners convicted of capital offenses were ever executed constituted reversible error as relating to matters not included in evidence. See also *Smith vs. State* (Tex. 1909) 117 S.W. 966.

Whether the court's error in refusing to correct the misstatement of the district attorney was prejudicial depends on whether it likely affected the jury's deliberations. In this connection we call attention to the facts. Here is a defendant who because of a severe mental illness has killed two people without motive, without remorse and without conscience. Because of his mental condition it is likely that if freed he would again commit an anti-social act. This is particularly true unless he undergoes treatment for his condition which Dr. Nelson described as inpatient treatment consisting of the slow process of relearning over a period of years, somewhat as a child is taught from infancy to maturity (R. 164). No jury is going to contemplate with favor turning a criminally insane person loose under such circumstances. They unquestionably would have an entirely different attitude about a verdict of not guilty

by reason of insanity which would result in a further hearing and a fair determination by the court of defendant's mental illness and likelihood of injuring somebody. With that assurance they could consider the question of defendant's legal sanity solely on its merit. The refusal of the court to clarify the law concerning this matter placed defense counsel in the anomalous position where added proof of mental illness would diminish rather than increase their chance of a not guilty verdict. The more severe defendant's mental illness the more abhorrent the thought of turning him loose. The jury unquestionably believed the District Attorney when he told them that a verdict of guilty would be the only obstacle to defendant's freedom. They believed him because of his position as a public servant. They believed him because the court, although urged to correct his misstatement of the law, refused to do so, and by its silence lent tacit approval to what he had said. (See the exception taken by defense counsel to refusal of the trial court to give its requested instruction No. 3 at Record 240, 241.) Believing that the only way to avoid turning defendant loose was to find him guilty they found him guilty. The probability is that the defense of insanity was never even considered by the jury. Their concern was for the future of society and they believed themselves to be the sole and only obstacle in the path of defendant's freedom. This could be the only possible rationale for the cruel and inhuman verdict which did not recommend leniency for an eighteen year old youth concededly suffering from a severe mental illness.

CONCLUSION

It is our position that this court should grant defendant a new trial for two basic and important reasons. First, the trial court by instructing the jury that defendant was legally sane if he knew that murder is against the law, and by eliminating the requirement that defendant understand the moral implications of his conduct has reduced the defense of insanity to a sham. If a man can be held morally accountable and subject to punishment for an act which he does not comprehend and understand to be morally wrong, then our great progress of recent years toward an understanding of mental illness in all of its various forms has been confined to the medical profession and has utterly escaped the learned profession of the law.

The second proposition involves basic concepts of fairness and justice. We appreciate the fact that when two people have innocently met death at the hands of another, society as a whole becomes inflamed and biased to a certain degree against the perpetrator of that offense. This is true regardless of whether or not the defendant is mentally responsible for his acts. Therefore it is of utmost importance that the trial court be vigilant in guarding against any appeal to passion on the part of the prosecuting attorney. Here a duly elected officer of the people advised the jury that a verdict of not guilty by reason of insanity would turn defendant loose. This statement was absolutely erroneous and it cast before the jury the gruesome prospect, if they found

defendant not guilty, of turning loose a criminally insane person on society. The mere denial of such fact by defense counsel could not eliminate the prejudice. The only possibility of restoring the jury to a rational consideration of the insanity issue was for the trial court to give a cautionary instruction setting the record straight as to the manner in which defendant's future would be determined if he were found not guilty by reason of insanity. When the court refused to give defendant's requested Instruction No. 3 it was only to be expected that the jury would consider their duty to society paramount to their duty to defendant and would find him guilty, and they would do so irrespective of whether they believed his warped and distorted mind was capable of comprehending the moral wrong that he had committed.

It is our further hope that this honorable court will meet the challenge presented by our ever broadening knowledge of defects and diseases of the mind, and will review in its entirety our present legal standards for determining sanity. It is a well known fact that *McNaghten's* right and wrong test is obsolete and outmoded. It is as outmoded as the so-called wild-beast test which it superseded. See *Rex vs. Arnold*, 16 Howard State Trials 695. This court would not be without precedent in adopting such a course. The United States Court of Appeals, District of Columbia Circuit, has pointed the way in *Durham vs. United States*, 214 F. (2d) 862. The *Durham* case recognizes the humanitarian precept that

“our collective conscience does not allow punishment where it cannot impose blame.” Its criticism of the right and wrong test is two-fold. First, it does not take sufficient account of psychic realities and scientific knowledge, and, second, it is based upon one symptom so cannot validly be applied in all circumstances. The *Durham* case adopts the enlightened rule that where there is some evidence of mental disease or defect, in order to convict, the jury must find either (1) that the accused was not suffering from a mental defect or disease, or (2) that even if he was, the criminal act was not the product of that condition. In determining those issues the jury is given the broad discretion of examining every facet of the accused’s mental condition, not just the tiny compartment where his capability of understanding right from wrong resides.

We respectfully submit that for the errors pointed out in this brief defendant should be granted a new trial, and that this court should go a step further and adopt in substance the rule of the *Durham* case, *supra*, for a new trial in this case and for future use in the State of Utah.

Respectfully submitted,

WAYNE L. BLACK
LAMAR DUNCAN

*Counsel for Defendant
and Appellant*