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SUPREME COURT OF NEW JERSEY
DOCKET NO. 090216

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Certification Granted from a Final Judgment of the Superior Court
Plaintiff-Respondent,	:	of New Jersey, Appellate Division.
v.	:	Sat Below:
JEREMY D. ARRINGTON,	:	Hon. Jack Sabatino, P.J.A.D.;
Defendant-Appellant.	:	Hon. Maritza Berdote Byrne, J.A.D.; Hon. Adam E. Jacobs, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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3T — May 9, 2019 — Competency

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PRELIMINARY STATEMENT

Jeremy Arrington was fully deprived of his rights to present a defense and to testify on his own behalf at his trial for multiple counts of murder, attempted murder, and other charges. Rather than determine whether the defense had cleared the low threshold of demonstrating a rational basis that required Arrington's affirmative defense of insanity go to the jury, both the trial court and the Appellate Division invented a novel expert-testimony requirement.

New Jersey's standard for criminal insanity remains the same today as it was in 1846 when it was first adopted. And for more than a century, our law has recognized that criminal insanity is distinct from psychiatric views on mental illness and has allowed lay witnesses to offer fact and opinion testimony on a defendant's insanity. The plain language and legislative history of our insanity law additionally demonstrates that there is no expert-testimony requirement. In fact, our Legislature specifically rejected any such requirement when it adopted Title 2C. Moreover, the imposition of an expert-testimony requirement would make the insanity defense, already incredibly difficult to succeed with at trial, even more difficult, and could harm the most vulnerable defendants.

There is no requirement for a defendant to present expert testimony before he can have his sole defense – insanity – presented to the jury. This Court should not create such a requirement. It should instead reaffirm the centuries of cases

holding that lay witness testimony is competent, persuasive evidence of a defendant's sanity or insanity. It should hold that a defendant cannot be barred from testifying about his own mental condition at the time of a crime, and that such evidence can provide a rational basis to instruct the jury on the insanity defense. And it should reverse Arrington's convictions because of the total deprivation of his constitutional rights to present a defense and to testify.

PROCEDURAL HISTORY

Defendant-appellant Jeremy Arrington relies on the procedural history from his Appellate Division brief, adding the following. On December 20, 2024, in a published opinion, the Appellate Division affirmed Arrington's convictions. State v. Arrington, 480 N.J. Super. 428 (App. Div. 2024). The court held that "lay testimony by a defendant, untethered to admissible expert opinion substantiating the defendant's 'disease of the mind,' is inadmissible under our Rules of Evidence and insufficient to advance an insanity defense under N.J.S.A. 2C:4-1." Id. at 432. The Hon. Adam E. Jacobs, J.S.C., concurred, holding that "a defendant should not be categorically precluded from advancing an insanity defense in those rare instances where expert testimony is unsolicited or unavailable," but that Arrington "could not adduce the quantum of reliable evidence necessary to have an insanity defense entertained by a jury." Id. at 445, 451 (Jacobs, J.S.C., concurring).

Arrington filed a petition for certification. On March 19, 2025, this Court granted the petition, "limited to whether defendant can pursue an insanity defense without accompanying expert testimony from a qualified mental health professional." (Dsa 1) This supplemental brief follows.

STATEMENT OF FACTS

Arrington relies on his Appellate Division brief regarding the facts of the crimes. (Db 8-14) The following facts relate to the issue of Arrington's insanity defense. Arrington's sole defense at trial was going to be that he was not guilty by reason of insanity. (See, e.g., 8T 48-22 to 49-1: "I'm committing now that will be our defense.") Both the prosecutor and the court were on notice that the defense was pursuing an insanity defense. (See, e.g., 8T 22-7 to 11 (State: "To clarify this, I want the Defense to put on their case for the insanity."); 8T 32-20 to 23 (Court: "[Y]ou're probably not going to be denying it because you're going to be relying on the insanity defense.")) Defense counsel approached various pretrial issues, such as voir dire questions and various redactions, consistently with the defense plan to pursue insanity. (See, e.g., 8T 39-1 to 48-15, 76-10 to 13 (discussing defense counsel's proposed questions seeking prospective jurors' "views on the insanity defense"); 9T 99-18 to 100-5 (defense counsel responding to court's question about redactions by explaining, "I don't want to eliminate any proofs that . . . may at some later point" support an insanity defense); 9T 102-3 to 103-25 (discussing redactions))

The defense did not have an expert who could testify at trial in support of Arrington's insanity defense. Defense counsel had retained an expert to examine Arrington for the pretrial competency hearing. (3T, 4T, 5T) The defense expert

psychologist examined Arrington, concluded he was not competent, opined that he had cognitive limitations, schizophrenia spectrum disorder, and a history of drug use – alcohol, marijuana, and PCP – beginning when he was a teenager, explaining that chronic PCP use "will cause irrefutable damage to the brain." (3T 5-2 to 5, 13-20 to 23, 14-14 to 15-3, 17-8 to 25, 38-20 to 39-1, 47-15 to 21) The State expert psychiatrist came to the opposite conclusion, opining that Arrington was "malingering" and competent to stand trial, and the court ruled that Arrington was competent. (4T 46-8, 47-1; 5T 18-20 to 32-20; Da 47) Although the defense expert had provided a report and testimony at the competency hearing, by the time of Arrington's trial, the expert was unavailable. (See, e.g., 8T 4-5 to 19, 20-20 to 21-2)

At a pretrial conference, defense counsel maintained that even without an expert, he still intended to pursue an insanity defense. The court raised the concern that without a defense expert and without testimony from Arrington, "then there is no insanity . . . case here." (8T 49-18 to 24; see also 8T 50-11 to 22) The State shared this concern, asking "how does the [d]efense even establish the preponderance of the evidence that the defendant . . . has a disease of the mind that affects his mental ability that he can't understand right and wrong" if the defense does not "put[ ] in medical records" and "if they're not putting in any doctors." (8T 51-8 to 22)

The defense acknowledged that it bore the burden to prove insanity and initially argued that it could meet this burden using the State's evidence – that the State's evidence would prove that "an individual would not be able to engage in this type of conduct unless he . . . did not know the difference between right and wrong. . . ." (8T 52-3 to 20) The court disagreed that the defense could rely exclusively on the State's evidence but initially stated that the defense could proceed with the insanity defense without an expert if, for example, Arrington "takes the stand . . . and he testifies I didn't know what I was doing . . . . I don't even have a recollection. . . . I must have been out of my mind. . . . I did not appreciate what I was doing" and "if that's believed by the jury." (8T 56-11 to 20) The court told defense counsel "[t]he point is that there has to be some witness. . . . I mean it may not be an expert witness, it could be a lay witness if they were capable and . . . if they're able to . . . testify as to his conduct or state of mind. But I think the key is that there has to be some evidence or some witness." (8T 71-9 to 18; see also 8T 64-12 to 65-6, 65-25 to 66-9, 71-9 to 18, 91-7 to 11) The defense accepted the court's ruling and maintained that "both the State's evidence and the possible testimony of the defendant will raise the issue sufficiently for it to go to the jury as to whether or not the defendant knew the difference between right and wrong." (8T 73-1 to 6)

At the next pretrial conference, defense counsel confirmed that the expert who had testified at the competency hearing was unavailable: "[h]e's ill" and "wasn't participating in any way, shape, or form in practice." (9T 73-2 to 21; see also 9T 79-7 to 10) At the court's request, defense counsel agreed to follow up with the expert to see if he could appear remotely rather than in person. (9T 73-11 to 21, 76-2 to 8)

Then, the court reversed its prior ruling on the need for a defense expert on insanity. The court stated that it "had a chance to further think about this unusual situation" and that it did not "see how you can have an insanity case without a doctor or an expert coming into court to testify as to Mr. Arrington's state of mind." (9T 78-12 to 18, 80-5 to 7) "[E]ven if you were to have Mr. Arrington testify," the court did not "know that he would be qualified to testify as to his own state of mind" as to whether he could "appreciate the consequences of his behavior." (9T 80-10 to 15) "[H]e's really not qualified to give an opinion about whether or not he was insane or not at the time of the offense." (9T 80-15 to 17) Thus, "without a doctor to . . . come in to do that," the court "wouldn't allow you to even bring insanity into the case." (9T 80-18 to 21; see also 9T 80-22 to 84-6)

Defense counsel objected, arguing to the court that there was no such legal requirement to present a defense expert. (See, e.g., 9T 82-15 to 83-3, 86-13 to

89-23, 94-9 to 95-14, 98-8 to 11) The court told defense counsel to reach out again to the defense expert from the competency hearing to see if he could testify remotely, but without that testimony, defense counsel was "just not going to be able to argue insanity." (9T 99-3 to 18)

At the final conference before trial started, defense counsel reaffirmed that the expert was unavailable to testify. (10T 8-20 to 23, 9-2 to 9) Defense counsel was unable to get approval to hire a different expert to testify at trial.[1] (10T 9-15 to 21, 11-4 to 12) The court reaffirmed its prior ruling that without the defense producing a doctor, psychologist, psychiatrist, or "anyone who will be qualified to testify about Mr. Arrington's state of mind," the court "would not be instructing the jury on insanity." (10T 4-13 to 24) The court acknowledged that in light of its ruling, defense counsel's "trial strategy has changed dramatically." (10T 6-10 to 15) Defense counsel maintained a continuing objection to the trial court's ruling barring the sole defense. (10T 6-4 to 7-16)

Arrington's trial proceeded without presenting his insanity defense. Arrington did not testify at trial, explaining, "I was going to testify but due to the fact you denied the insanity defense, I am not testifying." (20T 231-13 to 15) "I'm not testifying due to the fact you denied the insanity defense." (20T 232-

[1] At some point prior to trial, defense counsel had consulted with a second expert but chose not to proceed with this expert for trial purposes. (See 10T 9-15 to 21)

22 to 23) The jury acquitted Arrington of one count of attempted murder but convicted him of all other counts. (Da 49-55; 23T 125-21 to 130-11)

LEGAL ARGUMENT

Arrington relies on and incorporates the legal arguments from his Appellate Division brief and reply. (Db 15-26, Rb 1-14) He adds the following:

THERE IS NO EXPERT-TESTIMONY REQUIREMENT FOR AN INSANITY DEFENSE. DEFENDANT'S CONVICTIONS MUST BE REVERSED BECAUSE HE WAS IMPROPERLY DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO TESTIFY.

Arrington's sole defense was going to be that he was not guilty by reason of insanity. "Insanity is an affirmative defense which must be proved by a preponderance of the evidence." N.J.S.A. 2C:4-1. A court must instruct the jury on insanity when there is a rational basis for the defense. See State v. Alston, 311 N.J. Super. 113, 121 (App. Div. 1998) (noting that the "defense of renunciation is an affirmative defense which must be proved by the defendant by a preponderance of the evidence," and that the jury must be instructed on that defense when "upon an examination of all the evidence, there was a rational basis for the jury to conclude that the affirmative defense was demonstrated"). "The rational-basis test sets a low threshold," and in deciding whether the standard has been met, "the trial court must view the evidence in the light most favorable to the defendant." State v. A.L.A., 251 N.J. 580, 695 (2022).

Rather than apply this low rational-basis standard to assess whether the jury should be instructed on Arrington's defense, the trial court instead entirely

barred the defense before trial had even started. The court erroneously concluded that the defense must present expert testimony in order to advance an insanity defense. The Appellate Division affirmed the trial court's ruling, imposing a novel defense-expert-testimony requirement in all insanity cases. Because of this incorrect ruling, Arrington was fully deprived of his right to present a defense to the jury and was equally deprived of his right to testify in his own defense. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. The Appellate Division's creation of a new rule requiring defense expert testimony in all insanity cases cannot stand. Nor can the complete deprivation of Arrington's constitutional rights. This Court should reverse Arrington's convictions and remand for a new trial where he is permitted to present his defense to the jury, while holding that expert testimony is not required to advance an insanity defense.

This brief will: (1) discuss the history of New Jersey's insanity statute and the cases interpreting it to demonstrate that criminal insanity is different from mental illness, and that lay opinion testimony on a defendant's insanity has always been competent evidence; (2) explain that the plain language and legislative history of our insanity law demonstrates that expert testimony is not required to advance this defense; (3) explain why the Appellate Division's opinion imposing an expert-testimony requirement is contrary to law and

violates defendants' constitutional rights; (4) show how imposing an expert-testimony requirement could harm the most vulnerable mentally ill defendants; and (5) explain that the Appellate Division concurrence was wrong to conclude that completely depriving Arrington of his constitutional rights to testify and to present a complete defense was harmless. In sum, this brief asks this Court to reverse Arrington's convictions and reaffirm that the insanity defense can be raised exclusively with lay-witness testimony, as it has been for hundreds of years.

A. Legal Insanity Is Not The Same As Mental Illness, So Expert Psychiatric Testimony Is Not Necessary For The Defense.

New Jersey uses the exact same definition of legal insanity today as it did in the 1800s. Compare N.J.S.A. 2C:4-1 ("A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong.") with M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843) ("to establish a defence on the ground of insanity, it must be clearly proved that at the time of commiting the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong");

State v. Spencer, 21 N.J.L. 196, 204 (E. & A. 1846) (adopting the M'Naghten standard in New Jersey).

This definition of criminal insanity is distinct from medical or psychiatric definitions of mental illness, demonstrating that psychiatric expert testimony is not a necessary component of raising this defense. As this Court has stated, "[t]he insanity defense is not available to all who are mentally deficient or deranged; legal insanity has a different meaning and a different purpose than the concept of medical insanity." State v. Singleton, 211 N.J. 157, 173-74 (2012) (quoting State v. Crenshaw, 659 P.2d 488, 491 (1983) (en banc)). Demonstrating the distinction between mental illness and criminal insanity, critics have challenged the M'Naghten rule over the years, often pointing to advancements in "modern psychiatry" to support their alternative tests of legal insanity. State v. Worlock, 117 N.J. 596, 603 (1990).

For example, in State v. Noel, 102 N.J.L. 659 (1926), the court rejected defendant's argument that the test for criminal insanity should be changed because "the science of medicine has advanced and those devoting themselves to the study of mental diseases have increased in wisdom and learning to the point that they have demonstrated that the test to which our courts have so long adhered is obsolete and for it should be substituted either the rule of irresistible impulse, or that of permitting the jury to pass upon the question as to whether

the defendant is affected mentally, and, if so, to either acquit him or reduce the grade of the crime to murder of the second degree." Id. at 676. The court instead reaffirmed the M'Naghten rule because the court believed it to be "the best test which has as yet been promulgated," despite not being "scientifically perfect in the opinion of those most learned on the subject of mental disorders. . . ." Id. at 676-77.

Similarly, in State v. Cordasco, 2 N.J. 189 (1949), the defendant again sought to change the standard for legal insanity, arguing that the courts' "adherence to precedent denies reality and continues an anachronistic concept of insanity which fails to keep pace with the newly acquired medical knowledge and psychiatric progress made by those who are to be lauded for their devotion to the suffering and mental afflictions of others under a multitude of varying circumstances[.]" Id. at 197. The court instead reaffirmed the M'Naghten rule: "The rule condemned by many as ancient nevertheless seems to give as great a measure of protection and security to society as the exigencies and complexities of present-day circumstances will permit." Id. at 198.

There are alternatives to M'Naghten that line up better with psychiatry. For example, New Hampshire excuses a defendant for any act "that was a 'product of mental disease.'" Worlock, 117 N.J. at 603 (quoting State v. Jones, 50 N.H. 369 (1871)). Thus, in New Hampshire, "the test for insanity does not

define or limit the varieties of mental diseases or defects that can form the basis for a claim of insanity," and a wide variety of mental illnesses, including post-traumatic stress disorder and depression "may form the basis of an insanity defense." State v. Fichera, 903 A.2d 1030, 1035 (N.H. 2006).[2]

However, the problem with fully importing psychiatric views on illness into the definition of criminal insanity is that, for defendants charged with committing horrendous crimes, the commission of the crime itself is evidence of psychiatric illness. As this Court explained in State v. Lucas, 30 N.J. 37, 70 (1959), "the average psychiatrist's attitude toward criminal behavior seems to embody, as basic assumption, that such behavior is prima facie evidence of mental disease. . . . If it is true that, from a psychiatric viewpoint, antisocial behavior either evidences or equals mental disease or defect, then the [New Hampshire] test comes perilously close to suggesting that proof of the commission of a crime is also [p]rima facie evidence of the legal irresponsibility of the accused." Id. at 71.

Thus, instead of being a test of psychiatric disease, the M'Naghten rule and New Jersey's "insanity defense draw[ ] on principles of moral

[2] Notably, despite using a criminal insanity test that appears to line up nearly perfectly with psychiatric disorders, in New Hampshire, it is well-established "that a defendant may prove insanity by lay testimony and that expert testimony is not needed to support an insanity defense." Fichera, 903 A.2d at 1034.

blameworthiness." Worlock, 117 N.J. at 602. Criminal insanity is a legal determination, not a medical one. As such, medical expert testimony is not required to advance the defense.

New Jersey insanity cases discussing lay and expert testimony further demonstrate that criminal insanity is a different issue from mental illness and that there is no expert-testimony requirement. For example, in Spencer, the case that first adopted the M'Naghten rule in New Jersey, the court recognized that while the opinions of "medical men" were admissible, "their opinions in relation to a particular individual, are of no more weight, and in my judgment of not so much weight, as those of unprofessional persons of good sense, who have had ample opportunities for observation." 21 N.J.L. at 209. (emphasis added). The "evidence of those who saw the person accused every day immediately previous to the commission of the act, who were intimate with him, talked with him, ate and drank with him, and who testify to his acts, his words, his conversation, his looks, his whole deportment, is that on which a jury ought to place the greatest reliance." Id. at 208-09. (emphasis added). In other words, testimony from lay witnesses about the defendant's sanity was not only admissible but was considered better evidence than any medical expert testimony.

Similarly, courts have held that judges should not bar the testimony from lay witnesses on the defendant's sanity, so long as that testimony is sufficiently

grounded in personal observation. In Genz v. State, 58 N.J.L. 482 (Sup. Ct. 1896), the court held that it was error 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." Id. at 483-84. In Clifford v. State, 60 N.J.L. 287 (Sup. Ct. 1897), the court reaffirmed that "a nonexpert witness may state facts and express an opinion in respect to the sanity of a defendant," though finding no error in striking one part of the lay witness's testimony. Id. at 289-90 (citing In re Vanauken, 10 N.J. Eq. 186, 192 (1854) ("As in the case of insanity, a witness may state facts, may give the look of the eye, and the actions of a man, but unless he is permitted to tell what they indicate, or, in other words, be permitted to express an opinion, he cannot convey to the mind distinctly the condition of the man that such acts and looks portray.") (emphasis in original)); see also In re McCraven, 87 N.J. Eq. 28, 30 (Ch. 1916) ("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.").

The court reaffirmed this rule in State v. Morehous, 97 N.J.L. 285 (1922), overruled on other grounds by State v. Smith, 32 N.J. 501 (1960), though holding

in that case that the lay witness's testimony did not have a sufficient basis in fact. The defense had called a prison warden as a witness and asked him, based on his observations and conversations with the defendant, what his opinion was as to the defendant's "mental condition, or his sanity." Id. at 294. The trial court had barred the warden from answering this question because the warden had previously testified that "he could not recall" any specific things "he had seen the defendant do" or "heard him say." Ibid. On appeal, the court reaffirmed that "[l]ay witnesses on insanity may give their opinion of a person's sanity or insanity provided such opinions are based on facts within the knowledge of the witness and stated." Ibid. "Where, however, it is disclosed that the witness knows no facts upon which to base an opinion, it is perfectly within the discretion of the trial judge to overrule a question which seeks to obtain an opinion from a lay witness which is not based upon stated facts." Id. at 294-95.

Prior to the Appellate Division's opinion in Arrington, courts continued to reaffirm the rule that lay witness testimony on the defendant's sanity was not only admissible, but highly persuasive evidence. In State v. Scelfo, 58 N.J. Super. 472 (App. Div. 1959), the Appellate Division rejected a defense claim that uncontradicted expert testimony that the defendant was insane at the time of the offense ought to override lay testimony about the defendant's behavior and compel a "judgment of acquittal by reason of insanity." Id. 477-78. The

court instead held that expert testimony "is in parity with lay opinion testimony in that the jury is entitled to give each equal weight." Ibid. The court explained that "the right to a jury trial requires that the jury be the ultimate determinative body, thus making incompatible any concept of binding expert opinion testimony." Ibid.

In State v. Risden, 106 N.J. Super. 226, 235-36 (App. Div. 1969), affirmed as modified, 56 N.J. 27 (1970), the Appellate Division reaffirmed 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.'" Id. at 235-36. Following this longstanding rule, in Risden, this Court held that various lay witnesses should have been allowed to testify that the defendant acted "crazy," as this kind of opinion "springs from the common understanding and experience of mankind" and "represents the reaction of an ordinary man arising from his observation and is helpful to an understanding of his testimony and an appreciation of the mental or emotional state of the person described." 56 N.J. at 40. As the Appellate Division held, "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 was "at least as significant as the experts' testimony in helping the jury determine whether [defendant] was insane at the time of the murder." Ibid.

As these cases demonstrate, lay witness testimony has always been admissible, competent, and persuasive evidence in insanity cases. Legal insanity is different from mental illness, and legal insanity is ultimately a question that lay witnesses are competent to testify about. There is no expert-testimony requirement in our case law.

B. The Legislative History Of Our Insanity Laws Demonstrates The Lack Of An Expert-Testimony Requirement.

The plain language and legislative history of our insanity laws further demonstrates that expert testimony is not required to advance an insanity defense. The goal of statutory interpretation is "to determine and give meaning to the Legislature's intent," starting with "the plain language of the statute, which is typically the best indicator of legislative intent." In the Matter of Registrant R.H., 258 N.J. 1, 12 (2024) (cleaned up). "It is a guiding principle in achieving the goal of fulfilling the legislative intent underlying a statute that a provision be considered in light of its surrounding statutory provisions." State in Interest of K.O., 217 N.J. 83, 95 (2014); see also State v. Cooper, 256 N.J. 593, 605 (2024) ("Statutes must be read in their entirety, with each part or section construed in connection with every other part or section to provide a harmonious whole.") (cleaned up). Our insanity statute, N.J.S.A. 2C:4-1, makes no mention whatsoever of an expert requirement, and this plain language controls; there is no requirement to present defense expert testimony.

Further supporting the lack of an expert-requirement is the fact that the statute regarding a defendant's competency, rather than his insanity, does expressly contemplate experts. See N.J.S.A. 2C:4-5 ("Whenever there is reason to doubt the defendant's fitness to proceed, the court may on motion by the prosecutor, the defendant or on its own motion, appoint at least one qualified psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant."). "If 'the Legislature has carefully employed a term in one place yet excluded it in another, it should not be implied where excluded.'" R.H., 258 N.J. at 12 (quoting Cooper, 256 N.J. at 605). Courts "should not add language to section (x) that the Legislature chose to include in section (y) but left out of (x)." Ibid. In this case, the inclusion of a role for experts in the competency statute contrasted against the omission of any such role in the insanity statute demonstrates that experts are not required in the insanity context.

In addition, the legislative history of our insanity laws demonstrates that expert testimony is not required to advance an insanity defense. Before Title 2C was enacted, Title 2A combined, to a certain extent, the inquiries into a defendant's competency and sanity and expressly included a mechanism for psychiatric reports. Yet even with this explicit discussion of psychiatric experts, there was no requirement that the defense present expert testimony before being

allowed to raise an insanity defense at trial. Even if there had been such a requirement, the Legislature's enactment of Title 2C would have eliminated it. The Legislature rejected the Criminal Law Revision Commission's recommendations, which would have mandated psychiatric expert reports in every case where a defendant's competency was at issue, or the defense provided notice of an insanity defense. Instead, the Legislature chose to codify a permissive role for experts only to assist with competency, not insanity. By rejecting the Commission's recommendations, the Legislature has spoken: there is no requirement to present expert testimony before a defendant can raise an insanity defense.

First, the defense was not required to present expert testimony to advance an insanity defense under Title 2A, though the discussion of experts in Title 2A helps explain this Court's statements in State v. Whitlow, 45 N.J. 3 (1965), about psychiatric experts. Before Title 2C was enacted, N.J.S.A. 2A:163-2 essentially governed competency[3] and included specific mechanisms for the involvement

[3] Under N.J.S.A. 2A:163-2, the questions of competency and insanity were combined to a certain extent. See N.J.S.A. 2A:163-2 (noting that the court, or the jury, was to "determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time of the offense charged against him is alleged to have been committed"). As this Court explained in Aponte v. State, 30 N.J. 441 (1959), the reason for this was to avoid the problem that would arise "when an accused is found unable to defend" but is "returned for trial on the indictment years later after much of the evidence pertinent to the issue of insanity at the time of the offense may have been lost." Id. at 454. Thus,

of psychiatric experts. (See Dsa 3) The statute provided that if "any person under . . . indictment . . . shall appear to be insane," the judge "may, upon presentation to him of the application and certificates as provided in Title 30, chapter 4. . . institute an inquiry and take proofs as to the mental condition of such person." Ibid. (Dsa 3) "The proofs herein referred to may include testimony of qualified psychiatrists to be taken in open court by the judge, either in the presence of a jury specially impanelled to try the issue of insanity alone, or without a jury, as the judge in his discretion may determine." Ibid. (Dsa 3)

The referenced certificates from Title 30, chapter 4 were made under oath by "two physicians who have made examinations and who certify as to the accused's mental incapacity and need for commitment." Whitlow, 45 N.J. at 12-13 (citing N.J.S.A. 30:4-27 to 30); see also State v. Gibson, 15 N.J. 384, 391 (1954) (noting that 2A:163-2 "permits the testimony of qualified psychiatrists," while Title 30 requires "that the certificates be signed by a person duly licensed to practice medicine in this State and who holds a degree of doctor of medicine

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for a defendant found to be incompetent, "if he is adjudged to have been insane at the time of the crime," the court could dismiss the indictment. Ibid. As explained in Aponte, this statutory scheme left the judge with discretion. The court "should not deal with the defense of insanity until after the incapacity of the accused to stand trial has been established," and "[i]f incapacity is found, then, in its discretion, the court may, alone or with a jury, inquire into the defense of insanity." Id. at 454-55.

or a license to practice medicine and surgery in this State," and that "[w]here expert testimony in an action of this type is to be given[,] it must be given by witnesses so qualified"). (Dsa 16)

Even with this statute expressly discussing certificates and testimony from psychiatric experts, our case law still did not bar an insanity defense without expert testimony. For example, in State v. Whitlow, 45 N.J. 3 (1965), this Court wrote that "[w]hen a defendant charged with crime pleads mental incapacity to stand trial or innocence by reason of insanity, obviously expert medical opinion is necessary both for the defendant and for the State." Id. at 10. But in the very next sentence, this Court clarified that "[a]lthough lay testimony as to insanity might be admissible, it is unlikely in the extreme that exclusive reliance would ever be placed on it." Ibid. This language from Whitlow makes sense when considering 2A:163-2: expert proofs, specifically certificates from two psychiatrists, were necessarily presented to the court and triggered an inquiry into the defendant's competency, and if he were found incompetent, the inquiry expanded to defendant's sanity. This is why the Court noted that "obviously expert medical opinion is necessary." Whitlow, 45 N.J. at 10.

However, the very next sentence establishes that such expert testimony was not required at trial. It would be "unlikely in the extreme" to exclusively rely on lay testimony about sanity, but that does not mean that a defendant would

be barred from raising an insanity defense without that testimony. If the Court in Whitlow intended to read 2A:163-2 as requiring psychiatric expert testimony at trial, it would have said so explicitly. It did not. Therefore, Whitlow helps demonstrate that there was not an expert-testimony requirement at trial under Title 2A.

Adding further support to there being no expert-testimony requirement for trial is N.J.S.A. 2A:163-3, which governed the insanity defense alone. (Dsa 10) This statute stated that if "the defense of insanity is pleaded," "the jury shall be required to find specially by their verdict whether or not such person was insane at the time of the commission of such offense and to declare whether or not such person was acquitted by them by reason of the insanity of such person at the time of the commission of such offense. . . ." (Dsa 10) Unlike N.J.S.A. 2A:163-2, this statute does not contain any express language about medical or psychiatric experts, further demonstrating that there was no requirement to present expert testimony at trial to advance an insanity defense.

Even if there had been an expert-testimony requirement under prior law, our Legislature specifically rejected any such requirements when it adopted Title 2C.[4] The Criminal Law Revision Commission made several recommendations

[4] As to the substantive definition of insanity, in adopting Title 2C, our Legislature retained the M'Naghten rule despite the recommendation from the Commission. Singleton, 211 N.J. at 174; see Final Report of the New Jersey

regarding the insanity defense and the involvement of psychiatric experts. These recommendations were not adopted by the Legislature, demonstrating that our Legislature did not intend for there to be an expert-testimony requirement in insanity cases. For example, the Commission proposed a version of 2C:4-5, entitled "Psychiatric Examination of Defendant with Respect to Mental Disease or Defect," that provided that whenever the defendant provided notice of an insanity defense, "the Court shall on motion by the prosecutor, the defendant or on its own motion appoint at least one qualified psychiatrist to examine and report upon the mental condition of the defendant." Final Report of the New Jersey Criminal Law Revision Commission, Report and Penal Code, 2C:4-5, at 36 (emphasis added). (Dsa 20) Proposed subsection (c) explained the required contents of this psychiatric report:

> (1) a description of the nature of the examination; (2) a diagnosis of the mental condition of the defendant; (3) if the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense; (4) when a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired at the time of the criminal conduct charged;[5] and (5)

Criminal Law Revision Commission, Report and Penal Code, 2C:4-1, at 35 (1971) (Dsa 19); Final Report of the New Jersey Criminal Law Revision Commission, commentary to 2C:4-1, at 96 (1971). (Dsa 30)

[5] In the commentary to the proposed 2C:4-1, the Commission wrote about its expectations for the respective roles of psychiatric experts and lay jurors at a

> when directed by the Court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged. The examining psychiatrist or psychiatrists may ask questions respecting the crime charged when such questions are necessary to enable formation of an opinion as to a relevant issue.

[Ibid., at 37 (emphasis added) (Dsa 21)]

As this proposal sets forth, in any case where a defendant intended to raise an insanity defense, there would necessarily be expert evidence as to the "mental condition" of the defendant as well as to the defendant's legal insanity.

But when the Legislature adopted 2C:4-5, it limited this subsection to assessing the defendant's competency; not his insanity under 2C:4-1. As enacted, 2C:4-5 limited psychiatric examinations to those cases where "there is reason to doubt the defendant's fitness to proceed." L. 1978, c. 95. (Dsa 47) Moreover, contrary to what the Commission had recommended, the psychiatric expert report was only to assess issues related to competency, not insanity:

> (1) a description of the nature of the examination; (2) a diagnosis of the mental condition of the defendant; (3) an opinion as to the defendant's capacity to understand the proceedings against him and to assist in his own defense. The person or persons conducting the examination may ask questions respecting the crime charged when such questions are necessary to enable formation of an opinion as to a relevant issue, however, the evidentiary character of any

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trial: "It is anticipated that the psychiatric and psychological testimony would be addressed to the substantiality of the defendant's impairment but not to the adequacy. Thus, the psychiatrist will not be asked to make a moral or legal judgment. He can confine his opinion to the medical question which he is qualified to answer." Final Report, commentary to 2C:4-1, at 97. (Dsa 31)

> inculpatory statement shall be limited expressly to the question of competency and shall not be admissible on the issue of guilt.

[Ibid. (emphasis added) (Dsa 47)]

Additionally, the Commission's proposal for 2C:4-7 provided additional rules regarding psychiatric testimony at trials where the defense is insanity. "Upon the trial, the psychiatrists who reported pursuant to Section 2C:4-5 may be called as witnesses by the prosecution, the defendant or the Court." Final Report, Report and Penal Code, 2C:4-7, at 39. (Dsa 23) When that expert testifies, "he shall be permitted to make a statement as to the nature of any examination of the defendant, any diagnosis of the mental condition of the defendant at the time of the commission of the offense charged and his opinion as to the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. . . ." Id. at 40. (Dsa 24) As this proposal demonstrates, the Commission expected there to be psychiatric expert testimony at every insanity trial. But again, our Legislature rejected this proposal. As adopted, 2C:4-7 simply set forth the consequences of an acquittal by reason of insanity: "If a defendant is acquitted by reason of insanity the court shall dispose of the case as provided for in section 2C:4-8 of this chapter." L. 1978, c. 95, at 48. (Dsa 48)

The Commission proposals would have led to expert testimony in every case where the defense raised insanity. In rejecting these proposals, our

Legislature decided that expert testimony was not a necessary prerequisite to raising an insanity defense. See R.H., 258 N.J. at 12 (reaffirming that "courts should not add language to section (x) that the Legislature chose to include in section (y) but left out of (x). The reason is simple: The Legislature knows how to write a statute.") (cleaned up). This Court should therefore uphold the legislative intent for the statutes our Legislature adopted and reaffirm that there is no expert-testimony requirement embedded in our insanity defense.

C. The Appellate Division's Opinion Imposing An Expert-Testimony Requirement Should Be Reversed.

The Appellate Division majority held that "lay testimony by a defendant, untethered to admissible expert opinion substantiating the defendant's 'disease of the mind,' is inadmissible under our Rules of Evidence and insufficient to advance an insanity defense under N.J.S.A. 2C:4-1." Arrington, 480 N.J. Super. at 432. In reaching this conclusion, the Appellate Division relied on (1) the history and structure of New Jersey's insanity law; (2) the plain meaning of the word "disease" in N.J.S.A. 2C:4-1; and (3) the requirements for expert testimony under N.J.R.E. 702. None of these supports an expert-testimony requirement.[6] Moreover, even if N.J.R.E. 702 appeared to require testimony

[6] The Appellate Division additionally relied on out-of-state cases to support the expert testimony requirement. For the reasons set forth in defendant's Appellate Division reply brief, none of these cases is persuasive. (Rb 8-12) Additionally, contrary to the Appellate Division's conclusion, People v. Moore,

from an expert about a defendant's mental condition, a defendant's foundational constitutional rights to present a complete defense and to testify at trial must prevail over any limitations from our evidence rules. This Court should therefore reverse the Appellate Division's opinion and reaffirm the longstanding rule that expert testimony is not a perquisite for advancing an insanity defense.

First, the Appellate Division relied on the history and structure of New Jersey's insanity laws as supporting its expert-testimony requirement. The Appellate Division recognized that the law used to provide for psychiatric experts in insanity cases and cited Whitlow and its discussion of N.J.S.A. 2A:163-2. Arrington, 480 N.J. Super. at 439-40. The majority also recognized that the "Legislature eliminated Title 2A's procedural requirement for certifications by two examining psychiatrists" when it enacted the Title 2C insanity provisions. Arrington, 480 N.J. Super. at 440. The majority nonetheless concluded that the "Legislature maintained the general premise that a defendant would need to retain an expert to advance an insanity defense at trial." Ibid.

For all the reasons discussed above in Subsection B., the Appellate Division's conclusion is wrong. The Legislature did not somehow retain any

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96 Cal.App.4th 1105, 117 Cal. Rptr. 2d 715, 723 (2002), is equally unpersuasive for an additional reason. California sets a higher standard than New Jersey does for allowing defenses to go to the jury: "substantial evidence to support the defense," id. at 722, as opposed to New Jersey's low threshold of rational basis in the record.

expert requirements that had existed under Title 2A. Instead, the Legislature rejected any expert requirement when it rejected the proposal by the Commission that would have mandated the use of experts in every case where the defendant provided notice of an insanity defense.

Second, the Appellate Division relied on the use of the word "disease" in N.J.S.A. 2C:4-1 as demonstrating the Legislature's intent to retain an expert-testimony requirement. Arrington, 480 N.J. Super. at 440-41. Citing modern dictionary definitions, the majority reasoned that there must be an expert testimony requirement because only experts can identify and diagnose diseases. Ibid. But this reasoning fails to appropriately acknowledge that the use of the word "disease" in N.J.S.A. 2C:4-1 is not new; the M'Naghten test as set forth in 1843 uses the exact same phrasing: "to establish a defence on the ground of insanity, it must be clearly proved that at the time of commiting the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong." M'Naghten's Case, 8 Eng. Rep. 718 (emphasis added). Our Legislature specifically chose to retain this 19th century definition of criminal insanity over the recommendation from the Criminal Law Revision Commission. Choosing to use the exact same words that had been used

for over a century demonstrates that the Legislature did not intend for those words to take on a new meaning.

Moreover, longstanding caselaw since the adoption of the M'Naghten rule in New Jersey expressly recognizes lay witnesses can offer opinions on the defendant's sanity or insanity. See Subsection A. As our Legislature is presumed to be aware of relevant caselaw, its choice to retain the old standard for insanity further demonstrates its intent to retain these old rules permitting lay witness testimony to support a defendant's insanity defense. Maison v. New Jersey Transit Corp., 245 N.J. 270, 290 (2021) ("The Legislature is presumed to be aware of the decisional law of this State."); Yanow v. Seven Oaks Park, Inc., 11 N.J. 341, 350 (1953) ("A legislative body in this State is presumed to be familiar not only with the statutory law of the State, but also with the common law."). In short, New Jersey uses the exact same standard for insanity as it did in 1846. Medical experts were not mandated in 1846. They are not mandated now.

Third, the Appellate Division relied on N.J.R.E. 702 as supporting an expert-testimony requirement. The court reasoned that the assessment of whether a defendant was "laboring under such a defect of reason, from disease of the mind" "entails 'scientific, technical, or other specialized knowledge'" that can only be provided by a qualified expert. Arrington, 480 N.J. Super. at 442 (quoting N.J.S.A. 2C:4-1 and N.J.R.E. 702). Again, this reasoning

impermissibly ignores centuries of caselaw holding that lay witnesses are qualified to offer opinions on the defendant's sanity, when that sanity was being assessed under the exact same test as it is assessed today. See, e.g., Clifford v. State, 60 N.J.L. 287, 289 (Sup. Ct. 1897) ("[A] nonexpert witness may state facts and express an opinion in respect to the sanity of a defendant."); In re McCraven, 87 N.J. Eq. 28, 30 (Ch. 1916) ("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."); State v. Morehous, 97 N.J.L. 285, 294–95 (1922) ("Lay witnesses on insanity may give their opinion of a person's sanity or insanity provided such opinions are based on facts within the knowledge of the witness and stated."); State v. Scelfo, 58 N.J. Super. 472, 477-78 (App. Div. 1959) (rejecting the defense's claim that uncontradicted expert testimony that the defendant was insane ought to override lay testimony about the defendant's behavior and compel a "judgment of acquittal by reason of insanity" because expert testimony "is in parity with lay opinion testimony in that the jury is entitled to give each equal weight").

Moreover, although there had not been a recent published case regarding lay testimony and criminal insanity prior to Arrington, the Appellate Division had concluded that lay witness testimony under N.J.R.E. 701 could establish a

person's insanity in a civil case. Estate of Nicolas v. Ocean Plaza Condo. Ass'n, Inc., 388 N.J. Super. 571, 582–83 (App. Div. 2006). In that case, the trial court dismissed plaintiff's Law Against Discrimination claim as time-barred because the plaintiff had failed to "make a prima facie showing that his mother was insane and that such condition was a bona fide basis for tolling the statute of limitations." Id. at 579-80. The defendant argued that the plaintiff "failed to provide any proof" of insanity "because no expert report attesting to her insanity was presented." Id. at 582. The Appellate Division rejected this argument. Ibid. The court held "that a person's insanity for purposes of N.J.S.A. 2A:14-21 can be established under N.J.R.E. 701, through the testimony of laypersons, without the presentation of expert testimony." Ibid.

Although the definition of insanity for purposes of tolling the statute of limitations and for criminal insanity use different words, they both have the same basic components. See id. at 582 (citing Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 113 (1965)) (for purposes of tolling the statute of limitations, "insane . . . means such a condition of mental derangement as actually prevents the sufferer from understanding his legal rights or instituting legal action"). Both statutes require some kind of mental condition that causes or prevents someone from understanding his rights or knowing what he is doing. Thus, the Appellate Division's holding 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. Contrary to the Appellate Division's opinion in Arrington, insanity does not exclusively fall under the purview of N.J.R.E. 702; lay witnesses can provide competent opinions on insanity too.

Finally, even if our evidence rules would bar lay witnesses from offering opinions on a defendant's insanity, a defendant's constitutional rights to present a complete defense and to testify in his defense supersede those evidentiary rules. See Davis v. Alaska, 415 U.S. 308, 320 (1974) (reversing the defendant's convictions where he was barred, by state law, from cross-examining the State's witness because "[t]he States' policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness"); State v. Castagna, 187 N.J. 293, 311 (2006) (holding that defendant's confrontation rights were violated when he was barred from cross-examining a State's witness with the results of her polygraph test that were otherwise inadmissible under state law); State v. Garron, 177 N.J. 147, 169 (2003) ("[W]hen the mechanistic application of a state's rules of evidence or procedure would undermine the truth-finding function by excluding relevant evidence necessary to a defendant's ability to defend against the charged offenses, the Confrontation and

Compulsory Process Clauses must prevail."); State v. Budis, 125 N.J. 519, 530 (1991) (reversing defendant's convictions because the trial court's use of the Rape Shield Statute to "significantly" restrict defendant's ability to cross-examine witnesses on relevant and not-unduly prejudicial evidence violated his constitutional rights); State v. Duprey, 427 N.J. Super. 314, 316-17, 323 (App. Div. 2012) (holding that, under the Sixth Amendment and Article 1, Paragraph 10, the "testimony of a DV complainant must be available for use by the defendant during cross-examination" at his criminal trial despite a statute expressly barring the use of such testimony).

"Under both the Federal and the New Jersey Constitutions, criminal defendants. . . have the right to a meaningful opportunity to present a complete defense." State v. Chambers, 252 N.J. 561, 582 (2023) (citing Budis, 125 N.J. at 531; Crane v. Kentucky, 476 U.S. 683, 690 (1986). See also Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."). Included in this right is the "Sixth Amendment right to offer any evidence that refutes guilt or bolsters a claim of innocence." State v. Harris, 156 N.J. 122, 177 (1998). Thus, "if evidence is relevant and necessary to a fair determination of

the issues, the admission of the evidence is constitutionally compelled." Garron, 177 N.J. at 171.

Additionally, a defendant's right to testify in his own defense is an essential element of due process under our state and federal constitutions. Rock v. Arkansas, 483 U.S. 44, 51-52 (1987) (holding that a defendant's right to testify is guaranteed by the Fourteenth Amendment's due process guarantee, the Sixth Amendment's compulsory process clause, and as the "necessary corollary to the Fifth Amendment's guarantee against compelled testimony"); State v. Savage, 120 N.J. 594, 628 (1990) (holding that a defendant's right to testify "is essential to our state-based concept of due process of law" and is "also implicit in our state constitutional guarantee for a criminal defendant" to have compulsory process) (citing N.J. Const. art I, ¶ 10). Testifying allows a defendant the "opportunity to tell his story in his own words" and "to display his own demeanor and testimonial qualities to the finder of fact who will ultimately determine the credibility of his defense." State v. Fusco, 93 N.J. 578, 586 (1983). A defendant's testimony enhances the truth-seeking function of a criminal trial because "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be

determined by the jury." State v. Bradshaw, 195 N.J. 493, 508 (2008) (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)).

Here, even if our evidence rules prevented lay witnesses from offering opinions on a defendant's sanity, they cannot constitutionally bar a defendant's own testimony about his own mental state, any prior diagnoses, and his own account of what happened during the crime. Indeed, "[a] defendant's state of mind at the time of an alleged crime is inherently intangible and, therefore, is proven predominantly through witness testimony and circumstantial evidence." State v. Jenewicz, 193 N.J. 440, 451 (2008). "An obvious, ready source of direct evidence about state of mind is the defendant's testimony" on his own behalf. Ibid. Any "mechanistic application" of N.J.R.E. 702 to bar the sole defense and bar the defendant's own testimony about that defense "would undermine the truth-finding function by excluding relevant evidence necessary to a defendant's ability to defend against the charged offenses. Garron, 177 N.J. at 169-70. A defendant's constitutional rights "must prevail." Ibid.[7] There is no expert-

[7] In Kahler v. Kansas, 589 U.S. 271 (2020), the Supreme Court held that Kansas's abolition of the insanity defense did not violate the defendant's federal due process rights. Id. at 274. However, integral to that holding was the fact that Kansas law permitted a defendant to present evidence of his insanity at sentencing, and that the judge could sentence a defendant to a mental health facility rather than prison on the basis of that evidence. Id. at 285 ("[A] defendant arguing moral incapacity may well receive the same treatment in Kansas as in States that would acquit—and, almost certainly, commit—him for that reason."). New Jersey has no such mechanism for a defendant convicted of

testimony requirement to advance an insanity defense, nor can there be such a requirement without violating defendants' fundamental constitutional rights to present a complete defense and testify.

D. Creating An Expert-Testimony Requirement Would Harm Some Of The Most Vulnerable Defendants.

The insanity defense "is rarely used, and even more rarely successful." Judge Eugene M. Fahey et. al., "The Angels That Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense, 68 Buff. L. Rev. 805, 806 (2020). "Studies indicate that nationally, fewer than one percent of criminal cases involve an insanity defense, and of those cases, the defense succeeds in fewer than a quarter of them. Nationally, when the insanity defense is disputed at trial, 'only an estimated one-120th of [one] percent of contested felony cases' end in a successful insanity defense." Id. at 806-07 (quoting Mac McClelland, When "Not Guilty" Is a Life Sentence, N.Y. Times (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html). Requiring defendants to present testimony from an expert would make this defense even more difficult to raise and could harm the most mentally ill and least culpable defendants.

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murder to present evidence of his insanity at sentencing and be sentenced to a mental health facility rather than prison. Thus, a defendant cannot be constitutionally deprived of an insanity defense simply because N.J.R.E. 702 would seem to require expert testimony.

A defendant with a severe mental illness may not be able to fully cooperate with a defense expert's evaluation of his sanity. A mentally ill defendant may have cooperated with an expert for purposes of a competency evaluation, but, due to his mental illness, be unwilling to submit to a second evaluation. Or, a defendant may be paranoid and unable to give the expert enough information to form an opinion about the defendant's ability "to know the nature and quality of the act he was doing" or whether "he did not know what he was doing was wrong." N.J.S.A. 2C:4-1. Yet in these cases, the defense may still be able to marshal a compelling case for insanity through fact and opinion testimony by lay witnesses who know the defendant, know his history, and saw the defendant at or around the time of the offense. This Court should not make it impossible for these vulnerable defendants to present what might be their most viable defense. This Court should not impose an expert-testimony requirement in insanity cases.

Alternatively, if this Court concludes that some expert testimony is required to advance the defense, the expert should be permitted to testify generally rather than be required to specifically opine that this defendant satisfied the M'Naghten standard. There is a risk that a mentally ill defendant might not be able to provide a defense expert with the kind of specific information needed to form a conclusion on the defendant's sanity. In these

cases, the defense could still present expert testimony, so long as that testimony is allowed to be general; the expert could testify generally about the defendant, any known psychiatric diagnoses, and the features of any of those diagnoses. Similarly, testimony from an expert who only examined the defendant for competency, but did not evaluate the defendant's sanity, would also be more than sufficient to satisfy any expert-testimony requirement. If the jury is given this general, background information about the defendant's mental illness, the ultimate question – whether the defendant knew what he was doing or knew that it was wrong – would be left exclusively to the jurors. Particularly since criminal insanity is distinct from mental illness, if any expert testimony is required, general testimony must be found to be sufficient. Any other result risks harming those defendants for whom an insanity defense is most needed.

E. Depriving Defendant Of His Constitutional Rights To Present A Defense And To Testify Cannot Be Considered Harmless.

In his concurring opinion, Judge Jacobs wrote that "a defendant should not be categorically precluded from advancing an insanity defense in those rare instances where expert testimony is unsolicited or unavailable." Arrington, 480 N.J. Super. at 445 (Jacobs, J.S.C., concurring). Judge Jacobs noted that the M'Naghten rule, "unchanged in New Jersey since its adoption in 1846, ten years before the birth of Sigmund Freud . . . was applied by jurors for decades before the advent of psychiatric expertise" and "may yet be applied without need for

such expertise." Id. at 447-48. As discussed in this brief, this conclusion is correct; there is no expert-testimony requirement, and jurors are capable of assessing a defendant's sanity without the aid of defense expert testimony.

However, Judge Jacobs's other conclusions should not be adopted by this Court. First, Judge Jacobs wrote that rather than summarily barring Arrington's defense, "the better course" would have been to conduct a Rule 104 hearing at which the defense "must come forward with competent, reliable evidence about the existence of such a disease or defect which a reasonable juror could credit." Id. at 451 (quoting State v. Murray, 240 N.J. Super. 378, 399 (App. Div. 1990)). However, N.J.R.E. 104 hearings are to decide "any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible." Whether there is a rational basis in the record to instruct the jury on a defense is not any of these preliminary questions. Whether there is a rational basis that the defendant satisfies the insanity standard has nothing to do with whether a witness is qualified, a privilege exists, or evidence is admissible. N.J.R.E. 104(a). Thus, there is no basis to require a Rule 104 hearing at which the defense must give a pre-trial preview of his defense. Of course, if the defense wants such a pretrial hearing, they could request one. But N.J.R.E. 104 does not require such a hearing, nor should this Court require such a hearing.

Second, Judge Jacobs concluded that it was "clear from the competency hearing that defendant could not adduce the quantum of reliable evidence necessary to have an insanity defense entertained by the jury." Id. at 451. However, Arrington was barred from presenting his defense to the jury so we have no idea what that defense would have looked like. It is entirely inappropriate to speculate that that defense would have been so utterly inadequate that it did not create a rational basis in the record to instruct the jury on insanity. Moreover, Arrington did not testify at the competency hearing, and due to the trial court's erroneous ruling on the insanity defense, Arrington did not testify at trial. (20T 231-13 to 15, 232-22 to 23) There is no information in the record about what Arrington would have testified to had he been permitted to testify about the insanity defense.[8] Maybe he could have testified about a history of mental illness. Maybe he could have testified about how chronic use

[8] The trial court here did not demand a proffer from the defense about the contents of Arrington's insanity defense, making this case distinguishable from United States v. Keen, 104 F.3d 1111, 1117 (9th Cir. 1996), cited by the concurrence, where the Circuit Court held the defendant had not been wrongfully prevented from raising an insanity defense because the court's "review of the statements made by Keen's counsel reveal[ed] that the proffered evidence of insanity was statutorily insufficient." Arrington, 480 N.J. Super. at 453 (alterations in Arrington). Nor would it have been appropriate to demand a proffer from the defense before trial; the standard for whether a defense goes to the jury is whether there is a rational basis in the record for such a defense. An attorney's proffer is not evidence in the record so it should not be used to rule, before trial has happened, whether the jury will be instructed on a defense at the close of the evidence.

of PCP or other drugs fundamentally changed the way he perceives the world such that he did not realize what he was doing at the time of this offense or did not realize that it was wrong. Or maybe he could have testified to any number of other things that could have provided a rational basis in the record to instruct the jury on his defense. The trial court's erroneous ruling on the need for expert testimony means that there is simply no way to know what evidence the defense could have marshaled in support of an insanity claim. It is wholly inappropriate to speculate based on the incomplete information presented at the competency hearing.

Preventing a defendant from presenting his defense to the jury and preventing a defendant from testifying in support of that defense is akin to structural error. Like the right to represent oneself, the rights to present a defense and to testify are "either respected or denied; [their] deprivation cannot be harmless." State v. Outland, 245 N.J. 494, 507 (2021) (quoting State v. King, 210 N.J. 2 (2012)); see also State v. Hedgespeth, 249 N.J. 234, 252-53 (2021) (holding that the trial court's erroneous admission of defendant's prior convictions, which prevented him from testifying, was not harmless error). This total deprivation of the rights most fundamental to a fair trial cannot be harmless, and it was not harmless in this case.

CONCLUSION

For the reasons set forth in this brief, as well as for the reasons set forth in defendant's Appellate Division brief and reply, Arrington's convictions should be reversed. This Court should hold that there is no requirement for defense expert testimony to advance an insanity defense.

Respectfully submitted,

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