IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE v. CHRISTOPHER M. FLAKE

ON APPEAL BY PERMISSION FROM THE COURT OF CRIMINAL APPEALS

CRIMINAL COURT FOR SHELBY COUNTY

W2000-01131-SC-R11-CD

BRIEF OF APPELLEE CHRISTOPHER M. FLAKE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

INTRODUCTION

This Court granted this appeal to determine the appropriate standard of review in assessing a conviction where the trier of fact rejects an affirmative defense of insanity. This Court should hold: if an appellate court determines, after viewing the evidence in a light most favorable to the state, that a rational trier of fact could only find that insanity has been established by clear and convincing evidence, then a guilty verdict may not be sustained. Applying this standard to Mr. Flake's case, this Court should affirm the judgment of the Court of Criminal Appeals which reversed Mr. Flake's conviction for attempted voluntary manslaughter. The case should be remanded to the trial court for proceedings consistent with a judgment of not guilty by reason of insanity.

DESIGNATION OF THE PARTIES

The State of Tennessee, the Appellant, will be referred to as the "State." Christopher M. Flake, the Appellee, will be referred to as the "Defendant," in accordance with his status in the trial court or, more frequently, by his name.

DESIGNATION OF THE RECORD

The Record consists of eleven (11) volumes. Volume 1 contains the pleadings, orders and documents filed in this cause, and will be referred to as "TR." Volumes 2 and 3 contain the trial Exhibits and Jury charge respectively. Volumes 4 through 8 contain the transcript of the trial, and will be referred to by Volume number and page number. Volumes 9 through 11 contain the pretrial Motion to Suppress, Sentencing Hearing and Motion for New Trial respectively and will be referred to by Volume number and page number.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. How does the burden of proof on the issue of insanity affect the standard of review of the jury's findings on insanity?

2. Whether the verdict was contrary to the evidence as a matter of law in that there was clear and convincing evidence presented establishing insanity.

3. Whether the evidence seized from Mr. Flake's vehicle and his statements to the police should have been suppressed because Mr. Flake was not mentally capable of knowingly and intelligently consenting to a search or waiving his *Miranda* rights.

STATEMENT OF THE CASE

Mr. Christopher M. Flake was born on March 1, 1972. Mr. Flake's mental health treatment began in 1988 when Mr. Flake was first seen by two doctors for six months on an out-patient basis. (Vol. 5, p. 300). These various treatments, for what was later diagnosed as paranoid schizophrenia, continued throughout the years until as late as April 3,1997, when Mr. Flake taken to a psychiatrist by his father because of Flake's bizarre behavior.

On the evening of April 6, 1997, for no apparent reason, Flake wounded Mr. Turner Carpenter with a pistol in a church in Memphis, Tennessee. Mr. Flake was arrested approximately two hours later.

Mr. Flake was found to be incompetent to stand trial and remained so for over two years. Mr. Flake told the doctors that "voices" had told him to shoot Mr. Carpenter as a "signal to the FBI to come to Central Church to take care of the Mafia." (Vol. 6, p. 425).

On August 26, 1997, the Shelby County Grand Jury returned an indictment against Mr. Flake charging him with Attempted First Degree Murder. (TR 1, pp. 1-1A). The indictment alleged that Mr. Flake did "unlawfully attempt to commit the offense of First Degree Murder as defined in Tennessee Code Annotated 39-13-202, in that he, the said Christopher M. Flake did unlawfully, intentionally and with premeditation attempt to kill Turner Carpenter by use of a deadly weapon, to wit: a firearm and did cause bodily injury to the said Turner Carpenter."

Mr. Flake was evaluated for competency to stand trial. He was transferred to various mental health facilities. On August 12, 1999, the staff at a mental hospital determined that Mr. Flake was finally found competent to stand trial. (TR 1, pp. 33-34).

Mr. Flake filed a motion to suppress any and all statements taken from him and all evidence collected from his vehicle. (TR 1, p. 35-40). On November 5, 1999, the trial court held a hearing on the motion. (Vol. 9). On November 9, 1999, the trial court entered an order overruling motion to suppress. (TR 1, pp. 46-48).

On November 15-18, 1999, a jury trial was conducted and, at its conclusion, Mr. Flake was convicted of Attempted Voluntary Manslaughter, as a lesser-included offense of the indicted charge. (Vol. 8, p. 697). On February 11, 2000, following a brief sentencing hearing, the trial court sentenced Mr. Flake to four years incarceration. (Vol. 11).

On March 10, 2000, Mr. Flake filed a Motion for a New Trial. (TR 1, pp. 70-71). The trial court heard and overruled the motion on March 30, 2000. (Vol. 11).

On July 13, 2001, the Court of Criminal Appeals reversed Mr. Flake's conviction and entered a judgement of Not Guilty by Reason of Insanity. On December 17, 2001, this Court granted the State's Application for Permission to Appeal.

STATEMENT OF THE FACTS

STATE'S PROOF

The State's first witness, Turner Carpenter, is a pastoral counselor at Central Church on Winchester Road in Memphis Tennessee. (Vol. 5, p. 168-69). He testified he first met Mr. Flake approximately 5 to 6 weeks prior to the shooting incident. (Vol. 5, p. 170). Mr. Flake had been referred to Mr. Carpenter by an associate for counseling. (Vol. 5, p. 170-71). Mr. Carpenter recalled that Mr. Flake missed three different appointments with him before the evening of April 6, 1997. (Vol. 5, p. 171).

At approximately 6:00 p.m. on April 6, 1997, Mr. Carpenter was preparing for one of his Sunday Heart-to-Heart group sessions, when Patricia Hoffman came to his office to talk to him. (Vol. 5, pp. 172-75). While talking with Ms. Hoffman, Carpenter heard someone knock on the door to his office. (Vol. 5, p. 176). Mr. Flake came in and asked if he could see Carpenter. (Vol. 5, p. 176). Carpenter told Mr. Flake he was with someone and that he could see Mr. Flake in fifteen minutes. (Vol. 5, p. 176).

Moments later, Carpenter heard the door open and saw that Mr. Flake had come into the adjoining waiting room and sit on the corner of the couch. (Vol. 5, p. 177). Carpenter acknowledged Mr. Flake and went back to his conversation with Ms. Hoffman. (Vol. 5, p. 177).

Suddenly, Mr. Flake yelled Turner Carpenter's name real loud and came running into the office with a gun in his hand. (Vol. 5, p. 178). Carpenter was in shock and said "are you kidding," as Mr. Flake shot him. (Vol. 5, p. 178). The bullet went through Carpenter's

hand, between the middle and index fingers, then went through his arm, through his diaphragm and liver, and lodged in his back. (Vol. 5, p. 178).

Mr. Flake immediately ran off. Mr. Carpenter staggered over to Ms. Hoffman where she helped him to the ground and called 911 and the front office. (Vol. 5, p. 179). Mr. Carpenter was taken to the hospital where he stayed for six days. (Vol. 5, p. 191). He then spent 4 to 5 weeks recuperating. (Vol. 5, 194).

On cross-examination, Mr. Carpenter admitted that Mr. Flake's conduct was "totally off the wall, weird, crazy" and that there had been no ill feelings or animosity between the two of them. (Vol 5, pp. 199-200). At one moment Mr. Flake seemed "normal" and the next Flake "was not normal." (Vol. 5, p. 203). Mr. Carpenter was struck by Mr. Flake's appearance: "those eyes." (Vol. 5, p. 204). Mr. Carpenter was of the view that Mr. Flake "turned into the devil himself." Mr. Flake was "horrible looking." (Vol. 5, p. 204). Mr. Carpenter had no explanation for Mr. Flake's actions. (Vol. 5, p. 205).

The State's next witness was Patricia Hoffman, who testified that she worked at Methodist Hospital as the manager of the radiology department. (Vol. 5, p. 207-8). She stated that on April 6, 1997, she had met with Turner Carpenter at Central Church around 6:00 p.m. to discuss some literature that he had distributed at one of their previous meetings. (Vol. 5, p. 209). She was on the couch in Mr. Carpenter's office when she heard a knock and saw Mr. Carpenter open the door to talk to someone she could not see. (Vol. 5, p. 210). After Turner Carpenter returned, they talked for a few minutes and "all of a sudden, just seemly out of nowhere, someone shouted his name, "Turner!, Turner Carpenter!" (Vol. 5,

p. 213). Then Mr. Flake came in the room very quickly with a gun and shot Mr. Carpenter. (Vol. 5, p. 213). She then described the aftermath and her assistance to Mr. Carpenter. (Vol. 5, p. 213-14). Nothing had taken place which would explain Mr. Flake's sudden, rash behavior. (Vol. 5, p. 224).

The State's third witness was Officer Robert Lampley of the Shelby County Sheriff's Department. (Vol. 5, p. 225). He testified that when he arrived at Central Church on April 6, 1997, he was assigned to proceed to 2122 Shadow Ford Cove of Germantown, Tennessee, to look for Christopher Flake. (Vol. 5, p. 228). When he and his partner arrived at that location they waited perhaps 45 minutes. Officer Lampley observed Mr. Flake walking from his vehicle toward the back door of the house. (Vol. 5, p. 231). Officer Lampley yelled for Mr. Flake to stop, which he did without incident, and the officers arrested him. (Vol. 5, p. 232). Mr. Flake never asked the officers what he was being arrested for doing. (Vol. 5, p. 235). When asked how Mr. Flake acted when taken into custody, the officer responded: "No emotion is really the best way I guess I can describe it. I don't believe he spoke or we spoke to him at all at that time. (Vol. 5, p. 236).

Officer Johnny Brown of the Shelby County Sheriff's Office testified that on April 6, 1997, he was dispatched to the Shallow Cove address where he met with Mr. Flake. (Vol. 5, p. 238). He advised Mr. Flake of his *Miranda* Rights and asked Mr. Flake if he knew why the officers were there, which Mr. Flake said he did. (Vol. 5, p. 240). Officer Brown then asked Mr. Flake where the weapon was located, and Mr. Flake directed them to the glove box of his vehicle. (Vol. 5, p. 240). Mr. Flake signed a consent to search form, and the officers

located the gun, which had one round in the chamber, five live rounds and a spare clip. (Vol. 5, p. 241-42). Mr. Flake displayed "no emotion." (Vol. 5, p. 253).

Robert Goodwin, a former member of the Shelby County Sheriff Department's detective division, testified that he went to the hospital shortly after the shooting to visit the victim. (Vol. 5, p. 257-60). Turner Carpenter identified Mr. Flake from a photo lineup as the individual who shot him. (Vol. 5, p. 260).

James Simonton, who works at the Guns and Ammo store on Summer Avenue, testified that he had a receipt for the sale of a gun to Mr. Flake in March of 1997, which was cleared for pick up on April 4, 1997. (Vol. 5, p. 267-272).

Finally, the victim's wife, Chellye Carpenter, testified regarding the photo lineup shown to her husband in the hospital and identified his mark on the lineup. (Vol. 5, p. 287).

DEFENSE'S PROOF

The first defense witness was Dr. Lynne Zager, a clinical psychologist, who works as the Director of Forensic Service Program at Midtown Mental Health Center in Memphis. (Vol. 5, p. 291-94). She was qualified as an expert and testified that she was court ordered to perform a forensic evaluation on Mr. Flake. (Vol. 5, pp. 297-99). She observed Mr. Flake from October 17, 1997 through January 28, 1998. (Vol. 5, p. 299).

Dr. Zager testified that Mr. Flake's mental state was evidenced in Dr. Janet Johnson's medical records, upon which Dr. Zager relied. Dr. Johnson's records indicated that she saw Mr. Flake on April 3, 1997, just three days prior to the shooting, at the request of Mr. Flake's father "because of [Mr. Flake's] bizarre behavior." The records indicated the

manifestation of Mr. Flake's bizarre behavior occurred when he, after seeing a man on a farm, placed his Prozac medication in the man's mailbox because he "felt that the man was in need of help." (Vol. 6, p. 304).

Dr. Zager testified as to Mr. Flake's extensive history of mental illness and mental health treatments. This went back to 1988 when Mr. Flake had first been treated by two doctors for six months on an out-patient basis. (Vol. 5, p. 300).

Dr. Zager stated that in her professional opinion "to a degree of psychological certainty" Mr. Flake suffers from schizophrenia, paranoid type. (Vol. 6, p. 304). More importantly, she believed that he was suffering from schizophrenia at the time that the shooting occurred. (Vol. 6, p. 304). Finally, Dr. Zager testified that she did not believe Mr. Flake could appreciate the wrongfulness of shooting Turner Carpenter at the time of the incident. (Vol. 6, p. 305).

Dr. Hilary Linder, a psychiatrist at the State of Tennessee at Western Mental Health Institute, testified that at the time Mr. Flake was sent to him for observation, Mr. Flake was not competent to stand trial. (Vol. 6, p. 380). He stated that over time, with the use of anti-psychotic medication, Mr. Flake became competent to assist his counsel at trial. (Vol. 6, p. 381). Dr. Linder was of the professional opinion that Mr. Flake was suffering from a severe mental illness and that he could not appreciate the wrongfulness of shooting Mr. Carpenter at the time of the incident. (Vol. 6, p. 382). Dr. Linder also testified to Mr. Flake's extensive history of mental illness and mental heath hospitalizations. Dr. Linder said that Mr. Flake,

who was 25 years old at the time of the shooting, had suffered from schizophrenia since his early teenage years. (Vol. 6, p. 383).

Dr. Rokeya Farooque, an Assistant Professor of Psychiatry at Meharry Medical College in Nashville, testified that she and her staff were court ordered to evaluate Mr. Flake to determine if he was competent to stand trial. (Vol. 6, p. 447). They completed their 30-day evaluation in December, 1997, and Dr. Farooque testified that Mr. Flake was not competent to stand trial at that time. (Vol. 7, p. 453-54). After further evaluation it was determined that at the time of the shooting , Mr. Flake was suffering from a severe mental illness and that he could not appreciate the wrongfulness of his conduct. (Vol. 7, p. 460-46).

Dr. Sam Craddock, a psychologist with the Middle Tennessee Mental Health Institute in their Forensic Services Division, testified that Mr. Flake was evaluated for 30 days at his facility in December, 1997. (Vol. 7, p. 484). Dr. Craddock testified that, in his professional opinion, Mr. Flake was so mentally ill that he "was deprived of the ability to reason effectively." (Vol. 7, p. 504). Moreover, Mr. Flake was delusional and thought he was morally justified in his actions. (Vol. 7, p. 505).

Rebecca Smith, a psychiatric social worker who also worked at Middle Tennessee Mental Health Institute, testified that when she interviewed Mr. Flake she recalled him telling her that he was hearing voices that told him to shoot Mr. Carpenter as a signal to the FBI to come to Central Church to take care of the terrorists and Mafia. (Vol. 6, p. 425).

Finally, Dr. John Hudson, a clinical psychologist in private practice in Bartlett, Tennessee, testified that Mr. Flake was one of the three most disturbed individuals he had

ever met in his life. (Vol. 7, p. 550). Dr. Hudson testified that he had "no doubt that [Mr. Flake] was suffering a very serious, incapacitating psychiatric illness" on April 6, 1997. (Vol. 7, p. 550). He stated that in his opinion Mr. Flake could not appreciate the wrongfulness of his act on that date. (Vol. 7, p. 550).

REBUTTAL PROOF

The State called Dr. John McCintosh, a medical doctor who worked in the Shelby County Jail at the time Mr. Flake was initially detained there, who testified that he met Mr. Flake a month after he was booked into the jail. Dr. McCintosh said he observed no evidence of psychosis at that time. (Vol. 8, p. 626-28). However, on cross-examination, he admitted that he was not ordered to evaluate Mr. Flake's state of mind at the time of the shooting and that the other doctors would be in a better position to make that determination. (Vol. 8, p. 638-48).

Additionally, the State called Dr. Mark Luttrell, who stated that on the occasion that he observed Mr. Flake for about an hour, he did not notice any "apparent distress" on Mr. Flake's part while Dr. Luttrell was treating Flake for a urinary problem. (Vol. 8, p. 658).

Finally the State called Mr. John Perry who is the mental heath director at the jail. Despite his title, Mr. Perry was a layman who testified that he saw Mr. Flake "briefly" on intake following his arrest in April and four to five days a week until Flake was transferred to Middle Tennessee Mental Health Center in November of that same year. Mr. Perry said that Flake did not joke around but was "responsive." (Vol. 8, p. 676). Mr. Flake was not a problem when he was placed in protective custody on the medical floor. (Vol. 8, p. 677).

ARGUMENT

1. A GUILTY VERDICT MAY NOT BE SUSTAINED IF AN APPELLATE COURT DETERMINES, AFTER VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THAT A RATIONAL TRIER OF FACT COULD ONLY FIND THAT INSANITY HAS BEEN ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE.

As addressed in the next issue, Mr. Flake asserts that the proof in this case establishes by clear and convincing evidence that he was insane at the time of the commission of this offense and thus this Court should find him not guilty by reason of insanity and remand the matter for further proceedings pursuant to Tenn. Code Ann. §33-7-303. To resolve that question this Court must first ascertain the appropriate standard of appellate review where the jury rejects the affirmative defense of insanity.

A.

The various "burdens" regarding criminal defenses differ depending on the nature of the defense and when the "burden" becomes relevant. Affirmative defenses impose a pre-trial notice burden on the defendant. Tenn. Code Ann. §39-11-204(c).

Where an affirmative defense is "fairly raised" by the evidence the trial judge has the duty to instruct on the affirmative defense. Tenn. Code Ann. §39-11-204(b). This is known as a "production burden" since no defense ever "goes to the jury" unless there are sufficient facts in the record to generate a jury instruction on the issue. There is also a persuasion burden whereby the burden is on the defendant to establish any affirmative defense by a preponderance of the evidence. In other words, the defense bears the burden of the risk of non-persuasion: if the defendant fails to persuade the jury of his or her affirmative defense

by a preponderance of the evidence then he or she loses. See, Tenn. Code Ann. §39-11-204(e) which provides: "If the issue of the existence of an affirmative defense is submitted to the jury, the Court shall instruct the jury that the affirmative defense must be established by a preponderance of the evidence."

Insanity, also being an affirmative defense, is governed by similar rules albeit requiring a higher standard of persuasion. Insanity has a "burden of pleading" imposed on the defendant in light of the requirement of pretrial notice. Tenn Rule Crim. Pro. 12(a). Absent good cause, the "failure to comply with the requirements [of pretrial notice], insanity may not be raised as a defense." *Id.*

Assuming pretrial notice has occurred there is a "burden of production" requirement on the defendant to inject enough proof before the jury (either by cross-examination of State's witnesses or independent defense proof) so that the defense is "fairly raised" sufficient to generate a jury instruction on the matter. See, *State v. Chambliss*, 682 S.W.2d 227 (Tenn. Crim. App. 1984) (defendant's statement that he "went crazy" insufficient to require insanity instruction). See also, *State v. Driver*, 598 S.W.2d 774 (Tenn. 1980) where this Court distinguished between burdens of production and burdens of persuasion.

Assuming production of sufficient proof for a jury instruction, the next issue becomes who has the burden of persuasion of establishing the affirmative defense to the trier of fact. Tenn. Code Ann. §39-11-501 provides:

> (a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts. Mental disease or defect does not

otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

At *trial* the defendant bears the burden of persuasion to establish the components of the insanity affirmative defense (by clear and convincing evidence). As with other issues the burden of persuasion is to allocate the risk of non-persuasion. If the defendant does not "meet the burden of persuasion" the defendant is convicted assuming the prosecution establishes the elements of the offense beyond a reasonable doubt which is the government's burden (and standard) of persuasion.[1]

Just as the various burdens differ prior to trial and during the trial, they also differ post-trial when considering the "sufficiency of the evidence" in a motion for judgment of acquittal or when there is an identical inquiry on appeal. What are the rules for a post-trial assessment of the rejection of an affirmative defense? This is an issue of first impression in this Court which inquires as to the appropriate "standard of review."

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[1] Defenses (as opposed to affirmative defenses) under Tennessee law are addressed under Tenn. Code Ann. §39-11-203. Any defense must be submitted ("charged") to the jury where it is "fairly raised" by the proof. This is a judicial determination as to whether there is enough evidence on the issue that it should be injected into the trial as a question of fact for the jury. Once the existence of the defense is submitted to the jury the trial judge must instruct the jury "that any reasonable doubt on the issue requires the defendant to be acquitted." Tenn. Code Ann. §39-11-203(d). The burden of persuasion of a "true defense" is on the government. Tenn. Code Ann. §39-11-201 provides that no person may be convicted of a criminal offense unless the following is proven beyond a reasonable doubt: "the negation of any defense to an offense defined in this title if admissible evidence is introduced supporting the defense." As noted in *State v. Jones*, 889 S.W.2d 225, 229 (Tenn. Crim.App. 1994), "once a defense is factually at issue, the State has the burden of proving beyond a reasonable doubt that the defense does not apply."

B.

"A dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610, 110 S.Ct. 2997, 3033, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting). Determining the standard of review often has an enormous impact on the outcome of the underlying substantive issue and is thus the subject of contentious debate. See e.g. *State v. Edison*, 9 S.W.3d 75 (Tenn.1999) ("Although *Sensing* prescribed the requisite criteria for the admissibility of breath-alcohol test results, it did not establish an appropriate standard of review to be applied to the trial court's decision on admissibility. Indeed, even during these proceedings, the parties have argued for different standards of review, including abuse of discretion, preponderance of the evidence, and *de novo* standard.").

The State's Brief advocates an impossible Standard of Review which rests on the notion that since the defense must establish insanity under the current law, the government is relieved of any burden of any sort at any level of review. This, of course, ignores the very nature of appellate review.

Absent procedural waiver, no decision is unreviewable by a higher court. In *State v. Bryant*, 805 S.W.2d 762 (Tenn.1991) this Court soundly rejected the State's contention that the amount of the fine is unreviewable despite statutory language which supported the State's argument. Appellate courts take seriously their responsibilities in reviewing ALL issues pertinent to a criminal conviction. "In a case involving a demonstrated claim of insanity on the part of any defendant, the responsibilities of not only the jury, but the trial judge and the

reviewing courts are particularly onerous." *State v. Overbay*, 874 S.W.2d 645 (Tenn. Crim. App. 1993). It is against this background of our constitutionally grounded system of checks and balances that a proper examination of the standard of review can begin.

In *State v. Holder*, 15 S.W.3d 905 (Tenn. Crim. App. 2000) the Court of Criminal Appeals articulated the familiar standard of review in determining whether the evidence supported the verdict where an insanity affirmative defense was raised. The Court stated that the standard of review is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The Court also found that the accused "has the burden in this Court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact."

While this standard is appropriate for determining whether the government has proven all of the elements of the offense or has negated any "fairly raised" defenses, *Holder* does not directly articulate a standard of review to determine whether the defendant has successfully established his or her affirmative defense so that the conviction would be reversed. There is a tension between the government's burden of proof as to the elements of the crime and the defendant's lesser burden to establish the affirmative defense. What happens when both sides sustain their respective burdens?

Tennessee has not dealt with the issue of appellate review of affirmative defenses probably because affirmative defenses are relatively new in this jurisdiction and because

there are so few of them.[2] Other courts,[3] have addressed the topic and have observed that an affirmative defense is different from determining whether the State has proven the elements of the offense beyond a reasonable doubt. The assessment of the sufficiency of the evidence regarding the State's burden of "proving" the elements of the crime and the appellate review of the sufficiency of the evidence establishing the affirmative defense are different questions:

> It is apparent that a review of the facts relative to proof of an affirmative defense does not inexorably lead to a review of facts relative to proof of the elements of the offense. Although a defendant certainly is not foreclosed from requesting both reviews, the former does not incorporate the latter. . . . In addition, the utilization of the standard of review constitutionally reserved for the courts of appeal and required by the Texas Supreme Court to be applied in situations where the burden of proof was on the individual claiming factual insufficiency does not impede a defendant from seeking a factual review relative to his affirmative defense nor does it preclude him from a sufficiency review as to whether there was sufficient evidence to warrant a conviction. The two reviews are mutually exclusive.

Meraz v. State, 785 S.W.2d 146, 152 (Tex. Crim. App. 1990).

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[2] There are several affirmative defenses in our code other than Insanity. For example, it is an affirmative defense to criminal responsibility of a corporation that a manager used due diligence to prevent the commission of the offense. Tenn.Code Ann. §39-11-406.

Renunciation to a conspiracy charge is an affirmative defense under Tenn.Code Ann. §39-12-104.

Extortion contains an affirmative defense where a person can argue that he or she was not guilty of extortion because the defendant reasonably claimed appropriate restitution or appropriate indemnification for harm done or appropriate compensation for property or loss of services. Tenn.Code Ann. §39-14-112(b).

Another affirmative defense is a "claim of right" under Tenn.Code Ann. §39-14-107. Here an individual may defend against a theft prosecution where the individual acts under an "honest claim" to the property or had an "honest belief that he had the right to obtain or exercise control over the property."

[3] To assist the Court in resolving the question posed by this Court when granting the appeal, this portion of the brief will only cite cases from other jurisdictions which have adopted insanity laws like Tennessee placing the burden of persuasion on the defendant.

Under this standard, the Texas courts find that "when assessing whether an appellant has proved his or her affirmative defense of insanity by a preponderance of the evidence, we consider all the evidence and determine whether the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust." *Jackson v. State*, 941 S.W.2d 351 (Tex. App. 1997) (copy in Appendix) (In a case with remarkably similar facts to Mr. Flake's case, Texas court reverses conviction, finding that the defendant has established insanity where a defendant's attack on a person was a "mission from God."). See also, *Morgan v State*, 869 S.W.2d 388 (Tex. App. 1993) (defendant found insane on appeal).

Other courts apparently use the same standard of review in determining the sufficiency of the evidence and the existence of the affirmative defense although it is not clear whether these are distinct, independent assessments. In *Phillips v. State*, 863 S.W.2d 309 (Ark. 1993) the Court found that the standard of review regarding the sufficiency of the convicting evidence is "whether there was substantial evidence to support the verdict." With respect to the affirmative defense of insanity, the appellate court reviewed the record to determine whether there was "substantial evidence" to support the verdict including the rejection of the insanity affirmative defense:

> It is for the jury to decide whether a defendant has sustained the burden of proving insanity by a preponderance of the evidence. The jury is the sole judge of the credibility of witnesses, including experts, and has the duty to resolve conflicting testimony regarding mental competence. . . . Here, evidence regarding insanity, both pro and con, including the ability of the appellant to conform his conduct, was submitted to the jury, and it was then instructed on the law. The jury rejected the insanity defense and entered a verdict of guilty. There was clearly substantial evidence to support this verdict.

863 S.W.2d 309, 311.

More recent Arkansas authority on the issue holds that:

> On appeal, our standard of review of a jury verdict rejecting the insanity defense is whether there was any substantial evidence to support the verdict. *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.* Moreover, this court will affirm the jury's verdict if there is any substantial evidence to support the verdict. *Id.*

Haynes v. State, 346 Ark. 388, 395, 58 S.W.3d 336, 341(Ark. 2001).

In Indiana the Standard of Review appears to be as follows:

> The burden rests with the defendant to prove, by a preponderance of the evidence, the affirmative defense of insanity. I.C. §35-41-4-1(b); *Lyon v. State*, 608 N.E.2d 1368, 1370 (Ind.1993). A determination of insanity is a question for the trier of fact. 'The jury is free to disregard the testimony of experts and rely upon that of lay witnesses.' *Barany v. State*, 658 N.E.2d 60, 63 (Ind.1995). A jury is not obligated to believe expert testimony on the issue of insanity, *Bonham v. State*, 644 N.E.2d 1223, 1227 (Ind.1994), and may consider lay opinion testimony on the issue of sanity. *Haggard v. State*, 537 N.E.2d 28, 29 (Ind.1989); *Bonham*, 644 N.E.2d at 1227. 'Accordingly, the standard of review is a deferential one.' *Barany*, 658 N.E.2d at 63. A convicted defendant who claims that his insanity defense would have prevailed at trial is in 'the position of one appealing from a negative judgment,' and such a judgment will be reversed 'only when the evidence is without conflict and leads to but one conclusion which the trier of fact did not reach.' *Metzler v. State*, 540 N.E.2d 606, 610 (Ind.1989); *Barany*, 658 N.E.2d at 63-64. Such an evidentiary conflict exists in this case.

Gambill v. State, 675 N.E.2d 668, 672 (Ind. 1997).

More recently the Indiana Supreme Court refused to alter the Standard of Review:

> One who has interposed [an insanity] defense and failed therein at the trial level has a monumental burden if he seeks to upset the finding of the fact trier on appeal, for he is appealing from a negative finding, and the issue is not whether or not the finding was sustained by the evidence but whether it was contrary to all the evidence and hence contrary to law. It is only where the

> evidence is without conflict and leads to but one conclusion and the trier of fact has reached an opposite conclusion, that the decision predicated upon such finding will be disturbed as being contrary to law.

Hurst v. State, 699 N.E.2d 651,654 n.3 (Ind.1998).

In Alabama the courts require that the defense proof of insanity must be "overwhelming" before a conviction will be reversed. *Christian v. State*, 351 So.2nd 623, 624 (Ala. 1977). In Alabama the burden of proving insanity is on the defendant by a preponderance of the evidence. However, while the jury is not bound to accept the testimony of experts "opinion testimony, even of experts in insanity cases must be weighed by the jury and may not be arbitrarily ignored." 351 So.2d, at 624. In *Christian,* the Alabama Supreme Court found that the defense proof had overcome the presumption of sanity and that "the jury verdict in this case is contrary to the preponderance of the evidence." 351 So.2d, at 624. See also, *Alvis v. State*, 434 So.2d 859 (Ala. Crim. App. 1983) (containing extensive discussion of Alabama case law and cases where insanity verdict was reversed under statute placing burden of proof on defendant).

In Illinois "the issue of a defendant's insanity is a question of fact, and the jury's resolution of that issue will not be overturned unless it is contrary to the manifest weight of the evidence." *People v. Johnson*, 585 N.E. 2d 78, 86 (Ill. 1992). Under this Illinois standard courts have reversed convictions where the State's evidence of sanity was lacking:

> Defendant contends she proved by a preponderance of the evidence that she was not sane at the time of the offense. A defendant may not be convicted of conduct 'if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.' (Ill.Rev.Stat.1987, ch. 38, par. 6-2(a).) Defendant bears the burden of proving

'by a preponderance of the evidence that the defendant is not guilty by reason of insanity.' (Ill.Rev.Stat.1987, ch. 38, par. 6*20-2(e).) A preponderance of the evidence means defendant must prove it is 'more likely than not that he was insane when he committed the offenses charged.' (*People v. Moore* (1986), 147 Ill.App. 3d 881, 886, 101 Ill.Dec. 377, 498 N.E.2d 701. See also, P. Robinson, 1 *Criminal Law Defenses*, sec. 5(c) at 51- 52 (1984) ('Proof by a preponderance of the evidence requires the burdened party to convince the jury that the claim he asserts is more likely than not to be true. Where a defendant must prove a defense by a preponderance of the evidence, the fact-finder must deny the defense where it believes only that it is as likely as not that the defendant qualifies for the defense'.) The State bears no burden on the issue of insanity. *People v. Seuffer*, (Ill.1991), 144 Ill.2d 482, 163 Ill.Dec. 805, 582 N.E.2d 71.

Under the pre-1984 insanity defense, a reviewing court would only overturn the finding of the trial court on sanity if the finding was so improbable or unsatisfactory as to create a reasonable doubt as to defendant's sanity.[citations omitted] Because the burden of proof has been modified from 'beyond a reasonable doubt' to 'a preponderance of the evidence,' the standard of review has changed to 'a determination of whether the trial court's finding was against the manifest weight of the evidence.' (*People v. Quay* (1988), 175 Ill.App. 3d 965, 968, 125 Ill.Dec. 486, 530 N.E.2d 644.) For other opinions construing the new insanity defense and holding that the standard of review is that the fact-finder's resolution of the sanity issue will not be disturbed unless it is contrary to the manifest weight of the evidence, see, e.g., [citations omitted] See also People v. Bradley (Ill.App., Oct. 11, 1991), 220 Ill.App. 3d 890, 904, 163 Ill.Dec. 359, 368, 581 N.E.2d 310, 319 ('it was not unreasonable for the jury to conclude that defendant failed to prove the defense of insanity by a preponderance of the evidence'). Cf. People v. Beehn, 205 Ill.App. 3d at 541-42, 151 Ill.Dec. 101, 563 N.E.2d 1207 (Steigmann, J., specially concurring) (standard of review should be same as civil standard for directed verdict or judgment n.o.v.).

The issue of defendant's sanity at the time of the offense is generally a question of fact. [citations omitted] The weight to be given an expert's opinion on sanity is measured by the reasons given for the conclusion and the factual details supporting it. [citations omitted] The opinion of an expert is of value only when it is based upon and in harmony with facts which are capable of verification by the court. [citations omitted] The trier of fact may accept one expert's testimony over that of another, but the witness must be credible in his diagnosis. [citations omitted] If the expert's opinion is without proper foundation, particularly where he fails to take into consideration an essential

> factor, that opinion 'is of no weight and must be disregarded.' 32 C.J.S., Evidence, sec. 569(1) at 609 ('[e]xpert testimony is of no weight, and must be disregarded, when it is contrary to common sense * * *, undisputed facts * * *, or where the opinion admits ignoring much of the best evidence available'), citing, e.g., *Kentucky-Tennessee Light & Power Co. v. Fitch* (1946), 304 Ky. 574, 201 S.W.2d 702 [n. 78.10]; see also 32 C.J.S., *Evidence*, sec. 569(2) at 616, citing *Marshall v. Sellers* (1947), 188 Md. 508, 53 A.2d 5 (if any essential facts have been overlooked, the weight of the expert's opinion is thereby weakened or destroyed) [n. 38].
>
> In *People v. Parr* (1971), 133 Ill.App. 2d 82, 86-87, 272 N.E.2d 712, the court found that the testimony of the State's expert witness was 'improperly admitted into evidence, in light of the fact that no proper foundation was laid for its admission' where the expert admittedly failed to take into consideration the weight of the occupants of the vehicles 'which [was] especially significant in light of his testimony that his opinion as to the speeds of the vehicles was based in part on the relative weights of the vehicles.' See also *Heideman v. Kelsey* (1960), 19 Ill.2d 258, 265-66, 166 N.E.2d 596 (expert's testimony was 'at best meaningless' and was not competent evidence and was improperly admitted where he 'failed to take into account' essential information regarding handwriting specimens).
>
> We conclude that the manifest weight of the evidence at trial established that it was more likely than not that defendant was insane at the time of the offense. The weak and conflicting reasons offered by [the prosecution's witness] Dr. Tutuer for his opinion that defendant was sane, and the absence of factual details supporting that opinion render the opinion of little or no weight, as a matter of law. The trial court's holding that defendant failed to prove by a preponderance of the evidence that she was insane at the time of the offense is against the manifest weight of the evidence.

People v. Wilhoite, 228 Ill. App. 3d 12, 169 Ill. Dec. 561, 592 N.E.2d 48 (1991) (copy in Appendix).

C.

Finding an appropriate Tennessee standard of review where the jury rejects overwhelming evidence of insanity must take into account the practical difficulty associated with this type of defense:

> This type of issue [regarding insanity] is proving to be increasingly difficult for our juries. In a case involving a demonstrated claim of insanity on the part of any defendant, the responsibilities of not only the jury, but the trial judge and the reviewing courts are particularly onerous . . . The law requires the exoneration of this defendant: his actions are legally excusable despite his obvious responsibility for the senseless death of this innocent victim. In a similar instance, this court observed that: 'the duty of this jury to find the defendant not guilty by reason of insanity proved to be too difficult a task.' . . . That assessment fits these circumstances as well.

State v. Overbay, 874 S.W.2d 645, 650 (Tenn. Crim. App. 1993).

In *State v. Perry*, 13 S.W.3d 724, 733 (Tenn. Crim. App. 1999) the Court of Criminal Appeals discussed both insanity and diminished capacity:

> This court may not reweigh or reevaluate the evidence. The jury rejected claims of insanity and diminished capacity, determining that the defendant was fully capable of forming the *mens rea* necessary to commit a knowing killing. Because there was evidence to support their determination, we must defer to the results reached by the finders of fact. . . . Although the defendant presented proof to support insanity and diminished capacity, the jury accredited the expert witness for the State who determined that the defendant had a character disorder rather than a mental disease or defect and that he was able to appreciate the nature of his conduct at the time of the shooting. In the light most favorable to the State, a rational trier of fact could have included that the defendant was aware of his conduct and the likely results of his conduct.

In *State v. Overby*, 2000 WL 246225 (Tenn. Crim. App. 2000)(unpublished) the Court held:

> That the defendant was unable to establish by clear and convincing evidence that he was insane at the time of the offense does not mean that the trial court did not provide him with the opportunity to do so. . . . The defendant had an opportunity to establish his insanity defense. The supporting proof was simply inadequate to meet his burden.

What happens when there <u>is</u> more than sufficient evidence to meet the burden of establishing the insanity affirmative defense but the jury rejects same? This is particularly

important where, as here, the evidence is not pro and con on the issue but is only consistent with insanity. It is suggested that one could utilize a two-step analysis in determining whether the rejection of an affirmative defense can be supported by the record. First, a reviewing court should determine whether the "elements" of the affirmative defense have been established by the defendant so that a rational trier of fact could find the necessary elements by clear and convincing evidence. This is a modified version of determining whether the government has proven the elements of the crime beyond a reasonable doubt on appellate review. This familiar standard is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. 2000).

Assuming that an appellate court found that the record established all of the necessary components of the affirmative defense by clear and convincing evidence, the next question would be whether there is "substantial evidence" of proof to the contrary. In plain terms, does the record contain a stout peg for a jury to hang their collective hats upon so as to reject the affirmative defense.

Under this formulation an appellate court would really never need to look at the existence of substantial evidence going against the affirmative defense unless the appellate court first found that all of the components of the affirmative defense were established by clear and convincing evidence. Certainly a jury has every right to reject an affirmative defense where the accused has failed to advance sufficient facts to prove the affirmative defense in the first place. However, where the accused has sustained that significant burden

of proof then there must be something substantial in the record so as to justify the rejection of the affirmative defense. Any other formulation of judicial review of the rejection of an affirmative defense would, as a practical matter, make the verdict conclusive. In short, there must be some standard of determining whether a defendant has established an affirmative defense to the degree that an appellate court will reverse the jury's rejection of the affirmative defense. Instances of such should be rare but the practice should not be extinct. The rejection of an affirmative defense by a jury should not be immune to appellate review.

In *State v. Flake*, Tenn. Crim App. At Jackson, filed July 13, 2001, the intermediate appellate court here vacated the conviction for attempted voluntary manslaughter because Mr. Flake had established "the defense of insanity by clear and convincing evidence." The analysis of the standard of review is worthy of reproduction in full here:

> [Tenn. Code Ann. §39-11-501(a)] places the burden on the defendant to establish insanity by clear and convincing evidence; the State is not required to prove sanity. See *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999).
>
> In determining the issue of insanity, the trier of fact may consider both lay and expert testimony and may discount expert testimony which it finds to be in conflict with the facts of the case. *State v. Sparks*, 891 S.W.2d 607, 616 (Tenn. 1995); *State v. Jackson*, 890 S.W.2d 436, 440 (Tenn. 1994). Where there is a conflict between expert testimony and testimony as to the facts, the trier of fact is not required to accept expert testimony over other testimony and must determine the weight and credibility of each in light of all the facts and circumstances of the case. *Edwards v. State*, 540 S.W.2d 641, 647 (Tenn.1976). In determining the defendant's mental status at the time of the alleged crime, the trier of fact may look to the evidence of his actions and words at or near the time of the offense. *Sparks*, 891 S.W.2d at 616; *Humphreys v. State*, 531 S.W.2d 127, 132 (Tenn. Crim. App. 1975). It is undisputed that the defendant had a prior history of mental illness with hospitalizations. He was comprehensively evaluated on numerous occasions, pursuant to court orders, after his arrest on these charges. All such evaluations

were performed by mental health experts with extensive experience in conducting mental health evaluations for the criminal justice system. Some were employed by the State of Tennessee; others were not. All agreed the defendant was incompetent to stand trial for many months. In fact, the defendant remained incompetent to stand trial for almost two years after the shooting. After many months of treatment and medication, he was finally declared competent to stand trial in February 1999. Both evaluating psychiatrists and all evaluating clinical psychologists testified that the defendant, at the time of the offense, suffered from a severe mental disease and was unable to appreciate the wrongfulness of his act. [FN3] The medical testimony consistently supported the statutory elements of the insanity defense. See Tenn. Code Ann. §39-11-501. Even the two non-evaluating physicians called by the State in rebuttal agreed that the defendant suffered from a severe mental disease.

> FN3. We do not view Dr. Craddock's testimony that the defendant believed the shooting was morally justified to be inconsistent with the testimony of the other four evaluating mental health experts.

The testimony of State witnesses Dr. John McIntosh, Dr. Mark Luttrell, and John Perry did not create an issue for the jury. Dr. McIntosh did not perform an evaluation to determine the basis for an insanity defense; he examined the defendant for only one hour; he acknowledged that the other professionals who performed comprehensive evaluations were in a better position to render an analysis; he did not have the defendant's prior medical records; he agreed that the defendant had a 'severe mental disease;' and he did not testify as to appreciation of the wrongfulness of conduct based upon this severe mental disease. Dr. Luttrell treated the defendant for a physical illness in July 1997; he did not conduct a mental evaluation; yet, he agreed that the defendant had a severe mental disorder. John Perry offered no insight into the defendant's mental condition at or near the time of the shooting.

A defendant is required to establish the defense of insanity by "clear and convincing evidence." Tenn. Code Ann. §39-11-501(a). "Clear and convincing evidence" is "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Holder*, 15 S.W.3d at 911 (citations omitted). Although this is a higher standard than "preponderance of the evidence," it is a lesser standard than "beyond a reasonable doubt." *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

> After a through review of the evidence, we reach the following inescapable conclusion: a rational trier of fact could only find that there is no serious or substantial doubt that the defendant, at the time of the shooting, was unable to appreciate the wrongfulness of his act as a result of a severe mental disease. Thus, the defense of insanity was established by clear and convincing evidence. See. Tenn. Code Ann. §39-11-501(a).
>
> Although this court affirmed the rejection of the insanity defense in *Holder*, 15 S.W.3d at 914, a case in which expert testimony supported the insanity defense, we view *Holder* as distinguishable. We emphasize that each case is fact specific. In *Holder*, the trial judge, as the trier of fact, specifically recited numerous instances of the defendant's conduct at or near the time of commission of the offense, including the defendant's admission that he knew the killing was "wrong." Id. at 909-10. We believe the facts of the instant case are distinguishable. In short, our review of the record does not reveal sufficient lay testimony, nor expert testimony, concerning the defendant's mental state at or near the time of the shooting that would justify rejection of the insanity defense.
>
> In reaching this conclusion we are mindful that issues of credibility, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are for the trier of fact, not this court. *State v. Tuttle*, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995). Nor may this court reweigh or re-evaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn.1978). Nevertheless, if we determine, after viewing the evidence in a light most favorable to the State, that a rational trier of fact could only find that insanity has been established by clear and convincing evidence, then a guilty verdict may not be sustained. See generally Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). We so find in this case.
>
> Accordingly, the judgment must be modified to "Not Guilty By Reason of Insanity" and the case remanded for further proceedings pursuant to Tenn. Code Ann. §33-7-303.

There are two key phrases in the intermediate appellate court's review. The first is that: "The testimony of State witnesses Dr. John McIntosh, Dr. Mark Luttrell, and John Perry did not create an issue for the jury." Even though superficially contrary to the defense experts, the government's experts did not offer opinion testimony that detracted from the

defense proof since the State's experts could not give an opinion on the defendant's state of mind at the time of the commission of the crime. The idea that there never was "an issue for the jury" is similar articulation of the idea that the government must present substantial evidence of sanity once the defense has presented proof of insanity by clear and convincing evidence.

The second key concept in *Flake* is that:

> After a through review of the evidence, we reach the following inescapable conclusion: a rational trier of fact could only find that there is no serious or substantial doubt that the defendant, at the time of the shooting, was unable to appreciate the wrongfulness of his act as a result of a severe mental disease. Thus, the defense of insanity was established by clear and convincing evidence.

This formulation "takes the bull by the horns" and directly confronts a jury's aberrant rejection of an insanity defense despite overwhelming proof supporting all components of the statute. Where one concludes that there is "no jury issue" on the question or "no serious or substantial doubt" means that the defense has established insanity and a reviewing court must vacate a conviction which implicitly rejects the defense.

The intermediate appellate court's holding in *Flake* is certainly not unique. Other jurisdictions follow the *Flake* opinion and recognize that an assessment of the sufficiency of the evidence in the context of an affirmative defense is still constitutionally grounded. Thus, in *State v. Silman*, 663 So.2d 27, 32 (La. 1995) the court held that in "reviewing a claim for insufficiency of evidence in an action where an affirmative defense of insanity is raised, this court, applying the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), must determine **whether under the facts and circumstances of the**

case, any rational fact finder, viewing the evidence most favorable to the prosecution, could conclude, beyond a reasonable doubt, that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense. [citations omitted]." Stated in the positive fashion, Louisiana courts will reverse where no rational trier of fact could have found that the defendant failed to prove that he or she was insane at the time of the crime by a preponderance of the evidence.

In *Fuss v. State*, 519 S.E.2d 446 (Ga. 1999) the court expressed a similar, constitutionally grounded standard of review for insanity cases:

> **The applicable standard of review 'is whether after reviewing the evidence in the light most favorable to the [S]tate, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the crime.**' *Brown v. State*, 250 Ga. 66, 71-72(2)(c), 295 S.E.2d 727 (1982). '[T]he fact that a person is schizophrenic or suffers from a psychosis does not mean he meets the test of insanity requiring a verdict of not guilty on the basis of insanity.' *Nelms v. State*, 255 Ga. 473, 475(2), 340 S.E.2d 1 (1986). The trial court, sitting as the trier of fact, was not compelled to accept the testimony of Fuss's psychologist, but was authorized to find proof of Fuss's criminal intent based upon the testimony of the State's expert, as well as the words, conduct, demeanor, motive and other circumstances connected with Fuss's acts. *Pittman v. State*, 269 Ga. 419, 420, 499 S.E.2d 62 (1998); *Foote v. State*, 265 Ga. 58, 59(1), 455 S.E.2d 579 (1995). Thus, the trial court was authorized to find that Fuss failed to prove his insanity by a preponderance of the evidence, and that the State met its burden of proving that Fuss was guilty, but mentally ill, beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Lawrence v. State*, 265 Ga. 310(1), 454 S.E.2d 446 (1995).

519 S.E.2d 446, at 448.

Stated in the positive fashion, Georgia courts will apparently reverse a conviction where a rational trier of fact could only have found that the defendant proved that he or she was insane at the time of the crime by a preponderance of the evidence.

The federal standard of review is expressed in a positive fashion as follows:

> Normally, '[i]n reviewing a motion for judgment of acquittal, we "consider the evidence as a whole taken in the light most favorable to the government, together with all legitimate inferences to be drawn therefrom to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt." ' *United States v. Turner*, 960 F.2d 461, 465 (5th Cir.1992) (citations and footnote omitted); see *United States v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir.), cert. denied, 506 U.S. 918, 113 S.Ct. 330, 121 L.Ed.2d 248 (1992); *United States v. Newman*, 889 F.2d 88, 92 (6th Cir.1989), cert. denied, 495 U.S. 959, 110 S.Ct. 2566, 109 L.Ed.2d 748 (1990). Here, our review is different because insanity is an affirmative defense for which the defendant, not the government, bears the burden of proof at trial by clear and convincing evidence. 18 U.S.C. §17 (1988). Accordingly, **we should reject the jury verdict in this respect only if no reasonable trier of fact could have failed to find that the defendant's criminal insanity at the time of the offense was established by clear and convincing evidence**. [FN5]
>
> > FN5. The federal insanity statute provides: 'It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.' 'The defendant has the burden of proving the insanity defense by clear and convincing evidence.' 18 U.S.C. §17(a) & (b) (1988).
>
> We still view the evidence in the light most favorable to the government since the government prevailed below.
>
> Although there is substantial evidence that he was insane beginning in April of 1991, we think a reasonable fact finder could have concluded that Barton failed to prove by clear and convincing evidence that at the time of the offense in July 1991 he was by reason of his mental illness unable to appreciate the nature and quality or the wrongfulness of his acts. [FN6]

> FN6. Clear and convincing evidence is 'that weight of proof which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts" of the case.' *In re Medrano*, 956 F.2d 101, 102 (5th Cir.1992) (quoting *Cruzan*).

U.S. v. Barton, 992 F.2d 66, 68-69 (5th Cir.1993)

At bottom is the State's notion that *Flake* was wrongly decided because the decision was allegedly contrary to the statutory assignment of the burden of proof, as well as the principle that a jury is not required to accredit expert testimony. The defense asserts that this case was correctly by the intermediate appellate court decided and that there must be some constitutionally grounded standard of review so as to determine whether a party has sustained his or her burden of proving an affirmative defense. While the government has no burden to prove sanity, once the defendant establishes insanity by clear and convincing evidence a guilty verdict must be set aside if the State has failed to present significant contrary evidence. Otherwise, there is nothing in the record for a guilty verdict to rest upon.

A reviewing Court cannot simply "defer" to the jury where the State's evidence fails to rebut proof of insanity. In the final analysis this is no different than traditional review of any other mental state.

Courts have dismissed or reduced the grade of conviction where the State did not establish that the defendant had a "premeditated intent," [4] acted "knowingly," [5] "acted recklessly," [6] or acted with "criminal negligence." [7] These cases demonstrate that just because a jury convicts does not automatically mean that a defendant's mental state fell within the proscribed statute. Similarly these cases illustrate the standard of review where a mental status is at issue.

Analytically it should make no difference that the defendant bears the initial burden of persuasion of establishing insanity because, in the final analysis, if the defendant does meet whatever burden the statute requires, a reviewing court must enforce the consequences of the statute by, in the case of insanity, an acquittal by reason of insanity. ALL the jurisdictions addressed above have some standard by which a defendant will prevail on appeal notwithstanding that insanity is an affirmative defense. While courts articulate different requirements – a heavy burden, overwhelming evidence or the other tests – still, there is a point at which the affirmative defense prevails over the state's evidence necessary to prove the elements of the crime.

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[4] *State v. Darnell*, 905 S.W.2d 953 (Tenn. Crim. App. 1995) (first degree murder reduced to second).

[5] *State v. Wilson*, 924 S.W.2d 648 (Tenn. 1996) (aggravated assault).

[6] *State v. Gose,* 1996 WL 30992 (Tenn. Crim. App., January 29, 1996)(vehicular homicide dismissed).

[7] *State v. Owens*, 820 S.W.2d 757 (Tenn. Crim. App. 1991) (negligent homicide dismissed); *State v. Davis*, 798 S.W.2d (Tenn. Crim. App. 1990) (same).

The Standard of Review must then rest on an assessment of both whether the defendant has mustered proof by clear and convincing evidence and whether the government has rebutted this with substantial evidence to the contrary. The intermediate appellate court effectively held as much in *Flake*:

> Nevertheless, if we determine, after viewing the evidence in a light most favorable to the State, that a rational trier of fact could only find that insanity has been established by clear and convincing evidence, then a guilty verdict may not be sustained. See generally Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

It is this constitutionally-based standard which should govern this appeal. This standard is consistent with the federal standard upon which the Tennessee insanity statute was undoubtably based.[8] Moreover, the intermediate appellate court's standard here is similar to those better-reasoned state jurisdictions which recognize than an appellate assessment of insanity must look to the insanity issue itself rather than merely mouthing the inapplicable inquiry of "whether the evidence supports the verdict."

While no court has expressly analyzed an affirmative defense in a due process entitlement context, it should be obvious that where the State has enacted a statutory procedure for conviction-avoidance any conviction must be vacated where the defendant has mustered sufficient proof to satisfy the statutory criteria and the prosecution has failed to rebut same. The standard of review which this Court should adopt is no more complex than saying that: unless the State counters with substantial evidence to create a jury question on

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[8] *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. Crim App. 2000) recognized that the Tennessee statute is virtually identical to the federal version.

the issue, the defendant must be acquitted where he or she establishes the components of the insanity affirmative defense by clear and convincing evidence.

2. THE VERDICT WAS CONTRARY TO THE EVIDENCE AS A MATTER OF LAW IN THAT THERE WAS CLEAR AND CONVINCING EVIDENCE PRESENTED ESTABLISHING INSANITY

A.

Before embarking on an analysis of the evidence to determine if Mr. Flake established insanity it is be appropriate to examine the current law in some detail. Tenn. Code Ann. §39-11-501 provides:

> (a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

The components of the modern insanity affirmative defense include the following: First the defense must establish that the defense existed "at the time of the offense." This is identical to the prior statute and, indeed, has always been the law. Thus, in *Forbes v. State*, 559 SW.2d 318 (Tenn.1977) this Court held that a defendant had to establish non-remission at the time of the crime where the defendant was suffering from episodic insanity.

The defense must also establish the second component by showing a "severe mental disease or defect." The prior statute required only a mental disease or defect. Under the current law the disease or defect must be "severe."

Third, the defense must establish that the defendant was "unable appreciate the nature or wrongfulness of [his or her] acts." This portion of the current law (as well as the similar provision of the statute it replaced[9]) is frequently called the cognitive prong as opposed to the now discarded, separate volitional prong.

It is important to note that the current cognitive prong is NOT: "did he know the difference between right and wrong, doctor?" The current law is more subtle.

The current law (as well as the prior statute) does not use the word "know" but rather employs the term "appreciate" which connotes a requirement of a fuller understanding or rather the lack thereof of the nature or wrongfulness of one's acts. One might realize ("know") that pushing a person off a building will cause the person to fall but there is a lack of appreciation that this will cause the person to be injured or killed. A failure of "appreciation" is also caused by delusional thinking. Thus insanity can exist even though the defendant possessed some surface knowledge of the nature of his or her act and that such act was wrong but failed to fully "appreciate" the wrongfulness of the conduct. [10]

The person's failure to "appreciate" applies to the "nature or wrongfulness" of the harmful acts. The "nature" of the act deals with a person who does not recognize, for

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[9] "Insanity is a defense to prosecution if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of law." quoted in *State v. Sparks*, 891 S.W.2d 607, 614 (Tenn. 1994).

[10] One need but consult any dictionary to see that "appreciate" has a different meaning from "know": "**Appreciate 1.** To recognize the quality, significance, or magnitude of: *appreciated their freedom*. **2.** To be fully aware of or sensitive to; realize: *I appreciate your problems*." *American Heritage Dictionary*.

example, that he or she is firing a pistol but instead believes the gun is a harmless squeeze spray-bottle. This is usually the most extreme species of insanity since there is a perceptual delusion.

The new insanity statute (as well as prior statute) also refers to a failure to appreciate the "wrongfulness" of his or her acts. Under Tennessee law "wrongfulness" or "wrong" is not to be equated with just "criminality" or "illegality." In other words, a defendant might "appreciate" that his or her actions were illegal and that he might be subject to punishment but still be incapable of appreciating the greater wrongfulness of the act in its more general and moral sense and thus still meet the statutory definition of insanity. The issue of the "definition" of "wrong" is summarized by Professor LaFave:

> If the defendant does not know the nature and quality of his act, then quite obviously he does not know that his act is 'wrong' and this is true without regard to the interpretation given to the word 'wrong.' For example, a madman who believes that he is squeezing lemons when he chokes his wife to death does not know the nature and quality of his act and likewise does not know that it is legally and morally wrong. On the other hand, as noted above, a defendant might know the nature and quality of his act (especially if that is taken to refer only to the physical consequences), but yet not know that it is 'wrong.' The extent to which such situations might arise, however, depends upon whether the *M'Naghten* test refers to legal wrong or moral wrong: 'A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to procure that result by those means. A's act is a crime if the word 'wrong' means illegal. It is not a crime if the word wrong means morally wrong.'
>
> The *M'Naghten* judges did not make clear what construction they were giving to the word 'wrong.' At one point they said that a persons is punishable if "he knew at the time of committing such crime that he was acting contrary to law;' by which expression we . . . mean the law of the land." But at another point they observed: "If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might

> tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.
>
> In England, *M'Naghten* is now read as requiring that the defendant know that the act was legally wrong. In this country, however, the question of whether wrong means legally or morally wrong has not been clearly resolved. The issue has very seldom been raised; this part of the *M'Naghten* test is simply given to the jury without explanation. In the few cases in which the matter has been put into issue, some have held that the defendant must not have known that the act was legally wrong, while other have interpreted "wrong" to mean morally wrong. Some courts have held that the defendant must not have realized that the act was wrong *and* punishable, but have not made it clear whether this refers to both moral and legal wrong or only one of the two.

LaFave, Substantive Criminal Law §4.2, 442-443 (West 1986) (Footnotes omitted).

There is no question that early Tennessee cases on the subject equated "wrong" with a strictly "legal wrongness" concept. Indeed, the cases spoke of "wrong" and "criminal" conjunctively. "The inquiry under the plea of insanity was whether the defendant had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing – a knowledge and consciousness that the act he was doing was wrong and criminal, and would subject him to punishment." *Bond v. State*, 165 S.W. 229 (Tenn. 1914).[11]

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[11] Curiously *Watson v. State*, 180 S.W. 168,171 (Tenn. 1915) also quoted the same passage from *Bond* but intentionally omitted reference to "and criminal."

"In one of our latest cases on this subject it was said:

'The inquiry under the plea of insanity was whether the

(continued...)

At the end of the nineteenth century American jurisdictions followed the English rule that for the defendant to be insane he or she must not "know" that his act was criminal in the sense that it was illegal. This more limited view was altered by most jurisdictions either by a court decision or legislation beginning in the early twentieth century to include "moral wrongness." See, *People v. Schmidt*, 110 N.E. 945 (N.Y. 1915) an excellent opinion by Judge, later Justice, Cardozo. In *Schmidt*, Judge Cardozo stated that juries generally should be allowed to consider whether a defendant who claimed that he acted on a command from God was capable of perceiving that his act was morally wrong. 110 N.E., at 949.

The term "wrong" is now interpreted by most jurisdictions as a more general "wrong" against society as opposed to the more restrictive "criminal" or "legal" awareness. In *State v. Wilson*, 700 A.2d 633 (Conn. 1997) the Court traced the history of the insanity defense in Connecticut up to the current affirmative defense version and inquired as to the meaning of the word "wrongfulness." The Connecticut Supreme Court noted the option of using the term "criminality" in its legal sense as a possible definition of "wrong" or using the word "wrongfulness" in the broader moral sense of the term:

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[11](...continued)

> defendant had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing--a knowledge and consciousness that the act he was doing was wrong * * * and would subject him to punishment." *Bond v. State*, 129 Tenn. (2 Thomp.) 75-83, 165 S. W. 229, 231.' "

The Model Penal Code test focuses on the defendant's actual perception of, rather than merely his knowledge, of the wrongfulness of his conduct. . . . The drafters of the Model Penal Code purposefully adopted the term "appreciate" in order to account for the defendant whose detached or abstract awareness of the wrongfulness of his conduct does not penetrate to the affective level. . . . To appreciate the wrongfulness of conduct is, in short, to realize that it is wrong; to understand the idea as a matter of importance and reality; to grasp it in a way that makes it meaningful in the life of the individual, not as a bare abstraction put in words.

The third important feature of the Model Penal Code test, and the most relevant for purposes of this appeal, is its alternative phrasing of the cognitive prong. By bracketing the term "wrongfulness" and juxtaposing that term with 'criminality,' the drafters purposefully left it to the individual state legislatures to decide which of those two standards to adopt to describe the nature of the conduct that a defendant must be unable to appreciate in order to qualify as legally insane. . . . The history of the Model Penal Code indicates that 'wrongfulness' was offered as a choice so that any legislature, if it wishes, could introduce a 'moral issue' into the test for insanity. . . .

The more difficult question, and the issue that we asked the parties to address at the reargument of this appeal is how properly to define the moral element inherent in the term 'wrongfulness' under [the statute]. The defendant contends that morality must be defined in purely personal terms, such that a defendant is not responsible for his criminal acts as long as his mental disease or defect causes him personally to believe that those acts are morally justified even though he may appreciate that his conduct is wrong in the sense that it is both illegal and contrary to societal standards of morality. . . . The State, on the other hand, contends that morality must be defined by societal standards, such that a defendant is not responsible for his criminal acts unless, because of mental disease or defect, he lacks substantial capacity to appreciate that his actions were wrong under the society's moral standards. Although we agree with the State that the proper test must incorporate principles of societal morality, we conclude that the State's interpretation of the cognitive prong of [the statute] does not sufficiently account for a delusional defendant's own distorted perception of society's moral standards. Accordingly, we conclude that a defendant may establish that he lacked substantial capacity to appreciate the "wrongfulness" of his conduct if he can prove that, at the time of this criminal act, as a result of mental disease or defect, he substantially misperceived reality and harbored a delusional belief that society, under the circumstances as the defendant honestly but mistakenly understood them, would not have morally condemned his actions.

700 A.2d 633, 637-640.

Tennessee has made a similar choice in adopting "wrongfulness" in its broader sense rather than using the term "criminality" in its more narrow, "legal" meaning. In *Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977) this Court adopted the Model Penal Code definition of insanity which, in relevant part, requires that the accused lacks the substantial capacity "to appreciate the wrongfulness of his conduct." Justice Henry observed that "it will be noted that we have used the word 'wrongfulness' in the place of 'criminality' so that the rule requires an appreciation of the wrongfulness of conduct as opposed to its criminality." This passage should remove all doubt that "wrongfulness" should be interpreted in a broader sense consistent with holding in the Connecticut case addressed above and most other American jurisdictions.

As we know, the *Graham* test for insanity was adopted by the Tennessee legislature as part of the Sentencing Reform Act of 1989. See, *State v. Sparks*, 891 S.W.2d 607, 616 (Tenn. 1995) acknowledging that the 1989 law was a codification of *Graham*. The 1995 version of our insanity law ("unable to appreciate the . . . wrongfulness of such defendant's acts") uses virtually identical language contained in the former statute regarding the cognitive prong of the insanity test ("appreciate the wrongfulness of the person's conduct...").

Certainly, when the legislature enacted the 1995 affirmative defense provision it was well aware of the existence of *Graham's* "wrongfulness" concept carried into the 1989 law and did not utilize the more restrictive "criminality" language. It is a basic rule of statutory construction that a court will not construe a statute to change existing law more than a statute

itself declares or necessarily implies. *Winter v. Smith*, 914 S.W.2d 527 (Tenn. App. 1995). Certainly the legislature is presumed to know the state of the law on the subject under consideration at the time it passes legislation.

Most jurisdictions interpret "wrongfulness" as here in Tennessee. See e.g. *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983), *State v. Wilson*, 700 A.2d 633 (Conn. 1977), *State v. Worlock*, 569 A.2d 1314 (N.J. 1990) and *People v. Alverez*, 763 F.2d 1036 (9th Cir. 1985). See also, *United States v. McGraw*, 515 F.2d 758 (9th Cir. 1975) noting that five Circuit Courts of Appeal utilize the doctrine that "wrongfulness" means moral wrongfulness rather than "criminal" wrongfulness.

Even after the adoption of the more recent federal affirmative defense version of the insanity defense, those jurisdictions which utilized the broader definition prior to the alteration continue to interpret the concept of "wrongfulness" in a similar manner. See *United States v. Aho*, 1991 WL 216952 (9th Cir. 1991) (unpublished, copy appearing in the Appendix). In *Aho* the defendant was required to prove insanity by clear and convincing evidence under the new federal affirmative defense statute. Even at that, the trial judge was found to be in error for refusing to instruct the jury that "wrongfulness for purposes of establishing a defense of insanity means moral wrongfulness, not criminal wrongfulness."

State courts which have considered the question have a similar interpretation. In *State v. Tamplin*, 986 P.2d 914 (Ariz. App. 1999) the Court examined the prior judicial rulings which equated "wrong" with "community standards of morality." The Court found that this prior definition of "wrongfulness" survived the new codification of the insanity test in that

state, which, like most American jurisdictions, abandoned all but the cognitive prong of the insanity rule. Thus, "wrongfulness" in Tennessee is as was adopted by this Court in *Graham* and carried through two statutes: a broader moral sense and not necessarily a literal illegality.

As noted earlier, the second component of the current insanity defense is a "severe mental disease or defect" and the third is a failure to "appreciate the wrongfulness" of one's acts. It is not enough to establish only the second and third components. The defense must also prove a fourth component: that of a "result" between the second and third. To illustrate: although the defendant may be suffering from pyromania (an uncontrollable impulse to start fires) there would be no result component to an insanity defense if the defendant were charged with say, theft. Thus, the defense must prove a nexus between his or her inability to "appreciate the wrongfulness" of the harmful behavior and the mental disease or defect.

Finally, the current law requires the "defendant has the burden of proving the defense of insanity by clear and convincing evidence." This makes insanity an affirmative defense, working a significant change from prior law which placed the burden of persuasion on the prosecution.

While the new statute makes insanity more difficult to establish, it is not impossible. Given a sufficient foundation Tennessee citizens should be acquitted by reason of insanity notwithstanding a verdict which fails to accept the affirmative defense. The current insanity statute does not make such a verdict virtually immune to appellate review.

B.

Under the Standard of Review suggested earlier, [12] this Court should find that Mr. Flake's case represents an instance where a verdict of insanity was the only result that a rational jury could have returned in that Memphis courtroom.

The evidence was overwhelming in that ALL the proof in this record demonstrated that Mr. Flake was insane. When the evidence is considered in its totality, no reasonable jury could have concluded that Christopher M. Flake, was sane at the time of the offense.

The defense recognizes that when determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). This Court may not substitute its inferences for those drawn by the trier of fact from circumstantial evidence. *State v. Liakas*, 286 S.W.2d 856, 859 (Tenn. 1956). Furthermore, this Court must afford the State the strongest legitimate view of the evidence. *Cabbage*, 571 S.W.2d at 835.

Accrediting the testimony of the witnesses for the State and resolving all conflicts in favor of the State, this Court must still find that no rational trier of fact could conclude that Mr. Flake was sane at the time of the offense. Mr. Flake does not dispute that he was the person who committed the actions for which he was on trial. However, Mr. Flake established through clear and convincing proof that because of a mental disease he was unable to appreciate the wrongfulness of his conduct at the time of the offense. Accordingly, the State

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[12] Any standard of review which prohibits an assessment of the failure of the government to rebut with substantial evidence, the defendant's proof of insanity by clear and convincing evidence violates the Sixth Amendment and Due Process provisions of the United States Constitution and similar provisions of the Tennessee Constitution.

was required to rebut this with substantial evidence that Mr. Flake was sane. *State v. Holder*, 15 S.W.2d 905 (Tenn. Crim. App. 1999). Without doubt, the State failed to make the required showing.

The State's case-in-chief at trial consisted of four lay witnesses and three officers of the Shelby County Sheriff's Department. The State witnesses established that Mr. Flake was the person who committed the acts that constituted the crime for which he was ultimately found guilty. (Vol. 5). However, the defense called six witnesses on Mr. Flake's behalf, five doctors and one psychiatric social worker. (Vol. 6-7). All five doctors evaluated Mr. Flake after the incident, and all five gave opinions regarding Mr. Flake's severe mental disease and his inability to appreciate the wrongfulness of his actions on April 6, 1997. (Vol. 5-7).

Dr. Lynne Zager testified as a court-appointed expert in psychology. She conducted a forensic evaluation of Mr. Flake from October of 1997 to January of 1998. (Vol. 5, p. 291-300). As to the issue of insanity at the time of the shooting:

> Q. BY MR. BALLIN: You made mention of severe, a severe mental illness. Do you have and will you share with us your opinion to a degree of psychological certainty what that severe mental illness was?
>
> A. BY DR. ZAGER: Mr. Flake suffers from schizophrenia, paranoid type.
>
> Q. BY MR. BALLIN: And when did you render that opinion for the first time? When did you come to that opinion for the first time?
>
> A. BY DR. ZAGER: That was my initial impression, and then once I reviewed all the records and had the benefit of information from the hospitalization that occurred after my evaluations of Mr. Flake, it solidified what my initial impression was.

Q. BY MR. BALLIN: What is your testimony and your opinion to a degree of psychological certainty whether or not Mr. Flake was suffering from that severe mental disease on April the 6th of 1997?

A. BY DR. ZAGER: In my opinion he was suffering from schizophrenia at that time.

Q. BY MR. BALLIN: When you say 'at that time', are you saying just on April the 6th or would it have been for a time preceding and post?

A. BY DR. ZAGER: The disorder known as schizophrenia is one that is pretty well a severe and a persistent mental illness. Somebody who suffers from schizophrenia, it pretty much is a disorder that they will carry with them through life like diabetes might be. There are times when the disorder is more stable and the person's behavior is more appropriate, and then there are other times when the disorder is more unstable and the person's behavior is more unstable.

Q. BY MR. BALLIN: How clear was it to you, the existence of this severe mental illness in my client?

A. BY DR. ZAGER: Very clear.

Q. BY MR. BALLIN: And how convinced are you in your opinion as a forensic psychologist that he in fact suffered from schizophrenia on April the 6th, 1997?

A. BY DR. ZAGER: I truly believe that to be the case.

Q. BY MR. BALLIN: Do you have an opinion, Doctor, back on April the 6th, 1997, as to whether or not, because of his severe mental illness, schizophrenia, he was able to appreciate the wrongfulness of shooting Turner Carpenter?

A. BY DR. ZAGER: I do not believe he could.

Q. BY MR. BALLIN: How clear was it to you to come to that decision?

A. BY DR. ZAGER: Very clear.

Q. BY MR. BALLIN: And how convinced are you in rendering that opinion to a degree of psychological certainty that Mr. Flake, as a result of

schizophrenia, could not appreciate the wrongfulness of shooting Turner Carpenter?

A. BY DR. ZAGER: It's my professional opinion that that is the truth of what occurred.

Q. BY MR. BALLIN: Are you convinced?

A. BY DR. ZAGER: Yes, I am.

Q. BY MR. BALLIN: Do the records upon which you rely indicate whether or not Mr. Flake had received treatment within a few days prior to April the 6th of 1997?

A. BY DR. ZAGER: Yes, I do.

Q. BY MR. BALLIN: And who is it that Mr. Flake saw just three days prior to April the 6th of 1997?

A. BY DR. ZAGER: Mr. Flake was in treatment with a psychiatrist, Dr. Johnson, at that time.

Q. BY MR. BALLIN: And Dr. Johnson's first name?

A. BY DR. ZAGER: I believe it's Janet.

Q. BY MR. BALLIN: And at that time was young Mr. Flake brought in to see Dr. Johnson by his father?

A. BY DR. ZAGER: Yes. As I recall he was seen on Monday by Dr. Johnson, and then his father called Dr. Johnson because of his bizarre behavior and requested an additional session and he was seen on that Wednesday.

Q. BY MR. BALLIN: And that would've been April 3rd?

A. BY DR. ZAGER: Correct.

Q. BY MR. BALLIN: Of '97?

A. BY DR. ZAGER: Correct.

Q. BY MR. BALLIN: Is there a reference in the records to a bizarre event that occurred in regard to Prozac, a medication that had been prescribed to Mr. Flake?

A. BY DR. ZAGER: Yes, there is a reference to that.

Q. BY MR. BALLIN: If you will share that with us.

A. BY DR. ZAGER: Apparently Dr. Johnson had given Mr. Flake a prescription for Prozac. And he was driving in the country, and saw a man working on a farm, and felt that that man was in need of help. And he had learned through - - going through AA, that you help others, and he apparently took the medication and put it in the mailbox of the man.

And there's reference in Dr. Johnson's records that she received a phone call from the man that this prescription was sitting in his mailbox.

Q. BY MR. BALLIN: Now, when you have shared with us your expert opinion that it was very clear to you and you were very convinced that Mr. Flake was suffering from a severe mental disease, and that because of that disease he could not appreciate the wrongfulness of his actions in shooting Turner Carpenter, would that be apparent to anyone just on a superficial basis in talking with him, asking him to fill out forms?

A. BY DR. ZAGER: One thing that I observed during my evaluation of Mr. Flake, in the beginning of the evaluation I do what's known as a social history and that's a very structured interview, name, address, phone number, date of birth, etcetera. And while I was conducting that part of the evaluation I really didn't notice anything unusual. He responded to the questions correctly, appropriately.

When I opened the interview up and asked him open-ended questions, it was not long at all before he started sharing some of his very bizarre beliefs, false beliefs, and other symptoms and signs of the disorder.

Q. BY MR. BALLIN: Do you know about Dr. Johnson now as to whether or not she's passed away or what's - -

A. BY DR. ZAGER: Yes. She died, I believe it was approximately a year ago.

Q. BY MR. BALLIN: Were you additionally concerned as to the extent and severity of Mr. Flake's illness that you recommended that the processing be expedited to Western State?

A. BY DR. ZAGER: I was concerned about him and I believe it was to Middle Tennessee Mental Health Institute.

Q. BY MR. BALLIN: I'm sorry. I apologize, Middle Tennessee.

A. BY DR. ZAGER: I believe, if I remember correctly, it was on two different occasions that I made efforts to expedite his transfer to the hospital. On one of the occasions it did not occur, and I had our social worker on the team following very closely in the jail during that interim period of time when he was waiting to be transferred back to the hospital.

(Vol. 6, pp. 304-309)

Dr. Hilary Linder testified as an expert in psychiatry. Dr. Linder first saw Mr. Flake in November, 1998. After various anti-psychotic medications were administered Mr. Flake was diagnosed as competent to stand trial in February, 1999. (Vol. 6, p. 380-81). As to the issue of insanity at the time of the shooting:

Q. BY MR. BALLIN: Doctor, have you formed an opinion to a degree of psychiatric certainty as to whether or not on April the 6th, 1997, Christopher Michael Flake was suffering from a severe mental disease?

A. BY DR. LINDER: Yes, I have.

Q. BY MR. BALLIN: And what is that opinion?

A. BY DR. LINDER: I believe that he was mentally ill at that time, was severely mentally ill at that time.

Q. BY MR. BALLIN: Doctor, do you have an opinion to a degree of psychiatric certainty, as a result of this severe mental disease, whether or not he could appreciate shooting Turner Carpenter was wrong?

A. BY DR. LINDER: I do have an opinion that he did not appreciate that it was wrong at that time.

Q. BY MR. BALLIN: Would you explain to the ladies and gentlemen of the jury how you come to give those professional expert opinions to them, what you went through, what information you got, and what you're relying on to come in and tell the ladies and gentlemen of the jury what you have today?

A. BY DR. LINDER: Well, there are a lot of things involved in that decision. One, he seems now to be very mentally ill, which would support the idea that he probably was then. Since he reports hallucinations in the form of voice - - hearing voices. He's delusional and he's a very withdrawn person. And when anybody talks to him I think they could probably, after a while, tell that he has mental problems.

Also part of it's historical because he has a history obtained from him, and his family, and others that he had psychiatric problems in the past and did have prior hospitalizations and treatment. And we received extensive reports from Middle Tennessee Mental Health Institute where he went first right after the shootings for evaluation. And they report that he was delusional and - -

Q. BY MR. BALLIN: Doctor, your opinion that on April the 6th, 1997, that Mr. Flake was suffering from a severe mental disease, is that your testimony?

A. BY DR. LINDER: Yes.

Q. BY MR. BALLIN: What was that mental disease, that severe mental disease in your opinion, to a degree of psychiatric certainty?

A. BY DR. LINDER: Well, paranoid type of schizophrenia is what our diagnosis was.

Q. BY MR. BALLIN: And is that a condition, in your opinion, that existed only on that day or had it existed for some time prior?

A. BY DR. LINDER: I think it had actually existed for some time prior to that although I don't think it had been well-recognized before that.

Q. BY MR. BALLIN: Are you talking months, years, prior to April the 6th, '97?

A. BY DR. LINDER: Well, he did have prior behavioral problems, treatment, and hospitalization for actually years before that.

Q. BY MR. BALLIN: What is your opinion as far as to a degree of psychiatric certainty how far back prior to April the 6th, '97 Mr. Flake suffered from this schizophrenia?

A. BY DR. LINDER: Well, my opinion would be that he clearly suffered from schizophrenia back to early teenage years.

(Vol. 6, pp. 381-383)

Dr. Rokeya Farooque, an Assistant Professor of Psychiatry at Meharry Medical College in Nashville, testified that she and her staff were court ordered to evaluate Mr. Flake to determine if he was competent to stand trial. (Vol. 6, p. 447). They completed their 30-day evaluation on December 16, 1997, and Dr. Farooque testified at that time that Mr. Flake was not competent to stand trial. (Vol. 7, pp. 453-54). Dr. Farooque continued to describe her evaluation of Mr. Flake:

Q. BY MR. FARESE: At that point in time is that when you appeared in court to testify as an expert?

A. BY DR. FAROOQUE: Yes. At that time after we finish our evaluation, [December, 1997] we said like that he is not competent to stand trial and he met commitment criteria to a secure psychiatric facility. Means that he needs to come back to the hospital for treatment of his mental condition.

At that time I came and testified that patient is not competent to stand trial and patient meets commitment criteria so that patient can go back to my unit for treatment.

Q. BY MR. FARESE: And what treatment would be given to help Mr. Flake become competent to stand trial? What kind of treatment would you give?

A. BY DR. FAROOQUE: Because we diagnose Mr. Flake as having serious mental disorder, that is schizophrenia paranoid type, and for schizophrenia

paranoid type, to treat his mental condition at that time I felt that he needed to start with anti-psychotic medication. Anti-psychotic medication that we give to treat psychotic processes.

Q. BY MR. FARESE: And what is the purpose - - Can you give us an example of the purpose of anti-psychotic medication and what those medications are?

A. BY DR. FAROOQUE: Anti-psychotic medications we prescribe mostly to the patient when they have psychotic thinking, psychotic behavior. Psychosis means that when they lost touch with reality. They hallucinate, they hear voices when nobody is around them. They see things when there is nobody else can see. They think they have - - they might have delusions.

Delusion is that sick false beliefs. They might think that they are doing something good for others when they - - that is not true. They might think that they are working for FBI. They might think that certain peoples are terrorists. Those are sick false beliefs that they have those beliefs, but whatever you say, that's not going to change it because of their mental illness, they believe like that. And those are the things - - And also they might have like some kind of disorganized speech. Means that their speeches don't make any connection with each other. They are talking incoherently. They are talking inappropriately. They are behaving inappropriately. Disorganized behavior.

They might have amotivation, affect, blunted affect or flat affect, means that whatever you say they don't have any change in their face and - -

Q. BY MR. FARESE: Can I stop you right there, Doctor?

A. BY DR. FAROOQUE: Yes.

Q. BY MR. FARESE: When you say - - and I could only pick up on the last words. They don't have any change in their facial features.

A. BY DR. FAROOQUE: Facial expressions.

Q. BY MR. FARESE: Okay. If I used the word emotionless, would that be synonymous with the appearance - -

A. BY DR. FAROOQUE: More or less but affect - - we say that affect - - The term that we use as a psychiatrist, in the psychiatric field is that was there

external expression of internal mood. But with schizophrenic patient or psychotic patient, that is really like flat, blunted, but there is no change.

So for those kind of symptoms we give anti-psychotic medication. There are - - now we have many newer anti-psychotic medication but we used to use Thorazine, Haldol, Stelavine, Navane, those were our typical anti-psychotics that we used to use. Now, presently we use newer medication called Zyprexa, Resperdal, Clozarin. So I use mostly the newer kind of medication because that helps patient most and then also they have less side effects.

Q. BY MR. FARESE: Do these medications or do these medication not help bring a patient back into reality?

A. BY DR. FAROOQUE: They are supposed to help them to clear up their psychosis and help them to get like reality base and their hallucinations disappear, delusion disappear. But it's like most of the patient that when they get really sick, it takes long time to treat them.

Q. BY MR. FARESE: How long did it take you to treat Mr. Flake?

A. BY DR. FAROOQUE: Mr. Flake, when he was first admitted, after - - I say after short period of time I started him with medication. So when I send him back to jail after 30 days evaluation I send him back with medication and those are called Olanzapine and Zoloft.

Yeah. I send him back to jail with Olanzapine and Zoloft. Zoloft is anti-depressant medication and Olanzapine is anti-psychotic medication.

So after I send him back - - Can I talk about the second admission?

Q. BY MR. FARESE: Yes.

A. BY DR. FAROOQUE: Okay. Then after that I had to come to court and testify that he's still not competent to stand trial and meets commitment criteria so that I can take him back to my unit and treat him for his mental condition.

Q. BY MR. FARESE: All right. Let me stop you there.

A. BY DR. FAROOQUE: Yes.

Q. BY MR. FARESE: You just said that he did not meet the criteria as far as competency. Is that what you said?

A. BY DR. FAROOQUE: Yes.

Q. BY MR. FARESE: And what is that criteria? What is your understanding as to what that criteria is?

A. BY DR. FAROOQUE: When we send him back to jail after 30-days evaluation, we felt like that he was still psychotic, he was hearing voices, he was talking about delusional thinking, and so - - and his affect was real flat. He was amotivated, concentration was poor, and whenever we talked his answers were limited.

So we felt like that at that condition, mental condition, he'll not be able to help his lawyer to prepare his defense to come to trial. So on the ground of - - because he felt like that he didn't do anything wrong. So all those kind of thing we felt at that present condition he couldn't help his lawyer to prepare his defense. He'll not be able to follow the trial. So we felt like that he was not competent to stand trial.

Q. BY MR. FARESE: During the treatment of Mr. Flake, at times when you had these meetings with him, and after he had come back to your treatment, did you go over with him what the role was of the courtroom personnel and what the idea behind the trial was?

A. BY DR. FAROOQUE: Yes, we did.

Q. BY MR. FARESE: How did you do that?

A. BY DR. FAROOQUE: We have in the group we have we call competency training group. We have nurse, psychologist, social worker. They meet. And so they provide the treatment. And when I see the patient, I also ask them, and I - - mostly I do the mental status. I see that how much is their mental condition doing. What's happening with their psychotic thinking, whether that's getting better or not. But the staff provides the competency training. So we all work together.

Q. BY MR. FARESE: Have you had experience with people who have had - - the people you have treated who have had hallucinations before? Have you treated other people who have had hallucinations?

A. BY DR. FAROOQUE: Yes.

Q. BY MR. FARESE: Have you or have you not found in studying the history of these people that they took some kind of action to block out the voices? Have you ever found that they tried to do something to stop the voices they were hearing?

A. BY DR. FAROOQUE: Sometimes patient does.

Q. BY MR. FARESE: Would patients drink alcohol or take drugs to try to stop the voices?

A. BY DR. FAROOQUE: We call that self-medication. Yes. The patient sometimes when they get unbearable, hearing voices all the time, they get so much that unbearable thing, they feel bad and they drink alcohol sometimes, because alcohol is depressant. [13] Alcohol sedate the person. So and that time they want to just forget that they are hearing voices. That is so distressing.

Yes, many - - That's why alcohol abuse goes like with schizophrenia diagnosis. Many of the schizophrenic drinks alcohol to stop the voices.

Q. BY MR. FARESE: Now, did you have an opportunity to check historically the records of Christopher Flake in your treatment of Mr. Flake?

A. BY DR. FAROOQUE: Yes. When we are thinking of diagnosis at that time we saw Mr. Flake for 30 days, we had the symptomology that he hears voices, he has hallucinations, he has some sick false beliefs, he has delusions. Then he has like this affect, flat affect, amotivation. So he has some negative symptoms of schizophrenia. We got that. But we needed some more to confirm our diagnosis of schizophrenia.

At that time social worker, she got the history, and that time we saw - - as a psychiatrist, I saw that he has this gradual deteriorating functioning level from starting from like 12, 13 years old. He was going in and out to psychiatrists, psychologists. He was diagnosed as with major depression. He was diagnosed as with alcohol dependence. He was diagnosed as with obsessive-compulsive disorder. Those all goes along with schizophrenia.

The schizophrenic patient time to time shows undefined symptoms of depression. Schizophrenic patient also sometimes shows signs, symptoms of

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[13] There is nothing to suggest that Mr. Flake was drinking or on drugs at the time of the shooting. This was explored during cross-examination of the victim. (Vol. 5, p. 205 lines 20-25).

obsessive-compulsive disorder. So and with his gradually deteriorating functioning level he was not able to work good, he was not able to function as a student, and he was in seven years he was in college, was not getting grades.

So we established that his functioning level is downhill course. Just like schizophrenia. And with his hallucination, and delusion, and his negative symptomology, we concluded that - - and also we ruled out other kind of disorders, like he doesn't have any other kind of mental illness, and he was not, at that time when he was with us, was not intoxicated with alcohol or drugs.

So with all those one by one we ruled in and ruled out and then we established our diagnosis with schizophrenia, paranoid type.

Q. BY MR. FARESE: Doctor, how long did it take you, and did you form an opinion as far as Mr. Flake's condition as to whether or not he had a mental defect? Did you ever form such an opinion?

A. BY DR. FAROOQUE: Say that again.

Q. BY MR. FARESE: Did you ever form an opinion - - and I'm going to ask another question after this. But did you ever form an opinion as to whether or not Christopher Flake had a serious mental defect?

A. BY DR. FAROOQUE: Yes.

Q. BY MR. FARESE: Let me ask it this way. Did you form an opinion within a reasonable degree of certainty based upon your field of expertise as to whether or not Christopher suffers from a serious mental defect. Yes or no.

A. BY DR. FAROOQUE: Yes.

Q. BY MR. FARESE: What is that opinion?

A. BY DR. FAROOQUE: My opinion, I just described to you that after we bring all the doctors, and after seeing him, evaluating him, we formed the opinion that he is suffering from serious mental illness and that is schizophrenia, paranoid type.

Q. BY MR. FARESE: How clear is this defect to you? How clear is it to you?

A. BY DR. FAROOQUE: Yes, it's clear.

Q. BY MR. FARESE: How clear?

A. BY DR. FAROOQUE: It's clear to me. Like I'm confident about my diagnosis.

Q. BY MR. FARESE: Is it very clear to you?

A. BY DR. FAROOQUE: Yes.

Q. BY MR. FARESE: How convincing is this defect to you?

A. BY DR. FAROOQUE: It is very convincing to me, because after I also treated him when he went back to the hospital for like - - he went back in February. I discharge him back in November, so that almost one year I treated him. So with my previous one-month evaluation and my ninth, tenth-month treatment, I'm convinced that he has schizophrenia, paranoid type.

Q. BY MR. FARESE: Have you formed an opinion within a reasonable degree of certainty based upon your expertise as a psychiatrist as to whether or not Christopher Flake had the ability to appreciate the wrongfulness of his act of the event on which we were speaking of April the 6th, 1997? Did you form an opinion on whether he could understand the wrongfulness of his act?

A. BY DR. FAROOQUE: Yes, I formed an opinion.

Q. BY MR. FARESE: What was that opinion?

A. BY DR. FAROOQUE: My opinion is that after our evaluation and after our treatment we feel like that Mr. Flake is suffering from serious mental illness, and at the time of the act he was delusional and his act was the product of delusion, and on the basis of that we felt like that he was not able to appreciate the wrongfulness of his act.

Q. BY MR. FARESE: How clear is that to you that he couldn't appreciate the wrongfulness of his act?

A. BY DR. FAROOQUE: We did the incidents, we talked with him, social worker talked with the victim. After reviewing all those things, it is my opinion that at that time hew as suffering from serious mental illness, and because of his delusional thinking his perception was not - - because he - - he was delusional at that time and he was not able to appreciate the wrongfulness of act.

Q. BY MR. FARESE: Are these things that you observed, his mental defect and his inability to appreciate the wrongfulness of his act, is that clear and convincing to you?

A. BY DR. FAROOQUE: Yeah. Again, that is up you-all, what is clear and convincing, what is preponderance, and what is - - But in my medical certainty I can say as a psychiatrist, yes, that's my opinion.

Q. BY MR. FARESE: And you can say that with certainty?

A. BY DR. FAROOQUE: Yes.

Q. BY MR. FARESE: Thank you. And I appreciate you separating the medical and the legal lingo, Doctor.

(Vol. 7, pp. 454-464).

Mr. Flake received a thirty-day inpatient evaluation in December, 1997, by Dr. Sam Craddock who is an expert in clinical psychology. The doctor was of the opinion that Mr. Flake was mentally ill and was confused about the wrongfulness of the his actions on April 6, 1997. (Vol. 7, pp. 503-5). Dr. Craddock explained:

A. BY DR. CRADDOCK: When we're talking about wrongfulness of his acts, Mr. Flake, I thought, was essentially deprived of the ability to reason effectively. That is, what one has to do to function is to be able to - - your actions have to be guided by reason or rationale. I did not see that in Mr. Flake. And that was from what his father had told us had preceded the incident around April 6th and what we observed while he was with us throughout both stays at our facility. Mr. Flake does not reason effectively, and I think that's entirely the result of his mental illness.

Where he is confused as far as the wrongfulness of his actions, if someone were to ask him at the time of the alleged assault, Is it wrong or criminal to assault somebody else, he would say, Yes, that's wrong, I can understand why a person would be arrested for that. Morally he thought that what he was doing was justified. Now then, you and I perhaps can say, okay, morally I think something is right or wrong and I can also think some action is criminal, or it's illegal, or it is not. And we decide, we weigh what to do when perhaps if we were to say, I think this person is a terrorist, morally it benefits

> society if I eliminate this person. And I think that's what was going on with Mr. Flake. He morally felt justified to do it.
>
> So in that respect I would say that he failed to appreciate the wrongfulness. Where he would appreciate the wrongfulness if somebody said, is it a crime or can somebody be arrested for assaulting another person, I think without hesitation he would say, Well, yes, of course. If somebody said, Well, doesn't that apply to what your actions were? I don't think he assimilated that. And the reason I say that is, again, because of the way his thinking was around the time of the incident.

(Vol. 7, pp. 504-505).

The final defense expert was Dr. John Hudson, a clinical psychologist in private practice in Bartlett, Tennessee. Dr. Hudson evaluated Mr. Flake after meeting with him on twelve occasions beginning on April 8, 1997, just two days after the shooting. The doctor discussed Mr. Flake's mental health history in detail including the fact that Mr. Flake was seen by a psychiatrist twice within a few days prior to the shooting. (Vol. 7, pp. 562-568).

Dr. Hudson had "no doubt that [Mr. Flake] was suffering a very serious incapacitating psychiatric illness." (Vol. 7, p. 550). He stated that in his opinion Mr. Flake could not appreciate the wrongfulness of his act on the day of the shooting. (Vol. 7, p. 550). Dr Hudson described Mr. Flake as one of the three most disturbed individuals he had ever met in his twenty-five years of practice. (Vol. 7, p. 551). Dr. Hudson was "very comfortable" testifying that Mr. Flake could not appreciate the wrongfulness of his actions on April 6, 1997. (Vol. 7, p. 551).

Lastly, the defense called Rebecca Smith, a psychiatric social worker who testified as to Mr. Flake's reasons for shooting Mr. Carpenter:

> He [Mr. Flake] said that when he was attending a chemical dependency group at the church, he began to think of chemical weapons and became convinced that Mr. Carpenter was a terrorist because he was also affiliated with the chemical dependency group.
>
> He said that Mr. Carpenter was affiliated with the AA inner group and there was a person in AA who had worked with Mr. Flake that physically resembled Mr. Carpenter. And Mr. Flake said that this individual was involved with stealing weapons in Memphis and thieves who stole weapons worked for him.
>
> Pertaining to the incident in question, he said that voices told him to shoot Mr. Carpenter but not to kill him. He said that when he went to the office that night, that there was a lady in the office with Mr. Carpenter and that he left and then came back and he said the voice told him to watch. He said that he then shot him and the voice had told him not to shoot the lady. And he said that the reason he had done this was that he – the church members who attended the church knew he was going there, knew there were terrorists there, knew that there were members of the Mafia there, and this act of public violence would be a signal for the FBI to come in and take care of the terrorists and the Mafia.

(Vol. 6, p. 425).

Following the defendant's proof , the State presented three witnesses in rebuttal. (Vol. 8). First, the State called Dr. John McCintosh who was a medical doctor at the Shelby County Jail at the time Mr. Flake was arrested. (Vol. 8, p. 614). He testified that he met Mr. Flake on May 9, 1997, for approximately an hour to an hour and fifteen minutes. (Vol. 8, p. 627). Following this one meeting, Dr. McCintosh testified that he observed no evidence of psychosis, but believed Mr. Flake to suffer from a depressive disorder. (Vol. 8, pp. 627-28). On cross-examination, Dr. McCintosh admitted that the defense doctors were in a better position to evaluate Mr. Flake, and admitted that he could not really disagree with their diagnosis. This was primarily due to the fact that the defense doctors had thirty days or more

to conduct an evaluation and his contact with Mr. Flake was only an hour or so. (Vol. 8, pp. 638-48). Significantly Dr. McCintosh offered no opinion at all as to Mr. Flake's mental condition at the time of the shooting.

Finally, the State called Dr. Mark Luttrell, who is now the Director of Psychiatric Services at the Shelby County Jail. (Vol. 8, p. 654). At the time he saw Mr. Flake, Dr. Luttrell was proforming primary medical care for the inmates. He testified that his only function was to provide physical treatment of Mr. Flake in July of 1997 for urination problems! (Vol. 8, pp. 657-658). He stated that on the occasions that he observed Mr. Flake, he did not notice any "apparent distress" on Mr. Flake's part. (Vol. 8, pp. 657-58). In fact, Dr. Luttrell could not remember anything remarkable about Mr. Flake. (Vol. 8, p. 659). "He was just like everybody else." (Vol. 8, p. 659).

Dr. Luttrell's testimony has little bearing on Mr. Flake's state of mind three months earlier when the shooting occurred since, when Dr. Luttrell saw him, Mr. Flake was taking Prozac as prescribed by another physician. (Vol. 8, p. 658). It is hardly surprising then that Mr. Flake seemed "unremarkable" given that he was taking psychotropic medication designed to have a calming effect. What is important of course is that Dr. Luttrell did NOT perform any psychiatric evaluation of Mr. Flake. (Vol. 8, p. 657).

These two witnesses were the sum total of the State's expert proof regarding Mr. Flake's sanity. Neither of these two doctors spent any significant time with Mr. Flake. Dr. McCintosh formed his opinion of Mr. Flake's current mental state after one hour-long meeting with Mr. Flake over a month after the shooting. Dr. Luttrell merely gave the court

his "passing impressions" about Mr. Flake garnered some three months after the shooting while Dr. Luttrell was treating Mr. Flake for a urinary problem.

The State relies heavily on the two prosecution doctors but neglects to admit that neither of the State's experts offered any opinion as to Mr. Flake's state of mind at the time of the shooting. It is elementary that insanity must exist "at the time of the offense." Tenn. Code Ann. §39-11-501(a) provides in pertinent part: "It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts."

In *Forbes v. State*, 559 SW.2d 318 (Tenn. 1977), this Court held that a defendant had to establish non-remission at the time of the crime to establish insanity. Since there was no such proof in *Forbes* this Court rejected the insanity claim out of hand. Similarly, since the government's doctors here offered NO PROOF as to Mr. Flake's mental state at the time of the shooting their testimony was absolutely worthless. Indeed an argument could be made that they should not have been permitted to testify at all given that their proof was simply not relevant to the time of the shooting.

Mr. Flake's case is not unlike that in *People v. Johnson*, 585 N.E. 2d 78, 86 (Ill. 1992), where the government's expert simply had nothing relevant to add to the insanity inquiry. See also, the testimony of "two country" physicians disparaged in *McElroy v. State*, 146 Tenn. 442, 242 S.W. 883 (1922).

Of course insanity cases can consider lay proof. The instant case is far different from the typical case where the lay witnesses say "well, he looked all right to me." See, *State v. Cherry*, 639 S.W.2d 683 (Tenn. Crim. App. 1982) (the lay testimony of the victim as to the defendant's actions could have supported the verdict of the jury on the issue of insanity). Here the victim himself admitted that Mr. Flake's conduct was "totally off the wall, weird, crazy" and that there had been no ill feelings or animosity between the two of them. (Vol 5, p. 199). At one moment Mr. Flake seemed "normal" and the next Flake "was not normal." (Vol. 5, p. 203). Mr. Carpenter was struck by Mr. Flake's appearance: "those eyes." (Vol. 5, p. 204). Mr. Carpenter was of the view that Mr. Flake "turned into the devil himself." Mr. Flake was "horrible looking." (Vol. 5, p. 204). Mr. Carpenter had no explanation for Mr. Flake's actions. (Vol. 5, p. 205).

The first officer to have contact with Mr. Flake more than an hour after the shooting was asked how Mr. Flake acted when taken into custody. The officer responded: "No emotion is really the best way I guess I can describe it. I don't believe he spoke or we spoke to him at all at that time. (Vol. 5, p. 236). Officer Johnny Brown of the Shelby County Sheriff's Office testified that he arrived later, questioned Mr. Flake and retrieved the weapon. (Vol. 5, p. 241-42). Officer Brown agreed that Mr. Flake displayed "no emotion." (Vol. 5, p. 253).

The emotionless countenance observed by the officers is entirely consistent with a delusion where the person has "blunted affect or flat affect, [which] means whatever you say they don't have any change in their face." (Testimony of Dr. Farooque) (Vol. 3, p. 455).

As its final witness the State called Mr. John Perry who is the mental heath director at the jail. Despite his title Perry was a layman who testified that he saw Mr. Flake "briefly" on intake following his arrest in April and four to five days a week until Flake was transferred to Middle Tennessee in November of that same year. Mr. Perry said that Flake did not joke around but was "responsive." (Vol. 8, p. 676). Mr. Flake was not a problem when he was placed in protective custody on the medical floor (Vol. 8, p. 677). Mr. Perry said he did not have any intellectual discussions with Mr. Flake, just "down to earth talk" about food. (Vol. 8, p. 678). Obviously the government can find no comfort in the testimony of its lay witnesses.

This case can be resolved by recalling that Mr. Flake is a paranoid schizophrenic which is a profound mental illness often associated with insanity.[14] Recall that as Dr. Zager testified Mr. Flake answered routine questions appropriately but that more open-ended questions revealed his bizarre beliefs and symptoms. (Vol. 6, pp. 308-09). Further there are times when the disorder is more stable and behavior is appropriate and there "are other times when the disorder is more unstable and the person's behavior is more unstable." (Vol. 6, pp. 304-05).

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[14] Even under the former insanity statute, instances of reversals were rare but were most common when the defendant was a paranoid schizophrenic. *State v. Sparks*, 891 S.W.2d 607 (Tenn.1995), *State v. Clayton*, 656 S.W.2d344 (Tenn.1983), and *State v. Edwards*, 890 S.W.2d 436 (Tenn.1994). One has but to read the remarkably similar facts in the Texas case of *Jackson v. State*, 941 S.W.2d 351 (Tex. App. 1997) to recognize that a paranoid schizophrenic can be insane as a matter of law even under statutes placing the burden of persuasion on the defense.

In *Forbes v. State*, 559 SW.2d 318 (Tenn.1977), this Court found that a paranoid schizophrenic does not always manifest the symptoms of his or her illness and thus insanity must consider the defendant's mental state at the time of the crime:

> The testimony of the medical experts is consistent with these textbook principles and is replete with proof of periodic psychotic episodes, with periods of remission. Three inescapable conclusions emerge from the proof, i.e. (1) that a paranoid schizophrenic is not legally insane under the *M'Naghten* rules when he is in a period of remission; (2) a prima facie case of legal insanity in such a case may only be established by proof that at the time of the crime the accused was not in remission; and (3) that proof of proper job functioning and normal appearance on the part of a paranoid schizophrenic is of questionable value. The issue in this case boils down, first, to the single question of whether the proof shows that this defendant was not in remission on the date of this crime. If this question is resolved in favor of remission the insanity defense is, inappropriate. If resolved in favor of non-remission, then the two-pronged test of *M'Naghten* comes into play.

559 S.W.2d 318, at 325-326.

Since there was no proof of non-remission at the time of the crime, the insanity defense in *Forbes* failed. Without a doubt Mr. Flake's behavior at the moment he shot Mr. Carpenter demonstrated an extreme instance of non-remission: Mr. Flake's illness was in full flower. At one moment Mr. Flake seemed "normal" and the next Flake "was not normal." (Vol. 5, p. 203) Mr. Carpenter was struck by Mr. Flake's appearance: "those eyes." (Vol. 5, p. 204) Mr. Carpenter was of the view that Mr. Flake "turned into the devil himself." Mr. Flake was "horrible looking." (Vol. 5, p. 204) Mr. Carpenter had no explanation for Mr. Flake's actions. (Vol. 5, p. 205).

None of the State's proof touching on sanity or insanity focused on the critical moment of the time of the shooting. All the State's evidence related to "observations" hours or days

or weeks later when Mr. Flake was not acting out or was otherwise medicated. But then, as this Court has observed, "***proof of proper job functioning and normal appearance on the part of a paranoid schizophrenic is of questionable value."*** *Forbes v. State*, 559 S.W.2d 318, at 325-326.

This case can also be resolved by the nature of the defense expert testimony. As this Court held in *State v. Sparks*, 891 S.W.2d 607 (Tenn. 1995).

> In making its determination [on the issue of insanity], the jury is allowed to consider both lay and expert testimony as evidence, and it may discount expert testimony which it finds to be in conflict with the facts of the case. In this state, 'it is settled beyond question that the weight and value of expert testimony is for the jury and must be received with caution." *Mullendore v. State*, 183 Tenn. 53, 191 S.W.2d 149 [(1945)]. This applies to the expert opinions of medical men. *Crane Enamel Co. v. Jamison*, 188 Tenn. 211, 217 S.W.2d 945 [(1948)]. Where there is any conflict between expert testimony and the testimony as to the facts, the jury is not bound to accept expert testimony in preference to other testimony, and must determine the weight and credibility of each in the light of all the facts shown in the case. *Id*. at 647.

State v. Sparks, 891 S.W.2d 607, at 616.

Here there is NO conflict between the defense expert testimony and the prosecution's testimony as to the facts of the moment of the shooting. Indeed, they are entirely consistent. There was simply no rational basis for the jury to reject the expert proof.

In conclusion, this Court should reverse the verdict of the jury because, as a matter of law, the State failed to rebut the defense proof of insanity with either lay or expert testimony. Mr. Flake had suffered from severe mental problems for years. He had been treated by many doctors. Mr. Flake's father had taken him to see a doctor not three days prior to shooting Mr. Carpenter because of Mr. Flake's bizarre behavior. The defense presented five

experts who each evaluated Mr. Flake at great length. Each expert testified that Mr. Flake was suffering from a severe mental disease and was unable to appreciate the wrongfulness of his conduct on April 6, 1997. Their testimony was certainly "clear and convincing evidence" to support an insanity defense.

The State of Tennessee produced two doctors, who never evaluated Mr. Flake as to his mental state on April 6,1997. These doctors did no more than say that they saw no evidence of current psychosis after a review of but an hour. The State's lay witness testified only that Mr. Flake displayed "no emotion" an hour or two after the shooting. The critical moment of course was at the time of the shooting when Flake appeared to "look like the devil himself."

After viewing the evidence here in a light most favorable to the State, a rational trier of fact could have only found that the defense established insanity by clear and convincing evidence. Thus, the guilty verdict of attempted voluntary manslaughter here may not be sustained. This case should be remanded to the trial court for proceedings consistent with a judgment of not guilty by reason of insanity.

3. THE EVIDENCE SEIZED FROM MR. FLAKE'S VEHICLE AND HIS STATEMENTS TO THE POLICE SHOULD HAVE BEEN SUPPRESSED BECAUSE MR. FLAKE WAS NOT MENTALLY CAPABLE OF KNOWINGLY AND INTELLIGENTLY CONSENTING TO A SEARCH OR WAIVING HIS *MIRANDA* RIGHTS.

A.

The trial court should have suppressed Mr. Flake's statements to the police and the evidence seized from him on April 6, 1997. In light of his obvious mental disability Mr. Flake was unable to "knowingly and intelligently" waive his *Miranda* rights or to competently consent to a search of his vehicle.

On April 6, 1997, approximately two hours[15] after Mr. Carpenter was wounded, Deputy Johnny Brown met Mr. Flake at the Shallow Cove address. (Vol. 5, p. 238). Deputy Brown advised Mr. Flake of his *Miranda* Rights and asked Mr. Flake if he knew why the officers were there, which Mr. Flake said he did. (Vol. 5, p. 240). Deputy Brown then asked Mr. Flake where the weapon was located, and Mr. Flake directed them to the glove box of his vehicle. (Vol. 5, p. 240). Mr. Flake signed a consent to search form, and the officers located the gun, which had one round in the chamber, five live rounds and a spare clip. (Vol. 5, pp. 241-42).

The Fifth Amendment to the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." Article I, Section 9, of the Tennessee Constitution provides "that in all criminal prosecutions, the accused shall not give evidence against himself." The provisions are not identical. The most significant

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[15] This time can be deduced from the fact that another deputy, Lampley, was the first officer to have contact with Mr. Flake. Lampley first went to the church after hearing the shooting call on the radio. (Vol. 5, p. 227). Lampley spent some thirty minutes at the church. (Vol. 5, p. 228).He then drove over to Germantown and waited 30 to 45 minutes until Mr. Flake appeared. (Vol. 5, p. 230). Flake was arrested and placed in the rear of a patrol car until other officers arrived. (Vol. 5, p. 236). Officer Brown was one of these officers and first saw Mr. Flake in the rear of the patrol car. (Vol. 5, 239).

difference between the two is that Tennessee's provision "is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." *State v. Crump*, 834 S.W.2d 265, 268 (Tenn. 1992). *See State v. Smith*, 834 S.W.2d 915, 918 (Tenn. 1992).

The United States Supreme Court has interpreted the Fifth Amendment to require that statements and/or confessions be freely and voluntary given to be admissible. More specifically, any waiver of an individuals Fifth Amendment rights must be made "voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444. Whether a waiver has been made voluntarily, knowingly, and intelligently must be decided on the totality of the circumstances on a case-by-case basis. See the extensive discussion in *State v. Benton*, 759 S.W.2d 427, 431-32 (Tenn. Crim. App. 1988) (retarded person).

Likewise, the Fourth Amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause . . ." Similarly, Article I, Section 7 of the Tennessee Constitution guarantees, "That the people shall be secure in their possessions, from unreasonable searches and seizures . . ." Unless it falls within a specific established and well-delineated exception, a search conducted without a warrant is per se unreasonable. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

"One of the specifically established exceptions to both a warrant and probable cause is a search that is conducted pursuant to a voluntarily given consent." *Id.*; *see also State v. Bartram*, 925 S.W.2d 227, 230 (Tenn. 1996). The burden of proof rests upon the State to show, by a preponderance of the evidence, that the consent to a warrantless search was given

freely and voluntarily. *Schneckloth*, 412 U.S. at 248-49. The question of whether an accused voluntarily consented to the search is a question of fact which focuses upon the totality of the circumstances. *Id*; *State v. Ashworth*, 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999). In order to pass constitutional muster, "consent to search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *State v. Brown*, 836 S.W.2d 530, 547 (Tenn. 1992).

As these cases reveal, the constitutional protections against unlawful searches and self-incrimination require a "knowing and intelligent" waiver before consent searches and statements can be admissible. In our case, there was absolutely no evidence from which the trial court could have concluded that Mr. Flake did, in fact, knowingly and intelligently waive his rights. (Vol. 9). At the hearing on this issue, the State simply produced two Shelby County Sheriff's officers who indicated that they explained the *Miranda* warnings to Mr. Flake, which he "appeared" to understand. (Vol. 9, p. 22).

Testifying for the defense, Dr. John Hudson, a clinical psychologist, stated that he evaluated Mr. Flake after his arrest to determine his competency. (Vol. 9, pp. 40-42). Dr. Hudson testified that, in his professional opinion, Mr. Flake could have given up his constitutional rights. (Vol. 9, p. 55). However, "I don't think he could be expected to have done it knowingly or intelligently." (Vol. 9, p. 55). Dr. Hudson further explained that Mr. Flake probably understood the words of the *Miranda* warning, but Hudson had "serious concerns" about Mr. Flake knowingly (or rationally) giving up his rights. (Vol. 9, p. 56).

Even in late April and July of 1997, Dr. Hudson doubted that Mr. Flake understood the waivers that he signed for release purposes. (Vol. 9, pp. 56-62).[16]

Following this proof, the State cross-examined Dr. Hudson, but failed to introduce any evidence to rebut the doctor's testimony. As a result, the only evidence before the trial court regarding Mr. Flake's ability to "knowingly and intelligently" waive his rights was the testimony of Dr. Hudson.

In *State v. Bell*, 690 S.W.2d 879, 882 (Tenn. Crim. App. 1995) the court held that mental unsoundness is not alone sufficient to bar introduction of the defendant's statements if the evidence shows the defendant was capable of understanding his rights. To this one need add that the person must also understand a "waiver" or the abandonment of those rights.

In *State v. Blackstock*, 19 S.W.3d 200 (Tenn. 2000), this Court reviewed the authorities on the question of a *Miranda* waiver by a person with a mental deficiency. Obviously this would apply to a person who was insane. *See*, *Townsend v. Sain*, 372 U.S. 293, 309, 83 S.Ct. 745, 755, 9 L.Ed.2d 770 (1963); *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960) (statements or confessions made during a time of mental incompetency or insanity are involuntary and consequently are inadmissible). In *Blackstock* this Court held that the retarded defendant in that case did not voluntarily, knowingly, and intelligently waive his *Miranda* rights although the trial court found the defendant "appeared to understand his rights."

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[16] Dr. Hilary Linder, a psychiatrist for the State of Tennessee at Western Mental Health Institute testified at trial that at the time Flake was sent to her for observation, Mr. Flake was not competent to stand trial. (Vol. 6, p. 380). She stated that over time, with the use of anti-psychotic medication, Mr. Flake became competent to assist his counsel at trial. (Vol. 6, p. 381).

Several points are relevant here. In *Blackstock* this Court focused not only on the understanding of the rights but ALSO on the equally important waiver: "*Moreover, the waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.*" *State v. Blackstock*, 19 S.W.3d, at 208 (emphasis in original). In Mr. Flake's case there was no showing that Mr. Flake understood his rights much less that he comprehended the waiver of those rights. At the hearing on this issue, the State simply produced two Shelby County Sheriff's officers who indicated that they explained the *Miranda* warnings to the Appellant, which he appeared to "understand" his rights. (Vol. 9, p.22). The defense introduced the testimony of the doctor who said Mr. Flake could not comprehend the waiver. This is very similar to the testimony of Mr. Blackstock's conservator "that he treated Blackstock like a six or eight-year-old child, and in [the conservator's] opinion, Blackstock lacked the capacity to understand his constitutional rights." *State v. Blackstock*, 19 S.W.3d, at 209.

In *Blackstock* this Court considered a number of factors and had to balance against Mr. Blackstock the fact he had been found to be competent to stand trial: "On one hand, Blackstock was found competent to stand trial by the Johnson Mental Health Center, a determination which encompassed a finding that he had the capacity to understand the proceedings against him." 19 S.W.3d, at 209. Notwithstanding this factor this Court considered other circumstances to determine that Mr. Blackstock did not knowingly waive his rights because of his mental disability. In our case Mr. Flake was incompetent to stand trial

for some TWO YEARS! [17] By definition this means that his lack of comprehension of the legal proceedings forecloses any possible finding that he could competently waive his Fifth and Fourth Amendment rights.

There was no understanding of "rights" or "waiver" here. How could there have been? Mr. Flake was both insane and incompetent. Accordingly, Mr. Flake's statements and his consent to search his vehicle were not given after a "knowing and intelligent" waiver of his constitutional rights. Thus, his statements and the weapon should have been suppressed and not introduced during the trial.

B.

The intermediate appellate court really never reached the merits of this issue but found that, in any event, the proof of Mr. Flake's statements and the weapon were harmless:

> This issue presents a close question; however, we find it unnecessary to determine whether the evidence preponderates against the findings of the trial court. If the trial court did err in failing to grant the motion to suppress, we conclude the admission into evidence of the defendant's statement and the weapon was clearly harmless. It was undisputed that the defendant shot the victim. The admission of the defendant's statement and weapon did not affect the judgment. See Tenn.R.App. P. 36(b).

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[17] See the testimony of Dr. Farooque: "Mr. Flake, when he was first admitted, after -- I say after short period of time I started him with medication. So when I send him back to jail after 30 days evaluation I send him back with medication and those are called Olanzapine and Zoloft. Yeah. I send him back to jail with Olanzapine and Zoloft. Zoloft is anti-depressant medication and Olanzapine is anti-psychotic medication. So after I send him back [to the jail]. ... Then after that I had to come to court and testify that he's still not competent to stand trial and meets commitment criteria so that I can take him back to my unit and treat him for his mental condition." (Vol. 7, pp. 457).

Mr. Flake asserts that the illegality occurred and that his rights were violated. That the matter was "harmless" and did not affect the judgment" utilizes the wrong standard of review. Harmless error analysis requires an examination of the type of error involved because of the different burden of proof requirements. In *State v. Harris*, 989 S.W.2d 307, 314 -315 (Tenn. 1999) the Court held that:

> To resolve the issue in this appeal we must first determine whether the error complained of is constitutional or statutory. The answer to this question is important because the test for harmlessness of constitutional errors differs from that for non-constitutional errors. First, once a constitutional error is found, the burden shifts to the State to prove harmlessness; the burden does not shift to the state for non-constitutional errors. Second, the standard which applies to assess the harm or prejudice resulting from constitutional errors is more exacting than the standard which applies to non-constitutional errors. ...
>
> For example, in Tennessee, non-constitutional errors will not result in reversal unless the error affirmatively appears to have affected the result of the trial on the merits, or considering the whole record, the error involves a substantial right which more probably than not affected the judgment or would result in prejudice to the judicial process. Tenn.R.Crim. P. 52(a); Tenn. R.App.P. 36(b), *State v. Cook,* 816 S.W.2d 322, 326 (Tenn. 1991); *State v. Williams,* 977 S.W.2d 101, 105 (Tenn. 1998). In contrast, a constitutional error *will* result in reversal unless the reviewing court is convinced "beyond a reasonable doubt" that the error did not affect the trial outcome. *Chapman v. California,* 386 U.S. 18, 87 S.Ct 824, 17 L.Ed.2d 705 (1967); *Howell,* 868 S.W.2d at 260; *Cook,* 816 S.W.2d at 326; Tenn.R.Crim. P.52(a).

The error in this case was of constitutional magnitude. Consequently the burden shifts to the State to prove harmlessness beyond a reasonable doubt. It would be sheer speculation to assume that the jury attached no significance to the pistol in the vehicle as it related to the insanity question. While Mr. Flake's identity as the assailant was never an issue his mental state certainly was. Thus, the government cannot establish harmlessness and the introduction of the evidence was error.

CONCLUSION

This Court should affirm the Court of Criminal Appeals which imposed a judgment of not guilty by reason of insanity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Document has been sent via United States Mail to Kim R. Helper, Assistant State Attorney, Criminal Justice Division, P.O. Box 20207 Nashville, Tennessee 37202, on this the ____ day of March, 2002.

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David L. Raybin

APPENDIX

INDEX TO APPENDIX