

tor can direct the defendant to contact his attorney to address any concerns or questions.

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## Instructions to Jury With Regard to Intoxication and Insanity Defense

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### First-Degree Murder Conviction Reversed for Retrial Because of Misleading Instructions Given to Jurors With Regard to Criminal Responsibility

In *Commonwealth v. Berry*, 931 N.E.2d 972 (Mass. 2010), the Massachusetts Supreme Judicial Court (SJC) held that the jury instructions about criminal responsibility given at trial were misleading. The court reinforced the notion of lack of criminal responsibility, whereby consumption of alcohol does not negate the evidence of an active mental illness at the time of an offense, so long as the mental illness can be shown to be directly linked to the requirements for this finding. The court further found the need for additional jury instruction regarding the relationship of criminal responsibility to the defendant's knowledge about her negative reaction to alcohol.

#### *Facts of the Case*

In August 2002, Sheila Berry consumed three glasses of rum with a friend at dinner. She walked to a nearby market and became involved in a discussion with three women, one of whom was arguing with her boyfriend on the phone. During the conversation, Ms. Berry said that she wanted to blow up the Brockton police station and the train that passed underneath it. She also laid claim to the Oklahoma City Federal Building explosion and the destruction of the World Trade Center in New York.

When the boyfriend of one of the women arrived, Ms. Berry became furious after he starting to yell and spit at her. She attempted to throw beer bottles at him but was unsuccessful. An acquaintance of Ms. Berry's, Admilson Goncalves, arrived and attempted to calm her by putting his arm around her. She pushed him away and rode his bike back to her friend's apartment.

Her friend, Deanna Marshall, found Mr. Goncalves attempting to restrain Ms. Berry outside her apartment. Ms. Berry appeared excessively agitated. Having never seen her in this state before, Ms. Marshall told her to go to the back of the house. Although she initially went, she later returned with a cinder block and violently hit Mr. Goncalves with it until the cinder block broke into pieces, killing him. Despite the use of pepper spray at the scene, three police officers had to hold her down to take the handcuffs off at the station.

Ms. Berry was sent to Taunton State Hospital in Massachusetts for an evaluation of her mental state. She was found incompetent to stand trial in September 2002 and again in March 2003, for behavior that was described as delusional, paranoid, and erratic at times. She continued to show agitation and paranoia, even after the implementation of court-ordered medications in March 2003. In April 2003, she had a longstanding cerebellar tumor removed, and her behavior improved markedly. She was later found competent to stand trial.

At her trial, Ms. Berry pleaded insanity, given her history of several psychiatric hospitalizations, her substance abuse history, and the effects of the cerebellar tumor that was discovered in 1994. In what would later become the critical issue during trial, the judge gave specific instructions to the jury with regard to criminal responsibility, based on the Model Jury Instructions on Homicide 52-53 (1999):

Lack of criminal responsibility is not present when a defendant with a mental disease or defect knows, or, in the circumstances has reason to know, that consumption of a substance will cause [her] to be substantially incapable of either appreciating the wrongfulness of [her] conduct or conforming [her] conduct to the requirement of the law (or both). In deciding what the defendant had reason to know about consequences of [her] consumption of a substance, you should consider the question solely from the defendant's point of view, including her mental capacity [*Berry*, p 980].

During her trial, Ms. Berry testified that she could "feel the effects of alcohol" and that alcohol "made [her] laugh." Five expert witnesses evaluated her, all

of whom diagnosed either bipolar disorder or schizoaffective disorder, as well as an assortment of contributing illnesses, including but not limited to traumatic brain injury and posttraumatic stress disorder (PTSD), as well as the cerebellar tumor. All of the experts attempted to tease out the contributions of her mental illness, substance use, and neuropsychiatric deficits at the time of the incident. Ultimately, three experts (including one retained by the prosecution) opined that she was not able to conform her conduct to the requirements of the law because of mental illness. Not at issue was the first prong of the insanity test, derived from *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967), that the defendant lacked the substantial capacity to appreciate the criminality or wrongfulness of conduct.

At the time that this instruction was given, the defense did not object. Ms. Berry was later convicted of first-degree murder on a theory of extreme atrocity or cruelty. She appealed on the basis of the instruction given to the jury, since it did not properly inform the jury of the correct laws governing criminal responsibility, both with regard to the situation in which alcohol may activate an underlying mental disease or defect and with regard to the defendant's lack of knowledge of the effects of voluntary consumption of alcohol on her future behavior.

#### Ruling and Reasoning

The Supreme Judicial Court (SJC) of Massachusetts ruled in favor of the defense, remanding the case for a new trial. They argued that the instructions given to the jury did not correctly interpret the laws for criminal responsibility derived from *Commonwealth v. McHoul*—namely, that as a result of mental disease or defect, the defendant lacked the substantial capacity to appreciate the wrongfulness of her actions or to conform her conduct to the requirements of the law. Instead, the instructions blended the question of criminal responsibility with voluntary intoxication, the latter of which by itself, does not allow for an insanity defense (see *Commonwealth v. Sheehan*, 383 N.E.2d 1115 (Mass. 1978)). Specifically the model instruction that was adopted in 1999 blended several cases. In *Commonwealth v. McGrath*, 264 N.E.2d 667 (Mass. 1970), it was the added insult of alcohol intoxication, not simply the defendant's underlying mental illness, that left him unable to conform his behavior to the law. Three other cases, *Common-*

*wealth v. Brennan*, 504 N.E.2d 612 (Mass. 1987); *Commonwealth v. Shelley*, 409 N.E.2d 732 (Mass. 1980); and *Commonwealth v. Herd*, 604 N.E.2d 1294 (Mass. 1992), all helped to establish that lack of criminal responsibility held if voluntary consumption of alcohol activated a latent mental illness, unless the defendant knew that the drug would have this effect. According to the SJC, the circumstances in the *Berry* case were not captured in the model instruction, since they represented a unique set of circumstances where the defendant's "existing and active mental disease or defect reached the level of lack of criminal responsibility separate from the consumption of alcohol" (*Berry*, p 983).

The SJC decided that, on the basis of the instructions, the jurors may have come to the conclusion that even if mental illness had rendered Ms. Berry not able to conform to the law, any consumption of alcohol would negate this defense. They referenced the Model Penal Code from the American Law Institute:

Certainly one who lacks the capacity described in Section 4.01 [to appreciate wrongfulness of his actions or conform his conduct to the requirement of the law] because of mental disease ought not to be limited in the presentation of his defense simply because he is intoxicated as well as insane at the time of acting [American Law Institute, Model Penal Code and Commentaries s. 2.08 comment 2, at 361 (1985)].

As a result, the court held that the jury instructions "created a substantial likelihood of a miscarriage of justice."

Where the Commonwealth offers evidence that the defendant knew or had reason to know of the effects and potential consequences of alcohol or drugs on her active or latent mental illness, additional instruction negating lack of criminal responsibility must be added. However, the SJC also held that barring such evidence, the Commonwealth did not show that Ms. Berry had any knowledge about the ill effects of her alcohol consumption on her behavior. The only direct evidence presented was the defendant's own testimony that alcohol "made [her] laugh."

As a result, the SJC reversed the conviction for first-degree murder and granted Ms. Berry a new trial.

#### Discussion

The determination of criminal responsibility in cases that involve contributions from psychiatric

problems and substance abuse are complex. In the *Berry* trial, the instructions provided to jurors suggested that lack of criminal responsibility can be found when there is voluntary intoxication that is additive to an active mental illness or that exacerbates a latent mental illness, but only when a mentally ill defendant does not know that intoxication will cause the detrimental and consequential behavior. Although five experts opined on the matter of criminal responsibility, given the evidence presented, it is unclear what level of inquiry was pursued about Ms. Berry's knowledge on this matter. Moreover, the prosecution failed to prove her knowledge about her negative reaction to alcohol, which could have altered the jury's deliberations related to her criminal responsibility.

The SJC held that the establishment of an active mental illness at the time of an offense is a critical feature for a defense showing lack of criminal responsibility and one that cannot be overlooked, even if the defendant has also consumed alcohol. In the *Berry* case, all experts diagnosed a major mental illness (bipolar or schizoaffective disorder), and all but one believed that the mental illness was active at the time of the defendant's arrest, separate from the consumption of alcohol at the time. The SJC ruling highlights the importance of clear jury instructions, especially when the crime is of a violent nature, given the complex interplay of substances and mental illness.

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## Expert Testimony on Extreme Emotional Disturbance in Criminal Proceedings

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## Kentucky Supreme Court's Refusal to Admit Expert Testimony Regarding Extreme Emotional Disturbance (EED) or EED Instruction, When Evidence Was Based Solely on the Defendant's Out-of-Court Statements, Did Not Compel the Defendant's Testimony in Violation of His Fifth Amendment Rights

Mark Padgett was convicted in the Campbell Circuit Court of criminal attempt to commit first-degree manslaughter, second-degree assault, and violation of an emergency protective order. In *Padgett v. Commonwealth of Kentucky*, 312 S.W.3d 336 (Ky. 2010), Mr. Padgett appealed to the Supreme Court of Kentucky, raising five issues, most notably that he was compelled to incriminate himself to raise a defense of extreme emotional disturbance (EED).

### Facts of the Case

On June 29, 2007, Mr. Padgett searched for his two teenage sons in Fort Thomas, Kentucky. Unable to locate either by phone, he drove to places they frequented, searching for them. After giving up his search to return home, he noticed a nearby church hosting a festival. He parked his truck and looked for friends. He heard one of his teenage sons call for him. He testified that he observed his son carelessly cross the street in front of oncoming traffic and that he yelled at his son to stop as he watched a car pass in front of him. Mr. Padgett's son told him that his mother, Susan Padgett, was supervising him and that she was across the street in a laundromat. Following their divorce, Ms. Padgett had an emergency protective order issued against Mr. Padgett, requiring him to stay 500 feet away from her.

Intending to avoid violating the protective order, Mr. Padgett returned to his truck to leave. He testified that he then again saw his son cross the street in front of oncoming traffic, causing him to become extremely upset. He testified that his eyes were blinking, he was having trouble breathing, and he could not feel the ground beneath his feet. Apparently, to show Ms. Padgett that her failure to supervise their son was unacceptable, he parked his truck near the laundromat, grabbed a rifle from the back of his truck, and went inside to scare her. Mr. Padgett testified that he left his truck's motor running so that he could easily flee after he had frightened her. Inside the laundromat, a fight ensued between the two that led to a struggle over the gun. Mr. Padgett testified that he never intentionally hit Ms. Padgett but that