

1992

Utah v. Tomas R. Herrera and Mikell Sweezey : Reply Brief

Utah Supreme Court

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BRIEF

DOCKET NO. 920209

IN THE SUPREME COURT OF THE STATE OF UTAH

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| v. | : | |
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| and | : | |
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| Defendant/Appellant. | : | Priority No. 11 |

REPLY BRIEF OF APPELLANTS

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UTAH

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INTRODUCTION

The insanity defense has been firmly established in the criminal law in this country since the adoption of the federal constitution. A. Goldstein, The Insanity Defense (1967) (hereinafter "Goldstein"); State v. Searcy, 798 P.2d 914, 929 (Idaho 1990) (McDevitt, J., dissenting); Jacques Quen, Psychiatry and the Law: Historical Relevance Today in L. Freedman, By Reason of Insanity: Essays on Psychiatry and the Law, 143, 154-7 (1987). While the defense has been subject to the "evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man" (see Powell v. Texas, 392 U.S. 514, 535-6 (1968)), the basic premise that insane individuals are not criminally culpable has been a part of this nation's criminal law jurisprudence throughout the nation's history.

Although the concept of insanity has evolved, until the Hinckley verdict, that evolution consisted of broadening the defense

as our understanding of mental processes progressed. See Goldstein at 19, 96-7; discussion infra at 14-15 regarding evolution of insanity defense in Utah. Until 1983, criticism of the M'Naghten defense revolved around the narrow definition of insanity under M'Naghten and the failure of the M'Naghten rule to provide an insanity defense to all persons who should not be held criminally culpable based on mental illness. Goldstein at 11, 46-7; Wayne LaFave, 1 Substantive Criminal Law 446 (1986) (hereinafter "LaFave").

The controversy surrounding the Hinckley verdict is similar to the controversy surrounding the M'Naghten verdict in 1843.¹ See

1. Despite the public outcry following the Hinckley verdict, it should be kept in mind that the insanity plea is "rarely used and even more rarely successful." R. D. MacKay, Post-Hinckley Insanity in the U.S.A., 1988 Crim. L. Rev. 88, 89 fn. 10, citing Pasewark, "A Review of Research on the Insanity Defense" (1986), 477 Annals of the American Academy of Political and Social Science 100. Historically, the majority of acquittals by reason of insanity have appeared to be uncontested or stipulated. See Goldstein at 23. Only a very small percentage of criminal defendants who go to trial plead not guilty by reason of insanity ("NGBRI"). Goldstein at 22. Establishing the defense at trial can be very difficult given the fact that usually only more serious offenders assert the defense, and the defendant, who must be competent to stand trial, may well appear sane to the jury at the time of trial. Goldstein at 19, 23-4.

Furthermore, the public's perceived abuse of the insanity defense following the Hinckley verdict reflects a widespread misperception of the treatment of individuals found NGBRI. As Goldstein pointed out:

[I]nsanity has become a defense in name alone. In virtually every state, a successful insanity defense does not bring freedom with it. Instead, it has become the occasion for either mandatory commitment to a mental hospital or for an exercise of discretion by the court regarding the advisability of such commitment. And because the commitment is for treatment, it continues until such time as the hospital authorities conclude the patient is ready for release.

(continued)

R. D. MacKay, Post-Hinckley Insanity in the U.S.A., 1988 Crim. L. Rev. 88 (hereinafter "MacKay"). Unfortunately, the Utah Legislature responded to the present-day controversy in an opposite manner than the House of Lords and severely restricted the use of evidence of insanity. Indeed, the current Utah statute is more restrictive and narrow than the rule in effect in England in 1843, despite extensive advances in our understanding of the human mind and significant broadening of the concept of insanity since that time.

Appellants contend that the Utah Legislature has overstepped its ability to pass laws and thereby violated due process by precluding criminal defendants from presenting an affirmative defense of insanity. Such a defense is fundamental to notions of fairness, decency and justice and incorporated in the concepts of state and federal due process.

STANDARD OF REVIEW

The issues presented in this case involve questions of law. See Appellant's opening brief at 3.

(footnote 1 continued)

Goldstein at 19. See Jones v. United States, 463 U.S. 354, 368, 370, 103 S.Ct. 3043, 3052, 3053, 77 L.Ed.2d 694 (1983) (defendant found NGBRI can be committed based on verdict and can be held in "a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society").

It is interesting to note that pursuant to due process, Utah's current statute may well limit the jury to a determination that a defendant is "not guilty" and preclude the use of "NGBRI" verdict form since the State has failed to prove an element of the crime. As Justice Durham noted in Young, 853 P.2d 327 (Utah 1993) (Durham, J.), "in Utah, a person found NGBRI is, in effect, not guilty because he or she did not possess the mental state required to commit the offense charged."

SUMMARY OF THE ARGUMENT

Fundamental fairness requires that persons who, as the result of mental illness, do not understand the wrongfulness of their conduct not be held criminally culpable. An affirmative defense of insanity was firmly ingrained in the criminal justice system at the time the federal constitution was adopted and has been embraced by the majority of the states. Federal due process requires that such an affirmative defense exist.

Utah has shown a heightened and progressive awareness regarding the treatment of mentally ill persons and a broad and progressive application of the insanity defense. State due process requires that an affirmative defense of insanity exist.

The State is relieved of its burden of proof, in violation of due process, where evidence of insanity is admissible only for purposes of negating the mens rea element.

Appellant Herrera has standing to raise this issue. The statute is arbitrary and capricious in that it arbitrarily differentiates between delusional offenders.

A defendant's right to due process and against self-incrimination is violated where such a defendant is allowed to introduce evidence of mental illness only for purposes of negating the mens rea.

ARGUMENT

POINT I. UTAH'S STATUTORY SCHEME VIOLATES FEDERAL DUE PROCESS IN THAT IT ELIMINATES AN AFFIRMATIVE DEFENSE OF INSANITY WHICH IS FUNDAMENTAL TO OUR CRIMINAL JUSTICE SYSTEM.

(Reply to Point I of Appellee's Brief)

Appellants' argument in this point is that federal due process requires that, at a minimum, criminal defendants have a right to present an insanity defense based on the M'Naghten test. Appellants claim that this minimum threshold test has been firmly ingrained in our criminal justice system and that an affirmative defense of insanity based on this test is fundamental to our system. Appellants are not asking this Court to draft a new rule or assess current, and perhaps fleeting, reactions to the use of this defense. Instead, Appellants are asking this Court to recognize that use of this minimum threshold test is so fundamental to our notions of fairness that it is protected by due process.

To the extent that this Court agrees that such an affirmative defense is protected by due process, the State is not free to outlaw such a defense. See Nebbia v. New York, 291 U.S. 502 (1934).

"The language of M'Naghten is fairly simple." Goldstein at 45. The rule states:

that to establish a defense on the ground of insanity, it must be clearly proved 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.

Goldstein at 45 (emphasis added).

The State claims that Utah's current statute allows a defense based on the first phrase of M'Naghten but disallows a defense based on the second phrase. State's brief at 19-20. The

State argues further that the current statute evidences an intent to relieve individuals from criminal culpability where they are not "responsible," but to not "exonerate"² them based on a failure to know that the conduct was wrong. State's brief at 17-21.

Even if the State were correct that our current statute encompasses the first phrase of M'Naghten, the statute nevertheless violates federal due process since both phrases are constitutionally mandated. Since the early 1800's, individuals who fit within either phrase were absolved of criminal culpability. The M'Naghten rule did not make a distinction between those who were not guilty due to insanity and those who would not be punished based on insanity. See State v. Green, 6 P.2d 177, 184 (Utah 1931). Instead, all persons who fit under either phrase were entitled to an acquittal. Id.

The Green Court pointed out that while "[n]ot all persons who are afflicted with insanity, lunacy, idiocy or other unsoundness of mind are to be exonerated from punishment for their criminal acts," an individual is "entitled to an acquittal if at that time he was ... insane to such an extent that he either (1) did not know the nature of his act ... ; or (2) ... did not know that it was wrong ... ; or (3) ... was unable by reason of his mental disease to control his actions or impulses ... " (emphasis added). Hence,

2. In attempting to make a distinction between the two phrases, the State appears to be referring to "exoneration from punishment" and not the more common meaning for the term "exoneration," i.e. relieve from blame. The State's distinctions without a difference further complicate an already complex area, and Appellants would urge this Court not to adopt the State's labels for the two M'Naghten phrases.

pursuant to Green, individuals who fit under either phrase were acquitted; those who fit under the second phrase were not merely "exonerated from punishment."

In addition, it is not clear that Utah's current statute encompasses even the first phrase of the M'Naghten rule. The first phrase absolves an individual where that individual did not know the nature and quality of his act. By contrast, a person acts "intentionally" "when it is his conscious objective or desire to engage in the conduct or cause the result," and "knowingly" when he is "aware of the nature of his conduct or the existing circumstances" and "aware that his conduct is reasonably certain to cause the result." Neither mental state encompasses the requirement that the individual be aware of the "quality" of his act, as is required by the first phrase of M'Naghten. See Utah Code Ann. § 76-2-103.

Various courts have determined that the two phrases of M'Naghten are indistinguishable, i.e. "that the ability to know the nature and quality of an act is indistinguishable from the ability to understand its wrongfulness." State v. Patterson, 740 P.2d 944, 947 (Alaska 1987), disavowing its earlier reasoning to that effect in Chase v. State, 369 P.2d 997, 1002-3 (Alaska 1962), overruled in part on other grounds, Fields v. State, 487 P.2d 831, 836 (Alaska 1971), in light of express legislative history. In Jessner v. State, 231 N.W. 634, 639 (Wis. 1930), the Court stated that the two phrases in the M'Naghten test

... express exactly the same thing, but in different language. They are synonymous, and their conjunctive use results only in emphasis.

If a person is unable to distinguish between right and wrong in respect to an act, he must be unaware of the nature and quality of the act which he is doing

See also Maas v. Territory, 63 P. 960, 961 (Okla. 1901) ("knowledge of the wrongfulness of an act also embraces capacity to understand the nature and consequences of the same"). Assuming the two phrases of M'Naghten are indistinguishable, Utah's negation of the mens rea statute does not cover the first phrase since it does not allow an insanity defense based on the actor's lack of knowledge as to the wrongfulness of his act.

Further support for this concept that the two phrases of M'Naghten are indistinguishable comes from the label generally given the test. Throughout case law and commentaries, the M'Naghten test is referred to as the "right-wrong test" or by a similar term denoting the actor's knowledge of the wrongfulness of his or her conduct. See LaFave at 427, 436. These labels demonstrate that the essence of the M'Naghten test is the actor's knowledge of the wrongfulness of the conduct. Hence, Utah's statute does not permit an affirmative defense of insanity where an individual fits within the M'Naghten test.³

3. Although the language of the M'Naghten rule is fairly simple, its meaning is not so straightforward. See Goldstein at 47. Little case law exists which explains the meaning of the two phrases. Id. at 23, 47-50; LaFave at 439. LaFave suggests that the paucity of case law explaining the meaning of the two M'Naghten phrases "is probably due to the small percentage of defendants who raise an insanity defense and the extreme rarity of appeals by these defendants." LaFave at 439. While the precise meaning of the two phrases has not been extensively litigated, it is apparent that the rule protects individuals who do not know that their conduct is wrong.

The State relies heavily on the United States Supreme Court decision in Foucha v. Louisiana, 504 U.S. ___, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), in support of its argument that the statute does not violate federal due process.

Foucha did not consider whether some form of affirmative insanity defense was constitutionally mandated. Instead, the Court held that a state violates due process where it continues to hold a defendant found NGBRI in a mental institution where the defendant is no longer mentally ill.

Although the State emphasizes statements made in concurring opinions in Foucha v. Louisiana, 112 S.Ct. 1780 (1992), it recognizes that these statements are dicta. State's brief at 21-23. Furthermore, Justice O'Connor's concurring opinion was not joined by any justices; the Chief Justice joined Justice Kennedy's dissent. Hence, a majority of the Court has not embraced the dicta in Foucha cited by the State.

As Appellants pointed out in their opening brief, the United States Supreme Court has never squarely addressed the issue of whether federal due process requires that a defendant be able to present a defense of insanity other than the ability to negate the mens rea. See Appellants' opening brief at 16-17. Case law from the United States Supreme Court does suggest, however, that insane persons are not criminally culpable and that a distinction exists between lack of mens rea and an insanity defense. See Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed.2d 1302 (1952); Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254

(1968); State v. Searcy, 798 P.2d 914, 923-6 (Idaho 1990) (McDevitt, J., dissenting).

This Court has also never addressed the issue raised in this part. Although it has affirmed convictions of mentally ill offenders, none of these defendants claimed that pursuant to federal due process they were permitted to present an affirmative defense of insanity. See State v. Young, 853 P.2d 327 (Utah 1993); State v. DePlonty, 749 P.2d 621, 627 (Utah 1987); State v. Anderson, 789 P.2d 27, 29 (Utah 1990).

In State v. Young, 853 P.2d at 383-4 (Justice Durham dissenting and concurring, joined by Justices Stewart and Zimmerman), a majority of this Court recognized that under the Utah statute,

a defendant found NGBRI is, in effect, not guilty because he or she did not possess the mental state required to commit the offense charged. There is no assessment of a defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her behavior to the requirements of law. A good deal of critical commentary has been directed at this approach, see, e.g., R. D. MacKay at 92, but the legislature has maintained it through recent revisions of the statute.

Appellants are now asking that this Court consider for the first time the constitutionality of Utah's much criticized statute, and hold that an affirmative defense of insanity is so fundamental to our system of justice that it is incorporated in the concept of federal due process.

POINT II. UTAH'S STATUTORY SCHEME DENIES
DEFENDANTS DUE PROCESS UNDER THE STATE
CONSTITUTION.

(Reply to Point II of Appellee's Brief)

The historical treatment of the mentally ill in Utah demonstrates a heightened awareness of the lack of responsibility or "accountability" of such persons.⁴

In addition to the request by Governor George Woods in 1872 that Utah address the problems of the mentally ill, quoted on page 32 of Appellant's opening brief, Governor George W. Emery made the following statement to the legislative assembly on January 11, 1876:

We need a Territorial Asylum for the insane, which will afford this class of unfortunate people proper treatment, at the public expense unless they are possessed of sufficient means to defray the necessary charges attending their case. Such an institution is indispensable in every State and Territory and should be under the control of a skillful physician, who has had experience in treating this class of patients. Humanity and wise government, alike, seem to require of us such a provision, and I suggest some action be taken by you looking to the establishment of such an institution even if it be on a limited scale, though adequate to the present wants of our people.

23 Utah Historical Quarterly 302 (1955).

The governor made this request for a territorial asylum even though Salt Lake City had opened a mental institution at the mouth of Emigration Canyon in 1869. R. D. Poll, Utah's

4. The historical information in this reply brief supplements the historical information outlined in Appellants' opening brief at 32-37.

History 285 (1989) (hereinafter "Utah's History"). In 1879, Dr. Seymour Young, a trained medical doctor and nephew to Brigham Young, purchased the Salt Lake City institution and thereafter ran it "under contract of the city." Id.⁵

In 1880, the Utah territorial legislature authorized the Utah Territorial Insane Asylum. The legislature intended "that the territorial facility be modern in every regard." Lester E. Bush, Jr., Health and Medicine Among the Latter-Day Saints: Science, Sense and Scripture 119 (1993) (hereinafter "Health and Medicine"). "When the Territorial Asylum opened in July 1885, it was heralded as incorporating all the improvements, conveniences and appointments of a modern asylum." Id., quoting Charles R. McKell, "The Utah State Hospital: A Study in the Care of the Mentally Ill," Provo Papers, 1 October 1976, pp. 6-28, originally published in 23 Utah Historical Quarterly (1955). In addition, Dr. Walter R. Pike, who "was probably the most qualified person in the territory," was appointed as the first superintendent. Health and Medicine at 119. Hence, prior to statehood, the government was providing funds and superior facilities and personnel for treatment of the mentally ill. This demonstrates an early, heightened concern for the treatment of the mentally ill.

This early "commitment to the institutional approach to care" (Health and Medicine at 119) was "notable" in "that there was

5. Articles written by Dr. Young "generally showed him to be current with recent developments in the field." Lester E. Bush, Jr., Health and Medicine Among the Latter-Day Saints: Science, Sense and Scripture 119 (1993).

so little opposition to defining individuals as mentally ill, as opposed to being possessed of evil spirits or devils, given the general distrust of medicine and the emphasis upon the supernatural in every day life." Utah's History at 285. This early commitment to care for the mentally ill as opposed to a belief they were possessed by spirits also demonstrates the early progressiveness of Utah in this area.

One of the first acts of the legislature after statehood was to take over control of the mental institution in Provo. Utah's History at 412. This also reflects the awareness of the importance of treatment for mentally ill persons.

Almost ninety percent of the population of Utah were members of the Church of Jesus Christ of Latter-Day Saints at the time Utah achieved statehood. Utah's History at 397. Only 28 of the 107 participants in the constitutional convention held March 4 through May 8, 1895 were non-Mormons. Hence, Mormon views on the treatment of the mentally ill should be considered in determining whether state due process guarantees an affirmative defense of insanity.

Insane persons who "do not develop mentally to the point where they know right from wrong" are not accountable under Mormon doctrine. B. R. McConkie, Mormon Doctrine (2d ed. 1966) at 853.

Considered at another level the ecclesiastical status within Mormonism of those who are mentally handicapped always has been clear. The notion implicit in LDS scripture that "accountability" was a prerequisite to baptism (or any other personal ordinance) was early understood to apply not just to young children but to any who were

mentally incapable of accepting responsibility for their own actions. Thus there has been no requirement of baptism or any other formal ordinance for those who are either severely retarded or insane.

Health and Medicine at 123 (emphasis added).

This theme that insane persons are not accountable for their actions is apparent in other areas. In the context of suicide, Elder Bruce R. McConkie, a respected leader in the LDS Church, wrote in part:

Suicide consists in the voluntary and intentional taking of one's own life, particularly where the person involved is accountable and has sound mind.

Obviously persons subject to great stresses may lose control of themselves and become mentally clouded to the point that they are no longer accountable for their acts. Such are not to be condemned for taking their own lives.

Mormon Doctrine at 771 (emphasis added).

Historically, Utah has shown a progressive approach for treatment of the mentally ill and a recognition that insane persons are not accountable for their actions. See Appellants' opening brief at 32-37 for further discussion of the historical approach to insanity. The current statute, which precludes an insanity defense for persons who are not responsible or "accountable" for their actions, cuts against this historical concern for and progressive treatment of the mentally ill.

Over the years, the judicial and statutory definitions of insanity have, for the most part, broadened as knowledge of mental processes has progressed. See Territory v. Catton, 16 P. 902, 907-8 (1888), reversed on other grounds, 130 U.S. 83 (1889) (if individual

"with ability to refuse" acts "with the knowledge that it is wrong, he is responsible" for his actions); State v. Mewhinney, 134 P. 632 (Utah 1913) (M'Naghten test)⁶; State v. Green, 6 P.2d at 184-6 (M'Naghten plus inability to control actions or impulses); State v. Poulson, 381 P.2d 93, 94-5 (Utah 1963) (upholding use of instruction outlining M'Naghten and irresistible impulse tests); legislative adoption of Model Penal Code substantial capacity test, Utah Code Ann. § 76-2-305 (1973); State v. Sessions, 645 P.2d 643, 645 (Utah 1982) (recognizing that Utah broadened "the insanity test to conform to current accepted principles of moral responsibility; cf. State v. Young, 853 P.2d at 383-4 (Durham, J.) (noting that Utah's approach is not assessing defendant's capacity to appreciate wrongfulness of his conduct or to conform his conduct to the law has been subject to criticism)).

The State points out that Utah's current statutory scheme holds "all defendants accountable when the prosecution establishes proof of the elements of the crime and by otherwise rejecting mental illness as a basis for exoneration." State's brief at 36. Holding insane defendants "accountable" cuts against the historical concern for and progressive treatment of mentally ill persons in this state and the fundamental and pervasive acceptance of the notion that

6. In Mewhinney, the Court rejected the irresistible impulse test despite the "ability to refuse" language in Catton. In Green, 6 P.2d at 189-6, the Court again included the lack of ability to control one's conduct. Mewhinney is perhaps the only example of the State narrowing the definition of insanity over the years. Other than Mewhinney, the judicial and statutory definitions broadened from territorial times until 1983.

insane persons are not "accountable."

The Legislature cannot abrogate rights that are protected by due process. See generally Nebbia v. New York, 291 U.S. 502 (1934). The State's argument at 23, 29, 39 that defining the insanity defense is a legislative function disregards the due process limitations placed on any legislative act.

Decisions cited by the State for the proposition that "other decisions [] have [] concluded that restriction of mental illness evidence is a constitutional legislative action" (State's brief at 39; see also State's brief at 23, 29) do not involve statutes which allow evidence of insanity solely for purposes of negating the mens rea. For instance, in United States v. Cameron, 907 F.2d 1051, 1061 (11th Cir. 1990) (cited in State's brief at 39), the Court discussed the Insanity Defense Reform Act which eliminated the "lack of volitional control" excuse, but retained the M'Naghten standard. See also Haas v. Abrahamson, 910 F.2d 384 (7th Cir. 1990)⁷ (holding that due process not violated where state disallows expert testimony as to whether defendant lacked required intent);

7. The State relies on Haas v. Abrahamson, 910 F.2d 384 (7th Cir. 1990), in support of its argument that states are free to define insanity without any due process limitations. See State's brief at 13, 29, 39. The issue in Haas was whether Wisconsin could disallow expert testimony offered by the defendant to establish that he was incapable of forming the necessary intent. In reaching its decision that precluding expert testimony on the issue of whether the defendant could form the requisite mens rea did not violate due process, the Court pointed out that "the issues of insanity and intent, although related, are not identical" Id. at 396. Haas did not address the issue raised in these cases as to whether the State could restrict the insanity defense to negation of the mens rea element, and provides little support for the State's argument.

United States v. Pohlott, 827 F.2d 889, 895 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988) (discussing Insanity Defense Reform Act which retains M'Naghten standard but deletes "volitional prong" of Model Penal Code); Hart v. State, 702 P.2d 651, 659 (Alaska App. 1985) (holding that elimination of "irresistible impulse" insanity defense does not violate due process); Hicks v. State, 352 S.E.2d 762, 775 (Ga. 1987), cert. denied, 482 U.S. 931 (1987) (upholding Georgia insanity defense which had right/wrong test and delusional compulsion test, but did not include "an impulse-control-disorder" insanity defense); State v. Turrentine, 730 P.2d 238, 242 (Ariz. App. 1986) (commenting that insanity defense which exonerates defendant from guilt "represents a public policy adopted by this state," and pointing out that finding defendant NGBRI under M'Naghten test is distinct from mens rea element).

POINT III. UTAH CODE ANN. § 76-2-305 IS
ARBITRARY AND CAPRICIOUS IN VIOLATION OF DUE
PROCESS.

(Reply to Point IV of Appellee's Brief)

A. APPELLANT HERRERA HAS STANDING.

The State challenges Defendant Herrera's standing to raise this issue but apparently does not challenge Defendant Sweezey's standing. State's brief at 44-6.

Dr. LeBegue holds the opinion that Appellant Herrera suffered from a mental disease at the time of the offense and "would qualify for an affirmative defense of insanity as that defense existed in Utah prior to 1983." RH. 160. At the time of the

hearings in the trial court, Dr. LeBegue was "unable to state with certainty whether Tomas Herrera would qualify for the defense of insanity as presently defined." RH. 160. Defense counsel proffered that

He is mentally ill, your Honor. He is a paranoid schizophrenic. He experiences hallucinations.

RH. 386; see also 450. In addition, Appellant Herrera amended his plea to not guilty or, in the alternative, NGBRI. R. 374.

Although the State ultimately conceded standing in some areas, it initially argued

As to the standing issue, what the State's position would be is that to establish standing sufficient to raise the constitutionality of these statutes, that the defendant must show that he is mentally ill and that that mental illness does not fit within the current legal definition as stated under 76-2-305; that because no facts have been proffered that this Court doesn't have any basis to conclude whether or not the defendant has raised any relevant issue.

R. 286-7.

Later, in arguing over the Findings of Fact and Conclusions of Law, the State claimed:

Your Honor, again, at the time Dr. LeBegue testified and at the time the defendant made the strategy decision not to allow him to testify fully, all that needed to be set forth at that time was the fact that Mr. Herrera was delusional and why that would make any difference under the current statute as opposed to previous law. It was a due process argument that they were raising. And to have him state in relationship to such, as his testimony, that had to do with delusional offenders which, as I remember Dr. LeBegue's testimony, was the only thing where there might be some shift from prior law to current law. He simply never put Mr. Herrera in that category; nor was it proper to put him in that category.

R. 450-1.

The argument in the trial court appears to have been about whether or not the State was entitled to an opportunity to cross-examine Appellant Herrera's expert witness. R. 448-52, 456. Defense counsel was concerned about the unlimited cross-examination the trial judge would allow, and despite the State's argument to the contrary, Appellant Herrera made an adequate showing that he was mentally ill and would have been entitled to assert the insanity defense under the former law.⁸

As Appellant Herrera argued in the trial court, the facts of the case as known at that point, R. 60-61, the proffer of Dr. LeBegue and the affidavit of Dr. LeBegue, show that Appellant Herrera has standing. In raising the issue in the trial court, defense counsel relied on the suggestions in State v. Rhoades, 809 P.2d 455, 459-60 (Idaho 1991).

In Rhoades, the Court recognized that Appellant Herrera need not present an opinion on the ultimate issue of sanity in order to raise a claim. Instead, an expert opinion that sanity might be an issue in the case or "an assertion by counsel that he was raising the defense of insanity." 809 P.2d at 459. Live testimony was not a requirement. Summary affidavits from the expert or, in the

8. Regardless of whether Appellant Herrera could assert the defense under the current law, the current statute severely limits the defense and precludes the jury from finding Appellant Herrera NGBRI in the event he is unable to negate the mens rea but able to establish that he did not know that the act was wrong. Hence, he has a claim regardless of whether he is also mentally ill under the current statute.

alternative, an in camera review of an affidavit by an expert appear sufficient under Rhoades.

B. THE STATUTE ARBITRARILY DIFFERENTIATES
BETWEEN DELUSIONAL OFFENDERS.

As Dr. LeBegue testified, individuals who suffer from the same type and severity of mental illness are treated differently under the statute. Appellant's opening brief at 44-6.

As Appellants outlined in their opening brief, a defendant found "guilty and mentally ill" (GAMI) may nevertheless be imprisoned. Appellants' opening brief at 26-30. Any of the following determinations could result in imprisonment rather than hospitalization: (1) the defendant is not mentally ill at the time of sentencing; (2) at the time of sentencing, the defendant is currently mentally ill, but the various factors weigh in favor of incarceration rather than hospitalization; (3) the defendant has achieved "maximum benefit" (whatever that means). Utah Code Ann. § 77-169-203.⁹ Hence, the GAMI statute severely limits the persons who will be hospitalized as the result of their mental illness.

In addition, under the current mens rea insanity defense and the GAMI scheme, persons are held criminally culpable "who are mentally diseased and who cannot reasonably be used to serve the

9. Pursuant to Utah Code Ann. § 77-16a-202(1)(b), the court can order that a GAMI defendant be "committed to the department for care and treatment ... for no more than 18 months, or until he has reached maximum benefit, whichever occurs first" (emphasis added). Under this subsection, a GAMI defendant can be hospitalized for no more than 18 months before being transferred to the prison.

purposes of the criminal law." See generally Goldstein at 11-15 (discussing how M'Naghten defense furthers criminal law goals of retribution, deterrence and rehabilitation).

Finally, the GAMI statute does not free an individual who is mentally nonresponsible from criminal culpability. Although a person found NGBRI under predecessor statutes could be hospitalized, a distinction between a conviction and a finding of NGBRI nevertheless existed. The advantage enjoyed by the person found NGBRI is that "he suffers no formal judgment of condemnation." Goldstein at 20.

The existence of the GAMI statutory scheme fails to alleviate the due process violations caused by the current insanity defense.

POINT IV. UTAH CODE ANN. § 77-14-4 VIOLATES DUE PROCESS AND THE RIGHT AGAINST SELF-INCRIMINATION.

(Reply to Point VI of Appellee's Brief)

The current statutory scheme requires a defendant who desires to negate the mens rea requirement based on insanity to submit to a mental examination. Appellants' argument in this point is that such a requirement, where Appellants intend only to negate the mens rea element, violates due process and the fifth amendment.

In Estelle v. Smith, 451 U.S. 454, 465, 101 S.Ct. 1866, 68 L.Ed.2d 359, 370 (1981), a pre-Hinckley case, the Court stated in dictum:

Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [citations omitted]

The dictum in Estelle refers to an affirmative defense of insanity, as universally followed at that time. A defense of insanity which entertained only the negation of the mens rea element was not codified until after Estelle was decided. Hence, the dictum in Estelle does not address the issue raised in this part.

Nor did the defendant in State v. Bishop, 753 P.2d 439, 472 (Utah 1988), challenge the constitutionality of the examination procedure in light of the limited nature of the insanity defense available to him. Instead, Bishop claimed that he was not asserting a diminished capacity or insanity defense, and was introducing psychiatric testimony to establish that he had committed a manslaughter rather than an intentional homicide.

Appellants have not "interjected" an affirmative defense of insanity into this case. Instead, they are claiming that requiring them to be examined where they intend to use mental state only to negate the mens rea element violates due process and the fifth amendment.

CONCLUSION

Based on the foregoing, Appellants Herrera and Swezey respectfully request that this Court reverse the trial judges' orders denying their motions to "Declare Utah Statutory Scheme Unconstitutional" and remand the cases for trial in which Appellants are permitted to assert an affirmative defense of insanity.

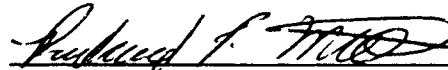
SUBMITTED this 23rd day of September, 1993.



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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered ten copies of the foregoing to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 23 day of September, 1993.



JOAN C. WATT

DELIVERED this _____ day of September, 1993.
