

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Howard P. King, Circuit Court Judge

Opinion No. 5258 (S.C. Ct. App. filed August 6, 2014)

11-GS-32-03528

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S.C. Supreme Court

THE STATE,

PETITIONER,

V.

WAYNE STEWART CURRY,

RESPONDENT

Appellate Case No. 2014-002238

RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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QUESTION PRESENTED

Did the Court of Appeals correctly determine the trial judge erred in failing to instruct the jury concerning a possible verdict of guilty but mentally ill and in ordering a new trial as the remedy for such an error?

STATEMENT OF THE CASE

Respondent was indicted for throwing bodily fluids on a corrections officer (2011-GS-32-3528) in violation of section 24-13-0470 of the South Carolina Code by a Lexington County grand jury on November 7, 2011. R. 239. The prosecution, represented by Rhonda Patterson and Shannon Davis, called the case to trial before the Honorable Howard P. King and a jury on November 5, 2012. R. 1. The jury found Respondent guilty as charged. R. 217, lines 3-8. On November 6, 2012, Judge King sentenced Respondent to imprisonment for eight and a half years with a recommendation for mental health treatment within the Department of Corrections. R. 223, lines 7-12; R. 223, lines 18-21; R. 242.

Respondent filed a timely notice of appeal. A unanimous panel of the Court of Appeals reversed Respondent's conviction and sentence. State v. Curry, 410 S.C. 46, 762 S.E.2d 721 (Ct. App. 2014); App. 1-8. The state filed a petition for rehearing on August 21, 2014. App. 9-21. The Court of Appeals denied the petition on September 18, 2014. App. 22. On October 20, 2014, the state filed a petition for writ of certiorari. This Return follows.

ARGUMENT

The Court of Appeals correctly determined the trial judge erred in failing to instruct the jury concerning a possible verdict of guilty but mentally ill and in ordering a new trial as the remedy for such an error.

Reasons to deny certiorari

In its petition, the state stated certiorari should be granted because “the decision of the Court of Appeals is in conflict with prior decisions of this Court in that the Court of Appeals misapplied the standard of review.” Cert. 7. However, the petition offered no argument to support such a claim. The state failed to cite any prior decision of this Court in conflict with the Court of Appeals’ opinion. The decision by the Court of Appeals was based upon clear precedent from this Court and a reasonable reading of the statute.

Relevant facts

While Respondent was detained at the Lexington County Detention Center, he was charged with throwing bodily fluids on a corrections officer. Prior to his trial, Respondent was evaluated numerous times regarding his mental condition.

Competency Hearing

Judge King presided over a hearing to determine whether Respondent was competent to stand trial pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

Testimony of Dr. Marla Domino

The prosecution presented the testimony of Dr. Marla Domino, a psychologist with the South Carolina Department of Mental Health. Pursuant to a court order for a competency evaluation, Dr. Domino interviewed Respondent on November 2, 2010. R. 6, lines 18 – 22; R. 7, line 1. Respondent had significant mental health history and Dr. Domino gathered records

concerning his prior psychiatric care. R. 7, lines 13 – 21. Dr. Domino’s interview with Respondent lasted approximately one hour and thirty minutes. R. 8, lines 7 – 9. Additionally, Dr. Domino attempted to speak with Respondent on the date of the hearing, but Respondent refused to speak with her. R. 8, lines 10 – 14. Based upon her interview of November 2, 2010, Dr. Domino opined that Respondent “did not lack the capacity to understand the proceedings against him or to assist in his own defense as a result of the lack of mental capacity.” R. 8, lines 19 – 24; R. 10, lines 13 – 17.

Although Respondent seemed to understand the charges against him, he was unsure of the penalties and required education in various areas of competency. R. 8, line 25 – R. 9, line 5. When discussing the roles of court personnel, Respondent gave multiple incorrect answers, including his belief that the role of the prosecutor was to advocate on his behalf, that the judge was on his side, and that his attorney was “rotten to the core” and wanted “to fry him.” R. 9, lines 6 – 10; R. 20, lines 4- 14. It was the opinion of Dr. Domino that Respondent was feigning an inability to learn the information regarding the responsibilities of courtroom personnel. R. 9, lines 13 – 15; R. 20, line 18 – R. 21, line 1. Respondent appreciated the seriousness of the charges against him and understood the difference between pleas of guilty and not guilty. R. 9, lines 16 – 21. Although Respondent seemed to be able to assist in his own defense, according to Dr. Domino, he gave numerous incorrect responses regarding the role of his attorney. R. 9, line 25 – R. 10, line 9.

When Dr. Domino interviewed Respondent, he had tremors in his hand and lacked proper personal hygiene. R. 18, line 25 – R. 19, line 6. Respondent gave incorrect answers during the examination, such as Eisenhower was the current United States President and that the colors of the United States flag were brown and green. However, she concluded that Respondent

intentionally gave incorrect information. R. 19, lines 7 – 15. She also explained that he acted silly by laughing or smiling all of a sudden, for no reason whatsoever. R. 19, lines 16 – 21.

On cross-examination, Dr. Domino admitted that Respondent had been in “special school” from an early age. R. 12, lines 3 – 7. She also admitted that he had a learning disability and was considered emotionally handicapped. R. 12, lines 8 – 11. Respondent suffered a severe head injury when he was eleven- or twelve-years old. R. 12, lines 19 – 21. Additionally, Respondent had received disability payments since 1995 based upon his diagnosis of paranoid schizophrenia. R. 12, lines 12 – 14. Although Respondent’s mother had been his payee on these checks, he had another individual named as the payee because of his paranoid distrust of his mother. R. 12, lines 15 – 18. Prior to his incarceration, Respondent had slept under a bed, complained of seeing a bald man, and believed his family members had been cloned. R. 13, lines 2 – 5; R. 13, lines 6 – 10; R. 16, line 21 – R. 17, line 4.

Respondent was admitted to the Gilliam psychiatric hospital multiple times between 1992 and 1999, where he was diagnosed as suffering from post-traumatic stress disorder, an anxiety and mania disorder, antisocial personality disorder, paranoid schizophrenia, and a delusional disorder. Not surprisingly, he was prescribed antipsychotic medications. R. 13, line 19 – R. 14, line 1; R. 22, lines 2 – 8; R. 14, line 25 – R. 15, line 4. Additionally, Respondent had received treatment at the Aiken Barnwell Mental Health Center between 1993 and 2010, where he had been diagnosed with schizophrenia, paranoid type and a delusional disorder. R. 15, lines 15 – R. 16, line 2; R. 224.

Respondent had been evaluated by the Department of Mental Health in 1997, 2000, 2001, 2006, 2007, three times in 2008, and twice in 2010. R. 16, lines 3 – 8; R. 224 (Court’s Exhibit #1). In 2007, Dr. Pamela Crawford found Respondent incompetent and not likely to restore. R.

16, lines 14 – 16. Respondent was admitted to Just Care in March 2010, on an emergency inpatient commitment due to his erratic behavior. R. 17, lines 13 – 23. Dr. Domino admitted that historically Respondent was noncompliant with his medications, including at the time of her interview and at the time of his trial. R. 18, lines 3 – 5; R. 20, lines 1 – 3. Dr. Domino admitted that Respondent’s non-compliance with medication would have an impact on competency. R. 23, lines 6 – 9. Also, Dr. Domino admitted that Respondent was not cooperative with her and that his lack of cooperation limited her ability to diagnose Respondent. R. 17, lines 5 – 8.

Testimony of Respondent

Respondent testified during the Blair hearing as well. Respondent stated that he understood he was in court “[t]o stand trial;” however, he indicated he was unsure of that response by posing it as a question. R. 31, lines 24 – 25. He further testified that it was the job of the jury to find him guilty or innocent. R. 32, lines 9 – 3. However, he indicated confusion regarding the subject matter that would be presented to the jury. Respondent wanted to testify regarding his having been hit on the head with a sledgehammer while he was at the jail and of his constitutional rights having been violated due to the delay in his trial. R. 32, lines 3 – 11; R. 32, line 25 – R. 33, line 2. He further indicated that he was charged with throwing bodily fluids. R. 32, lines 16 – 17. However, he indicated he was not worried about the seriousness of the charge because he was innocent. R. 32, lines 20 – 23. Respondent indicated unwillingness to help his attorney present his case explaining that he wanted to speak to the jury about the head injury. R. 33, lines 17 – 20.

Court’s Exhibits

Dr. Domino’s report indicated that on May 21, 2008 she determined Respondent was competent to stand trial because he was uncooperative and therefore, she had insufficient data to

overcome the presumption of competence. Despite this finding by Dr. Domino, Respondent was found incompetent to stand trial by the court on June 16, 2008. R. 232. After Respondent underwent a period of competency restoration, Dr. Domino reexamined him on August 19, 2008. Again, Dr. Domino opined that Respondent was competent because he had been uncooperative and there was insufficient evidence to overcome the presumption of competence. Nevertheless, the court held Respondent was incompetent to stand trial and unlikely to be restored. R. 235. A month later, on May 5, 2009, Dr. Domino evaluated Respondent again. Because he was uncooperative, she opined that there was insufficient evidence to overcome the presumption of competence. However, when Respondent cooperated with her interview in November 2010, Dr. Domino found Respondent competent to stand trial. R. 224.

Judge's Ruling

Judge King found Respondent was competent to stand trial. The judge concluded that based upon the evidence presented, his observations of Respondent, and Respondent's testimony that Respondent understood the charges and the role of the jury. He further concluded that Respondent was malingering in his answers to some questions regarding the functions of the court in order to convince everyone that he was unaware of what the proceeding was about. R. 39, line 19 – R. 41, line 18.

Trial

Following Judge King's finding that Respondent was competent to stand trial, the parties proceeded to present evidence concerning the charge against Respondent, throwing bodily fluids, and Respondent's defenses.

Testimony of Frederick Hopkins

Frederick Hopkins, an officer at the Lexington County Detention Center, testified that on August 18, 2010, Respondent was an inmate at the detention center. R. 44, lines 12 – 16. Hopkins was working the first floor, which is where the detention center housed inmates with special needs and mental health issues, such as Respondent. R. 44, line 21 – R. 45, line 1; R. 46, line 20; R. 55, lines 4 – 5. The officers reserved the clean-up of Respondent's cell until last because of the strong smell emanating from his cell even through the closed door. R. 46, line 9 – R. 46, line 15. When Hopkins opened the door, Respondent lobbed fecal matter hitting Hopkins in the abdomen and dribbling down onto his right leg. R. 46, line 25 – R. 47, line 4. Hopkins immediately sealed the door and called for assistance. R. 48, lines 20 – 24.

Hopkins was well aware of Respondent's mental illness. In fact, Hopkins was aware that Respondent was refusing to take medications around the time of the incident. R. 57, lines 2 – 6. Respondent stayed alone in his cell and took his recreation alone. R. 58, lines 19 – 20; R. 59, lines 1 – 5. After the alleged incident, Hopkins discovered that Respondent was hoarding feces under the sink in his cell. R. 61, lines 6 – 7. Hopkins and Respondent had no cross words before or after the incident, and the incident occurred out of the blue. R. 67, lines 15 – 23.

Testimony of James Clawson

James Clawson, another officer with the detention center, testified that after the alleged incident, he and others cleaned feces from Respondent's cell. The officers removed the linens and the mattresses, and cleaned the walls and the toilet to remove feces. R. 73, lines 8 – 18; R. 81, lines 17 – 24; R. 86, lines 19 – 22. Respondent had feces on his face and clothing. R. 81, lines 1 – 12. Although Clawson had almost daily contact with Respondent, he explained that Respondent experienced very little human interaction. R. 82, lines 19 – 25. Respondent usually said very few words and spent most of his time of alone. R. 83, lines 1 – 8.

Testimony of Respondent

Respondent did not graduate from high school. In fact, Respondent did not even make it into middle school. R. 98, lines 11 – 21. Respondent received disability benefits for mental illness – paranoid schizophrenia. R. 199, lines 19 – 22. Respondent claimed that Ella Walker was not his real mother and that his real mother lived in New York. R. 100, lines 2 – 10. Much of Respondent’s testimony was irrelevant to the matter before the court because Respondent wanted to discuss the infringement of his constitutional rights and his being hit on the head with a sledgehammer by correctional officers. Respondent testified that he did not remember throwing feces on Hopkins. R. 109, lines 23 – 25. However, Respondent did recall putting feces on the walls at the detention center more than once. R. 112, line 20 – R. 113, line 2.

Testimony of Casandra Means

Casandra Means, a counselor with the Department of Mental Health, worked as a counselor at the detention center. R. 118, lines 1 – 10. Respondent was housed with other individuals requiring mental health observation. R. 123, lines 2 – 18. Although Respondent initially interacted with her, his level of interaction decreased over time. Respondent was isolated, did not talk, and did not engage. Although he would make eye contact at times, he would not answer questions. R. 123, lines 19 – 25. Respondent always had a flat affect, meaning he showed no expression or emotion. R. 124, lines 10 – 13. Respondent’s willingness to engage in conversations fluctuated. R. 124, lines 14 – 18. However, even at his best, Respondent was not a conversationalist. R. 125, lines 4 – 6. Respondent would not communicate with Means or anyone else for long periods of time. R. 125, line 7 – 9. She found him to be consistent in his conduct and mannerisms. R. 125, lines 10 – 16. Means recalled that

at the time of the alleged incident, Respondent was presenting symptoms consistent with mania. Mania involved a high energy state and irrational thinking. R. 132, line 15 – R. 133, line 8.

Testimony of Merrie Cherry

Merrie Cherry, the psychiatrist at the detention center, had contact with Respondent fairly regularly because he had significant mental illness. R. 137, lines 1 – 9; R. 140, lines 3 – 4; R. 140, lines 12 – 16. She explained that Respondent had never been one to volunteer information. He would answer questions asked, but he would not elaborate or provide details. Recently, he refused to answer questions altogether. During his depressed state he isolated more. Although he may answer her questions, he would be “cocooned” in his sheets and blanket. She described him as having a very flat affect. During periods of mania, Respondent showed increased agitation, increased psychomotor activity, increased impulsivity, and hypersexuality. She also explained that during his mania, he would laugh loudly and inappropriately. R. 141, lines 1 – 24. Dr. Cherry diagnosed Respondent with bipolar affective disorder. R. 142, lines 3 – 5. She explained his disorder was defined by episodes of severe mania, including psychotic symptoms. R. 142, line 8 – 15. Dr. Cherry acknowledged that previously Respondent had been diagnosed with schizophrenia, indicating he had had delusions, false beliefs, and paranoia. R. 143, lines 5 – 24.

Testimony of Ella Walker

Ella Walker, Respondent’s mother, testified. Although Respondent had testified that she was not his birth mother, Walker testified that she had in fact given birth to him on November 1, 1959. R. 152, lines 5 – 12. Respondent dropped out of school at the age of twelve. R. 153, lines 1 – 3. Respondent received disability payments as he was unable to hold a job due to his mental illness. R. 153, lines 6 – 10. Although Walker had been the payee on his check, Respondent

developed a distrust of her and the payee was changed. R. 153, lines 11 – 18. Walker allowed Respondent to live in the home next door to hers. Respondent tore out the walls because he saw a “bald headed Mexican,” who was trying to harm him. R. 154, lines 1 – 16. Respondent would not eat food that she prepared for him because he feared she was trying to poison him. R. 154, line 21 – R. 155, line 3.

When Respondent returned from the jail, he had a scar and insisted the scar showed that he had been cloned. He wore sheets and aluminum foil around his waist as protection. R. 155, lines 4 – 11. Respondent repeatedly complained of hearing voices throughout his life. R. 155, lines 15 – 19. Respondent additionally had visual hallucinations, usually involving the “bald headed Mexican.” R. 155, lines 20 – 24. Respondent’s visual and auditory hallucinations worsened over time. R. 156, lines 3 – 5.

Testimony of Dominique Curry

Dominique Curry, Respondent’s daughter testified. R. 158, lines 11 – 14. Respondent often claimed he saw “small, little midgets, white people, bald headed Mexicans running around.” R. 158, line 20 – R. 159, line 2. Respondent believed that his family members had been replaced by clones. R. 159, lines 3 – 8. Respondent accused his mother of attempting to poison him, and he refused to eat food prepared by others. R. 159, lines 12 – 19. Respondent tore down the walls in the house because he thought people were inside the walls trying to get to him or kill him. R. 159, line 23 – R. 160, line 5. Respondent believed the correctional officers had placed a tracking device in his chest. As a result, he always wore aluminum foil around his chest to keep the tracking device from working. R. 160, lines 6 – 14. Respondent believed the tracking device was to aid others in killing him. R. 160, lines 15 – 18. Curry recalled

Respondent sitting in the living room and then suddenly jumping up by the air because he believed people were attacking him. R. 160, line 19 – R. 161, line 1.

Testimony of Dr. Marla Domino

In reply, the prosecution called Dr. Domino. Specifically, Dr. Domino testified that in her opinion, Respondent did not lack the capacity to distinguish right from wrong at the time of the alleged crime. Dr. Domino reached this conclusion based upon her opinion that Respondent was not experiencing symptoms of mental illness at the time of the alleged act. R. 186, line 14 – R. 187, line 1. Additionally, Dr. Domino testified that in her opinion, Respondent was able to conform his conduct to the requirements of the law. R. 187, lines 2 – 5. This decision, as well, was based upon her opinion that Respondent was not experiencing symptoms of mental illness at the time of the alleged period. R. 187, lines 6 – 20; R. 224 (Court's Exhibit #1).

Charge Conference – Request for GBMI & NGRI

At the conclusion of the presentation of evidence, Respondent moved for the jury to consider the verdicts of not guilty by reason of insanity (NGRI) and guilty but mentally ill (GBMI). The judge refused to instruct the jury as to these two verdicts because he found no evidence in the record that Respondent lacked the ability to distinguish right from wrong. The judge surmised that the test in South Carolina is whether the moving party put forward evidence regarding the defendant's inability to distinguish right from wrong. The judge found no testimony in the record regarding Respondent's inability to distinguish right from wrong. He concluded that the only testimony in the record concerning the issues was from the prosecution that Respondent possessed the ability to distinguish right from wrong. The judge agreed that Respondent displayed "eccentric behavior," but determined there was no testimony that Respondent lacked the ability to distinguish right from wrong. R. 196, line 5 – R. 201, line 20.

Renewal of requests to charge

At the conclusion of the jury instructions, Respondent renewed his request for the charge on the mental health defenses of NGRI and GBMI. R. 215, lines 16 – 19. The judge again denied the request. R. 215, line 20 – R. 216, line 1.

Motion for new trial

After the jury returned its guilty verdict, Respondent moved for a new trial based on the judge's refusal to charge the jury as to NGRI and GBMI. Respondent argued that the judge was requiring that he present testimony, either expert or lay, that at the minute of the alleged incident, Respondent did not know the difference between right and wrong, or that he was insane. Respondent argued that he presented testimony from Dr. Cherry and Dr. Means regarding his mental health around the time of the crime and had provided testimony regarding Respondent's mental health in general. R. 218, line 7. R. 219, line 18. The judge disagreed, stating that the law required Respondent to present evidence, not just of manifestations of mental illness, but specific evidence of his inability to distinguish right from wrong at the time of the crime. R. 219, line 19 – R. 220, line 13.

Discussion

An individual's constitutional right to due process of law as provided in the Fourteenth Amendment to the United States Constitution prohibits the conviction of an incompetent defendant. Medina v. California, 505 U.S. 437, (1992); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). Therefore, states must provide procedures adequate to protect this right. Pate, 383 U.S. at 378.

South Carolina law provides for the verdict of guilty but mentally ill (GBMI). S.C. Code Ann. § 17-24-30. A defendant is GBMI if, at the time of the commission of the act constituting

the offense, he had the capacity to distinguish right from wrong, but because of mental disease or defect, he lacked sufficient capacity to conform his conduct to the requirement of the law. S.C. Code Ann. § 17-24-20(A); State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255 (1993). The burden of proof is on the defendant to prove by a preponderance of the evidence that at the time of the crime he was mentally ill. S.C. Code Ann. § 17-24-20(B). If a defendant is found to be GBMI, the judge must sentence the defendant as provided by law for a defendant found guilty; however, if the sentence includes incarceration, then the defendant must be taken to a facility designated for treatment and retained there until he may be safely moved to the general population. S.C. Code Ann. § 17-24-70 (A). Expert testimony is not necessary to prove insanity or sanity; lay testimony may be sufficient. Id.; State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997). In fact, a jury may disregard expert testimony on the issue of a defendant's sanity. Id. "The law to be charged is determined from the facts presented at trial." Lewis, 328 S.C. at 278, 494 S.E.2d at 117 (citing State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986)).

"The purposes for the enactment of GBMI statutes are (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society's while incarcerated." State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997)(citing State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992)). The GBMI statute provides a guide for a jury when considering whether a defendant is not guilty, NGRI, GBMI, or guilty. Id. at 127, 484 S.E.2d at 872.

In State v. Hartfield, 300 S.C. 469, 471-472, 388 S.E.2d 802, 803 (1990), the South Carolina Supreme Court reversed a defendant's drug convictions where the trial judge refused to allow the jury to consider NGRI or GBMI because the defendant's mental condition was the result of organic brain syndrome caused by chronic substance abuse. The Court reasoned that

although the voluntary intoxication or use of drugs does not constitute a defense to a crime, insanity caused by the use of drugs or intoxication may be a defense where the insanity is permanent and destroys the defendant's ability to know right from wrong. Id. at 473, 388 S.E.2d at 804. In proceedings to determine whether the defendant was competent to stand trial, the defense presented an expert who testified the defendant was incompetent based upon his delusional thought system. The defendant suffered from paranoid psychosis. The expert testified that three weeks prior to the alleged incident, the defendant was "crazy as a billy goat." The expert opined that Respondent was unable to distinguish right from wrong or to recognize his acts as wrong. Id. at 471, 388 S.E.2d at 803.

At his trial, Poindexter presented lay testimony that he exhibited behavioral changes in the months prior to the murder for which he was charged. Poindexter presented an expert who testified that Poindexter was unable to absorb vitamin B-12 and was insane as a result. The jury rejected Poindexter's claim that he was insane, but found him GBMI. Poindexter, 314 S.C. at 491-492, 431 S.E.2d at 254. The Supreme Court affirmed the trial court's refusal to direct a verdict of NGRI where the prosecution presented lay testimony that Poindexter fled after the murder, appeared normal within hours of the murder, and was cooperative during the arrest. Despite the strong evidence of Poindexter's insanity, the Court found evidence in the record from which the jury could have deduced that Poindexter was sane. "The jury was free to rely on circumstantial evidence to find Poindexter sane even though expert testimony favored a finding that he was insane." Id. at 493-494, 431 S.E.2d at 256.

Compelling testimony to support Respondent's contention that if he were guilty, then he was GBMI came from the officers and mental health specialist employed by the detention center as found by the Court of Appeals. Hopkins, the alleged victim in the case, explained that

Respondent was housed in an area of the detention center where inmates with special needs and mental health issues were placed. Respondent stayed alone in his cell and took his recreation alone. Hopkins was aware that Respondent was refusing to take medications around the time of the incident. After the alleged incident, Hopkins discovered that Respondent was hoarding feces under the sink in his cell, a clear sign of mental illness. Clawson, another officer with the detention center, testified that after the alleged incident, he and others cleaned feces from Respondent's cell, including on the linens, walls, and the toilet area. Respondent even had feces on his face and clothing.

Cassandra Means, a counselor with the Department of Mental Health, explained that although Respondent initially interacted with her, his level of interaction decreased over time. Respondent was isolated, did not talk, and did not engage. Although he would make eye contact at times, he would not answer questions. Respondent always had a flat affect, meaning he showed no expression or emotion. Respondent's willingness to engage in conversations fluctuated in that he would not communicate with Means or anyone else for long periods of time. She found him to be consistent in his conduct and mannerisms. Means testified specifically that at the time of the alleged incident, Respondent was presenting symptoms consistent with mania associated with bipolar disorder. Merrie Cherry, the psychiatrist at the detention center, testified similarly to Means regarding Respondent's seclusion, affect, and communication. Dr. Cherry diagnosed Respondent with bipolar affective disorder. She explained his disorder was defined by episodes of severe mania, including psychotic symptoms.

The testimony of Respondent and his family reinforced the testimony of the detention center employees that he was severely mentally ill. Respondent claimed that Ella Walker was not his real mother and that his real mother lived in New York; however Walker testified clearly

that she had given birth to Respondent. Additionally, much of Respondent's testimony was irrelevant to the matter before the court because Respondent wanted to discuss the infringement of his constitutional rights and his being hit on the head with a sledgehammer by correctional officers. Respondent testified that he did not remember throwing feces on Hopkins; however, he did recall putting feces on the walls at the detention center more than once.

Walker testified that Respondent developed a distrust of her for no apparent reason. He changed his disability check to reflect another family member as payee rather than Walker. He would not eat food prepared by Walker because he feared she was poisoning him. She explained that Respondent slept under the bed rather than on it and feared people were trying to kill him. He had hallucinations of a "bald headed Mexican," who was trying to harm him, which led to Respondent tearing down walls in his home in an effort to defend himself. Respondent insisted he had been cloned and wore sheets and aluminum foil around his waist as protection. Respondent repeatedly complained of hearing voices throughout his life. Respondent's daughter testified that Respondent often claimed he saw "small, little midgets, white people, ball headed Mexicans running around." Respondent believed that his family members had been replaced by clones. Respondent tore down the walls in the house because he thought people were inside the walls trying to get to him or kill him. Respondent believed the correctional officers had placed a tracking device in his chest. As a result, he always wore aluminum foil around his chest to keep the tracking device from working.

Although Dr. Domino was presented as a reply witness by the state, she informed the jury of Respondent's history of severe mental illness and repeated hospitalizations. She informed the jury of Respondent's decades-long battle with mental illness.

The jury had ample evidence to support Respondent's contention that he was GBMI from lay witnesses and an expert as found by the Court of Appeals. Nevertheless, the trial judge refused to charge the jury as to GBMI. The judge's comments indicated that he required a witness to testify to "magic words" in order for such a verdict and charge to be given. He stated there was no testimony in the record that Respondent lacked the ability to distinguish right from wrong. The judge agreed that Respondent displayed "eccentric behavior," but determined there was no testimony that Respondent lacked the ability to distinguish right from wrong. What the judge disregarded was the clear evidence in the record concerning Respondent's mental illness and the indications that he was suffering from mental illness at the time of the alleged crime. Respondent's family testified as to his delusions regarding correctional officers attempting to kill him, clone him, and implant tracking devices. The mental health specialists who saw him around the time of the incident testified to Respondent exhibiting characteristics of mania shortly before the incident and that mania is characterized by delusions.

It was for the jury to determine whether Respondent's mental illness rendered him unable to conform his conduct to the requirements of the law at the time of the crime. Neither South Carolina case law nor statutory law required Respondent to present expert testimony regarding an opinion of such. See State v. Smith, 298 S.C. 205, 379 S.E.2d 287 (1989)(providing that expert testimony is not necessary for proof of sanity or insanity). Rather it is the province of the jury to make such a determination. The trial judge required specific testimony that Respondent lacked the ability to conform his conduct to the requirements of the law in order to instruct the jury concerning GBMI, but this is not the state of the law. Only an expert would be permitted to render an opinion that a defendant lacked the ability to conform his conduct to the requirements of the law, but our case law specifically provides that expert

testimony is not necessary in order to entitle a defendant to a GBMI verdict and charge. A lay witness could never offer such opinion testimony. Therefore, specific testimony that Respondent lacked the ability to conform his conduct to the requirements of the law was not required.

The state argued the “remedy that the Court of Appeals fashioned was entirely inappropriate.” Cert. 11. According to the state, “[t]he Court of Appeals’ decision to reverse [Respondent]’s conviction provides no legitimate remedial relief to him at this present juncture of his incarceration.” Cert. 11. The state then posited the hypothetical of a subsequent jury returning a GBMI verdict and suggested that “the entire process provides no substantive benefit to [Respondent] where he already possesses the constitutional right to medical treatment during his term of incarceration.” Cert. 11. The only benefit Respondent “could reap upon remand is entirely moot,” according to the state, because the GBMI statute “only provides for immediate evaluation and treatment.” The state argued his “continued confinement now, nearly two years after the verdict, negates concerns of whether [Respondent] was entitled to the submission of a GBMI verdict.” Cert. 11.

The state’s argument is untenable in light of the denial of Respondent’s right to have the jury consider all of the evidence before it and arrive at a just verdict. With the verdict options of guilty and not guilty only, the jury had no way to use the evidence concerning Respondent’s mental health and erratic behavior in arriving at its verdict. The trial judge’s failure to instruct the jury concerning GBMI rendered that evidence irrelevant and beyond the scope of the jury’s consideration except as it related to the circumstances of the offense itself. In support of its position that the failure to charge the jury concerning guilty but mentally ill was harmless, the state cited People v. Ritsema, 307 N.W.2d 380 (Mich. Ct. App. 1981). Cert. 12. However, the following year, the Michigan Court of Appeals declared the decision “unsound.” People v. Gasco, 326 N.W.2d 397

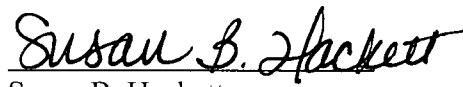
(Mich. Ct. App. 1982). Thus, the decision of the Michigan Court of Appeals is of little import to the South Carolina judicial system.

The Court of Appeals correctly determined, in a unanimous decision, that the trial judge erred in failing to instruct the jury concerning guilty but mentally ill. The clear evidence in the record supported submission of the verdict option to the jury. Further, the Court of Appeals' remedy was required as the appellate court's judgment could not be substituted for that of the jury, and Respondent has the right to a true and just verdict rendered by a fair and impartial jury.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 19th day of November, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Howard P. King, Circuit Court Judge

Opinion No. 5258 (S.C. Ct. App. filed August 6, 2014)
11-GS-32-03528

THE STATE,

PETITIONER,

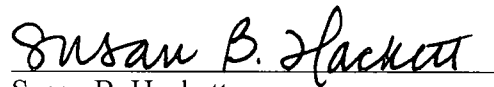
V.

WAYNE STEWART CURRY,

RESPONDENT

CERTIFICATE OF SERVICE

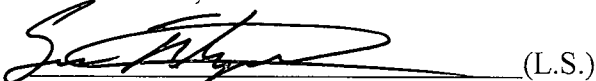
I certify that a true copy of the return to petition for writ of certiorari to the Court of Appeals in this case has been served on Mary S. Williams, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Wayne Stewart Curry #242952, at Gilliam Psychiatric Unit, 3344 Broad River Road, Columbia, SC 29201 and the S.C. Court of Appeals this 19th day of November, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 19th day
of November, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022