IN THE SUPREME COURT OF IOWA

FILED
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CLERK SUPREME COURT

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	SUPREME COURT 10-0631
	)	
MARK DARYL BECKER,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR BUTLER COUNTY
HONORABLE STEPHEN P. CARROLL, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED SEPTEMBER 8, 2011

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CERTIFICATE OF SERVICE AND FILING

On the 27th day of September, 2011, the undersigned certifies that a true copy of the foregoing instrument was served upon the Attorney General's Office, Criminal Appeals Division by electronic transmission to: CAmail@ag.state.ia.us and on Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Mark D. Becker, # 6099733, Iowa Medical & Classification Center, 2700 Coral Ridge Avenue, Coralville, IA 52241.

I further certify that on September 27, 2011, I will file this document by mailing 18 copies of it to the Clerk of the Supreme Court, Iowa Judicial Building, 1111 East Court Avenue, Des Moines, Iowa 50319 through Iowa State Capitol Complex Local Mail.

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MJL/slc/9/11

APPLICATION FOR FURTHER REVIEW

COMES NOW the Defendant-Appellant, and pursuant to Iowa R. App. P. 6.1103, and hereby makes application for further review of the September 8, 2011, decision of the Iowa Court of Appeals in State v. Becker, Supreme Court No. 10-0631. In support thereof, appellant states:

1. This Court should grant this application for further review to resolve substantial issues of first impression. Iowa R. App. p. 6.1101(2)(c).

2. Instruction 35 outlined the elements the defense was required to prove Becker was insane. Instruction 35 did not use the statutory language, "diseased or deranged condition of the mind" but instead used the terminology "mental capacity." (App.724). "Mental capacity" and "diseased or deranged mind" are not synonymous. The Court of Appeals was correct in finding the trial court should have given Becker's requested jury instruction outlining the elements of insanity using the statutory language as it correctly stated the law.

However, the Court of Appeals erred in determining the jury was properly instructed when all of the instructions are read together. The Court of Appeals erred in determining the language contained in Instruction 34, defining "insane" cured the error.

Instruction 35 when read in conjunction with Instruction 34 did not properly instruct the jury as to what the defense was required to prove. Instruction 34 used different language to define "sane" and "insane." While the definition for "insane" followed the statutory language, the definition for "sane" used the incorrect language of "mental capacity." (App.722). Instruction 35, the actual marshaling instruction, did not mention "diseased or deranged condition of the mind." The erroneous instruction required the defense to prove Becker was not "sane" instead of proving the legal requirement of "insanity." (App.722-24).

The jury was specifically instructed as to the defense's burden to prove insanity by the language used in Instruction 35. The inclusion of the correct statutory language defining

"insane" in Instruction 34 did not alleviate the confusion. The use of different language in the definition of "sane" undoubtedly increased the confusion as to the legal insanity standard. "Uniformity of vocabulary has an important value . . . as is evidenced from the familiar experience of meanings that "get lost in translation."" Cf. United States v. Brawner, 471 F.2d 969, 984 (D.C. Cir. 1972), superseded by statute (discussing the uniformity of approach as an appreciation of the need and value of judicial communication). The difference between the statutory language and that used in Instruction 35 is not stylistic, but substantive.

While it is not uncommon for competing experts to have vastly different opinions, all the experts agreed that Becker suffers from paranoid schizophrenia. (App.433,512-513, 570-571, 583, 597-598). Where the experts' opinions differed was whether Becker met the legal criteria for insanity. In expressing each opinion, the experts did not use the same language. Neither defense expert spoke of "mental capacity" unless specifically questioned by the prosecutor. (App.457,

458-460, 478-482, 525-526). The prosecution experts did use the inexact language of "mental capacity." (App.582-583, 606-607). It appears the prosecution experts may not have used the statutory meaning of insanity in formulating their opinion of Becker's psychiatric condition.

The definition of "insanity" stated in Instruction 34 got lost in translation in Jury 35. The jury did not have adequate instructions to address whether Becker had a diseased or deranged condition of the mind as to render him incapable of knowing the nature and quality of his act or incapable of distinguishing between right and wrong in relation to the act. Becker should be granted a new trial.

3. The Court of Appeals erred in affirming the district court's denial of the Instruction regarding the consequence of a not guilty by reason of insanity (NGI) verdict. The Court of Appeals incorrectly determined Oppelt, and Hamann were controlling. While the cases have held the consequence instruction is generally inappropriate, the decisions do not rest on constitutional grounds. State v. Oppelt, 329 N.W.2d 17, 21

(Iowa 1983); State v. Hamann, 285 N.W.2d 180, 185-186 (Iowa 1979). The proposed consequence instruction was required by due process and the right to a fair trial guaranteed by Article I, section 9 of the Iowa Constitution. The Court of Appeals found that Justice Stevens' dissent in Shannon v. United States, 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994) had appeal, particularly in the present case where after a lengthy deliberation, the jury questioned what would happen to Becker if found not guilty by reason of insanity.

Studies show the jurors do not know the consequences of a NGI verdict. Marsha Bach, The Not Guilty By Reason of Insanity Verdict: Should Juries be Informed of Its Consequences?, 16 Whittier L. Rev. 645 (1995). Becker's jury specifically inquired about the consequence of a NGI verdict. (App.725). Clearly, the jurors were concerned about the consequences of their verdict.

Scientific studies have measured the public's conceptions of mental illness. The public stereotype of dangerousness, rather than improving, actually increased between 1950 and

1996. Bruce G. Link, PhD et al., Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance, 89 American Journal of Public Health, 1328 (1999), http://ajph.aphapublications.org/cgi/reprint/89/9/1328.pdf (last visited 9/16/11). The study determined that there still is a strong connection between mental disorder, and perceived likelihood of violence. This coupled with the fact that such a perception is strongly associated with attitudinal social distance made the researchers pessimistic regarding the current status of public beliefs about mental illness. If the symptoms of mental illness continue to be linked to fears of violence, people with mental illness will be negatively affected through fear-based exclusion by processes such as the "not in my backyard" responses. Id.

If the jurors, like the general public, already held the view that persons with mental illness are dangerous, those concerns were intensified after hearing the evidence. (App.18-20, 27-30, 31-32, 37, 38, 40-41, 43-46, 50, 56, 60, 61-62, 207, 211-212, 274-275, 278). Presumably, the jurors sought the information

regarding the consequences of a NGI verdict to calm fears that Becker would be released into their "backyard." The proposed consequence instruction was necessary to lessen the risk of a verdict based on an emotional reaction.

The proposed instruction was an accurate statement of the law. Iowa R. Crim. P. 2.22(8)(b). The failure to instruct the jury on the consequences of a NGI verdict violated Becker's due process rights under the Iowa Constitution and deprived him of a fair trial. To the extent this Court's prior holdings are in conflict, the cases should be overruled. Becker should be granted a new trial.

4. The Court of Appeals erred in determining Becker was required to pay the cost of his legal assistance fee in excess of the fee limit. "Legal assistance" includes attorney witness fees and expenses. Iowa Code §815.9(3). Section 815.14 caps the "expense of the public defender" to the fee limit. Iowa Code §815.14. The expense of the public defender includes witness fees paid by the Public Defender.

The definition for "fee limitation" in June 2009 provided "the fee limitation established by the state public defender for specific classes of cases." Iowa Admin. Code r. 493-7.1(6/17/09) (App.760). This limit is $18,000. Iowa Admin. Code r. 493-12.6(1) (App.766).

Iowa Administrative Code rules 493-12.7 and 493-13.2(3) provide for reimbursement to the court appointed attorney for payments made for other expenses such as shorthand reporters, investigators and expert witnesses. (App.767-771). However, these rules do not change the definition of "fee limitation" in effect at the time of appointment. Becker is not required to pay in excess of $18,000.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY?

Authorities

State v. Heemstra, 721 N.W.2d 549, 553 (Iowa 2006)

State v. Marin, 788 N.W.2d 833, 836 (Iowa 2010)

State v. Fountain, 786 N.W.2d 260, 262 (Iowa 2010)

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State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)

Iowa R. Civ. P. 1.924

Summy v. City of Des Moines, 708 N.W.2d 333, 340 (Iowa 2006)

State v. Beets, 528 N.W.2d 523 (Iowa 1995).

1. Jury Instruction 35 - failure to give the proposed jury instruction on the elements of the insanity defense.

Iowa Code § 701.4 (2009)

State v. Schuler, 774 N.W.2d 294, 298 (Iowa 2009)

Iowa Code § 229.1(9) (2009)

Taber's Cyclopedic Medical Dictionary, 1108 (1989)

http://www.nami.org (last visited 10/4/10)

Black's Law Dictionary 207 (6th ed. 1990)

In re Estate of Henrich, 389 N.W.2d 78, 81 (Iowa Ct. App. 1986)

In re Faris' Estate, 159 N.W.2d 417, 420 (Iowa 1968)

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State v. Reid, 394 N.W.2d 399, 402-404 (Iowa 1986)

State v. Collins, 305 N.W.2d 434, 436 (Iowa 1981)

State v. Craney, 347 N.W.2d 668, 679 (Iowa 1984)

State v. Harkness, 160 N.W.2d 324, 330 (Iowa 1968)

2. Jury Instruction 10- failure to give proposed jury instruction on the consequences of a not guilty by reason of insanity verdict.

State v. Fetters, 562 N.W.2d 770 (Iowa Ct. App. 1997)

Shannon v. United States, 512 U.S. 573, 575 114 S.Ct. 2419, 2422, 129 L.Ed.2d 459, ___ (1994)

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Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009)

State v. Bruegger, 773 N.W.2d 862, 886 (Iowa 2009)

State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010)

State v. Hamann, 285 N.W.2d 180, 185-86 (1979)

State v. Oppelt, 329 N.W.2d 17, 21 (1983)

Masha Bach, The Not Guilty by Reason of Insanity Verdict: Should Juries Be Informed of Its Consequences?, 16 Whittier L. Rev. 645, 674 (1995)

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In Re Detention of Garren, 620 N.W.2d 280 (Iowa 2000)

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Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

II. WHETHER THE COURT ERRED IN ORDERING DEFENDANT TO PAY LEGAL ASSISTANCE FEES IN EXCESS OF THE FEE LIMIT?

Authorities

Iowa Code § 815.14 (2009)

State v. Dudley, 766 N.W.2d 606, 621 (Iowa 2009)

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State v. Austin, 585 N.W.2d 241, 244 (Iowa 1998)

Iowa Admin. Code r. 493-12.6(1)

STATEMENT OF THE CASE

Nature of the Case: Appellant appeals following his conviction for murder in the first degree in violation of Iowa Code section 707.2 (2009).

Course of Proceeding and Facts: Becker accepts the Court of Appeals' statement of the proceedings and facts as essentially correct.

ARGUMENT

I. THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY.

A. Standard of Review and Preservation of Error.

Review of challenges to instructions is for corrections of errors at law. State v. Heemstra, 721 N.W.2d 549, 553 (Iowa 2006). The failure to give a requested instruction is reviewed for an abuse of discretion. State v. Marin, 788 N.W.2d 833, 836 (Iowa 2010). Error was preserved. (App.617-619, 720, 724, 728). State v. Fountain, 786 N.W.2d 260, 262 (Iowa 2010); State v. McKee, 312 N.W.2d 907, 915 (Iowa 1981); Iowa R. Civ. P. 1.925.

If this Court were to find error was waived, counsel provided ineffective assistance. Counsel's conduct is reviewed de novo. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

B. Discussion.

The Court is required to "instruct the jury as to the law applicable to all material issues in the case." Iowa R. Civ. P. 1.924. The court is required to give a requested instruction so long as it correctly states the law having application to the facts of the case and when the concept is not otherwise embodied in other instructions. Summy v. City of Des Moines, 708 N.W.2d 333, 340 (Iowa 2006). This Court has been reluctant to disapprove uniform jury instructions. If an instruction is faulty, the Court will do so. State v. Beets, 528 N.W.2d 523 (Iowa 1995).

Instruction 35

Becker pled not guilty by reason of insanity. (App.4). Iowa Code section 701.4 provides:

> A person shall not be convicted of a crime if at the time the crime is committed the person suffers from such a diseased or deranged condition of the mind as

> to render the person incapable of knowing the nature and quality of the act the person is committing or incapable of distinguishing between right and wrong in relation to the act. Insanity need not exist for any specific length of time before or after the commission of the alleged act. If the defense of insanity is raised, the defendant must prove by a preponderance of the evidence that the defendant at the time of the crime suffered from such a deranged condition of the mind as to render the defendant incapable of knowing the nature and quality of the act the defendant was committing or was incapable of distinguishing between right and wrong in relation to the act.

Iowa Code §701.4.

Becker requested the jury be instructed in accordance with the statutory language. (App.5). The court denied the request finding Instructions 34 and 35 were correct statements of the law and mirrored the uniform jury instructions. (App.625).

The court instructed the jury that "insane" or "insanity" meant "such a diseased or deranged condition of the mind as to make a person either incapable of knowing or understanding the nature and quality of his acts, or incapable of distinguishing right and wrong in relations to the acts." (App.722). The instruction also stated a person is "sane" if at the time he

committed the criminal act he had "sufficient mental capacity" to know and understand the nature and quality of the act and had "sufficient mental capacity and reason" to distinguish right from wrong as to the particular act. (App.722).

The jury was additionally instructed that the defendant had the burden to prove he was insane. This instruction did not include the statutory language of "diseased or deranged condition of the mind." Instead the instruction used the language from the second half of Instruction 34 - the defendant must prove he did not have sufficient "mental capacity." (App.724).

Although an instruction need not contain or mirror the precise language of the applicable statute, it must be a correct statement of the law. State v. Schuler, 774 N.W.2d 294, 298 (Iowa 2009). The difference between the statutory language and the jury instruction is not stylistic, but it is substantive. Id. The phrases "diseased or deranged condition of the mind" and "mental capacity" are not synonymous.

"Diseased or deranged condition of the mind" means a mental illness, disorder or disease. The Iowa Code does not define mental illness for the purposes of the criminal code. Iowa Code §229.1(9). "Mental disorder" is an imprecise and general term, but can be described as "a clinically significant behavioral or psychological syndrome or pattern typically associated with either a distressing symptom or impairment of function." Taber's Cyclopedic Medical Dictionary, 1108 (1989). Mental illness means a medical condition that disrupts a person's thinking, feeling, mood, ability to relate to others and daily functioning. http://www.nami.org (last visited 10/4/10).

"Mental capacity" was not defined in the jury instructions. "Capacity" is defined as "[l]egal qualification (i.e. legal age), competency, power or fitness. Mental ability to understand the nature and effect of one's acts." Black's Law Dictionary 207 (6th ed. 1990). While "mental capacity" refers generally to cognitive ability, the specific meaning varies. In re Estate of Henrich, 389 N.W.2d 78, 81 (Iowa Ct. App. 1986); In re Faris'

Estate, 159 N.W.2d 417, 420 (Iowa 1968); Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985); Iowa Code § 232.2(6)(n) (2009); In re L.E.H., 696 N.W.2d 617, 619 (Iowa Ct. App. 2005); State v. Reid, 394 N.W.2d 399, 402-404 (Iowa 1986). "Mental capacity" may mean intellectual functioning, based on I.Q. or age, level of functioning or impairment due to alcohol or drug use, physical injury, or mental illness.

In Collins, this Court examined the three affirmative defenses related to a mental condition: insanity, diminished capacity, and intoxication. State v. Collins, 305 N.W.2d 434, 436 (Iowa 1981). The Collins Court made clear that "mental capacity" does not have the same meaning for each defense. Id. at 436-437.

Instruction 34 used different language to define "insane" and "sane." (App.722). The jury was not instructed in Instruction 34 that the definition for "insanity" contained any consideration of "mental capacity" or "reason." (App.722). Yet in Instruction 35, the jury was only instructed to consider "mental capacity" and not whether defendant had "such a

diseased or deranged condition of the mind" which caused him to be incapable of either factor. (App.724). The erroneous instruction required the defense to prove Becker was not "sane" instead of the legal requirement of "insanity."

Additionally, Instruction 35 incorrectly omitted the language which connects the mental illness to the inability to know and understand the nature and quality of the acts or distinguish right and wrong in relation to the acts. (App.724). Iowa Code §701.4; State v. Craney, 347 N.W.2d 668, 679 (Iowa 1984).

Section 701.4 requires a causal connection between the mental illness and the person's incapacity. "Whether this defense of mental irresponsibility should prevail in a given case, of course, is determined in a large degree by the standard the court provides the jury with which 'to measure whether the degree of relationship between the mental illness of the accused and his offensive conduct is sufficient to relieve him from responsibility.'" State v. Harkness, 160 N.W.2d 324, 330 (Iowa 1968).

Instruction 35 is an incorrect statement of the law. The instructions as a whole did not sufficiently provide the law to apply to the defendant's defense of insanity. Becker was prejudiced by the erroneous jury instruction.

Resnick concluded Becker had a diseased or deranged condition of the mind. (App.457, 458-460). Rogers also opined Becker suffered from a diseased or deranged condition of the mind. (App.525-526). Neither defense experts spoke of "mental capacity" unless questioned by the prosecutor.

Resnick was questioned about the "choices" Becker made. (App.478-482). The prosecutor asserted that the choices were rational decisions made by Becker. (App.482). Resnick stated the decisions were a great example of rationality within irrationality - a person can engage in many rational behaviors in order to respond to a delusional belief system. (App.431-432, 482). The prosecutor then questioned that "nonetheless, he had the mental capacity to do those things." Resnick agreed. (App.482). People with paranoid schizophrenia do not lose the ability to make choices. The choices can be influenced by their

delusions and hallucinations. (App.500-501). Intellectual functioning has little to do with the insanity standard. There is no reason a smart person cannot have paranoid schizophrenia. (App.534-535).

Spodak spoke of Becker's "mental capacity." In concluding Becker was sane, Spodak looked at his "fundamental thinking capacity, his ability to think rationally, whether there was this irrational umbrella or he was simply thinking rationally," "all the evidence is that he was capable of thinking in a rational manner and his capacity to make - - to understand what was going to happen and what he was about was - was not impaired." (App.582-583). Spodak testified because Becker was not acting in "some bizarre, out of control way, spouting forth all kinds of - - of strange sounds or anything" he showed organized, rational, and goal directed behavior. (App.587-588).

Taylor spoke in terms of "mental capacity." Taylor noted Becker was not "running around like a chicken with his head cut off," he was "pursuing his prey in a well-organized,

meticulous, methodical manner." (App.606). Taylor stated the fact that Becker was organized is the indication he had sufficient mental capacity to understand the nature and quality of his acts. (App.606-607).

In objecting to the proposed instruction the State maintained to add "deranged or diseased mind," "whatever that means," would insert a causal connection that would be confusing and incorrect. (App.622-623). The failure to include the language linking the diseased or deranged condition of the mind to the inability to know and understand the nature and quality of the acts or distinguish right and wrong in relation to the acts allowed the jury to consider Becker's sole defense using the incorrect standard.

The prosecutor argued the legal standard to apply to Becker. (App.632). The statement is not correct and confused the legal standard. Iowa's standard focuses on the cognitive aspect - knowing, understanding and distinguishing. If the mental illness rendered Becker incapable of

understanding and knowing or distinguishing as required, the jury, with the correct instruction, could find him legally insane.

The prosecutor argued that "if you have sufficient mental capacity to do a lot of things, then how can you not have sufficient mental capacity to understand the nature and quality of your acts, to understand the difference between right and wrong?" (App.635-636). The prosecutor argued Becker had the sufficient mental capacity to: hold a job and train other people; flee from Rogers' residence; convince his parents he was locked out of his apartment; to convince his parents he was better than he had been in a long time; find the keys to the car; break into the gun cabinet; load and practice shooting the gun; drive the car; hide the gun; ask for Thomas instead of Satan; fabricate a reason he was looking for Thomas; follow the directions to Thomas' location; call Thomas "old man;" avoid shooting the students; think about turning himself into police; and know Thomas was his coach and teacher. (App.642-645, 647-660). Therefore, he had the mental capacity to make the decision to kill Thomas. (App.645-646). This argument

confuses the issue. As Rogers stated, "a crazy person doesn't have to be stupid when they're trying to accomplish their delusions." (App.537-538).

The instruction misstated the legal standard by the use of "mental capacity" instead of the statutory language of "diseased or deranged condition of the mind" and by omitting the language of a causal connection. The prosecutor added to the confusion by the questions and argument regarding "mental capacity," which is not synonymous with "diseased or deranged condition of the mind." The incorrect instruction allowed the jury to determine the only fighting issue by using an instruction that was not consistent with Iowa law. The error in instructing the jury caused prejudice to Becker. The case must be remanded for a new trial.

Instruction 10

Becker requested the court instruct the jury, in relevant part, "If you find a verdict of not guilty by reason of insanity, the defendant shall be immediately ordered committed to a state

mental health institute or other appropriate facility for a complete psychiatric evaluation." (App.717).

The court denied Becker's requested instruction. The court determined the Court of Appeals decision in State v. Fetters, 562 N.W.2d 770 (Iowa Ct. App. 1997) was directly on point. (App.626). The court also found the United States Supreme Court's decision in Shannon v. United States persuasive. (App.626-631). The court only instructed the jury as follows: "The duty of the jury is to determine if the Defendant is guilty or not guilty. In the event of a guilty verdict, you have nothing to do with punishment." (App.720). This instruction omitted any reference to the NGI verdict.

The proposed instruction was required by due process and the right to a fair trial guaranteed by Article I, section 9 of the Iowa Constitution. (App.717). Article I, section 9 of the Iowa Constitution guarantees that "no person shall be deprived of life, liberty, or property without due process of law." Iowa Const. art. I, § 9. The Iowa Supreme Court has jealously guarded the right and duty to differ in the interpretation of our

state constitution. State v. Wilkes, 756 N.W.2d 838, 842 n.1 (Iowa 2008).

This Court has demonstrated that the Iowa Constitution provides significant protection of individual rights. State v. Cline, 617 N.W.2d 277, 292-93 (Iowa 2000), rev'd on other grounds State v. Turner, 630 N.W.2d 601 (Iowa 2001); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009); State v. Bruegger, 773 N.W.2d 862, 886 (Iowa 2009); State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010). The application of the Iowa Constitution to the present case will provide Becker its fundamental guarantee of due process.

Iowa cases have held that such an instruction is generally inappropriate and unnecessary. State v. Hamann, 285 N.W.2d 180, 185-86 (1979); State v. Oppelt, 329 N.W.2d 17, 21 (1983); State v. Fetters, 562 N.W.2d 770, 775 (Iowa Ct. App. 1997). There are compelling reasons the jury should be informed of the effect of such a verdict and this line of cases should be overruled.

The court in Hamann found that a trial court did not err in refusing instruction on a defendant's disposition after NGI acquittal. State v. Hamann, 285 N.W.2d at 187. The two principal reasons for the view the jury should not be given such an instruction are (1) such information is irrelevant to the jury's proper function; and (2) the information would invite a compromise verdict. Id. The appellate courts have adhered to that holding. State v. Oppelt, 329 N.W.2d at 17; State v. Fetters, 562 N.W.2d at 776. The Iowa cases and Shannon do not rest on constitutional grounds.

In Shannon, the Supreme Court concluded that language of the Insanity Defense Reform Act of 1984 did not indicate the jury should be instructed regarding the consequences of an NGI verdict. Shannon v. United States, 512 U.S. 573, 580, 114 S.Ct. 2419, 2425, 129 L.Ed.2d 459, ___ (1994). The Court feared that providing the jurors with information concerning the consequences of the verdict would invite them to ponder matters that are not within their province, distract them from their factfinding responsibilities, and create a strong possibility

of confusion. Id. at 579, 114 S. Ct. at 2424, 129 L.Ed.2d at ___.

The Court declined to use its supervisory powers to require the instruction in federal courts finding there was no reason to depart from the assumption that jurors follow their instructions. The Court did not believe that the case where NGI defense was raised was any different than other factual situations. "For example, if the Government fails to meet its burden of proof at trial, our judicial system necessarily assumes that a juror will vote to acquit, rather than convict, even if he is convinced the defendant is highly dangerous and should be incarcerated. We do not believe that the situation involving an NGI verdict should be treated differently." Id. at 585, 114 S.Ct. at 2427, 129 L.Ed.2d at ___.

Justice Stevens maintained that the instruction should be given whenever requested by the defendant. Shannon v. United States, 515 U.S. at 587-93, 114 S. Ct. at 2428-31, 129 L.Ed.2d ___ (Stevens, J., dissenting). Justice Stevens suggested that the Court should not simply focus on the

traditional rule against informing the jury as to the consequences of a NGI verdict, but instead consider the seriousness of the harm to the defendant that may result from refusal of such an instruction, especially in the absence of any countervailing harm that would result from giving the instruction. Id. at 592-93, 115 S.Ct. at 2430, 129 L.Ed.2d ___.

Studies on juror behavior indicate that in insanity cases, jurors are extremely interested in the consequences of an insanity acquittal. Masha Bach, The Not Guilty by Reason of Insanity Verdict: Should Juries Be Informed of Its Consequences?, 16 Whittier L. Rev. 645, 674 (1995). Preliminary findings from a University of Chicago Law School study pointed out the evaluation of the possible consequences of the verdict was one of the most important factors in the jury deliberations. Id. The study revealed that in the absence of a NGI instruction, juries did speculate, and sometimes erred, in their conclusions to the detriment of the defendant. Id. at 674-675. These and similar findings clearly validate Justice Stevens' contention that "[a]s long as significant numbers of

potential jurors believe that an insanity acquittee will be released at once, the instruction serves a critical purpose." Shannon v. United States, 515 U.S. at 592, 114 S.Ct. 2430-31, 129 L.Ed.2d ___ (Stevens, J., dissenting).

The informative instruction may reduce the risk that during deliberations juries would speculate about the NGI consequences rather than on the evidence. Bach, at 681. When a jury is denied access to accurate information, it frequently speculates about the consequences of a NGI verdict and relies on erroneous assumptions. Id. at 682. The concern is that a "preventive" verdict will result because some jurors, mistakenly assuming that the insanity acquittee is immediately released into society, would choose to convict in order to avoid the release of a dangerous individual into the community. Id.

Becker was prejudiced by the failure to instruct the jury of the consequences of a NGI verdict. The jury did not know what would happen in the event of this verdict. (App.672, 725). The court did not inform the jury. (App.672-673).

The question shows the jury was concerned about the outcome of their decision. This concern is understandable because a jury in an insanity case is given significantly more information about the defendant's history, including prior offenses and the failure of mental health treatment, than in an ordinary criminal trial. Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984). In an ordinary criminal trial, prior acts would be excluded as propensity evidence. Iowa R. Evid. 5.404(b); State v. Reynolds, 765 N.W.2d 283, 289 (Iowa 2009). But because the defendant has the burden to prove insanity, he must present evidence that ordinarily would be inadmissible because it would incite the emotions, passions and prejudices of the jury. Or, at a minimum, the court would provide an instruction to minimize the prejudice. State v. Plaster, 424 N.W.2d 226, 232 (Iowa 1988). The consequence instruction is necessary to minimize the unfair danger of a verdict based upon an emotional response. The practice of shielding the jury from the consequences of their verdict is not sound.

Becker's jury heard a sizable amount of evidence that could cause concern for public safety if Becker is not sufficiently monitored. The jury heard of Becker's violent behavior: being arrested for hitting a man (App.211); using a bat to damage the kitchen (App.207); using a bat to terrorize Dwight Rogers, (App.274-275, 278); hitting his mother (App.211-212); and, most significantly, the shooting and stomping of Thomas. (App.18-20, 27-30, 31-32, 37, 38, 40-41, 43-46, 50, 56, 60, 61-62).

No doctor disputed Becker suffered from paranoid schizophrenia. (App.433, 512-513, 570-571, 583, 597-598). The jury heard evidence of the severe mental illness. There is no cure for schizophrenia and medication noncompliance is a major problem. (App.433-436, 499, 514-520). Becker lacked insight into his illness. (App.500).

Schizophrenia is treatable. But Becker's prognosis is uncertain. He needs antipsychotic medications, possibly injections to ensure compliance. People with really severe

paranoid schizophrenia require nursing home care to ensure compliance. (App.522-523).

The jury also heard evidence that Becker had supportive services. (App.281-282, 283-284). However, his disease was not well managed. (App.218, 274-278, 288-290, 292-293, 324-325, 327, 339, 399, 715).

The prosecution noted Becker had the support of his family and community agencies. (App.472-476, 663-666). The prosecutor asserted that a fairly significant factor in the jury's determination was that Becker turned away from the resources he had. (App.663-664).

The prohibition of instructing regarding punishment has historical support. State v. O'Meara, 177 N.W. 563, 569-570 (Iowa 1920). Yet, the penalty for first degree murder is fairly well known by the average citizen. Assuming the jurors did not know of the mandatory life sentence, "they know that if they find a defendant guilty, he will be punished in some fashion. They also know that the more serious the offense of which the defendant is convicted, the more serious punishment the

defendant will receive." State v. Piper, 663 N.W.2d 894, 915 (Iowa 2003). "Jurors are simply not that naive." Id.

The consequence of a NGI verdict is not punitive. In Re Detention of Garren, 620 N.W.2d 280 (Iowa 2000). The jury was put in a position where they had all of the evidence to cause them great safety concerns, but no information as to what would happen if they voted NGI. The instruction requested would have provided that needed information to lessen the risk of a verdict based on an emotional reaction. Cf. State v. Plaster, 424 N.W.2d 226, 232 (Iowa 1988).

The requested instruction was a correct statement of the law. Iowa R. Crim. P. 2.22(8)(b). The entire process need not be explained to the jury in order to provide a fair trial. Iowa R. Crim. P. 2.22(8); State v. Stark, 550 N.W.2d 467, 470 (Iowa 1996). A jury's concern about the NGI consequences is not about how long a person may be confined, but whether the person will be evaluated and treated. The key to such a consequence instruction is to ease the concern that there is no procedure in place to address NGI defendants. The jury then

can focus on whether the defendant is legally responsible or insane.

The failure of the trial court to instruct jurors on the NGI consequences violated Becker's due process rights under the Iowa Constitution. The benefits of the instruction may effectively eliminate unnecessary and dangerous speculation, thus safeguarding the rights of the accused against biases, misconceptions, and undeserved guilty verdicts, and substantially outweigh the professed harm of inviting jurors to consider matters not within their province. The instruction safeguards the rights of the defendant and preserves the fairness and integrity of the judicial process. This Court should adopt the well-reasoned approach in Justice Stevens' dissenting opinion in Shannon by holding that the jury instruction on the dispositional NGI consequences is necessary. To the extent this Court's prior cases hold otherwise, they should be overruled.

If error was not preserved, Becker received ineffective assistance. Strickland v. Washington, 446 U.S. 668, 686, 104

S.Ct. 2052, 2063, 80 L.Ed.2d 674, 692 (1984). The familiar standard is applied. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Counsel breached a duty. There was compelling evidence that defendant was legally insane. Trial counsel's error undermines the confidence in the outcome of the proceedings. Becker should be granted a new trial.

II. THE COURT ERRED IN ORDERING DEFENDANT TO PAY LEGAL ASSISTANCE FEES IN EXCESS OF THE FEE LIMIT.

A. Standard of Review and Preservation of Error.

Becker was ordered to pay restitution for his legal assistance. (App.755). An order in excess of the fee limitation is illegal. Iowa Code § 815.14 (2009); State v. Dudley, 766 N.W.2d 606, 621 (Iowa 2009). The general rule of error preservation is not applicable. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). Review is for errors at law. Iowa R. App. P. 6.907.

B. Discussion.

Becker was charged with a class A felony and the public defender was appointed. (App.1, 2, 727). A defendant is

required to repay the total cost of legal assistance provided. Iowa Code §815.9(3). "Legal assistance" means appointed attorney, transcripts, witness fees, and expenses. Iowa Code §815.9(3).

The court shall order restitution. Iowa Code §§910.2 and 815.9(4). The expense of the public defender shall not exceed the fee limitation. Iowa Code §815.14. Section 815.14 caps the total expense of the public defender. Iowa Code §815.14; State v. Dudley, 766 N.W.2d at 621.

In June 2009, "fee limitation" meant "the fee limitation established by the state public defender for specific classes of cases." Iowa Admin Code. r. 493-7.1 (6/17/09). (App.760). Compare Iowa Admin. Code r. 493-7.1 (12/29/10). (App.763). The administrative code in effect at the time of the appointment of counsel must control the required reimbursement. Cf. State v. Austin, 585 N.W.2d 241, 244 (Iowa 1998).

The fee limitation is $18,000. Iowa Code §13B.4(4)(a); Iowa Admin. Code r. 493-12.6(1). (App.766) The court ordered Becker to reimburse in a total amount of $71,734.62.

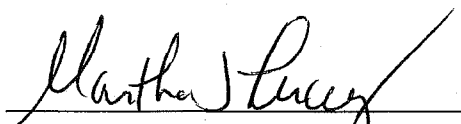
(App.754, 755). The expense of the public defender exceeded the fee limitation. Iowa Code §815.14 (2009); Iowa Admin. Code r. 493-12.6(1). (App.766). Becker cannot be required to repay the State for an amount above the fee limitation. Iowa Code §815.14.

CONCLUSION

Becker respectfully requests this Court reverse his conviction and remand for a new trial. Additionally, Becker requests this Court vacate the legal assistance restitution and remand for an order consistent with Iowa Code §815.14.

Respectfully submitted,

STATE APPELLATE DEFENDER'S OFFICE



MARTHA J. LUCEY No. AT0004837
Assistant Appellate Defender

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Application for Further Review was $ 49.94, and that amount has been paid in full by the Office of the Appellate Defender.

Martha J. Lucey

MARTHA J. LUCEY No. AT0004837
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This application complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) and 6.1103(4) because:

[X] this application contains 5,553 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This application complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[x] this application has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Bookman Old Style, font 14 point.

Martha J Lucey Dated: 9/26/11

MARTHA J. LUCEY No. AT0004837
Assistant Appellate Defender

IN THE COURT OF APPEALS OF IOWA

No. 1-325 / 10-0631
Filed September 8, 2011

FILED
SEP 08 2011
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK DARYL BECKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Butler County, Stephen P. Carroll, Judge.

Appeal from conviction of murder in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Scott A. Brown and Andrew Prosser, Assistant Attorneys General, Gregory M. Lievens, County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Mark Becker was convicted by a jury of first-degree murder for shooting and killing his former football coach, Edward Thomas. Becker, diagnosed as having paranoid schizophrenia, raised an insanity defense, which the jury rejected. Becker contends here that the district court committed error in (1) instructing the jury on his defense of insanity and (2) in fixing restitution. We affirm.

On June 24, 2009, Becker entered the weight room at the Parkersburg school in Parkersburg, Iowa, pulled out a gun, and shot Thomas six times. Thomas fell to the ground, where Becker kicked him and stomped on his head while yelling, "Fuck you old man" and "You stupid son of a bitch." Becker walked out the door screaming, among other things, about Satan and how he wanted Satan to know about Thomas's body and Thomas is Satan and to go get his carcass. Becker then got in his parent's car and drove away.

Shortly thereafter, Butler County Sheriff Jason Scott Johnson stopped Becker after following him to his parents' yard. Becker, who had been holding a gun out of the car window while driving, was told to drop the gun. Becker did and he related to Johnson that Ed was done and he was done with Ed. He told Johnson he would work with the police and the FBI and that he had stomped Thomas for the cops. Becker was taken to the Butler County Sheriff's office where he continued to make similar bizarre statements and exhibit strange behaviors. Thomas died shortly after the shooting.

Becker was charged on June 24, 2009, by trial information with murder in the first degree, in violation of Iowa Code sections 707.1, 707.2(1) and 707.2(2) (2009). On July 13, 2009, Becker filed a notice he intended to rely on defenses of insanity and/or diminished responsibility.

Events Preceding the Murder. Becker was born on June 3, 1985. He is the middle child, having an older brother and a younger brother. At the time of trial he was twenty-six years old. Becker's mother was to testify that Becker was a happy active child, but after he entered high school and became engaged in sports he started to become distant from her and his father. Becker spent his first semester away from home at Wartburg College in Waverly. He called home frequently, indicating that he was depressed and he exhibited signs of deep depression. He left Wartburg after the first semester. Becker went to live with relatives in Orange City for a period of time. Becker next attended Hawkeye Community College. His parents were told by Becker's friends there that he quit eating and would not leave his apartment. His parents took him home. At some point in time he began using illegal drugs. He also went to South Dakota to stay with a brother for a period of time. His brother indicated there would be times when Becker would have an episode and become very agitated. He continued to show signs of mental illness or use of illegal drugs. In September of 2008, he was at his parents' house when he awoke in the night screaming and, among other things, hit doors in the house with a baseball bat. He said people in town, including Coach Thomas, were ruining people, as were leaders from the church

and his parents. He threatened to beat up Coach Thomas and said Thomas was raping him and he could not stand it anymore.[1]

Becker was committed, and at some time during the process he said to Butler County Sheriff Jason Johnson he had a "metaphysical ESP connection with Coach Thomas." Becker was in a psychiatric unit for seven days. Becker's diagnosis was "bipolar disorder." He told a nurse he was hearing his football coach's voice. He was discharged and prescribed medication, which he took sporadically.

In November of 2008, Becker was arrested for committing an assault. He turned on his mother and he was committed for a week and discharged with medication. He was diagnosed with psychotic disorder and found to be exhibiting more intense psychotic, hallucinatory, and paranoid delusional thinking and believed he was receiving "telepathic messages."

In April of 2009, Becker was approved for services, and with help he got an apartment and a job. On June 10, 2009, he went to a church camp. He talked to a distant relative there. The person testified, noting Becker was tense and said the Devil kept messing with him. On the same day, Becker went to the home of a person he had known. He threatened the man who opened the door with a baseball bat and later broke windows in the house with the bat. Becker accused the owner of the house of being Satan. He did not leave until he heard police sirens. Becker was taken to the sheriff's office where he made statements about working for God and going to Satan's house and being hypnotized by a man he called Satan.

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[1] It is not clear whether Thomas was ever warned that Becker had hostility towards him.

In mid-June of 2009, Becker was engaged in a high-speed chase. Apparently he was going seventy miles an hour in a thirty-five mile zone. He had increased his speed to some ninety miles an hour when he struck a deer. He disabled his vehicle. He was taken to a psychiatric unit on a forty-eight hour hold. Sheriff Johnson said the hospital was told when Becker was released he was to be returned to law enforcement. Becker was evaluated on June 21, 2009, and diagnosed with schizophrenia. Again he spoke of Satan and voices. On June 22, he was assigned an attending physician who confirmed the diagnosis of schizophrenia. He was given medication.

On June 23, Becker indicated he wished to stay in the hospital a few more days. Becker's attending physician was glad, as he had been concerned about discharging him, particularly after he learned that Becker had hostility for his parents, and the doctor was concerned about who would pick Becker up on discharge.[2] But later that day Becker asked to be discharged. A nurse who was supervising Becker indicated to Becker's doctor that she felt Becker was better. The doctor, learning that Becker had a community service worker who would pick him up, discharged him. The sheriff was not notified. Becker was to be on medication and apparently the doctor had a call made to an area pharmacy to fill a prescription. Becker's community service worker took Becker to his apartment, but because Becker's key to the apartment was on a keychain in his disabled automobile, the community service worker unlocked the door for Becker. The worker planned to take Becker to get his prescriptions the next morning. Becker

[2] For reasons not clear, the doctor was unaware that the sheriff had indicated he would pick Becker up on discharge.

said the medications were working. The next day Becker called his parents. Becker had shown considerable animosity towards his parents, and the community service worker had indicated it would be better for them not to have contact with Becker in the hospital or just after his release. Becker's parents attempted to contact the community service worker for instructions but were unable to make contact. Not knowing what to do, they picked up their son and took him to their home. He appeared better, happy, and at peace. However, the next morning he took a car belonging to his parents without their permission and drove to Aplington, Iowa. He asked for Thomas at a home in Aplington, although Thomas did not live in Aplington. Becker saw a person on the street and asked about Thomas and was told Thomas was probably at the elementary school in Parkersburg. Becker went to the Parkersburg school and was told Thomas was in the weight room. Shortly thereafter Becker killed Thomas.

INSANITY DEFENSE. Becker submitted jury instructions on his insanity defense that the district court did not give, and he objected to certain instructions on that issue given by the district court. Appellate review of challenges to jury instructions is for correction of errors at law. *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006). The related claim that the district court should have given a defendant's requested instructions is reviewed for an abuse of discretion. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). The district court is not required to give any particular form of an instruction, but the instructions given, when read together, must fairly state the law as applied to the facts of the case. *Id.* at 837-38. We review to determine whether a challenged instruction accurately states

the law and is supported by substantial evidence. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). Error in a particular instruction does not warrant reversal unless the error was prejudicial. *Id.*

Becker was evaluated[3] by four mental health professionals, all of whom agreed Becker has paranoid schizophrenia. Phillip Resnick, a physician specializing in psychiatry of the University Hospitals of Cleveland in Cleveland, Ohio, testified and was asked if he had an opinion to a reasonable degree of medical certainty as to whether Becker was capable of knowing the nature and quality of the act of shooting Thomas. Resnick testified in part:

> A. . . . [I]t is my opinion that due to his diseased mind, Mark Becker was not capable of knowing the nature and quality of the act, the act being the shooting of Coach Thomas.
>
> Q. [E]xplain what you based your opinion on? A. . . . [T]here are four main pieces of evidence which caused me to reach the conclusion that he was not capable of understanding the nature and quality of what he was doing. And the first is that he believed that Coach Thomas was Satan. . . . The second is that he believed that Coach Thomas was not a human being. And if one . . . believes you're killing Satan and not a human being, you do not know the nature and quality of your act. . . . In addition, he did not understand the consequences of shooting him. And there are two aspects here. One is he believed that this would end the supernatural activity and the ESP activity of Coach Thomas . . . all the telepathy, all the suppression of children, all his inability to breathe, his being anally raped, all the things that he believed Coach Thomas was doing he believed would end by shooting Satan. . . . And then, finally, he believed that he would free children. . . . He believed that Coach Thomas was suppressing children and they would be free.

Dan Lorren Rogers, a licensed clinical psychologist in Fort Dodge, Iowa, testified. He was asked if he had an opinion within a reasonable degree of

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[3] It appears that all professionals who testified spent considerable time investigating Becker's mental health.

psychological certainty whether Becker was capable of knowing the nature and quality of his actions. Roger testified:

> A. I do not believe that he was capable of knowing the rightness or wrongness of his behavior.
> Q. What is the basis for that opinion? A. Because of his delusions, he interpreted his behavior, his perceptions, the behavior of other people incorrectly within delusions and within his hallucinations, so he saw himself as accomplishing a good by trying to attack the devil and those people who were raping him. It's obviously crazy thinking, but that's the way his thinking was based. And because of those misperceptions and delusions, he couldn't appreciate what the outcome was going to be. . . .

Michael K. Spodak, M.D., a psychiatrist from Baltimore, Maryland, testified. Asked his opinion as to whether Becker possessed the capability or capacity to understand the nature and quality of his acts on June 24, Spodak testified: "My opinion is that he was capable of knowing and understanding the nature and quality of the acts on that day and for what he was accused of."

He reviewed Becker's actions on the 24th and said:

> A. . . . Each of these things in my assessment of his mental state and his fundamental capacity on that day represented someone who could make choices, who could be rational and reason things out, who could understand when he was going to be shooting this gun and discharging bullets from it, it was intended to kill somebody to stop them from being. . . . Becker had sufficient mental capacity to know and understand the nature and quality of his acts . . .—perhaps he had a moral—he felt, a morally justified reason, but again it is my understanding that's not the test off insanity, whether you felt morally justified. It was whether you're capable or not of knowing the nature and understanding the nature and quality of what you're doing. . . .

Michael Taylor, a medical doctor who specializes in psychiatry and lives in an area southwest of Des Moines, testified that Becker had sufficient mental capacity to know and understand the nature and quality of his acts. When asked whether Becker had the mental capacity to tell the difference between right and

wrong on June 24, 2009, Taylor testified: "[H]e did have sufficient mental capacity to know the difference between right and wrong as it pertained to the shooting of Coach Ed Thomas."

With this expert testimony, evidence concerning the event, and the jury instructions, the jury was left with the difficult task of determining Becker's degree of guilt.[4]

Iowa Code section 701.4 defines "insanity":

> A person shall not be convicted of a crime if at the time the crime is committed the person suffers from such a diseased or deranged condition of the mind as to render the person incapable of knowing the nature and quality of the act the person is committing or incapable of distinguishing between right and wrong in relation to that act. Insanity need not exist for any specific length of time before or after the commission of the alleged criminal act. *If the defense of insanity is raised, the defendant must prove by a preponderance of the evidence that the defendant at the time of the crime suffered from such a deranged condition of the mind as to render the defendant incapable of knowing the nature and quality of the act the defendant was committing or was incapable of distinguishing between right and wrong in relation to the act.*

Iowa Code § 701.4 (2009). (Emphasis added.)

Becker requested the following instruction, which mirrored the language of the statute:

> In order for the defendant to establish he was insane, he must prove by a preponderance of the evidence either of the following:
>
> 1. At the time the crime was committed, the defendant suffered from such a deranged condition of the mind as to render him incapable of knowing the nature and quality of the acts he is accused of; or
>
> 2. At the time the crime was committed, the defendant suffered from such a deranged condition of the mind as to render

[4] The doctrine of criminal responsibility is such that there can be no doubt of the complicated nature of the decision to be made—intertwining moral, legal, and medical judgments. *United States v. Brawner*, 471 F.2d 969, 982 (D.C. Cir. 1972).

him incapable of distinguishing between right and wrong in relation to the act.

The court denied the defendant's request and submitted the following, numbered at trial as Instruction 35,[5] as to the elements of insanity defense:

> In order for the Defendant to establish he was insane, he must prove by a preponderance of the evidence either of the following:
>
> 1. At the time the crime was committed, the Defendant did not have sufficient mental capacity to know and understand the nature and quality of the acts he is accused of; or
>
> 2. At the time the crime was committed, the Defendant did not have the mental capacity to tell the difference between right and wrong as to the acts he is accused of.

In addition, the district court gave the following instruction at trial as Instruction 34:[6]

> The Defendant claims he is not criminally accountable for his conduct by reason of insanity. A person is presumed sane and responsible for his acts.
>
> Not every kind or degree of mental disease or mental disorder will excuse a criminal act. "Insane" or "insanity" means such a diseased or deranged condition of the mind as to make a person either incapable of knowing or understanding the nature and quality of his acts, or incapable of distinguishing right and wrong in relation to the acts.
>
> A person is "sane" if, at the time he committed the criminal act, he had sufficient mental capacity to know and understand the nature and quality of the act and had sufficient mental capacity and reason to distinguish right from wrong as to the particular act.
>
> To know and understand the nature and quality of one's acts means a person is mentally aware of the particular acts being done and the ordinary and probable consequences of them.
>
> Concerning the mental capacity of the Defendant to distinguish between right and wrong, you are not interested in his knowledge of moral judgments, as such, or the rightness or wrongness of things in general. Rather, you must determine the Defendant's knowledge of wrongness so far as the acts charged are concerned. This means mental capacity to know the acts were wrong when he committed them.

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[5] Iowa Criminal Jury Instruction 200.11.

[6] Iowa Criminal Jury Instruction 200.10.

> The Defendant must prove by a "preponderance of the evidence" that he was insane at the time of the commission of the crime.
>
> Preponderance of evidence is evidence that is more convincing than opposing evidence.
>
> Insanity need not exist for any length of time.

Becker contends his requested instruction mirrors Iowa Code section 704.1, while the district court's instructions do not. He points out that the instruction given, Instruction 35, does not include the statutory language "diseased or deranged condition of the mind." Rather, the district court's instruction says the defendant must prove he did not have sufficient "mental capacity." Becker argues the phrases "diseased or deranged condition of the mind" and "mental capacity" are not synonymous. Becker also notes that "mental capacity" was not defined in the jury instructions. Becker points to *State v. Collins*, 305 N.W.2d 434, 437 (Iowa 1981), where the court noted that diminished responsibility may be offered as a defense where an accused, because of a limited capacity to think, is unable to form the necessary criminal intent. But the court pointed out that a defense of diminished responsibility differs from the usual insanity situation where illness confuses or distorts the thinking process. The court noted in its opinion that the distinction between insanity and diminished responsibility was pointed out in 4 J. Yeager and R. Carlson, *Iowa Practice* § 7, at 4 (1979), where it is says:

> It must be recognized that diminished capacity is not a subdivision of the general subject, insanity, but is a different type of mental condition, a defect which affects (the accused's) capacity for thinking, rather than an illness which distorts his thought processes. Diminished capacity is not an absolute defense as is insanity, but is a fact which must be considered by the court or jury in its deliberations as to whether a particular mens rea has been proved.

> Nothing in . . . section (701.4) should affect the diminished capacity defense one way or another.

Collins, 305 N.W.2d 436-37.

Becker contends the language linking the diseased or deranged condition of the mind to the inability to know and understand the nature and quality of the acts or to distinguish right from wrong in relation to the acts allowed the jury to use an incorrect standard in assessing his defense. Becker also argues the instruction given paved the way for the prosecutor to argue that if you have sufficient mental capacity to do many things, then how can you not have sufficient mental capacity to understand the nature and quality of your acts, to understand the difference between right and wrong. He points out that the prosecutor expanded the argument to contend Becker had sufficient mental capacity, among other things, to find keys to his parents' car, break into a gun cabinet, load a gun, drive the car, ask for Thomas instead of Satan, and follow the directions to Thomas's location.

The State argues that the instructions, read together, convey what section 701.4 requires. It argues that the section is about sufficient mental capacity, and the insanity definition tests for mental incapacity. The State argues this is in accord with the central holding of *M'Naghten*.[7] The State also contends that the

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[7] The language of section 701.4 "is a codification of the rule articulated in Britain in *M'Naghten's* case," known as the *M'Naghten* rule, which has been adopted in certain other jurisdictions as the legal standard where insanity is alleged as a defense. *See* 4A B. John Burns, *Iowa Practice Series: Criminal Procedure* § 11:2, at 173 (2006) (citing *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 10 Cl. & F. 200); *see also State v. Craney*, 347 N.W.2d 668, 679 (Iowa 1984).

The Iowa Supreme Court first adopted the *M'Naghten* rule as a common-law rule in *State v. Harkness*, 160 N.W.2d 324, 330 (Iowa 1968), and the court continued to follow the rule. *See, e.g., State v. Lass*, 228 N.W.2d 758, 768-69 (Iowa 1975).

instructions given by the district court contain a common encapsulation of the *M'Naghten* test and are similar to instructions used in *Alexander v. United States*, 380 F.2d 33, 39 (8th Cir. 1967), and *Pope v. United States*, 370 F2d 710, 732 n.6 (8th Cir. 1967).

Becker, in his reply brief, tells us that the *M'Naghten* case does not mention mental capacity. Becker says that Lord Chief Justice Tindall in *M'Naghten* said

> that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. . . . 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; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

M'Naghten's Case, (1843) 8 Eng. Rep. 718, 722-23, 10 Cl. & F. 200, 210-11.

While other courts' discussions of the *M'Naghten* rule are instructive, our first responsibility is to determine what the Iowa Legislature said in 1976 when it enacted Iowa Code section 701.4. In doing so, the only conclusion we can reach is that the test to prove insanity required a showing the person "suffers from such a diseased or deranged condition of the mind as to render the person incapable

of knowing . . . ." Instruction 35 did not use this language.[8] We recognize that a jury instruction need not contain precisely the language of the statute, but the instruction must be a correct statement of the law. *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995); *State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994). We agree with Becker that "diseased mind" and "mental capacity" are not synonymous. The instruction given was a uniform instruction and we are instructed to be reluctant to disapprove of uniform jury instructions. *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). However, if an instruction is faulty we should do so. *See Monk*, 514 N.W.2d at 450; *State v. McMullin*, 421 N.W.2d 517, 518-19 (Iowa 1988). We cannot say Instruction 35 comported with the statute and the failure to use the words of the statute in Instruction 35 may have prejudiced Becker's defense. There was evidence from Dr. Resnick that due to his diseased mind Becker was not capable of knowing the nature and quality of the act of shooting Thomas. Indeed, he believed shooting was the right thing to do, to aid the community. Furthermore, the State was able to utilize Instruction 35 in arguing that Becker had the capacity to complete a number of acts and that he did not lack capacity. Furthermore, Becker's requested instruction should have been given as it correctly stated the law.

Having said this, we need to address the State's argument we should not look at Instruction 35 in isolation, but should consider it with other instructions given—most particularly Instruction 34, which contains the language that "insane" means "a diseased or deranged condition of the mind that robs him of the ability to know what he is doing is wrong or the nature and quality of his acts." We

[8] Becker's counsel tells us no Iowa cases have addressed this uniform instruction.

believe that in considering the two instructions together, the jury was properly instructed and was given the opportunity to address whether Becker had a diseased or deranged condition that robbed him of the ability to know what he was doing was wrong. We affirm on this issue.

CONSQUENCES OF AN INSANITY VERDICT. Becker contends the district court erred in failing to give his requested instructions on the consequences of a not-guilty-by-reason-of-insanity verdict. Becker requested the instruction twice. He initially offered it as a requested instruction. He asked the court to instruct the jury that:

> Punishment is not for the jury. The duty of the jury is to determine if the defendant is guilty or not guilty.
>
> In the event of a guilty verdict, you have nothing to do with the punishment.
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> If you find a verdict of not guilty by reason of insanity, the defendant shall be immediately ordered committed to a state mental health institution or other appropriate facility for complete psychiatric evaluation.

The district court rejected Becker's requested instruction. The court did instruct the jury that the duty of the jury is to determine if the defendant is guilty or not guilty and, in the event of a guilty verdict, the jury has nothing to do with punishment.

The issue was raised a second time. After the jury began their deliberations at 11:55 a.m. on February 26, 2009,[9] they sent the following

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[9] The jury began deliberations at 12:25 p.m. on February 24, 2010. On February 25, at about 10:00 a.m. the jury sent a note to the judge requesting to hear certain audio and video excerpts of Becker's interview with Chris Calloway. At 3:00 p.m. February 25, the jury sent a note to the judge stating, "We are at a stalemate at the present with much discussion. Can we go home and sleep on our decision? Start fresh tomorrow a.m.?" This note was stamped filed at 3:26 p.m. The jury was excused for the night. On February 26, at 11:55 a.m. the jury sent a note to the judge asking "What would happen

question to the judge: "Judge, what would happen to Becker if we find him insane?" The district court answered:

> You need not concern yourself with the potential consequences of a verdict of not guilty by reason of insanity.
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> Please refer to instruction 10.[10] You must decide whether he is guilty or not guilty, and if you decide he is guilty, you must then decide the issue of insanity. In the event of a guilty verdict or a verdict of not guilty by reason of insanity, you have nothing to do with the consequences. Those are issues for the court not the jury.

Becker contends again at this point his requested instruction should have been given.[11] Becker contends the instruction was required by due process and the right to a fair trial guaranteed by Article I, Section 9 of the Iowa Constitution. This section guarantees that "no person shall be deprived of life, liberty, or property without due process of law."

The State contends that the Iowa Supreme Court continues to hold that the jury has nothing to do with punishment and their one function is to seek the truth. The State notes as recently as the case of *State v. Hanes*, 790 N.W.2d. 545, 549 (Iowa 2010), the court has reaffirmed this view.

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to Mark Becker if we find him insane?" At 12:35 p.m. the judge had a conference with the attorneys and Becker. Jury was instructed that they would have nothing to do with the punishment at 12:38 p.m. The question was stamped filed at 12:28 p.m. On February 26, at 3:20 p.m. the jury sent a note to the judge that states "We have voted four times today and are still deadlocked. (Same vote ratio). How shall we proceed?" At 3:45 p.m. a conference was held on this question and the jury was told to separate for the weekend and reconvene on Monday morning at 10 a.m. when the judge would answer their question. The jury was adjourned at 4:10 p.m. The question was stamped filed at 3:41 p.m. On March 1, at 10:34 a.m. the jury was instructed to reread Instruction 36 and continue with deliberations. The jury was adjourned at 4:30 p.m. On March 2, the jury reconvened at 9:00 a.m. At 10:48 the jury verdict was read in court. It is unclear whether the verdict was reached the night before or the morning of March 2.

[10] This instruction provided: "[T]he duty of the jury is to determine if the defendant is guilty or not guilty. In the event of a guilty verdict, you have nothing to do with the punishment."

[11] Becker contends if his trial attorney did not correctly preserve error on this issue that the attorney was ineffective.

Becker seeks support for his position in Justice Stevens's dissent[12] to *Shannon v. United States*, 512 U.S. 573, 588, 114 S. Ct. 2419, 2422, 129 L. Ed. 2d 459, 472 (1994). In *Shannon* the majority of the court emphasized the principle that within the judicial system there is a basic division of labor between judge and jury that discourages jurors from considering the consequences of their verdict. *Id.* at 579, 114 S. Ct. at 2424, 129 L. Ed. 2d at 466. The jurors are the finders of fact; the judge, on the other hand, is a finder of the law and imposes the sentence upon the defendant after the jury returns a guilty verdict. *Id.* The court in *Shannon* feared that providing the jurors with information concerning the consequences of the verdict would invite them to ponder matters that were not within their province, distracting them from fact-finding responsibilities and creating a strong possibility of confusion. *Id.* at 579, 114 S. Ct. at 2424, 129 L. Ed. 2d at 466-67.

Justice Stevens's dissent takes the position there is no reason to keep this information from the jury and every reason to make them aware of it. *Id.* at 593, 114 S. Ct. at 2431, 129 L. Ed. 2d at 475. He maintained that the instruction should be given whenever requested by the defendant. *Id.* at 590-91, 114 S. Ct. at 2430, 129 L. Ed. 2d at 473-74. Stevens suggested the court should not simply focus on the traditional rules against informing the jury as to the consequences of not-guilty-by-reason-of-insanity verdict, but instead should consider the seriousness of the harm to the defendant that might result from a refusal to give such an instruction, especially in the absence of any countervailing harm that would result from giving the instruction. *Id.* at 591-92, 114 S. Ct. at 2430, 129

[12] Blackman joined the dissent.

L. Ed. 2d at 474. Stevens noted that at the time his dissent was written an increasing number of states that had considered the question endorsed use of the instruction, as had the American Bar Association.[13] *Id.* at 592, 114 S. Ct. at 2431, 129 L. Ed. 2d at 474-75.

Becker notes that numerous studies on juror behavior indicate that in cases where an insanity defense is raised jurors are extremely interested in the consequences of an insanity acquittal in support of this position. Marcia Bach, *The Not Guilty by Reason of Insanity Verdict: Should Juries Be informed of Its Consequences?*, 16 Whittier L. Rev. 645, 647 (1995). He further points out that the Bach article noted the researchers indicated that not a single jury studied refrained from considering what would happen to the defendant as a precondition for arriving at a decision concerning his guilt or innocence, sanity, or insanity; and more importantly, the study revealed that in the absence of a not-guilty-by-reason-of-insanity instruction, juries did speculate, and sometimes erred, in their conclusion to the detriment of the defendant. *Id.* at 674-75.

The State acknowledges that critics (including law students and commentators) of the holding in *Shannon* are not hard to find, noting that LaFave finds its reasons "questionable." 1 LaFave *Substantive Criminal Law* § 8.3(d) at 607. But the State argues this does not raise a constitutional right to require Becker's instruction.

Justice Stevens's dissent has appeal, particularly here where the jury asked the specific question after lengthy deliberations, the focal issue in the case was whether or not Becker proved his insanity defense, and there was

[13] ABA Criminal Justice Mental Health Standards § 7-6.8 (1989).

substantial evidence which, if believed, would support a finding that Becker was not guilty by reason of insanity.

However, Iowa cases have held generally that when the defendant requests such an instruction to be given to the jury before they begin deliberation, it is generally inappropriate and unnecessary. *See State v. Oppelt*, 329 N.W.2d 17, 21 (1983); *State v. Hamann*, 285 N.W.2d 180, 185-96 (1979); *State v. Fetters*, 562 N.W.2d 770, 775 (Iowa Ct. App. 1997). We find these decisions controlling. We affirm on this issue.

LEGAL ASSISTANCE FEES. The defendant contends the court erred in the amount of restitution ordered for reimbursement of legal assistance. The court ordered defendant to pay $16,600 for attorney fees, $53,709.82 for expert fees, and $824.80 for miscellaneous expenses, for a total of $71,734.62. Defendant contends this exceeds the allowable fee for a Class A felony, which the State Public Defender has set at $18,000. *See* Iowa Code § 13B.4(4)(a); Iowa Admin. Code r. 493-12.6(1). He contends he cannot be required to reimburse the State for legal assistance in amount exceeding the fee limitation. Iowa Code § 815.4 (providing "the expense of the public defender shall not exceed the fee limitations established in section 13B.4"). He argues section 815.14 "caps the total expense of the public defender, not only the attorney fees."

The State contends the court did not err in the restitution ordered because the Iowa Code separates attorney fees and expert fees. Section 910.2 provides for restitution according to section 815.9. Section 815.9 lumps together all of the costs of "legal assistance" to include "not only an appointed attorney, but also

transcripts, witness fees, expenses, and any other goods or services required by law to be provided to an indigent person." Iowa Code § 815.9(3).

The fee limitations set by the State Public Defender in Iowa Administrative Code rule 493-12.6 are for "for combined attorney time and paralegal time." Section 815.14, entitled "fee for public defender" provides that the "expense of the public defender" is to be calculated at the "same hourly rate" as paid attorneys in 815.7, but not to exceed the fee limitations from section 13B.4. Section 815.7 sets the hourly rate for court-appointed attorneys. Sections 815.3-6 provide for compensation to various types of witnesses. It is clear the statutory scheme in chapter 815 separates hourly attorney fees, whether for public defenders or court-appointed private attorneys, from costs for witnesses. In *State v. Dudley*, 766 N.W.2d 606, 621-22 (Iowa 2009), the supreme court considered whether a defendant could be required to reimburse the cost of a court-appointed private attorney that exceeded the fee limitations set by the State Public Defender. The court concluded it was a violation of equal protection of the law to do so. *Dudley*, 766 N.W.2d at 622. In *Dudley*, however, the court was concerned with attorney fees as described in chapter 815 and the fee limitations from section 13B.3 and the administrative code. The issue of costs for witnesses was not addressed.

In the case before us, the court assessed attorney fees that did not exceed the fee limitations. *See* Iowa Admin. Code r. 493-12.6. In addition, the court assessed certain witness costs. None of the sections dealing with witness costs, section 815.3-6, set any limitation on those costs. Those costs are

reimbursed under Iowa Administrative Code rule 493-12.7 and are separate from the attorney fee limitations in rule 493-12.6. We affirm the district court's order for restitution.

AFFIRMED.