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INSANITY PLEA IS HARD SELL IN COURT

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If a police officer had been standing there, would Susan Vaughan Smith have sent her two small children, strapped inside a car, into the murky water of a lake near Union?

If the answer is yes -- Smith would have done it anyway -- she could be insane under South Carolina law and not guilty of the murders of her sons, 14- month-old Alex and 3-year-old Michael.

The theory is that anyone who would commit a serious crime right under an officer's nose, apparently oblivious to the significance of the uniform and badge, would have to be crazy. If the answer is that Smith would not have done it with an officer watching, that would show she knew right from wrong. She couldn't be legally insane.

That's a simple explanation of a complicated law. But that's how hard it is to prove in court here that someone is not legally responsible, because they're insane, for doing a terrible thing.

Legal experts agree that claiming insanity may be the only logical option for Smith, who for nine days tearfully begged the nation to help find the children she already knew were dead. But they concede that South Carolina juries hardly ever buy an insanity defense to a serious crime.

"I could probably count on my fingers the murder cases where the defendant was found not guilty by reason of insanity," said Columbia attorney **Jack Swerling**, one of South Carolina's top defense lawyers. "I wouldn't need both hands."

In fact, when **Swerling** started looking for South Carolina cases to count, he found only one -- ax murderer Randall Huiett, who split a stranger's skull in 1978 and proudly told police he had just slain Cain.

But Huiett's case technically doesn't qualify for the list, either. A jury convicted the diagnosed paranoid schizophrenic after a judge warned that an insanity verdict would just put Huiett back out on the street in no time. After the state Supreme Court threw out the guilty verdict, Huiett was found incompetent to be tried again, and a different judge found him not guilty by reason of insanity.

Smith's attorney, David Bruck, represented Huiett. Bruck said there's no way to tell what a jury would have done in a new trial.

Problems for Smith

Smith's biggest problem is the nine-day lie, said Vincent Bugliosi, the California lawyer who rose to national prominence when he prosecuted Charles Manson and his "family" for the Tate-LaBianca murders.

"Based on what I've read so far in the newspapers, it does not indicate that she would qualify (for an insanity defense)," Bugliosi said. "A person who is legally insane would take no steps to cover up, because in their mind, what they've done is not wrong."

An insane killer would probably say God ordered the crime, and the bodies were resting peacefully at the bottom of the lake, Bugliosi said.

Another problem for Smith is her confession, in which she described running away from the lake screaming and crying, "Oh, God, what have I done?"

An insane person, under South Carolina law, would not ask that question, Bugliosi said.

State court administrators have no statistics to show how often the insanity defense has been tried and succeeded or failed. But successes are so rare that the state Department of Mental Health is treating only 68 people in a special program for patients acquitted of crimes because they were insane.

In the three years that the program has existed, all of those entering it had committed relatively minor crimes and were found not guilty because of their mental condition. Usually no jury was involved, but a judge made that decision.

Insanity is just one defense that Bruck has been quoted as saying he's considering. He said, "I'm considering everything."

"I thought I was being nonspecific in that answer," Bruck said. "It could have meant I was considering the Elvis-did-it defense."

But the insanity defense has attracted the most speculation nationwide -- although Bruck told The State, in talking about a different case he's handling, that he knows of no instance in the past 10 years in which a South Carolina jury found a defendant not guilty by reason of insanity.

Prosecutors are pushing Bruck to make a hard decision fast -- a decision that legal experts suggest would likely depend on whether the death penalty is sought against Smith.

While 16th Circuit Solicitor Tommy Pope is not announcing until after Jan. 1 whether he'll ask for death, he wants the court to make Bruck decide his strategy now.

There is a hitch in the insanity defense that becomes deadly important if the death penalty is sought.

If Bruck attempts to convince a jury that Smith is not guilty by reason of insanity, the judge is required by law to tell jurors there is another option -- that they could find her guilty but mentally ill.

What the judge is not required to tell the jury is this: If she's not guilty by reason of insanity, she would go to a mental hospital for treatment, and it would not be easy for her to get out.

If she's guilty but mentally ill, she would be sentenced like anybody else. And, in South Carolina, that means she could be sentenced to death, even if the jury thinks she had to be out of her mind to do what she admits she did.

The odds are so poor that many legal experts say Smith might be better off pleading guilty -- if she could be reasonably assured of a life sentence instead of death in the electric chair.

"There is no question that the death penalty is the biggest wrinkle in the fabric," said F. Lee Bailey, the Boston attorney who built his career on high-profile cases like Smith's.

"If the death penalty is involved, a lawyer does the best he can to keep his client alive," said North Carolina attorney Tom Manning, who also has handled high-profile murder cases. "That becomes the bottom line."
High stakes, high hurdles

The standard for insanity in South Carolina is the M'Naghten Rule, which legal experts say is as hard to comply with as it is to spell.

It's named for a man who tried to assassinate the prime minister of England in 1843 because of a paranoid delusion that the prime minister was trying to kill him. From that case, the British courts developed a legal test that remains in effect in some places, including this state, 150 years later.

The police officer-at-your-side is one way to explain it. Under M'Naghten, the defense would have to show that Smith had an identifiable mental defect that caused her not to know that rolling her car into the water would cause the children inside it to drown.

Or, if she did know that, she would have to show that she did not know it was wrong.

Defense attorneys struggle with the ancient M'Naghten Rule, **Swerling** said. "It does not take into consideration degrees of mental illness that are coming to light and new understandings about mental illness."

The only change South Carolina's Legislature has made is to allow the verdict of guilty but mentally ill. The jury can consider whether a person's mental disease or defect destroyed his capacity to distinguish moral or legal right from wrong.

That test makes it easier to recognize that a defendant is mentally ill, but only by sending him to prison, where he may be part of the general inmate population and receive only minimal psychiatric help.

Some defense attorneys believe that providing a way to punish people, even if they suffer from severe mental illness, has only made it harder to win an insanity defense and get hospital treatment for a client who needs it.

Although Bruck won't say how that might apply in the Smith case, those are his arguments about another case that is pending before the U.S. Supreme Court.

Juries don't buy it

There are other reasons that it's hard to win an insanity defense, said Charleston attorney Gedney M. Howe, who commands some of the state's highest fees because he usually wins hard cases.

"It is difficult to get juries to go along with it because the standard is a difficult standard," Howe said. "Jurors want to hold people responsible for what they do. We all do. It's a tenet of society. To claim you are not guilty by reason of insanity, you have to admit you did it. You have to go before 12 people who want to hold you responsible and say you did it.

"In cases like this, insanity is not a justification but an explanation. Juries won't buy it unless the proof is extreme. The test is knowing right from wrong, not being filled with anger, filled with fear, or responding to an irresistible impulse. Immense pressure, confusion, being distraught -- those are human frailties, but they don't make you legally insane."

Howe said the insanity defense makes sense only when little or nothing else applies. "If the evidence is so strong that your client did it, you can't say somebody else did it, and you can't claim the sudden heat of passion, which would take out the element of malice and make the crime voluntary manslaughter as opposed to murder."

Juries usually place great weight on the perspective of law enforcement and prosecutors when confronted with heinous crimes, said 11th Circuit Solicitor Donald V. Myers, who likes to counter medical witnesses with plain folks.

"You can get some doctors to say a person is insane and some doctors to say he's not," Myers said. "I bring in common, ordinary people who are very familiar with the defendant. I think jurors give them more credibility, and common sense prevails."

Myers prosecuted Death Row defendant Larry Gene Bell, whose mental state was an issue. Bell sang hymns in the courtroom, proposed marriage to his victim's sister in front of the jury and starred in a jail-cell video in which he ducked imaginary fecal missiles.

Swerling characterized those behaviors as indicative of mental imbalance. Myers characterized them as an act to convince the court.

Bailey said perceptions are a major part of the dance that lawyers do in front of juries. And in cases where irrational acts are at issue, juries are skeptical.

"Juries often don't have an adequate understanding of depression and how serious it can be," Bailey said. "Untreated and unmitigated, depression will lead to suicide. But tell a jury that the defendant was suicidal, and it can backfire."

His favorite example is ritzy headmistress Jean Harris, who shot her lover, "Scarsdale diet" doctor Herman Tarnower.

"Jean Harris said she tried to commit suicide and shot at herself four times. She just hit Dr. Tarnower instead."

Smith's confession could have the same result, Bailey said. In it, she said she meant to kill

herself and the boys, but let the car go into the water without her.

For South Carolina juries, the bottom line is worry.

"If there's a chance that someone who committed a heinous crime could ever be back on the streets, if there's a chance they would do it again, juries won't take the risk," said Columbia attorney John Delgado, who helped with Bell's defense. "They'll take the option that makes them feel safest."