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REME COURT OF THE STATE OF UTAH

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ff-Respondent,)
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nt-Appellant.) Case No. 14703

APPELLANT'S BRIEF

l from the Judgment of the
istrict Court for Carbon County
rable Edward Sheya, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 RUDY DOMINGUEZ,)
)
 Defendant-Appellant.)

Case No. 14703

APPELLANT'S BRIEF

Appeal from the Judgment of the
Seventh District Court for Carbon County
Honorable Edward Sheya, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)

Plaintiff-Respondent,)

vs.)

RUDY DOMINGUEZ,)

Defendant-Appellant.)

Case No. 14703

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a criminal case wherein the appellant appeals from a conviction of aggravated assault.

DISPOSITION IN THE LOWER COURT

This matter came before the Honorable Edward Sheya, Judge of the Seventh Judicial District Court in and for Carbon County, for trial, sitting with a jury, on June 22, 1976. On June 23, 1976, after closing arguments, the jury retired to deliberate and returned a verdict finding the defendant guilty of aggravated assault. Stand-by counsel for defendant requested a pre-sentence report and the matter was set for sentencing

on July 12, 1976, at which time the Court sentenced defendant to a term of not to exceed five years at the State Prison.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of his conviction because (1) The trial court denied appellant's constitutional right to a fair trial when it permitted appellant to represent himself, because he had insufficient time to prepare his defense and also because he was not mentally competent; and (2) The trial court committed reversible error by failing to properly instruct the jury on the defense of insanity.

STATEMENT OF THE FACTS

During the evening of February 29, 1976, appellant and Joe Albert Valdez were at the No Name Bar, previously known as the White Star, drinking beer with their respective friends (Tr. 6). Appellant and Valdez got into a verbal argument, Valdez struck appellant, and a fight ensued with Valdez knocking appellant to the ground (Tr. 7, 13); but friends soon stopped the fight (Tr. 17). Shortly thereafter Valdez left the bar (Tr. 7), and minutes later appellant also left the bar (Tr. 17). Approximately 45 minutes later Valdez returned to the bar (Tr. 8). Shortly thereafter appellant also returned, entering through a doorway with a knife in

his hand and walking over to Valdez and swinging once at him with the knife, cutting him under the right eye (Tr. 8, 18).

On March 18, 1976, appellant appeared before the Price City Court for arraignment and counsel on appeal was appointed as appellant's defense counsel (R 2). On April 5, 1976, appellant appeared before the District Court for arraignment and entered a plea of not guilty (District Court Minute Entries). On April 15, 1976, appellant's counsel filed with the District Court a Notice that appellant intended to assert the defense of insanity at his trial (R 11). The Court, on May 10, 1976, appointed two alienists to examine appellant and investigate into his sanity, and on June 2, 1976, the Court vacated its May 10 order appointing alienist and appointed two other alienists (R 12, 13). On June 21, 1976, the day before trial, appellant requested the Court to release his court appointed counsel and allow appellant to represent himself at trial without the assistance of counsel. The trial court granted appellant's request, ordering the release of his legal counsel and permitting appellant to represent himself as attorney pro se and further ordering that the same legal counsel act as appellant's Stand-By counsel at the trial (District Court Minute Entries). On June 22, 1976, the day of the trial, the Court conducted a special hearing, advising appellant as to the procedures to be followed.

in representing himself at the trial and ordering that the Court was satisfied that the defendant voluntarily waived his right to legal counsel and that appellant could represent himself at the trial and further ordering that appellant's previously appointed legal counsel be appointed as Stand-By counsel to be present at the counsel table with appellant (District Court Minute Entries).

At the conclusion of the special hearing appellant's trial commenced. Appellant, acting as attorney pro se, conducted all of the cross-examination of the State's eight witnesses. During the presentation of the State's case, appellant's Stand-By counsel occasionally made, on behalf of appellant, objections to the introduction of certain evidence, and on other occasions requested of the Court that he be allowed to confer with appellant before appellant continued with his cross-examination of the State's witnesses (Tr. 5, 9, 12, 14, 15, 24, 28, 30, 37, 39, 42, 47, 75, 77). At the conclusion of the State's case, appellant presented his case, consisting of one witness--one of the two Court appointed alienists. Immediately prior to direct examination of his sole witness appellant made the Court and Stand-By counsel aware of the fact that he could not read, and Stand-By counsel therefore requested of the Court that he be allowed to conduct the direct examination of the expert witness

(Tr. 57). After the State cross-examined, appellant conducted re-direct examination. (Tr. 72). At the conclusion of the presentation of evidence, both appellant and his Stand-By counsel presented closing arguments to the jury (Tr. 88). After the jury retired for their deliberations, appellant's Stand-By counsel took exception to Jury Instruction No. 4 pertaining to the defense of insanity (Tr. 88). The jury reached a verdict, finding the defendant guilty of aggravated assault (Tr. 88).

ARGUMENT

POINT 1

THE TRIAL COURT DENIED APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL, AND OTHERWISE COMMITTED REVERSIBLE ERROR, WHEN IT PERMITTED DEFENDANT TO REPRESENT HIMSELF AT HIS TRIAL, BECAUSE HE HAD INSUFFICIENT TIME IN WHICH TO PREPARE HIS DEFENSE AND ALSO BECAUSE HE WAS NOT MENTALLY COMPETENT.

Constitutionally, legislatively, and judicially, Utah has recognized that a defendant in criminal prosecutions has the right to represent himself. Constitution of Utah, Art. 1, Sec. 12; Utah Code Annotated, 77-1-8 (1) (1953); State vs Penderville, infra. The United States Supreme Court has recently held the same right of self representation to be applicable through the 14th Amendment to those States which have not passed a constitutional amendment or statute

giving a defendant a right of self representation. Faretta vs California, infra. However, in order to afford the criminal defendant his constitutional right to a fair trial, the judiciary has qualified the defendant's constitutional right of self representation by requiring that the criminal defendant desiring to represent himself be sui juris and not mentally incompetent. The Utah Supreme Court made such a qualification in State vs Penderville, 2 U. 2d 281, 272 P. 2d 195 (1954). Therein, defendant Penderville appealed his conviction of murder in the second degree on the ground, inter alia, that the trial court committed reversible error in refusing to permit the defendant to conduct his own defense. The Court agreed with the defendant, holding that the trial court erred in denying defendant his right to try his case without the aid of counsel. However, during the course of the opinion the Court qualified a criminal defendant's right under Article 1 Section 12 of the Utah Constitution to conduct his own defense:

It is generally, if not universally held that the accused in a criminal proceeding who is sui juris and not mentally incompetent has the right to conduct his own defense without the aid of counsel. 272 P. 2d at 199.
(emphasis added)

The United States Supreme Court in Faretta vs California, 422 U. S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975), made the same qualification to its holding that a criminal defendant

in state cases has a 6th and 14th ammendment right to conduct his own defense without the assistance of counsel:

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forego those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self representation, he should be made aware of the dangers and disadvantages of self representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open". Here, weeks before trial, Faretta clearly and unequivocally declared to the trial Judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will, 45 L. Ed. 2d at 581-582.

Reference is also made to 21 Am. Jur. 2d, CRIMINAL LAW, Section 310 at 335:

Thus, if he is sui juris and mentally competent, an accused may conduct his defense in person without the assistance of counsel, where he elects to do so in full knowledge and understanding of the risks involved.

In the instant case it is appellant's contention that the lower court denied his constitutional right to a fair trial and otherwise committed reversible error by granting his request to release his Court appointed legal counsel and to allow him to conduct his own defense at trial. Appellant

grounds his contention on the following three facts:

1. Appellant's request to act as attorney pro se, and the court's Order of the same, were made only one day prior to the trial and therefore didn't give appellant sufficient time in which to prepare his defense. As disclosed by the District Court's Minute Entries contained in the record on appeal, appellant requested of the court on June 21, 1976, that he be allowed to represent himself at his trial and that his Court appointed legal counsel be released from further representation. On that same day the District Court ordered that appellant be allowed to conduct his own defense and that his court appointed legal counsel be released but that he act as Stand-By counsel at the trial and sit at the counsel table with appellant to advise him on matters as the trial proceeded. Appellant's trial began the following day (Tr. Title Page, District Court Minute Entries). Therefore, at best appellant had 24 hours in which to prepare for his trial. Such a short time period would be entirely insufficient for the best of legal counsel, let alone one such as appellant who is not schooled in the law. Although not directly on point, Utah Code Annotated, Section 77-24-18 (1953) requires that defendant be allowed at least two days to prepare for trial after making his plea. Also, compare the criminal defendant's time situation in Faretta vs California, supra,

with that of appellant's:

Here, weeks before trial, Faretta clearly and unequivocally declared to the trial Judge that he wanted to represent himself and did not want counsel. 45 L. Ed. 2d at 582. (emphasis added).

2. Appellant was partially illiterate in that he could not read and therefore was not mentally competent to prepare and conduct his own defense. Even assuming that appellant could adequately prepare for trial within a 24 hour period, to do so would require that appellant have the ability to read over the pleadings and research out statutory provisions and judicial opinions. However, appellant did not possess the ability to read. The trial court and Stand-By counsel were first made aware at a very late stage of the trial proceeding that defendant could not read and therefore could not conduct the direct examination of his expert witness (Tr. 57). It requires little imagination for one to conclude that without the ability to read, appellant could not effectively prepare to meet the State's charge that he committed the offense of aggravated assault, or effectively prepare his defense of insanity. Again, compare defendant's situation in Faretta vs California, supra, where the trial court determined, prior to trial, that Faretta was literate:

The record shows that Faretta was literate, competent, and understanding, and that he

was voluntarily exercising his informed free will. Id.

3. Within the prescribed statutory period after district court arraignment and long before appellant requested that he be allowed to represent himself, appellant entered the defense of insanity. On April 5, 1976, appellant appeared before the district court for arraignment and entered a plea of not guilty (District Court Minute Entries). On April 15, 1976, appellant gave notice that he was intending to assert the defense of insanity at his trial (R 11). On June 21, 1976, appellant requested of the Court, and the Court granted his request, to represent himself at trial. On June 22nd trial began (District Court Minute Entries).

Counsel is well aware that when a criminal defendant enters the defense of insanity that defense puts in issue the defendant's sanity at the time of the proscribed conduct, not the defendant's sanity at the time of psychiatric examination or at the time of trial. Utah Code Annotated, Sec. 76-2-305 (1953 as amended); State vs Gleason, 17 U. 2d 150, 405 P. 2d 793 (1965). Appellant in the instant case does not contend otherwise. Rather, appellant contends first that by virtue of the trial court permitting the appellant to conduct his own defense at trial appellant's defense of insanity lost its credibility in the eyes of the jury. Stated otherwise,

a juror's reaction might very well be to conclude that for the trial judge to permit appellant to represent himself at trial implies that the trial judge is of the opinion that appellant has full control of his mental faculties and is legally sane, and therefore appellant's defense that he is not guilty by reason of insanity is entirely without merit. Again, counsel recognizes that a criminal defendant might very well be legally insane at the time he committed the offense but be in full control of his mental faculties and legally sane at the time of his trial. However, this begs the question as to whether jurors can draw the same distinction under these peculiar circumstances of a defendant who has entered a defense of insanity, yet who has been permitted to conduct his own defense.

Second, to be denied the constitutional right to represent himself, a criminal defendant need not be proved legally insane; rather, it need only be established that he is mentally incompetent. Yet, the connection between possible legal insanity at the time of the proscribed conduct and mental incompetency at the time of trial comes because the defense of insanity contains overtones that the criminal defendant is mentally ill or incompetent, although not to the point of insanity, at the time of trial. Such was the reasoning of

the federal district court for Tennessee in United States vs Davis 260 F. Supp. 1009 (E. D. Tenn. 1966). Therein, defendant Davis moved for a new trial after a conviction of kidnapping, on the ground, inter alia, that the Court erred in refusing defendant's request to conduct his own defense unassisted by legal counsel. The Court disagreed with the defendant, holding that defendant was not mentally competent to conduct his own defense:

In this case, defendant is a college graduate, having a bachelors degree from the University of Chattanooga, with a major in Business Administration. He has an agile mind, and is articulate. However, prior to the trial, and at the time of the trial, there was considerable evidence that defendant was at least emotionally disturbed. . . . It was generally agreed that defendant's disturbance took the form of schizophrenic reaction, paranoid type, manifested by inappropriate thinking, grandiose delusions, etc. . . . An important factor in capacity to be tried is the defendant's mental ability to render his counsel such assistance to make possible a proper defense. . . . On the other hand, it is vital to defense pro se, that one be able to recognize proper defenses and evidence to support them and to be able to discard the irrelevant. The distinction between capacity to stand trial and capacity to defend pro se has been recognized by the Supreme Court. In the case of Massey vs Moore 384 U. S. 105, 75 S. Ct. 145, 99 L. Ed. 135 (1954), the Court held: "One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." Further, the defense in the instant case was that of temporary insanity. There was little if any dispute as to the acts constituting the offenses with which defendant was charged.

Although defendant's plea was temporary insanity, such a defense has overtones of mental illness which might carry into the time of trial. It is appropriate to note the remark of Justice Douglas in Massey vs Moore, supra, that: "If he is insane, his need of a lawyer to tender the defense is too plain for argument," though that case was concerned with allegations of insanity at the time of trial. . . . The court is of the opinion that defendant, although having the capacity to stand trial, was not capable of representing himself and conducting his own defense. 260 F. Supp. at 1020 and 1021.

Although appellant is arguing the reverse, i. e. that he should not have been allowed to represent himself, the end result should be the same: Appellant shouldn't have been able to represent himself because he asserted the defense of insanity and the assertion of such a defense and presentation of evidence at trial to that effect sufficient to overcome the presumption of sanity has overtones that appellant suffered from mental illness at the time of trial and that such mental illness, even if falling short of legal insanity at the time of trial, would still constitute mental incompetence. As in United States vs Davis, supra, evidence was presented at trial in the instant case regarding mental illness defendant suffered from at the time of trial. On appellant's redirect examination of Dr. Chicadus, appellant's sole defense witness, the following colloquy took place between himself and Dr. Chicadus (Tr. 73):

- Q. Yes Sir. Would you call it a mental disease that I have?
- A. A mental illness, yes.
- Q. I do have a mental illness in your opinion?
- A. In my opinion.
- Q. Was this, a lack of education?
- A. No.
- Q. Would you classify it as lacking communication with society?
- A. Not really.
- Q. How would you classify it?
- A. Well, it has to do with the responses that you gave in the mental status examination. And it is to do with the ability to abstract. To be able to cognizant of things. To give reality. To respond to factual questions.

Lacking the ability to perceive reality and to be cognizant of his surroundings, the question must be asked seriously whether appellant was mentally competent to conduct his own defense at trial.

POINT 2

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO PROPERLY INSTRUCT THE JURY ON THE DEFENSE OF INSANITY.

At appellant's trial, the lower court gave the following jury instruction, titled Instruction No. 4 (R 22, 23):

I instruct you that the issue of whether the

Defendant was sane or insane at the time he is alleged to have committed the offense charged in the Information has been raised by the evidence in this case. Whether one is sane or insane at said time is a question of fact for you to determine.

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 the crime charged, 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 knife, or that if he used it on Joe Albert Valdez, it may injure Mr. Valdez; or that, when he wielded the knife against the person of Mr. Valdez, 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 Joe Albert Valdez.

If you find from all of the evidence in this case beyond a reasonable doubt that the Defendant cut Joe Albert Valdez with a knife, and that said knife was a deadly weapon, and if you further find that at the time of this act that Defendant knew the nature of the act and knew that wielding a knife and striking Mr. Valdez with the same may injure Mr. Valdez, and if you further find that Defendant knew it was wrong to wield said knife in the sense that such act was condemned by morals or law and that at said time he was not suffering from mental disease and could have controlled his actions or impulses to injure Mr. Valdez, then you should find the Defendant guilty as charged in the Information.

On the other hand, if you find from all of the evidence in this case that the Defendant at the time of wielding said knife and cutting Mr. Valdez, 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 knife or that if he wielded it and struck Mr. Valdez with it, it may injure Mr. Valdez; or that when he struck Mr. Valdez with the knife 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 Mr. Valdez, or if you entertain a reasonable doubt as to Defendant's insanity in doing the acts heretofore particularly mentioned, then you shall find the Defendant not guilty by reason of insanity.

You are further instructed that the terms "mental disease" or "insanity" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

After the jury retired for deliberation, appellant's Stand-By counsel excepted to the above jury instruction (Tr. 98) on the ground that it did not accurately reflect the definition and defense of insanity as set forth in Utah Code Annotated, Section 76-2-305 (1953 as amended):

(1) In any prosecution for an offense, it shall be a defense that the defendant, at the time of the proscribed conduct, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

(2) As used in this section, the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

On appeal here, it is appellant's contention that the above quoted jury instruction used by the lower court at his trial is taken from Utah Supreme Court opinions prior in time to

the State Legislature's adoption of Section 76-2-305, supra; that Section 76-2-305 sets forth a legal test of insanity different from that contained in the trial court's jury instruction and the Utah Supreme Court opinions from which it came; that Section 76-2-305 supersedes and overrules the judicial opinions prior in time to it, and consequently the jury at appellant's trial was not instructed on the proper and applicable Utah law relating to the defense of insanity; and therefore the trial Court committed reversible error.

Such contentions necessitate review of the Utah case law and comparison of it to Section 76-2-305. In State vs Hadley 234 P. 940 (Utah 1925), the Utah Supreme Court affirmed defendant Hadley's conviction of the offense of carnal knowledge, disagreeing with defendant that the trial court committed error in instructing the jury on the defense of insanity. During the course of the opinion, the Court gave its approval to the trial court's jury instruction on insanity:

The Court further instructed the Jury that insanity or mental unsoundness must be of such degree as to leave the accused in such a mental state as to deprive him of the capacity to understand that the act committed constituted an offense and was wrong. These instructions fairly defined the law governing the rights of the accused upon a defense based upon insanity or lack of mental ability. 234 P. at 942.

In State vs Green, 78 U. 580, 6 P. 2d 177 (1931); and 86 U.

192, 40 P. 2d 961 (1935), Utah's highest Court again addressed the issue of the legal test for insanity. Therein, the Court set forth the following as an accurate statement of the law to be incorporated into jury instructions:

Assuming that the jury in this case found from the evidence beyond a reasonable doubt that the defendant shot and killed James Green as charged in the Information, he would be entitled to an acquittal if at that time he was, as a matter of fact, insane to such an extent that he either (1) did not know the nature of his act, that is, did not know that he had a revolver, that it may be loaded, and that, if discharged at or towards James Green, it would probably injure or kill him; or (2) 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; (3) that he was unable by reason of his mental disease to control his actions or impulses to injure or kill James Green. If the defendant was afflicted with a disease of the mind at the time of the alleged offense in any one or more of the three manners and to the extent indicated, then and in such case he was not legally responsible. 6 P. 2d at 184.

A comparison of the above quoted language with that used by the lower court in Jury Instruction No. 4, supra, in the instant case will reveal that the lower court incorporated verbatim most of the language contained above into Instruction No. 4.

The next case heard by the Utah Supreme Court regarding the defense of insanity was that of State vs Kirkham 7 U. 2d 108, 319 P. 2d 859 (1958) and therein the Court approved

the jury instruction set forth in State vs Green, supra, once again and noted that it constituted a combination of the McNaghten test and the irresistible impulse test. 319 P. 2d at 861. The combination test set forth in State vs Green, supra, and reaffirmed in State vs Kirkham, supra, was the subject of attack in State vs Poulson, 14 U. 2d 213, 381 P. 2d 93 (1963). Defendant Poulson appealed his conviction of murder in the first degree on the ground, inter alia, that the trial court should have instructed the jury on the defense of insanity under either the so called "Durham Rule" or the American Law Institute's proposed rule, rather than the combination test set forth in State vs Green. The Supreme Court of Utah disagreed with the defendant, holding:

The instruction, as given by the lower court, embodies both the McNaghten Rule and the so called "irresistible impulse" test. Such an instruction adequately protected the interests of the defendant, and we are not persuaded to adopt in lieu thereof either the Durham Rule or the rule proposed by the A. L. I." 381 P. 2d at 95.

The Court's reaffirmation in State vs Poulson of the combination McNaghten-irresistible impulse tests initially promulgated in State vs Green, supra, and the accompanying rejection of the American Law Institute's "substantial capacity" test must now give way to Section 76-2-305, supra, which adopts the American Law Institute's test verbatim. The following

constitutes the American Law Institute's Rule on insanity as set forth in the Model Penal Code, Section 401, (1962 Proposed Official Draft):

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

Granted, the A. L. I. Rule as set forth in 76-2-305, supra, sets forth what appears to be a combination test of the McNaghten Rule and the irresistible impulse test; however, section 76-2-305 goes one step further and is much broader in statement and concept in that it only requires a lack of "substantial capacity". In contrast, both the McNaghten Rule and the irresistible impulse test require the complete lack of capacity. In addition, the A. L. I. Rule and Section 76-2-305 are broader in scope and definition as to what constitutes insanity in that it only requires defendant to lack substantial capacity to "appreciate" the wrongfulness of his conduct, whereas the McNaghten Rule requires defendant to lack complete ability to "know" his conduct is wrong. A well drafted statement of the difference between the A. L. I.

test and the McNaghten and irresistible impulse tests is set forth in CRIMINAL LAW, Wayne R. LaFare and Austin W. Scott, Jr., West Publishing Co., Hornbook Series, 1972, Section 38 at 293:

Most significant is the fact that the A. L. I. test only requires a lack of "substantial capacity". This is clearly a departure from the usual interpretation of McNaghten and irresistible impulse, whereby a complete impairment of cognitive capacity and capacity for self-control is necessary. Substantial capacity, the draftsmen noted, is all "that candid witnesses, called on to infer the nature of the situation at a time that they did not observe, can ever confidently say, even when they know that a disorder was extreme." Moreover, even if witnesses could be more specific, it is undoubtedly true that there are many cases of advanced mental disorder in which rudimentary capacities of cognition and volition exist but which clearly present inappropriate occasions for the application of criminal sanctions. The draftsmen acknowledged that the word "substantial" imputes no specific measure of degree, but concluded that identifying the degree of impairment with precision was "impossible both verbally and logically."

The A. L. I. test uses the word "appreciate" instead of "know," a term which has been responsible for much of the criticism and misunderstanding of McNaghten. It thus seems apparent that expert testimony concerning the emotional or affective aspects of the defendant's personality is clearly relevant on this aspect of the A. L. I. formulation. As to the "conform" part of the test, it avoids the implication (often drawn from the irresistible impulse test) that the loss of volitional capacity can be reflected only in sudden or spontaneous acts as distinguished from those accompanied by brooding or reflection.

As a comparison of the McNaghten-irresistible impulse tests and the A. L. I.-Section 76-2-305 test reveals, they differ markedly from one another. Therefore, failure on the part of the trial court to include in its Jury Instruction No. 4 the language set forth in Section 76-2-305 (1) prevented the jury from applying the correct Utah law on the defense of insanity, as adopted by the Utah State Legislature, to the facts of the case as presented through testimony at trial. This constitutes reversible error.

CONCLUSION

The appellant was denied his constitutional right to a fair trial, and the trial court otherwise committed reversible error, when it permitted appellant to represent himself at trial, because he did not have sufficient time in which to prepare for trial, and because he was not mentally competent to conduct his own defense in view of his illiteracy, his mental illness at the time of trial, and his assertion of the defense of insanity.

The trial court also committed error because it failed to properly instruct the jury on the defense of insanity in that the court's jury instruction contained the combination McNaghten-irresistible impulse rules as set forth

in State vs Green rather than instructing on the defense of insanity as set forth in 76-2-305.

Therefore, the appellant's conviction and sentence by the lower court should be reversed.

DATED this 21st day of October, 1976.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Brief was served on counsel for the respondent, Vernon B. Romney, Utah State Attorney General, by delivering three (3) copies thereof to his office at 236 State Capitol Building, Salt Lake City, Utah 84114 on the _____ day of October, 1976.

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