

CANADA / JUDGMENT

## R. v. Palmer

2025 BCSC 1822

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 1822 R. v. Palmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Palmer,

2025 BCSC 1822

Date: 20250625

Docket: 109220-1

Registry: Kamloops

Rex

v.

Michael Wayne Palmer

Restriction on Publication: Pursuant to 648(1) C.C.C.

Before: The Honourable Justice Greenwood

Oral Ruling: NCRMD and mens rea

Counsel for the Crown:

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Place and Date of Trial:

Kamloops, B.C.

June 2-6, 9-13,

16-17, 20, 23-27

and 30, 2025

July 1-3, 2025

Place and Date of Judgment:

Kamloops, B.C.

### June 25, 2025

- [1] THE COURT: Mr. Palmer is charged with second degree murder and three counts of attempted murder, all in relation to an alleged stabbing spree that took place on March 28, 2020, on the second floor of an apartment building in Kamloops.
- [2] This is a midtrial ruling with respect to how the issue of NCRMD and mens rea should be handled in the context of a two-stage trial in front of a jury.
- [3] Counsel provided submissions on the following three issues:
- 1) Based on how the evidence has unfolded, has the issue of NCRMD arisen in the first stage of the trial;
  - 2) If not, could defence counsel's submissions put Mr. Palmer's mental capacity in issue such that:
    - a) the Crown could lead evidence going to NCRMD at the first stage; and
    - b) NCRMD would be left with the jury; and
  - 3) If defence counsel argues mens rea in whole or in part based on evidence of mental impairment that is already before the jury, is it open to the defence at a second-stage hearing to invite the jury to render a verdict under s. 16 of the Criminal Code that is inconsistent with the jury's conclusion on mens rea, based on expert evidence or new evidence in relation to mental disorder.
- [4] The Crown case is now closed and the defence will shortly be called upon to elect whether it is presenting a defence.
- [5] Mr. Palmer has been diagnosed in the past with schizophrenia and for an extended period was found unfit to stand trial but has since been found fit. However, there is no expert evidence or formal evidence of a mental disorder currently before the jury.

- [6] Counsel for the defence have made it clear in the pretrial proceedings and in the trial itself that they are not raising a defence of NCRMD in the first stage of the trial before the jury, but they reserve the right to call an NCRMD defence at the second stage of the trial, as contemplated in *R. v. Swain*, [1991] 1 S.C.R. 933. I am advised that they have obtained an expert report in order to present such a defence, but the content of that report is unknown.
- [7] The Crown may also raise NCRMD at a second-stage hearing, particularly in light of a report that was received this morning as a result of an assessment ordered by the court.
- [8] There is evidence before the jury, based on the Crown case, that is clearly suggestive of mental impairment on the part of Mr. Palmer at or around the time of the offences. That evidence arises from statements Mr. Palmer made to the police. A list of examples will demonstrate the flavour of the evidence that is before the jury.
- [9] Mr. Palmer is alleged to have made all of the following statements or references:
- a) statements that display a paranoia about crime beyond what one might expect from living in a high-crime area;
  - b) reference to working on his wife for plastic surgery as part of his job;
  - c) COVID to him being people's voices;
  - d) the belief that he can sell energies from a cell and make a living for a year;
  - e) references to his medication from a psychiatrist doing things to his head that are not good for it;
  - f) an apparent reference to Maria being dragged out of the room by an invisible force and himself being pulled in across the hall;
  - g) reference to the fact that he is supposed to be a paranoid schizophrenic;
  - h) reference to the energies in the building;
  - i) reference to his ability to improve someone's face by looking in a particular direction and suggesting he could get rid of any visible scars or marks on Corporal Marshall's face;
  - j) reference to Ms. Rikley delivering a computer energy to him;
  - k) reference to the fact that he could find Ms. Rikley psychically, and that people in his building could control people in cars;
  - l) reference to people dragging Ms. Rikley back to that place with their mind control;
  - m) reference to Corporal Marshall being able to see out of Mr. Palmer's eyes;
  - n) reference to a "repop" being a body for a person's soul;
  - o) stating to Corporal Marshall out of the blue that Cpl. Marshall's "wife died didn't she";

- p) an apparent reference to people seeing Ms. Rikley out of his eyes;
  - q) reference to "that's what I go on" being the psychic stuff; and
  - r) reference to lending out his satanic bible;
  - s) an apparent reference to Ms. Rikley being pulled out of his apartment and his having a lot of energy in his apartment;
  - t) references to re-energizing the whole scene so that people could rewatch it;
  - u) references to 3D technology soaking up the energy trails;
  - v) reference to being worried about recording energies on a phone; and
  - w) references to mind control, reward money, and obtaining a marriage certificate.
- [10] I will refer to that evidence as evidence of mental disturbance or mental-disturbance evidence in recognition of its tendency to demonstrate that Mr. Palmer was subject to certain delusions that may have affected his thinking and his ability to form intent at the time, but also to distinguish it from the type of expert psychiatric evidence that often arises in NCRMD cases.
- [11] The purpose in reviewing this evidence is not to suggest that it is representative of everything that Mr. Palmer said. Indeed, other things he said were cogent and easy to make sense of, but it would be naïve to think that the jury will not wonder, based on the examples outlined, what was going through Mr. Palmer's mind at the time of the offences and whether he had the capacity to form the specific intent required for murder and attempted murder, as well as whether, based on his mental condition at the time, he actually had the necessary mens rea.
- [12] Because of the close connection between the NCRMD defence and issues surrounding proof of intent, I requested submissions from counsel with respect to how the jury should be charged and how the issue should be managed.
- [13] I will first address the general rules relating to NCRMD defences and the ability of the accused to choose when to raise such issues, and then address each of the issues that arise on the facts of this case.

## Legal Framework

- [14] The law is well established that an accused can choose to raise a s. 16 defence in the trial proper or post-verdict, after a jury has made a determination whether the Crown has proven all the essential elements of the offence charged beyond a reasonable doubt. The Crown can also raise the issue post-verdict.

- [15] When the issue arises post-verdict, it is the jury that must decide the s. 16 issue: see Swain; R. v. Faire, 2020 BCCA 110 at para. 30; R. v. Brown, 2006 BCSC 1581; R. v. Mehl, 2017 BCSC 1769, and new trial ordered on other grounds R. v. Mehl, 2021 BCCA 264.
- [16] In Swain, Justice Lamer noted that allowing the Crown to unilaterally raise issues of mental disorder or insanity, as it was referred to at the time, could interfere with other defences that an accused wished to advance, or could undermine the credibility of the accused. Thus, he found that the ability of the Crown to raise evidence of mental disorder over the wishes of the defence interfered with the accused's right to control the conduct of his or her own defence.
- [17] The rule developed in Swain and the cases following it is that the Crown may only raise evidence of mental disorder over the objections of the defence if the accused has put his or her mental capacity in issue or after a verdict has been rendered by the trier of fact. The three ways in which the NCRMD defence can arise are well summarized in Faire at para. 30:
- [30] The decision in Swain thus contemplates three ways in which the NCRMD defence can be raised at trial:
- a) The accused can raise the defence of NCRMD either during the trial or post-verdict. If the accused chooses the former approach, he or she can do so by proactively asserting an NCRMD defence during the course of the trial;
  - b) The Crown can raise the defence of NCRMD post-verdict; and
  - c) The Crown can raise the defence of NCRMD during the course of the trial if the accused has put his or her mental capacity in issue by virtue of the way in which the defence is conducted.

## Analysis

Has the issue of NCRMD arisen in the first stage of the trial?

- [18] The parties agree that the issue of NCRMD has not yet arisen in the trial. There is no suggestion from the Crown that up to this point in the trial, Mr. Palmer has put his mental capacity in issue, such that s. 16 of the Criminal Code is engaged.
- [19] I agree with that conclusion, based on the nature and extent of the evidence and the defence right to control the conduct of its own defence, which would be hollow if the Crown were entitled to raise the issue of NCRMD over Mr. Palmer's objection, based on evidence that it introduced in support of its case.

- [20] All of the evidence before the jury has been led by the Crown. While there is evidence of mental disturbance before the jury (and a reference to a diagnosis), there is no expert evidence or formal diagnosis before the jury. No psychiatrists have testified, and defence counsel has not cross-examined any police officers on evidence as to Mr. Palmer's capacity. In short, there is no specific evidence of a mental disorder and no expert evidence as to its effect on Mr. Palmer's capacity at the time of the alleged offences.
- [21] Addressing the relevance of mental disturbance evidence, the fact that the evidence does not give rise at this stage to an NCRMD defence raises another question, namely what use can be made of the evidence?
- [22] In my view, the mental disturbance evidence, while not giving rise to NCRMD, is clearly relevant to the jury's task in assessing whether Mr. Palmer had the ability at the time of the offence to form the necessary specific intents and whether he actually intended to kill, based on his mental processes at the time.
- [23] The law is clear that evidence of mental disturbance that falls short of giving rise to a defence of NCRMD is nonetheless relevant to the issue of mens rea.
- [24] In Swain, Chief Justice Lamer made it clear that where there is evidence of mental impairment that is insufficient to meet the requirements of s. 16, the accused is still entitled to have that evidence considered on the issue of mens rea. He stated as follows:

As I have stated earlier, and I think it useful to reiterate here, if during the course of the trial an accused raises evidence of mental impairment which (in the view of the trial judge) tends to put his or her mental capacity in issue, the Crown will be entitled to lead evidence of insanity and the trial judge will be entitled to charge the jury on the insanity defence within the meaning of s. 16. However, if such evidence of mental impairment is, in the view of the trier of fact, insufficient to meet the requirements of s. 16, the accused is still entitled to have such evidence considered with respect to the essential element of mens rea. This accords with the current practice wherein an accused has been able to deny the element of planning and deliberation or the specific intent required for murder despite the fact that s. 16 has not been satisfied.

- [25] It is clear from that passage that the defence may tender evidence of mental impairment that falls short of establishing an NCRMD defence, yet still rely on that evidence to negate mens rea. That being the case, I see no reason why, in a situation where the evidence of mental impairment has been introduced by the Crown as part of its case, the defence may not also rely on Crown evidence to negate mens rea. That is consistent with the general rule related to the introduction of statements by the Crown when they contain portions that may be exculpatory. When such statements are introduced, they become statements for the accused as well as against him: *R. v. Humphrey*, 2003 CanLII 6855 (ONCA), at paras. 18 and 19 and *R. v. Deboo*, 2016 BCCA 62 at para. 44.

- [26] Further support for this proposition can be found in *R. v. Mehl*, 2017 BCSC 1847, where psychiatric opinion evidence was called by the defence as it related to the accused's mental state (paras. 7 and 8), but the defence elected not to have the NCRMD defence put to the jury until after the verdict. The issue of mens rea was argued based on a body of evidence that included evidence of mental disturbance, but without a formal NCRMD defence at stage one.
- [27] In *R. v. So*, 2024 BCCA 101, the accused argued on appeal that the trial judge had erred in failing to consider all the evidence that was relevant to proof of intent for murder, including evidence that fell short of establishing an automatism defence. The Court of Appeal dismissed the appeal and found that the judge had directed herself in accordance with the "uncontentious proposition that evidence relevant to intent is not spent because the defence to which it relates has been rejected."
- [28] In my view, *So* is further authority, if any were needed, in support of defence counsel's right to rely on the evidence of mental disturbance as it relates to mens rea. It follows that both the Crown and the defence are entitled to make submissions about whether or not the evidence of mental disturbance should or should not raise a reasonable doubt as to intent. Accordingly, I will instruct the jury to consider that evidence on the issue of mens rea.

Could defence counsel's submissions put Mr. Palmer's mental capacity in issue?

- [29] The issue that arises in this case is whether the accused can be said to have put his or her mental capacity in issue by virtue of the way in which the defence is conducted, if all the defence does is allow the Crown to lead what evidence it chooses and then make submissions on that evidence that advance the position that there is a mental disorder or mental disturbance that negates mens rea.
- [30] The Crown submits that if the defence makes any argument that relies on Mr. Palmer's delusions, that would give rise to the right to call rebuttal evidence or reopen the Crown case to introduce evidence that is relevant to the NCRMD defence. Defence counsel vigorously opposes that suggestion as inconsistent with *Swain*, and says that it would interfere with Mr. Palmer's right to a meaningful choice as to what stage he raises the defence of NCRMD, if at all.
- [31] Defence counsel submits that submissions alone based on Crown-led evidence cannot give rise to a Crown right to introduce evidence of NCRMD over the objection of an accused.
- [32] The question of whether an accused has put his mental capacity for criminal intent into issue is a question for the trial judge: *Swain* at para. 975, para. 987; *Fehr* at para. 45. It will often depend on the evidence before the trier of fact and the manner in which a trial unfolds.
- [33] A question has arisen in the case law as to whether defence can only be said to be raising the issue of NCRMD by calling evidence or can it do so by other conduct. In *R. v. Harvey*, 2014 BCSC 1692 at paras. 29-35, *Humphries J.* observed that *Lamer C.J.C.* used different

terminology at different points in the judgment in Swain to describe when the defence might be said to put mental capacity into issue. For example, he referred to the situation "when an accused raises evidence," but more often simply referred to the conduct of the defence in general.

- [34] In my view, the debate over this general question was resolved in Faire. At para. 54, Justice Butler found that the exception in Swain, which permits the Crown to raise NCRMD before a verdict, is directed at the "conduct" of the defence which "may include" the calling of evidence. The defence argues that the language used in Faire is consistent with the language in Swain with respect to choosing to raise evidence. While I accept that the language is consistent, in my view Faire makes it clear that conduct includes but is not limited to calling evidence.
- [35] The issue of NCRMD can arise after all of the evidence is complete and submissions have been made. In Harvey, for example, the issue only arose after counsel had made their final submissions. The Crown took the position that defence counsel had raised the issue by cross-examining Crown witnesses and by virtue of its closing submission. The court did not have to decide whether defence submissions gave rise to NCRMD because the defence ultimately conceded they had raised the issue through their cross-examination of psychiatrists called by the Crown.
- [36] In *R. v. P.D.*, 2022 QCCS 4039 (Que. S.C.), the parties initially agreed on a two-stage proceeding in front of the jury. However, as a result of the accused's testimony, the Crown was permitted to call rebuttal evidence that would address both mens rea and NCRMD at the first stage. While the issue in P.D. arose as a result of the evidence that was tendered rather than submissions, it does demonstrate, in my view, that defence conduct can give rise to a crown right to call fresh evidence and reopen the issue of NCRMD at stage one.
- [37] Turning to the facts of the present case, can it be said that merely making submissions based on the evidentiary record that now exists could permit the Crown to raise NCRMD?
- [38] First, I think it is important to reiterate that the mental disturbance evidence is relevant to mens rea and properly the subject of defence submissions. NCRMD will not be put into issue simply as a result of the defence arguing that mens rea is negated based on the evidence that the Crown chose to lead. However, I am not prepared to foreclose the possibility that final submissions may amount to conduct that puts NCRMD into issue, rare though that may be.
- [39] While it may be easy to state conceptually that submissions may open the door to NCRMD, the question that defence needs to know in this case is what kind of submissions might do so. I will attempt to address that question. I would add that I would not lightly conclude that submissions alone put NCRMD into issue. In my view, submissions alone will rarely give rise to a right on the part of the Crown to raise evidence related to NCRMD, particularly where the defence is relying only on evidence introduced by the Crown.

- [40] Using the facts of this case as an example, there are many statements from Mr. Palmer that the defence might rely on to argue that he had delusional beliefs that meant that, in the concrete circumstances, he was unable to form the specific intent required for murder or attempted murder and/or that his delusional beliefs demonstrate that he did not have the necessary intent. In my view, given the Crown has chosen to lead that evidence, the defence may rely on such submissions without concern that it could give rise to the right on the part of the Crown to reopen the evidence on the issue of NCRMD.
- [41] On the other hand, there is also a statement from Mr. Palmer that he is supposed to be a paranoid schizophrenic and reference to his doctor and medication. There is no expert evidence before the jury and no evidence of a diagnosis. If the defence were to argue, for example, that Mr. Palmer disclosed that he was a paranoid schizophrenic and argue, either directly or indirectly, that that was a mental disorder or a diagnosis that meant he was unable to form the requisite intent, in my view that kind of submission could amount to conduct that tends to put Mr. Palmer's mental capacity for criminal intent into question, potentially allowing the Crown to put forward evidence of mental disorder if it chose to do so and potentially allowing the jury to be charged on NCRMD if sufficient evidence were called to give rise to the defence.
- [42] In Swain at p. 975, Justice Lamer noted that the purpose of allowing the Crown to raise evidence of mental disorder where the defence introduces some evidence of mental incapacity is to ensure that the jury is not deprived of the full story of the accused's mental incapacity, and stated that such a result would be "clearly undesirable". In my view, raising paranoid schizophrenia or any other mental disorder directly, when there is no expert evidence and no diagnosis before the jury, would be captured by the concern expressed in Swain that the jury not be left with an incomplete picture of the accused's mental capacity or deprived of the full story surrounding the accused's mental capacity: Swain at p. 975 and Faire at para. 55. It would amount to raising the "very issue" of NCRMD as a result of the accused's conduct of his or her defence: Swain at p. 988.
- [43] The defence says this hypothetical does not arise because there is no evidence of a diagnosis before the jury and, if such a submission were raised, the appropriate remedy would be to instruct the jury to disregard it. Defence counsel has invited me to specifically instruct the jury that there is no evidence of a diagnosis of paranoid schizophrenia before them and that they must not consider that evidence as evidence of a formal mental disorder that affected mens rea.
- [44] While a jury instruction might suffice in those circumstances, I mean this primarily as a hypothetical example. In my view, a submission that directly addresses the elements of s. 16 or invites the jury to draw conclusions on mental disorders without all the relevant evidence can amount to conduct that puts Mr. Palmer's mental capacity in issue. It may be unlikely to arise on these facts, but I would not foreclose the possibility on a different evidentiary record.

- [45] If counsel were to invite the jury, for example, to consider paranoid schizophrenia, the question of whether a corrective instruction would suffice or whether it ought to give rise to a right on the part of the Crown to introduce evidence of NCRMD would be a question of remedy and balancing the right of the accused to control his defence with the need not to ask the jury to make findings based on an incomplete record.
- [46] I appreciate this is a fine distinction but, in my view, it balances the right of the accused to control his own defence and the jury's need for a proper evidentiary foundation if they are being asked to give effect to what, for all intents and purposes, amounts to an NCRMD defence. The right to control one's defence is a principle of fundamental justice but it is not absolute.
- [47] It is not possible to envision every possible scenario that might arise from counsel's closing submission. If a situation arises that I have not addressed, I will of course entertain submissions following the closing arguments, as ultimately the question whether the conduct of the defence has put the accused's mental capacity in issue for the purposes of s. 16 of the Code is a decision for the trial judge to make based on the conduct at issue.
- [48] I would not give effect to the Crown position that any submissions relying on evidence of delusions would give the Crown a right to reopen the evidence. In my view, that is too broad an interpretation of the authorities and would leave little of Swain intact. In the circumstances, it would effectively curtail the right of the defence to make full submissions on one of the essential elements of the offence based on evidence the Crown chose to lead.
- Is it open to the defence to invite the jury to render a verdict under s. 16 of the Criminal Code that could be seen as inconsistent with the jury's conclusion on mens rea?
- [49] If the accused elects to present a s. 16 defence in a one-stage proceeding and the evidence is sufficient to put the defence to the jury, then the NCRMD issues are relatively straightforward, because the jury can consider the NCRMD defence and issues of mens rea at the same time and arrive at a verdict.
- [50] The two-stage process envisioned in Swain gives rise to a fundamental problem due to the close connection between proof of mens rea on the one hand, and the first branch of the s. 16 defence of NCRMD on the other, because of that defence's close connection to an accused's capacity to form intent.
- [51] In Harvey, Justice Humphries foreshadowed this problem. At para. 17, she stated:
- [17] However, where the accused refuses to raise the issue of NCRMD, a situation is created, apparently not anticipated in Swain, where an accused who is not unfit to stand trial maintains a set of obviously delusional beliefs that make an assessment of his intent in that unreal context completely artificial, but until there is a determination as to whether the Crown has proven the offence (which includes proof of intent) beyond a reasonable doubt, the Crown will not be able to raise the issue of mental capacity to form that very intent. . . .

- [52] Counsel for Mr. Palmer contends that the court in Swain must have understood the situation they were creating, given the evidence of delusions that were before the court in Swain on the facts, but concedes that the passage in Harvey reflects the potential difficulties that Swain creates for a court on the issue of intent when it is connected with apparent delusional beliefs that are before the trier of fact.
- [53] In my view, that problem arises squarely in this case. There is evidence of delusional beliefs on the part of Mr. Palmer, but the Crown does not have the ability to introduce the NCRMD issue prior to the jury's verdict, and the defence has clearly stated it is not willing to raise the issue of NCRMD before a verdict is rendered.
- [54] The Crown says that any final submission made by the defence counsel that relies on delusions would give rise to the Crown right to call evidence of NCRMD, but that the corollary to that is that the defence would be unrestricted at the second-stage hearing. However, as I have indicated, I would not interpret the crown right to introduce evidence of NCRMD that broadly, and therefore the conundrum of having evidence of mental disturbance and submissions on mens rea before the jury and then potentially again at a second-stage hearing remains.
- [55] The defence says there are no restrictions on the right to advance either branch of a s. 16 defence, even where mens rea has been argued. Their position is that is exactly what was envisioned in Swain.
- [56] Having reviewed the law in this area, I conclude, based on the combined effect of Swain, Brown, Mehl, Klein, and P.D., that if the defence chooses to wait until a second-stage hearing to raise the issue of NCRMD, it will be foregoing the right to revisit the issue of mens rea. The practical effect of that is that if the jury concludes that mens rea has been proven beyond a reasonable doubt, the defence will not be permitted to introduce a defence of NCRMD that is based on Mr. Palmer's incapacity to appreciate the nature and quality of his actions, the first branch of the s. 16 defence. In my view, doing so would be inconsistent with the jury's finding of intent.
- [57] It is helpful to examine how this issue has been dealt with in the authorities. In Brown, Powers J. confronted a similar situation and considered whether, in a two-stage proceeding where s. 16 was not considered by the jury at the first stage of the proceeding, the trier of fact would be entitled to reconsider its decision on the issue of mens rea in a second-stage proceeding. He concluded that where the defence waited for a verdict before raising the s. 16 defence, it could not revisit the jury's conclusion on mens rea:
- [24] I find that the correct interpretation of Warsing and Swain lead to the conclusion that an accused has an option to elect when to submit evidence of the defence of NCRMD. That is either during the trial itself or after a verdict. This does not, however, entitle an accused to split their case and reargue the issue of mens rea if they elect to await the verdict before submitting evidence of NCRMD. Neither trial fairness nor justice requires such an advantageous interpretation. A defence of NCRMD has been given special treatment by

Swain, and allows the accused to withhold the argument on the defence of NCRMD until after the Crown has proven its case beyond a reasonable doubt. This, however, does not require that the accused be given an opportunity to have essentially a second trial on the issue of mens rea. There are many instances where inconsistent defences are presented by the defence with regard to the actus reus and mens rea. The accused, with the assistance of counsel, must often make decisions about what defences to pursue, what evidence to give, and whether or not the accused will give evidence themselves. Where the accused wishes to lead evidence with regard to mens rea in general, they can do so during the main part of the trial, knowing that if that evidence raises the issue of mental capacity, then they may no longer have the benefit of reserving the issue of NCRMD until after trial, if the Crown decides to pursue it during the trial itself. However, this does not require an interpretation of the common law rule spelled out in Swain in such a manner that the accused can split his case with regard to the issue of mens rea in general.

- [25] I find that if the accused elects to await a verdict before leading evidence on the issue of NCRMD in the case before me, and then leads that evidence post-verdict, that the accused is not entitled to have the issue of whether the Crown has proven mens rea beyond a reasonable doubt revisited. The accused is only entitled to a decision as to whether or not they have met the onus placed on them of proving the defence of NCRMD.
- [58] In this case, the defence has evidence in support of a s. 16 defence in its possession or presumably in support of one, but it has not, at least at this stage, called any evidence. The defence may choose to withhold evidence of a mental disorder in accordance with its right to control the defence, but Brown clearly suggests that it may not then subsequently lead evidence or invite the jury to make a finding that is inconsistent with its conclusion on mens rea at the first stage.
- [59] In Mehl, as I have already mentioned, there was psychiatric opinion evidence before the jury at Stage one, and an NCRMD defence was allowed to proceed at Stage two. Crucially, however, as outlined in earlier reasons (Mehl, 2017 BCSC 1769 at para. 11), the accused in that case acknowledged that if an election was made to raise the defence post-verdict, the accused would not be entitled to ask the jury to revisit its findings on mens rea for murder or any included offence, whether that was based on additional instructions from the judge or additional evidence.
- [60] The jury found the accused guilty in Mehl and the NCRMD defence was raised, but the issue for the jury was whether the accused suffered from a mental disorder that rendered her incapable of knowing that her conduct was morally wrong, not whether she could appreciate the nature and quality of her actions: Mehl, 2017 BCSC 1847 at para. 9 and Klein at para. 79.

- [61] In P.D., the trial proceeded in one stage, but the judge instructed the jury that they had to be satisfied beyond a reasonable doubt with respect to mens rea before considering the NCRMD defence, so as not to deprive the accused of a defence. However, relying on Brown, LaChance J. stated that the situation was "different in the case of a two-step trial" and accepted that evidence of mental disorder introduced after a finding of guilt "cannot be used to retry the issue of mens rea": para. 27.
- [62] In Klein, 2021 BCSC 742, A.C.J. Holmes grappled with the same issue and I will deal with that case at some length, since it represents the most thorough analysis of the issue that I could find.
- [63] In Klein, defence counsel originally planned to call an NCRMD defence, but changed its position and elected to call no evidence. Instead, it took the position that mental disturbances short of NCRMD negated specific intent. The accused was found guilty and sought to raise an NCRMD defence, but the parties disagreed about whether the defence would be entitled to raise an NCRMD defence based on the first branch of s. 16, that the accused was incapable of appreciating the nature and quality of the act or omission in light of the earlier finding that mens rea had been established.
- [64] After reviewing the jurisprudence, Holmes A.C.J. held that the law did not permit the first branch of the NCRMD defence to be raised where there was evidence of mental disturbance before the trier of fact and doing so would be inconsistent with the trier of fact's conclusion on the issue of mens rea. She allowed the application to proceed anyway, based on trial fairness concerns, but those same concerns do not arise in this case, as the issue is being addressed before the defence is called on to elect whether or not it chooses to call evidence.
- [65] Holmes A.C.J. pointed out at para. 46 that, generally speaking, the first branch of the NCRMD defence has the effect of negating mens rea whereas the second branch is treated as an exemption or excuse:
- [46] The incapacity for criminal intent may manifest itself in a number of different ways, each reflected in different aspects of the legal framework. Generally - although, as I will discuss to a limited extent shortly, Lamer C.J.C. recognized exceptions to this binary analysis - mental disorder falling within the first branch of s. 16(1) negates (or is inconsistent with) the mens rea for the offence, while mental disorder falling within the second branch does not negate the mens rea or the actus reus of the offence but qualifies the accused person for an exemption from criminal liability, sometimes described by Lamer C.J.C. as an excuse.
- [66] As Holmes A.C.J. pointed out at para. 52:
- ... if the accused raises evidence of a mental condition during the course of the trial that could negate the mens rea of the offence, the trier of fact considers NCRMD before they consider whether the evidence of a mental condition negates mens rea.

She went on to find that where the defence leads evidence of a mental condition or delusions, they should expect that s. 16 may be engaged in the trial proper in appropriate circumstances, whether they intend that or not. She noted that the integral connection in some circumstances between NCRMD and mens rea requires those issues to be considered in the appropriate sequence in the trial proper (para. 54). After referring to Swain, A.C.J. Holmes stated as follows:

[58] From this, it is again clear that where evidence of a mental condition said to negate mens rea is led by an accused and this evidence may be inextricably intertwined with potential mental disorder, these two potential legal consequences are necessary to consider together in the trial proper (in the appropriate sequence). In such cases, after finding that the accused committed the act or omission, the trier of fact will consider NCRMD, if it is invoked. If the trier of fact rejects an NCRMD verdict, they then go on to consider whether mens rea is proven beyond a reasonable doubt, taking into account all of the evidence, including the evidence of mental disturbance that was insufficient to support an NCRMD verdict. In short, in such a situation the Crown is not required to prove the mens rea of an offence (in addition to the actus reus) before the analysis turns to NCRMD.

[59] The necessary corollary, in my view, is that where the accused person relies in the trial on evidence of mental disturbance to negate mens rea, it is not open to them to later raise NCRMD, relating to the same type of mental issues, after a verdict of guilt.

[Emphasis added]

[67] The reasoning in Klein is persuasive. In my view, even in a situation where the defence has not tendered evidence themselves, but intends to rely on evidence of mental disturbance that is before the jury to negate mens rea, they may not wait and raise an NCRMD defence at the second-stage hearing that would be inconsistent with the jury's finding of mens rea.

[68] In the case at bar, there is no suggestion that the defence has led evidence of a mental condition or delusions at this stage of the proceedings. However, I would note that in Klein, the evidence related to the accused's mental condition was also led by the Crown, and the defence elected not to call evidence, so in my view the reasoning is applicable in these circumstances.

[69] More importantly, the inconsistency would arise, irrespective of which party called the evidence. As was pointed out in Klein at para. 65, if mens rea or intent is proven in the face of evidence of mental disorder, then the accused's capacity for intent is necessarily also proven and a post-verdict NCRMD hearing on the first branch of the NCRMD defence would invite a finding that was inconsistent with the finding on which the verdict of guilt was based. That was so even though the NCRMD defence might be based on a different body of evidence: paras. 66-69.

- [70] I would acknowledge, as did A.C.J. Holmes in Klein, that there are authorities that suggest a broader ability to revisit the issue of mens rea post verdict. However, as outlined in Klein, many of those cases are cases that involved the second branch of the NCRMD defence, or situations where there was no evidence of mental disturbance or none that related to the issue of mens rea that the trier of fact would be asked to decide at the first stage.
- [71] The result in Klein was summarized in the following terms:
- [84] From Chaulk, Swain, and the other governing . . . authorities, I conclude that an accused person who relies on mental disturbance issues during the trial to support a lack of mens rea cannot, if found guilty, then pursue a mental disorder verdict on the basis that they were incapable of appreciating the nature and quality of the act or omission they were found after the trial to have intended.
- [85] This does not deprive an accused person of control of the conduct of their defence. They maintain the right to choose whether and when to raise s. 16 (by expressly invoking s. 16, or by leading evidence that engages it). The accused person simply cannot bifurcate the integrally-related issues I have been discussing, and force their separate consideration (in the trial and post-verdict) in a sequence that runs counter to logic, the policy of Part XX.1 of the Code, and the integrity of the fact-finding process.
- [72] The defence relies on what he says is the very different context in which the issues arose in Klein, and argues that the apparent incongruity or overlap between NCRMD and mens rea necessarily arises from the way the Supreme Court of Canada balanced the constitutional rights of the accused and the logic of criminal procedure in Swain. In Swain, there was detailed evidence from psychiatrists related to mental disorder and the evidence at the NCRMD hearing was expected to be similar.
- [73] The defence argues further that Holmes A.C.J. expressed a qualification in her reasons that distinguishes this case. She stated at para. 86:
- [86] It should be noted that these reasons do not address the situation where the evidence in the trial raises no mental disturbance issues, NCRMD is not invoked in the trial proper, and the accused person raises NCRMD post-verdict. Such a situation presents the conceptual difficulty that a verdict of guilt after the trial necessarily entails a finding that the mens rea was proven, while a post-verdict NCRMD application based on the first branch of s. 16(1) would call for a finding of incapacity for mens rea.
- [87] These reasons discuss only the applicable principles insofar as they relate to the situation in Mr. Klein's case, where evidence of mental disturbance was led in the trial, and the evidence expected to ground a post-verdict NCRMD verdict based on the first branch of s. 16(1) was of a very similar nature.

- [74] In my view, the distinguishing features of the evidence in Klein do not render the reasoning inapplicable in the context of this trial. First, this is not a situation where "the evidence in the trial raises no mental disturbance issues". In this case, as I have already outlined, there is unavoidable and extensive evidence that could potentially call Mr. Palmer's mental capacity into question and there is the ability of the defence to rely on that evidence in arguing mens rea before the jury.
- [75] The fact that the evidence was not expert evidence is an artificial distinction. In the circumstances, I find that the evidence of Mr. Palmer's mental condition is inextricably linked with the issue of mens rea based on the manner in which this trial has unfolded. Thus, to await a finding of guilt and then ask the jury to reconsider mens rea based on the first branch of NCRMD would be to invite inconsistent findings of fact.
- [76] Finally, I would note that Klein is not the only authority on this point and that I have also been guided by Brown and the other cases in arriving at this conclusion.

### Application of the law in this case

- [77] Applying the law, I find that the principles I have outlined from the authorities are applicable in Mr. Palmer's case. The defence has obtained an expert report related to issues of NCRMD. It may choose not to lead that evidence at Stage one and rely on the evidence as it exists now to argue it is sufficient to negate mens rea.
- [78] On the assumption that the expert evidence in the hands of the defence contains evidence that Mr. Palmer suffered from a mental disorder that rendered him incapable of appreciating the nature and quality of his actions, the defence has a choice to make. It can call that evidence at Stage one of the trial and the jury will be charged on the issue of NCRMD and mens rea in the appropriate order, or it can elect a two-stage trial and argue mens rea based on the evidence as it now exists including the evidence of mental disturbance. However, if it elects a two-stage proceeding, the NCRMD defence at the second stage will be limited to addressing the issue of whether Mr. Palmer was incapable of knowing that his actions were wrong.
- [79] Nothing in this ruling restricts the right of the defence to bring an NCRMD defence to bear that is based on the second branch of s. 16; namely, whether Mr. Palmer suffered from a mental disorder that made him incapable of appreciating that his actions were morally wrong. As noted in Klein at para. 49, the second branch of the s. 16 defence is not a denial of mens rea, but "rather a claim to be exempt or excused for what would otherwise be criminal conduct."
- [80] With respect to the second branch of NCRMD, the focus is not on the unlawful nature of the act or the formation of intent, but on the capacity to know that it was wrong. In *R. v. Oommen*, [1994] 2 S.C.R. 507 at p. 518, McLachlin J., as she then was, stated:

The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not. The inability to make a rational choice may result from a variety of mental disfunctions; as the following passages indicate these include at a minimum the states to which the psychiatrists testified in this case -- delusions which make the accused perceive an act which is wrong as right or justifiable, and a disordered condition of the mind which deprives the accused of the ability to rationally evaluate what he is doing.

## Conclusion

[81] For all of these reasons, I conclude that:

- a) the issue of NCRMD has not been raised in these proceedings to this point;
- b) defence submissions could put the issue of mental capacity in play in the manner I have described, but submissions that do not relate to a specific mental disorder and merely consist of arguing that the jury should conclude that Mr. Palmer did not have the ability to form the required intent and/or did not actually form the required intent will not give rise to the issue of NCRMD; and
- c) If the defence argues mens rea based on the mental disturbance evidence but chooses not to raise an NCRMD defence until a second stage hearing, the NCRMD hearing will be limited to consideration of whether Mr. Palmer was incapable of knowing that his actions were wrong.

[82] As Justice Lamer stated in Swain, the right to control one's defence is a principle of fundamental justice but it is not absolute. I have sought to balance that right with the requirements of the law as they apply on these particular facts.

[83] In my view, Mr. Palmer is not entitled to what would amount to two separate trials on the issue of mens rea, considering the evidence of mental disturbance that is before the jury already. He will have to choose how to conduct his defence accordingly and either argue his ability to form mens rea based on the evidence as it now exists or choose to raise additional evidence related to his capacity to form intent, potentially giving rise to a one-stage proceeding.

"Greenwood J."

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