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November 28, 2023

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2662-21T4
Indictment Nos. 16-03-689-I, 17-05-1346-I

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Appeal from a Judgment of
v.	:	Conviction of the Superior
JEREMY ARRINGTON,	:	Court of New Jersey, Law
Defendant-Appellant.	:	Division, Essex County.
	:	
	:	Sat Below:
	:	Hon. Ronald D. Wigler, J.S.C.,
	:	Hon. James W. Donohue, J.S.C., and a
	:	jury

DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

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Defendant-appellant Jeremy Arrington relies on the procedural history and statement of facts from his initial brief.

LEGAL ARGUMENT

POINT I

THE COURT IMPROPERLY DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO A DEFENSE AND TO TESTIFY.

Arrington was deprived of his constitutional rights to present a complete defense and testify because of the trial court's erroneous ruling that he was required to present expert testimony to advance an insanity defense. (Db 15-26)¹ In its response, the State tries to discount the long history of New Jersey precedent that holds that lay witnesses may opine on a defendant's sanity or insanity, while trying to support its novel expert-testimony requirement with cases from other jurisdictions. This Court should reject the State's attempts to avoid long-established New Jersey law and deny Arrington his constitutional right to a fair trial where he could present a full defense.

The State asserts that the court's unequivocal statement in State v. Morehous, 97 N.J.L. 285, 294 (1922), that "[l]ay witnesses on insanity may

¹ Arrington uses the abbreviations from his initial brief. In addition, Db refers to Arrington's initial brief, and Rb refers to the State's response brief.

give their opinion of a person's sanity or insanity provided such opinions are based on facts within the knowledge of the witness" should be rejected as "mere dicta." (Rb 41) However, "the prosecutor's office is not at liberty to disregard a pronouncement of this Court, even if that pronouncement is properly characterized as dictum." State v. Dabas, 215 N.J. 114, 136–37 (2013). As the Supreme Court has explained, "Appellate and trial courts consider themselves bound by this Court's pronouncements, whether classified as dicta or not." Ibid. Thus, whether "mere dicta" or not, what the highest court in New Jersey recognized more than a hundred years ago remains true today: lay witnesses may give their opinion of a person's insanity so long as that opinion is based on the witness's personal knowledge.

Moreover, Morehous was not the first time a New Jersey court upheld this principle. Morehous cited Genz v. State, 58 N.J.L. 482, 483-84 (Sup. Ct. 1896), which held that it was error for the court to refuse "to receive the opinions of nonprofessional witnesses as to the insanity of the prisoner. . . . [S]uch opinions of such witnesses, grounded on facts and circumstances within their personal knowledge, and stated, are held to be competent, and should go to the jury who are to estimate their worth." Similarly, the court in In re McCraven, 87 N.J. Eq. 28, 30 (Ch. 1916) wrote that "[a] witness, not an expert, may, in a case of insanity, state facts as to the actions of the alleged

lunatic, and then tell what, in his or her opinion, they indicate as to soundness or unsoundness of mind.” As these cases demonstrate, New Jersey courts have a long tradition of recognizing the admissibility and probative value of lay opinions on the defendant’s sanity.

More recent cases reaffirm this longstanding rule, and the State’s attempts to distinguish these cases are unavailing. For example, the State asks this Court to ignore the recognition in State v. Ridsen, 106 N.J. Super. 226, 235-36 (App. Div. 1969), modified, 56 N.J. 27 (1970), that “[i]t has long been the law of this State that a lay witness ‘may state facts and express an opinion in respect to the sanity of a defendant.’” (quoting Clifford v. State, 60 N.J.L. 287, 289 (Sup. Ct. 1897)). The State argues that this rule is irrelevant because the defense in Ridsen presented testimony from an expert witness. (Rb 42-43)

But this does not change the Appellate Division’s ruling in Ridsen, affirmed by the Supreme Court. See 56 N.J. at 40 (“We thoroughly agree with the Appellate Division that such evidence should have been admitted.”). The Appellate Division held “that in view of the insanity defense, it was important to give the jury a first-hand account of defendant’s mental and emotional attitudes and reactions at a time close to the homicide itself.” 106 N.J. Super. at 236. The lay witnesses’ testimony were “at least as significant as the experts’ testimony in helping the jury determine whether [the defendant] was

insane at the time of the murder.” Ibid. Thus, Risden helps demonstrate that lay testimony is admissible and can be as significant as any expert testimony in advancing an insanity defense.

The State’s attempt to distinguish State v. Scelfo, 58 N.J. Super. 472 (App. Div. 1959) because the defense called expert witnesses should also be rejected. (Rb 43-44) In affirming the defendant’s convictions, the Scelfo court in fact recognized the relative irrelevance of the defense expert testimony in assessing the insanity defense. In Scelfo, the defense presented evidence from two psychiatric experts who “both testified unequivocally that during the month of [the offense] [defendant] was unaware of the nature and quality of his acts and did not understand the difference between right and wrong.” Id. at 477. The State did not call any experts but instead relied exclusively on lay witness testimony to rebut the testimony from the defense medical experts.

On appeal, the defense argued that because of its presentation of “uncontradicted opinions” from “highly qualified medical experts,” the defendant was entitled to a directed judgment of acquittal by reason of insanity. Ibid. The Appellate Division disagreed, explaining that while “expert testimony bearing upon the sanity of the accused is relevant and admissible[.]” such testimony “is in parity with lay opinion testimony in that the jury is entitled to give each equal weight.” Id. at 477-78 (emphasis added). In other

words, lay opinion testimony about a defendant's sanity is just as good as the testimony from qualified psychiatrists.

The application of that holding to Arrington's case demonstrates the trial court's error in preventing him from presenting lay testimony, including from himself, about his insanity at the time of the crime. Arrington's own lay testimony "bearing upon the sanity of the accused" is "in parity" with any expert testimony on the same issue. To claim otherwise would impermissibly allow the State to use one rule when they want to use lay opinion testimony and a different rule when the defense wants to use the same kind of testimony. Such testimony is either admissible or inadmissible for both parties. The State is not entitled to cherry-pick the evidence rules depending on whether it wants or doesn't want to call an expert.

Finally, as for the State's attempts to distinguish Estate of Nicholas v. Ocean Plaza Condo. Ass'n, Inc., 388 N.J. Super. 571 (App. Div. 2006) (Rb 44-45), these also must be rejected. The State tries to claim that there is a meaningful difference between "a mental disability that prevents the person from understanding his legal rights. . .", N.J.S.A. 2A:14-21, and a "mental disease or defect" that prevents the defendant from "know[ing] the nature and quality of the act" or "know[ing] what he was doing was wrong." N.J.S.A. 2C:4-1. But both statutes have the same basic components — some kind of

mental disease or disability that causes or prevents the defendant from understanding his rights or knowing what he is doing. Thus, the court's statement that for purposes of a statute of limitation, a "person's insanity. . . can be established under N.J.R.E. 701, through the testimony of laypersons, without the presentation of expert testimony" supports Arrington's arguments here. He could have and thus should have been permitted to establish insanity through the testimony of laypersons.

In sum, expert testimony is only required when the subject "is so esoteric that jurors of common judgment and experience cannot form a valid conclusion." (Rb 24 (emphasis added)) And, though the State discounts the New Jersey caselaw supporting this point, our courts recognize that the defendant's sanity or insanity is within the ken of lay people. New Jersey has a long history of recognizing the admissibility, probative value, and equal status of lay opinion testimony on a defendant's sanity or insanity. Thus, there is no requirement that a defendant present expert testimony in order to present an insanity defense to the jury.

None of the other New Jersey cases cited by the State contradicts this longstanding rule because none addresses the core issue in this appeal: whether a defendant can present an insanity defense to a jury through lay opinion testimony. Several of the cases cited by the State relate whether the trial court

erred in excluding defense expert testimony. (Rb 25-26) See, e.g., State v. Hines, 303 N.J. Super. 311, 322 (App. Div. 1997) (reversing defendant's convictions because of the trial court's erroneous exclusion of a defense PTSD expert); State v. Kelly, 97 N.J. 178, 187 (1984) (reversing defendant's convictions because of the trial court's erroneous exclusion of the defense expert on battered women's syndrome). But it can be error to exclude expert testimony on a particular topic even though lay opinion testimony could also be admissible. Both expert and lay testimony are admissible and relevant to the question of a defendant's sanity or insanity.

Other cases cited by the State are wholly irrelevant, addressing whether a plaintiff should substantively prevail on an unemployment claim based on insanity instead of what is at issue here. (Rb 26) See Mullarney v. Bd. of Review, 343 N.J. Super. 401, 408 (App. Div. 2001) (holding that because the plaintiff failed to prove he left his prior job for good cause attributable to the work through expert testimony to explain any claims of mental illness, he was not entitled to unemployment benefits).

Contrary to the State's claims, none of the cases about competency proceedings hold that the defense is required to present expert testimony. (Rb 27) Instead, State v. Martini, 144 N.J. 603, 617 (1996) holds that the public defender's office must pay for an expert in a competency proceeding because it

is a “necessary service” to which indigent defendants are entitled. State v. M.J.K., 369 N.J. Super. 532, 549 (App. Div. 2001), certif. granted, 181 N.J. 549 (2004), app. dismissed, 187 N.J. 74 (2005) and State v. Purnell, 394 N.J. Super. 28, 50 (App. Div. 2007) also do not say that expert testimony is required.

Neither State v. Whitlow, 45 N.J. 3, 10 (1965), nor State v. Warlock, 117 N.J. 596, 601 (1990) (Rb 28-29) holds that the defense must present expert testimony to advance an insanity defense. Instead, these cases recognize that “lay opinion testimony as to insanity might be admissible,” but it would be “unlikely in the extreme” for a defendant to rely exclusively on such lay testimony. Whitlow, 45 N.J. at 10. See also Warlock, 117 N.J. at 606 (noting that insanity is “often established by medical testimony” and that “[g]enerally, the determination of a defendant’s ability to distinguish between right and wrong depends on psychiatric testimony” (emphasis added)). Thus, at most, these cases describe what might be good trial strategy, not what is mandated by the insanity statute or our caselaw about lay opinions about a defendant’s insanity.

In an attempt to support their contention an insanity defense requires expert testimony despite the longstanding New Jersey law that says the opposite, the State falls back on cases from other jurisdictions. The State

overstates and mischaracterizes the holdings from many of these cases. For example, the United States Supreme Court has never held that an insanity defense can only be proven through expert testimony, instead recognizing that indigent defendants cannot be deprived of access to psychiatric expert witnesses. Ake v. Oklahoma, 470 U.S. 68 (1985). (See Rb 29-31)

Similarly, contrary to the State’s claims, Georgia law recognizes that any witness, including a lay witness, may opine on the defendant’s sanity, though lay witnesses cannot use medical terms of art. (Rb 34) See Branch v. Carr, 396 S.E.2d 276, 277 (Ga. Ct. App. 1990) (“Sanity or insanity is a proper subject for opinion evidence, and where the question under examination ... shall be one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor.”) (emphasis in original). Many other states also recognize that lay witnesses cannot diagnose the defendant but may offer their opinions on the defendant’s sanity. See State v. Davis, 506 S.E.2d 455, 471 (N.C. 1998) (noting that a lay witness could “make a general observation that defendant appeared to be ‘mentally disturbed’” but could not “make a specific psychiatric diagnosis”) (cited at Rb 35-36); Doyle v. State, 785 P.2d 317, 322-23 (Okla. Crim. App. 1989) (reaffirming “that where insanity is interposed as a defense, a non-expert witness, after testifying to the act, conduct and appearance of the defendant, may state whether such acts, conduct and

appearance impressed him as being rational or irrational. However, a lay witness is not permitted to give an opinion calling for a medical diagnosis.”) (cited at Rb 35); White v. Commonwealth, 616 S.E.2d 49, 53-54 (Va. Ct. App. 2005), aff’d, 636 S.E.2d 353 (Va. 2006) (“While lay witnesses may testify to the attitude and demeanor of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.”). (cited at Rb 33-34)

The federal cases cited by the State are largely irrelevant because the federal standard for insanity is wholly different from New Jersey’s, and these cases do not hold that expert testimony is required in every single case where the defense is insanity. (Rb 37-39) Federally, the mental disease or defect must be “severe,” and the defense bears a higher burden of proof than in New Jersey — clear and convincing evidence instead of a preponderance of the evidence. See United States v. Turner, 61 F.4th 866, 889-93 (11th Cir. 2023) (holding that the improper admission of State expert testimony on defendant’s lack of insanity was not harmful error); United States v. Keen, 96 F.3d 425, 430 (9th Cir. 1996) (“Without reaching the question of whether lay opinion alone can ever support a finding of insanity, we can safely state that the record ultimately supports the district court's decision here.”) (emphasis added); United States v. Sanchez-Ramirez, 432 F. Supp. 2d 145, 148-49 (D. Me. 2006) (“[I]t is

unnecessary to decide whether a defendant's testimony standing alone can ever sustain an insanity defense. Here, the proffered testimony is insufficient.”).

The State is correct that Pennsylvania has recently held that the defendant must present expert testimony in order to advance an insanity defense. (Rb 32) Commonwealth v. Fortune, 302 A.3d 780, 787 (Pa. Super. Ct. 2023). However, this case is not binding on this Court, nor should it be persuasive given New Jersey’s long tradition of permitting lay opinion testimony about the defendant’s sanity or insanity. Instead, this Court should look to the jurisdictions with a similar tradition of expansive lay opinion testimony about insanity.

For example, in Arizona, like in New Jersey, “lay testimony has long been admissible in criminal trials on the issue of sanity.” State v. Bay, 722 P.2d 280, 284 (Ariz. 1986). Also like in New Jersey, Arizona courts have “previously held that there is no inference, as a matter of law, that a defendant’s insanity is established because the state failed to call experts to rebut a defendant’s experts.” Ibid. Cf. Scelfo, 58 N.J. Super. at 477 (rejecting the defense argument that he was entitled to a direct acquittal due to insanity where the State failed to present any expert testimony to rebut the defense psychiatric experts).

Thus, the Arizona Supreme Court in Bay held that “[t]he converse of this holding is logically true — there is no inference, as a matter of law, that a defendant’s sanity is established because he failed to call experts to rebut the state’s experts.” Bay, 722 P.2d at 284. The court explained that this rule must exist “because a jury need not believe or accept as true the testimony of experts over lay counterparts.” Ibid. The Court added that its reasoning was correct “in spite of the fact that a criminal defendant has the burden of proving by clear and convincing evidence that he was insane at the time of the act.” Ibid. In essence, and despite the higher standard of proof a defendant must meet in Arizona, the Bay Court was persuaded that the State could not benefit from relying on lay opinion testimony to establish sanity without also being subject to the converse of that rule — that the defendant may establish insanity through lay opinion testimony. Bay better conforms with New Jersey precedent and helps demonstrate that Arrington should have been permitted to raise an insanity defense by relying on lay testimony.²

² Both Ohio and Washington also recognize that an insanity defense can be raised through lay witness testimony. State v. Reynolds, 550 N.E.2d 490, 496 (Ohio Ct. App. 1988) (holding that it was error for the trial court to withdraw the insanity defense from the jury because the lay testimony from the defendant’s sister about his medical history and his behavior when he was not taking his psychiatric medications was sufficient to permit a reasonable juror to find defendant was legally insane”); State v. Odell, 227 P.2d 710, 722 (Wash. 1951) (“Whatever the rule may be in some other jurisdictions, it is the rule in this state that a nonexpert witness may, in answer to a proper question,

For the reasons set forth in Arrington’s initial brief and here, it was error for the trial court to bar Arrington from presenting an insanity defense through lay witness testimony. In addition to depriving Arrington of his right to present any defense, let alone a complete defense, this ruling also improperly deprived Arrington of his right to testify. (Db 22-26) Although the State claims that Arrington was not deprived of his right to testify because he could have testified about his state of mind, the trial court’s barring Arrington from presenting an insanity defense in fact held the opposite: “[E]ven if you were to have Mr. Arrington testify, I don’t know that he would be qualified to testify as to his own state of mind as far as . . . whether or not he would qualify . . . that he did not understand -- appreciate the consequences of his behavior, and that . . . he’s really not qualified to give an opinion about whether or not he was insane or not at the time of the offense.” (9T 80-8 to 17 (emphasis added)) Given the trial court’s expansive ruling, Arrington’s statement when the court asked if he wanted to testify is even more logical: “I was going to testify but due to the fact you denied the insanity defense, I am not testifying.” (20T 231-13 to 15) If Arrington could not talk about his health history, his own state of

give an opinion concerning the sanity, at some stated time, of one on trial for a criminal act.”).

mind, what he was thinking, or what he was experiencing during the commission of these crimes, his right to testify was meaningless.

Finally, the State claims that if there were any error, it was harmless. (Rb 47-48) But Arrington was deprived of two foundational constitutional rights: the right to present a defense and the right to testify. These rights are the essence of what makes a criminal trial fair. To fully deprive a defendant of these critical rights and then uphold his convictions on harmless error grounds would make a mockery of the right to a fair trial. A trial where the defendant cannot testify in his own defense is not fair. A trial where the defendant is erroneously barred from presenting his sole defense to the jury is not fair. Arrington's trial was not fair. This Court should reverse his convictions.

POINT II

THIS COURT SHOULD NOT EXERCISE ORIGINAL JURISDICTION TO RESENTENCE DEFENDANT.

The State concedes that the trial court's imposition of three 50-year sentences for attempted murder constitutes an illegal sentence. (Rb 53-54) However, rather than agree that this illegal sentence requires resentencing, the State instead asks this Court to exercise original jurisdiction and resentence Arrington to three consecutive maximum-term sentences for the attempted murder convictions. (Rb 53-54) This Court should decline to do so and instead

remand to the trial court for resentencing on these charges. “Although appellate courts possess original jurisdiction over sentencing, the exercise of that jurisdiction ‘should not occur regularly or routinely; in the face of a deficient sentence, a remand to the trial court for resentencing is strongly to be preferred.’” State v. Kromphold, 162 N.J. 345, 355 (2000) (quoting State v. Jarbath, 114 N.J. 394, 410-411 (1989)). This Court should not take the extraordinary measure of exercising original jurisdiction to resentence Arrington. It should instead vacate the illegal sentences and remand to the trial court for resentencing.

CONCLUSION

For the reasons set forth here and in defendant’s initial brief, his convictions must be reversed. Alternatively, his sentence should be vacated and remanded for resentencing.

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Dated: November 28, 2023