Approved: 3-23-93
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairman, Representative Michael R. O' Neal at 3:30 p.m. on March 15, 1993 in room 313-S of the Statehouse.

All members were present except:

Representative Tom Bradley - Excused
Representative David Heinemann - Excused

Committee staff present:

Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the Committee:

Senator Tim Emert
John Badger, Chief Legal Counsel, SRS
Raymond Spring
Ron Smith, Kansas Bar Association
Representative Elaine Wells
Jim Clark, Kansas County & District Attorneys Association
Sharon Sanders, Kansas Mental Health Association
Paul Shelby, Office of Judicial Administration
John Bork, Deputy Attorney General, Criminal Division
Gabrielle Thompson, Assistant Riley County Attorney

Hearings on SB 354 were opened regarding hearsay testimony of child victim witness admissible at a preliminary examination.

Senator Tim Emert appeared before the committee as a proponent of the bill. It provides that in criminal felony cases for children under the age of thirteen their testimony may be presented by video tape. (Attachment #1)

Representative Garner questioned what was missing in K.S.A. 22-3434 to cause the need for this bill. As a general rule the rules of evidence that applies to preliminary hearings applies to trials.

Senator Emert stated that K.S.A. 22-3434 applies only to trials and the proposed bill applies only to preliminary hearings.

Chairman O'Neal asked if the addition of the thirteen year olds was an amendment of the Senate.

Senator Emert stated that it was added in subcommittee to conform with the same age that is in K.S.A. 22-3434.

Hearings on SB 354 were closed.

Hearings on SB 10 were opened regarding commitment & release standards relating to persons acquitted because of insanity & committed after conviction but prior to sentencing. Interim Committee Proposal #25.

John Badger, Chief Legal Counsel, SRS, appeared before the committee as a proponent of the bill. He stated that the changes resulted from a recent court decision in Fucha v. Louisiana which held that a Louisiana statute similar to K.S.A. 22-3428a, which requires an insanity acquittee to show they are no longer dangerous, violates the 14th Amendment. SB 10 provides language that the legal determination shall be whether or not the defendant continues to suffer from a mental illness, which would be likely to cause harm to self or others. (Attachment #2)

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

The Chairman questioned what the basic change is between this proposed bill and the law that is unconstitutional.

Badger stated that the change is that a person can no longer be held in a psychiatric facility and be provided with psychiatric care based on the fact that they are dangerous to themselves or others. There needs to be evidence that the person is mentally ill.

Raymond Spring, on behalf of the Kansas Bar Association, appeared before the committee in support of the bill. They believe that the changes that have been proposed speak directly to the Fucha decision. This places the burden of proof on the defendant that they are no longer mentally ill. They oppose the amendment that would be offered by the Kansas County and District Attorneys Association to add the concept of "guilty but mentally ill". He believes that it hasn't achieved what it was set out to achieve.

Representative Plummer stated that there are people who commit a crime under the insane impulse and then in ninety days regain their sanity. He suggested this was the problem addressed under the "guilty but mentally ill" issue.

Dean Spring stated that it is not a question of law, but for the trier of fact. If the person did not know what they were doing at the time, then he shouldn't be convicted of the crime. A large portion of the population at psychiatric facilities are not there under a guilty by reason of insanity verdict. They are there because of a plea, not a trial. This bill requires that there be evidence of insanity.

Chairman O'Neal questioned how many in the state hospital would be affected by Fucha.

Dean Spring stated that there might be seven cases.

Ron Smith, Kansas Bar Association, appeared before the committee as a proponent of the bill. He stated that while "guilty but mentally ill" could be an option, it is not the best option. 80% of Michigan's guilty but mentally ill findings were not done by juries. 60% were by plea bargaining and 20% were found by judges. (Attachment #3)

Representative Plummer stated that whatever we do there is going to be an impact. If they are not in the hospital then they are in prison.

Jim Clark, Kansas County & District Attorney Association, appeared before the committee in support of the bill but suggested an amendment using the language "guilty but mentally ill". This way when a person is found guilty but mentally ill they would be sent to a mental health facility for treatment. When the determination is made that they are no longer mentally ill, they would serve the balance of their sentence. (Attachment #4)

Representative Elaine Wells appeared before the committee and requested that HB 2328 be amended into SB 10. She testified that she is in favor of the "guilty but mentally ill" verdict. She gave background information on how the guilty but mentally ill verdict came about. She stated that the juries are led to believe that with the not guilty by reason of insanity option the defendant will be locked up, which is not necessarily true. (Attachment #5)

The Chairman requested jury instructions that would be applicable to guilty but mentally ill.

Sharon Sanders, Kansas Mental Health Association, appeared before the committee and stated that they were opposed to the guilty but mentally ill verdict, because it hasn't diverted many people. She commented that South Carolina is trying to get this repealed this session. Treatment is usually two weeks and then they go to prison and serve their time.

Representative Plummer stated that we can't treat every inmate who has a mental illness. It would overburden the mental health system. Every inmate has some type of psychological or personality problem.

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 3:30 p.m. on March 15, 1993.

Representative Krehbiel questioned what the difference is between mentally ill and insanity and if we would be able to have someone come in and brief the committee.

Chairman O'Neal stated that we would try and get someone from Menninger's to brief the committee on the differences.

Hearings were left opened.

Hearings on SB 292 were opened regarding confidentiality of diversion agreements which terms have been fulfilled.

Paul Shelby, Office of Judicial Administration, appeared before the committee as a proponent of the bill. Under this proposed bill the records of fulfilled diversion agreements would be available to any prosecutor or court, but not the general public. This would reward the person who has fulfilled the diversion agreement by giving them a degree of privacy. (Attachment #6)

Chairman O'Neal questioned why the diversions couldn't be expunged.

Shelby stated that there would be so many statutes to change, that this appeared to be a simpler process.

John Bork, Deputy Attorney General, Criminal Division, appeared before the committee with an amendment to SB 292 and SB 348 which would add "Attorney General's office" to wherever the bill reads "county or district attorney's office".

Hearings on SB 292 were closed.

Hearings on SB 348 were opened relating to diversion agreements involving offenses other than DUI may include stipulation of facts.

Jim Clark, Kansas County & District Attorneys Association, appeared before the committee as a proponent of the bill. The proposed bill would not allow the parties to include a stipulation of facts as part of a diversion agreement. It allows the county or district attorney's to enter into a diversion agreement, if it is breached, without having the problem of not being able to relocate the witness at a later period of time to prove the case. (Attachment #7)

Gabrielle Thompson, Assistant Riley County Attorney, appeared before the committee as a proponent of the bill. She stated that they do very few diversions except for DUI's and drug cases. She believes that many people; courts, victims and defendants will benefit from the diversions. (Attachment #8)

Hearings on SB 348 were closed.

The Committee adjourned at 5:15 p.m. The next Committee meeting is March 16, 1993 at 3:30 p.m. in room 313-S.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE MARCH 15, 1993

NAME	ADDRESS	ORGANIZATION
Chip Wheelen	Topeka	Ks Psychiatric Soc
Ken Bahr	"	Ks. Assn of Prof. Psychologists
Sheryl Sanders	TOPEKA	KS. ALLIANCE FOR MENTALLY ILL
John Bork	TOPEKA	ATTY GEN OFF.
Gabrielle Thompson	Manhattan	Riley County attorney
JAMES CLARK	TOPEKA	KCDAA
Ron Smith	"	Ks Bar Assoc
Ray Spring	Topeka	KS Bar Assoc
John Bach	Topeka	SRS
John House	Topeka	SRS
Paul Shelby	"	OJA

STATE OF KANSAS

TIM EMERT
SENATOR, 15TH DISTRICT
ALLEN, CHAUTAUQUA, SE COFFEY,
MONTGOMERY, WILSON, WOODSON COUNTIES
P.O. BOX 747
INDEPENDENCE, KANSAS 67301
(316) 331-4831
STATE CAPITOL BUILDING, ROOM 143-N
TOPEKA, KS 66612-1504
(913) 296-7363

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
CHAIRMAN: JOINT COMMITTEE ON CLAIMS AGAINST THE STATE
VICE CHAIRMAN: JUDICIARY
MEMBER: EDUCATION
ENERGY AND NATURAL RESOURCES
TRANSPORTATION AND UTILITIES

March 15, 1993

Testimony Before the
House Judiciary Committee

Re: SB 354

by
Senator Tim Emert

Thank you for this opportunity to appear before you on Senate Bill 354. The scope of this Bill is rather limited. It applies only in the following situations.

When a witness at a preliminary hearing of a defendent charged with felonies is a child thirteen years of age or younger, the testimony of that child may be presented by video tape recordings or other means. This in essence allows hearsay testimony in that setting.

This Bill in no way affects KSA 22-3434 which deals with child victim witnesses at trials. Also, this does not violate any of the constitutional rights of defendents as provided by the 6th Amendment of the U.S. Constitution for the reasons that preliminary hearings are purely statutory; a procedure granted to defendents by the laws of the state of Kansas and not formed out of any constitutional rights.

The law will relieve youthful witnesses of significant stress and emotional strain caused by the very nature of court appearances.

I request your favorable consideration of this Bill.

HOUSE JUDICIARY
Attachment #1
03-15-93

KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Donna Whiteman, Secretary

Before the House Committee on Judiciary
March 15, 1993

Senate Bill No. 10

****

SRS Mission Statement

"The Kansas Department of Social and Rehabilitation Services empowers individuals and families to achieve and sustain independence and to participate in the rights, responsibilities and benefits of full citizenship by creating conditions and opportunities for change, by advocating for human dignity and worth, and by providing care, safety and support in collaboration with others."

****

Mr. Chairman and members of the Committee, on behalf of Secretary Whiteman, I thank you for the opportunity to appear and present testimony here today in support of SB 10.

On August 7, 1992, the Kansas Court of Appeals, in its decision In the Matter of the Application of Noel (for release), (No. 66,501), applied the law handed down last May by the U.S. Supreme Court in its decision in Foucha v. Louisiana (504 US ____), 118 L.Ed.2d 437, 112 S.Ct. 1780 (1992). In essence, the Kansas Court of Appeals declared that portion of K.S.A. 22-3428a which requires an insanity acquittee to show they are no longer dangerous unconstitutional and violative of the 14th Amendment's Due Process and Equal Protection clauses. The Foucha decision, which the Kansas Court was following, emphasized the impropriety of holding someone in a psychiatric facility and forcing them to receive psychiatric treatment when the evidence does not clearly show they continue to be mentally ill. The mere fact someone may have at one time suffered from a mental illness cannot be used as a legal presumption they continue thereafter to be mentally ill, nor can the sole criteria for release from a psychiatric facility rest on the question of "dangerousness" alone.

In addition, the Kansas Supreme Court in an unpublished decision captioned Simmons v. Sanborn, et al., (No. 68,004), dealt with a patient at Topeka State Hospital who was under the committing authority of K.S.A. 22-3430 (care and treatment in lieu of confinement). The Kansas Supreme Court said, ". . . (W)e suggest that the reach of Foucha may render Simmon's continued commitment in Topeka State Hospital without a sentencing hearing or a commitment hearing a violation of his due process rights."

HOUSE JUDICIARY
Attachment #2
03-15-93

Following this reasoning, the Kansas statutory provisions that rely upon a determination of dangerous alone have now been found improper and will need to be amended to bring them into line with the Foucha requirement.

SB 10 amends the provisions of K.S.A. 22-3428, 22-3428a, and 22-3431 which contain language suggesting that a decision on release is to be based solely on dangerousness so as to provide that the legal determination shall be whether or not the defendant continues to suffer from a mental illness. The Senate Judiciary Committee amended SB 10 to include a legal definition of mental illness which provides for an element of "likely to cause harm to self or others" (which would include physical injury or physical abuse to self or others or substantial damage to another's property). This will comply with the Foucha requirement that a showing of mental illness must be made in order to continue to detain such an individual in a psychiatric facility or to subject them to any type of continued psychiatric treatment, and yet satisfy the concerns for safety of the public.

Further, it appears the Foucha decision also makes Kansas' automatic commitment provisions after a verdict of not guilty by reason of insanity unconstitutional and subject to challenge. Accordingly, SB 10 amends K.S.A. 22-3428 to require that a second hearing be held shortly after the criminal verdict to determine the current mental illness of the defendant. This proceeding would eliminate a challenge based on the argument that while the not guilty by reason of insanity verdict answered the question of whether or not the defendant suffered from a mental illness at the time of the commission of the crime, it does not address the question of whether they are currently mentally ill and can rightfully be forced to accept confinement in a psychiatric hospital or to undergo psychiatric treatment. There is a concern that the passage of time between the time the criminal act was committed, and the date by which the defendant can be brought to trial and a verdict returned makes the legal presumption of mental illness contained in the automatic commitment subject to a Foucha type challenge. SB 10 provides that this second hearing would use the legal definition of "mentally ill person" as any person who: 1)is suffering from a severe mental disorder to the extent that such person is in need of treatment; and 2)is likely to cause harm to self or others.

SB 10 also reflects the needed due process changes for K.S.A. 22-3431 by providing for disposition upon completion of treatment under K.S.A. 22-3430. In addition to deleting the criterion of dangerousness, provisions are added to require a hearing, a status forensic report from the psychiatric institution, appointment of counsel, and notice of hearing. Under current law, courts are not required to hold a hearing to determine if the defendant still needs psychiatric care, and can thereby

effectively detain a defendant in a psychiatric hospital even when he or she no longer meets the legal requirements for such detention. Again, this provision of current Kansas law is subject to a Foucha challenge.

At the Senate Judiciary Committee, SRS suggested amendments to two (2) other forensic statutes. SB 10, as amended by the Senate Committee, includes these changes. K.S.A. 22-3219 is the statute governing the plea of insanity. In that statute the word "physician" is expanded to include the term "physician or licensed psychologist" to reflect the language used in other forensic statutes. The second change provides that the criminal court cannot accept a plea bargain where the defendant enters a plea of not guilty by reason of insanity unless there is prima facia evidence confirming the existence of the insanity. Currently a defendant in Kansas can plead insanity without any legal foundation for the plea. Since FY 1989, 30 insanity acquittees were admitted to State Security Hospital, and 9 persons were carried over from prior years. Of these 39 patients, 35 patients were admitted as a result of plea bargaining arrangements, with only 4 admitted as the result of a jury finding. Out of these 39 patients, roughly only one-half were evaluated by a mental health professional and found to be criminally insane. The remaining patients were never found to be criminally insane, but nevertheless plead insanity.

Lastly, SB 10 amends K.S.A. 22-3430 to reflect that the cost of care and treatment provided by a state institution under K.S.A. 22-3430 be assessed in accordance with K.S.A. 59-2006. Currently several Kansas counties order that the State be responsible for the cost of treatment of a defendant sent to a state hospital for care and treatment in lieu of confinement. This order effectively prohibits the state hospital from seeking reimbursement from a patient who has the financial means to pay a portion of his or her care, who has health insurance, or is covered by VA, Medicaid, Medicare, or Social Security benefits. This is the only forensic statute which contains language prohibiting reimbursement efforts. All other forensic patients are assessed hospitalization charges based on K.S.A. 59-2006.

For these reasons SRS urges this Committee to act favorably on SB 10.

John Badger
General Counsel
Kansas Department of Social
and Rehabilitation Services
(913) 296-3967

KANSAS BAR ASSOCIATION

Legislative Information for the Kansas Legislature

TO: **Members, House Judiciary Com.**
FROM: **Ron Smith, KBA General Counsel**
SUBJ: **SB 10; insanity defense; Guilty But Mentally Ill Verdicts**

KBA Position

The Board of Governors supports SB 10 to fix Kansas law because of the Foucha decision. KBA's Board of Governors opposes a Guilty But Mentally Ill verdict (GBMI) system.

BACKGROUND

In case GBMI is raised, let me make several points why GBMI verdicts should be rejected:

Reduce NGRI Verdicts. Michigan was the first state to use GBMI verdicts (1975). The hope was GBMI would be used by jurors more often than Not Guilty by Reason of Insanity (NGRI) verdicts. That has not happened. Michigan penal statistics show that GBMI does **NOT** reduce the overall number of Not Guilty By Reason of Insanity verdicts. What happens is from the felons ordinarily found "guilty," a new class of felon is created: GBMI.

Voodoo Penology? Dean Raymond Spring indicated during Senate hearings that if the goal of GBMI is to get a criminal some psychiatric help yet keep them in prison, *current Kansas law allows that.* K.S.A. 22-3430 and 22-3431 give the trial judge the authority after a jury has found someone guilty to order a the felon to a state hospital or security hospital for treatment. That may take quite some time. When these inmates complete their treatment *then they are brought back to court and sentenced to prison.* Since Michigan studies show the GBMI inmates come from the "guilty" population, GBMI is doing no more than what already is done in Kansas. That is why critics of GBMI labeled such verdicts about as meaningful as saying someone is Guilty But Bald.

Costs. If you are concerned about budgets and costs, you may

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.

HOUSE JUDICIARY
Attachment #3
03-15-93

not want GBMI. What we can predict will happen — based on Michigan's study of their GBMI law — is an unforeseen burden of expensive new psychiatric care placed on the correctional system. Adding new need for psychiatric care in prison settings is going to be a major unanticipated fiscal problem in the Corrections Budget. Illinois appears to have a comparable result.

The remaining states that adopted a GBMI option (apparently ten) appear either to have no published studies on results or adopted other changes in the law which invalidated the comparisons. If Kansas has the same results with GBMI as Michigan and must provide psychiatric services to both groups, the costs of penal psychiatric treatment in Kansas would double.

If the state is unable or unwilling to provide and fund mental treatment for this new class of GBMI inmates, confinement in prison may be unconstitutional, especially to those who plead GBMI. *People v. McLeod,* 288 N.W.2d 909 (Mich., 1980).

Sentencing Guidelines. Michigan — the state model for a GBMI verdict — does not have sentencing guidelines. Kansas will, on July 1, 1993.

The GBMI verdict is at odds with the concept behind the proposed new Kansas sentencing guidelines. A successful insanity defense automatically places someone in custody of the Dillon Unit at Larned State Hospital for mental evaluation. Under Foucha, they remain at Dillon until their illness is cured.

Defendants found GBMI, however, will go to prison the same as if they were found guilty. For prison sentences, the new guidelines make rehabilitation and mental illness secondary to incarceration and punishment. The grids do not consider factors such as mental illness at the time of the crime. Two defendants having committed the same crime, one guilty and one GBMI, if their criminal history backgrounds are similar, they will serve the same time.

Yet a Guilty but mentally ill jury finding may be a *mitigating* factor for sentencing departure rather than an aggravating factor. *Juries which want inmates to serve the time desired under sentencing guidelines should find defendants "guilty," not GBMI.* If there is no GBMI finding, then the possibility of using a GBMI verdict as mitigation is eliminated.

Treatment. While GBMI proponents argue that the defendant will get psychiatric care in prison, typically in Michigan GBMI defendants get little psychiatric counseling unless they are suicidal, or otherwise call attention to themselves through erratic mental behavior.

Thus while juries might be persuaded into a GBMI finding on the theory the defendant will get treatment in prison, nothing in the guidelines guarantee such treatment.

Recidivism. Defendants who are found NGRI have an incentive

to undergo psychiatric treatment in order to get well — their freedom depends on them convincing a psychiatrist to recommend to a Court they are well. Mentally ill defendants going to prison GBMI will serve the same amount of time in prison under sentencing grids regardless whether they cooperate in their treatment or whether they get treatment. Upon release, might there be higher recidivism to those sent to prison under GBMI?

Fewer Guilty Verdicts. Another result of Michigan's GBMI verdict is the conclusion that without the GBMI alternative, there would have been more guilty verdicts. As to the theory that juries are confused, over 80% of Michigan's GBMI findings were not by juries at all. Sixty percent of GBMI findings were through plea bargains. Twenty percent were bench trials. *Only twenty percent of Michigan GBMI findings came from juries.*

Public Safety? Since Michigan shows that Not Guilty By Reason of Insanity verdicts do not decrease because of the GBMI option, and a GBMI finding has no different consequence in Michigan's system than a "guilty" finding, the GBMI option is not better public safety for Kansans than juries which criminals to be plain old Guilty.

Personal Responsibility? GBMI gets at some fundamental pillars of the justice system. Criminal justice is founded on personal responsibility. If you know right from wrong at the time the crime was committed, even if you are "mentally ill," you are guilty of the crime. You go punished accordingly.

However, if a defendant truly cannot understand right from wrong, they cannot resist <u>any</u> urge, including those to commit the crime. Should they, then, be treated like other criminals?

GBMI changes 2,000 years of Judeao-Christian attitudes about punishment and mental illness.

The American Bar Association's Criminal Justice Mental Health Standards Committee, the American Psychiatric Association's Statement on the Insanity Defense and the National Mental Health Association's Commission on the Insanity Defense all have recommended against adoption of the GBMI verdict.

CONCLUSION

For all these reasons we ask you to enact SB 10 without a Guilty But Mentally Ill verdict system. It is an option in our system, but not a good one.

OFFICERS

Wade M. Dixon, President
John J. Gillett, Vice-President
Dennis C. Jones, Sec.-Treasurer
Randy M. Hendershot, Past President

DIRECTORS

William E. Kennedy
Nanette L. Kemmerly-Weber
Julie McKenna
Paul Morrison

Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX (913) 357-6352
EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of the

GUILTY BUT MENTALLY ILL VERDICT

A Proposed Amendment to Senate Bill No. 10

The Kansas County and District Attorneys Association appears in Support of Senate Bill No. 10 -- as far as it goes. The bill is in response to the recent decision of the U. S. Supreme Court, Foucha v. Louisiana, which requires that in order to confine a person found not guilty by reason of insanity, the person must be found both dangerous and mentally ill. Current Kansas law, like Louisiana's, requires only the finding of dangerousness, K.S.A. 1991 Supp. 22-3428 et seq., and is probably unconstitutional.

The simplest solution would be to amend the statutes to require the additional finding of mental illness, which appears to be the intent behind Section 1(b). However, this solution can lead to serious consequences. The determination that a defendant is not guilty by reason of insanity by a lay jury, or a judge, is a legal determination. The Kansas Supreme Court, and courts throughout the nation, have determined that this determination is not bound by expert testimony. The decision that an insanity acquittee is no longer mentally ill, hence is no longer in need of confinement, is a medical determination, which is determined strictly by expert medical testimony. The standards are entirely different, and there remains the possibility, as in Mr. Foucha's case, that a person charged with a serious crime, but found NGRI, could be released from confinement in as short a time as it takes to make a favorable medical determination.

The Kansas County and District Attorneys Association respectfully suggests that rather than adding the continued mental illness factor, the Legislature add the additional verdict of guilty but mentally ill. A person found GBMI would be sent to a mental health facility for treatment, but when the determination is made that they are no longer mentally ill, the finding of guilt remains and they would serve the balance of their sentence.

This additional, or alternative, verdict has withstood constitutional challenges, and is currently in effect in several other states, including Michigan; and has been considered by this Legislature several times in the past. KCDAA feels that under the mandate of the Foucha decision, now is the time to consider the guilty but mentally ill verdict.

HOUSE JUDICIARY
Attachment #4
03-15-93

STATE OF KANSAS

ELAINE L. WELLS
REPRESENTATIVE, FIFTY-NINTH DISTRICT
OSAGE AND NORTH LYON COUNTIES
R.R. 1, BOX 166
CARBONDALE, KANSAS 66414
(913) 665-7740

STATE CAPITOL
RM. 182-W
TOPEKA, KS 66612-1504
(913) 296-7637

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE-CHAIR: GOVERNMENT ORGANIZATION AND ELECTIONS
MEMBER: PUBLIC HEALTH AND WELFARE
JUDICIARY

TESTIMONY ON S.B. 10

TO THE

HOUSE JUDICIARY COMMITTEE

Thank you, Mr. Chairman for the opportunity to testify on this bill.

I'd like to give the new members some history behind this topic and the reason why we are now addressing the entire issue of the insanity defense.

In 1987 a killing took place in Wichita which took the life of an 18 yr. old. The murderer was acquitted in a ten minute trial on the insanity defense and received a "Not Guilty" verdict. Rep. Lowther, Rep. Freeman, and approximately thirty other legislators signed onto a bill creating the "Guily but Mentally Ill" Verdict. This verdict is one adopted by approximately thirteen states and was enacted primarily after the incident with President Reagan's life being endangered by John F. Hinkley.

The bill passed the House in advancing to final action, but the next day after Rep. Solbach called in two "so-called" experts to personally lobby the freshmen, it failed by a very narrow margin on Final Action.

In 1988 a summer interim was held to study the issue. The committee recommended S.B. 8 which required a hearing to be held and the proof that the acquittee was no longer dangerous to persons to be released from the state security hospital. This bill became law and this is the statute that has been declared unconstitutional.

As an active participant in the hearings on this issue, I was given assurance that S.B. 8 would address the problem with insanity acquittees, who were released and who did not stay institutionalized for very long. In my research, Insanity acquittees are kept in our security hospital for less than two years.

The following sesssion, though, I reintroduced the legislation on the Guilty but Mentally Ill verdict and this time it did pass the House. But did not have time to be considered in the Senate.

HOUSE JUDICIARY
Attachment #5
03-15-93

Last year, I again offered it as an amendment to the Sentencing Guidelines, and it again passed the House, by a very large margin.

Knowing that this bill (S.B. 10) was to be considered, I visited with the Chairman and concluded that rather than to hold hearings on the G.B.M.I. verdict again (for the third time in the House), it would be best to address it in S.B. 10. Especially, since S.B. 10 is a result of the interim on the Insanity Defense bill passed in 1989 changing the law which was then declared unconstitutional.

Since all of this has taken place another incident has occurred involving the insanity defense. Last year a therapist was murdered at Topeka State Hospital, by an insanity acquittee. He had murdered a co-ed in Emporia in the late eighties and was acquitted on the "Not Guilty" by reason of Insanity. The state is now facing a rather large lawsuit because of the negligence involved in the dangerousness of these persons.

H. B. 2328 is the only way to make sure that we do not encounter future problems with insanity acquittees. It is especially important now that making a person prove they are no longer dangerous to society is unconstitutioanl and has to be removed from the law.

I have included information from previous hearings, and also a copy of the bill introduced this year for consideration.

It is my hope that we address this issue completly by including the language in H.B. 2328 in S.B. 10.

Again thank you, and I would be happy to try and respond to questions.

STATE OF KANSAS

ELAINE L. WELLS
REPRESENTATIVE, THIRTEENTH DISTRICT
OSAGE AND NORTH LYON COUNTIES
R.R. 1, BOX 166
CARBONDALE, KANSAS 66414
(913) 665-7740

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: AGRICULTURE AND SMALL BUSINESS
INSURANCE
PUBLIC HEALTH AND WELFARE
PENSIONS, INVESTMENTS AND
BENEFITS

LEGISLATIVE ADMINISTRATIVE SERVICES

DATE: Sat. 1-21-89

- [x] TOPEKA CAPITAL-JOURNAL
- [ ] WICHITA EAGLE-BEACON
- [ ] KANSAS CITY TIMES
- [ ] KANSAS CITY STAR
- [ ] EMPORIA GAZETTE
- [ ] GARDEN CITY TELEGRAM
- [ ] HAYS DAILY NEWS
- [ ] HUTCHINSON NEWS
- [ ] LAWRENCE JOURNAL WORLD
- [ ] LEAVENWORTH TIMES
- [ ] MANHATTAN MERCURY
- [ ] OLATHE DAILY NEWS
- [ ] PARSONS SUN
- [ ] PITTSBURG MORNING SUN
- [ ] RUSSELL DAILY NEWS
- [ ] SALINA JOURNAL
- [ ] WINFIELD DAILY COURIER

Editorials — *In God We Trust*

A plea for justice

People will be lining up to testify for or against the death penalty when that issue comes before the Legislature next week. A more significant issue drew less attention this week when changes in the state's insanity plea were discussed.

The Senate Judiciary Committee discussed proposals to eliminate the innocent by reason of insanity plea and replace it with a guilty but mentally ill provision.

st eliminate
ut add
Guilty But
Mentally Ill

The change makes sense, not only in the interest of justice, but also in the interest of public safety. In a chilling bit of testimony, one shooting victim of a man who used the insanity plea said she had no idea whether he was still a patient or not. The hospital would not tell news reporters whether he was still being treated, had been released to another facility or was on the streets again.

A person declared innocent by reason of insanity must undergo treatment at the Larned State Hospital. But he can be released after only six months if the attending psychiatrists determine that the patient is no longer a threat to himself or to other patients. The average stay is 20 months. According to the law, whether he is a threat to the public is not a consideration for release.

One of the suggestions in testimony this week was that the patient not be released until psychiatrists can declare that the person would not harm himself or others in the future. That raises some obvious concern about liability for the state and the attending professionals.

Furthermore, it may be expecting the impossible. In 1983, the American Psychiatric Association disavowed psychiatrists' ability to predict whether a person is dangerous, especially "long-term future dangerousness."

More recently, an article in Science magazine reported: "Studies on the prediction of violence are consistent: Clinicians are wrong at least twice as often as they are correct."

The guilty-but-mentally-ill approach would give a safer measure of protection. It would assure treatment, but it also would provide for confinement.

Kansas has had few crimes that would qualify for the death penalty. It has had several in recent memory where the insanity plea has played a part. In the broad picture, a change in the insanity plea will do more to assure public safety than the death penalty.

The Legislature should act accordingly.

Insanity Defense Reform in the United States — Post-Hinckley

by Lisa Callahan, Connie Mayer and Henry J. Steadman

The insanity defense is among the most hotly debated and controversial issues in mental health law, recently brought into sharp public focus by the acquittal of John Hinckley. Public concern for defendants not "beating their rap" coupled with an enduring fear of the threat posed by insanity acquittees[1] led to considerable legislative activity to address these interests. This research catalogues the actual changes in insanity defense statutes in the three years before and three years after the 1982 Hinckley acquittal.[2]

The work reported here represents the first stage in a five-year study of the impact of insanity defense reform in ten states.[3] Some recent works have examined the specific results of one type of reform, a "guilty but mentally ill" (GBMI) verdict.[4] These studies strongly suggest that many of the legislative intents of such insanity defense reforms are not met. Our study will examine the impact of a variety of insanity defense reforms on the composition and volume of both insanity pleas and acquittals. We will compare data three years before and three years after significant insanity defense legislation in each of seven states. An additional three states with no reforms will be studied as a basis for comparisons.

It is suggested in both scholarly work[5] and popular literature[6] that unpopular decisions, such as the Hinckley acquittal, may affect insanity defense laws by eliciting a flurry of legislative change. Although such an effect has been suggested, no attempt to document reforms prior to and after the Hinckley decision has been previously reported. Further, it is entirely unclear if changes that did occur were precipitated by the sequelae (after-effects) of the Hinckley verdict.

The changes in the law identified and studied in this research are: abolition; test of insanity; burden and standard of proof; guilty but mentally ill plea or verdict; trial issues; and commitment and release procedures.

Abolition states have abolished a specific plea of not guilty by reason of insanity, but still allow the defendant to introduce evidence of mental illness to prove that he did not have a particular state of mind, or *mens rea*, which is an essential element of the offense charged. The *test of insanity* is the legal definition of what constitutes mental disorder sufficient to avoid criminal responsibility. Historically, many tests have existed that attempt to define insanity.[7] *Burden of proof* defines who must establish a particular degree of certainty concerning a specific fact. This degree of certainty is the *standard of proof*. The burden of proof falls on either the state or the defendant to prove some fact by one of three standards: beyond a reasonable doubt, by clear and convincing evidence or by the preponderance of the evidence.

Guilty but mentally ill (GBMI) is a procedure which allows the state to find a defendant guilty but acknowledge his or her need for treatment. The finding of GBMI may be established by plea or verdict or may be raised as a factor in sentencing.[8] There are two *trial issues* that affect the way in which an insanity defense is raised. The first refers to the structure and order of the trial, and the second refers to psychiatric assistance. The *procedures to commit* insanity defense acquittees vary widely. Some states require commitment in accordance with civil commitment, while other states commit automatically after an acquittal by reason of insanity. *Release procedures* are equally variant. Some states require release at the end of a stated period of time unless the state recommits, and others place the burden on the person committed to petition for release. Conditional release, resembling parole, is also an option in some jurisdictions.

Study Design

To assess the types of insanity defense reform made following John Hinckley's shooting of President Ronald Reagan, we examined all insanity defense reforms in the 51 U.S. jurisdictions from 1978 through 1985. Rather than simply look at the changes that followed Hinckley's actions, it is necessary to examine reforms prior to the shooting to identify any trends that may have produced reforms even without the Hinckley case. Each state's laws were analyzed, and telephone interviews were conducted with either the forensic director or mental health attorney in each state to identify changes that were not clear from the statutes.[9]

January 1978 through March 1981 is referred to as the "pre-Hinckley" time period. Reforms that occurred during this time are clearly not related to the shooting and subsequent acquittal. Analyzing the time period from the shooting to the acquittal, April 1981 through June 1982, is of questionable value as it is unclear if those reforms were in the process prior to Hinckley's actions and acquittal. The time from July 1982 through September 1985 is referred to as the "post-Hinckley" period. We have approximately 3 years of "pre-Hinckley" reforms and 3 years of "post-Hinckley" reforms.

The reforms are categorized as follows: (1) changes in the test of insanity or in the entering of the plea; (2) addition of the GBMI option; (3) changes in the burden and/or standard of proof; (4) changes in trial procedures; and (5) changes in commitment and release procedures. Clearly each state's reforms are idiosyncratic to its legal system. However, our classification system permits com-

Attachment #5 — 4
03-15-93

parisons of the general types of reforms that have occurred after the Hinckley case.

Findings

First, it should be noted that 13 states made no changes in the insanity defense during our 6-year study period (see Table 1). It is acknowledged that some changes may have occurred in other systems (e.g., civil commitment) that affect insanity aquittees, but these 13 states had no change in law that speaks directly to NGRI procedures. We have identified 38 states that made significant reforms at some point between 1978 and 1985.

During the pre-Hinckley period, 11 states made changes in their insanity defense laws; two of the states made multiple changes. Five of these states made changes in the commitment/release procedures; in three of those states, this was the only change made. The two states that made multiple changes involved a change in commitment/release rules and a change in the test of insanity. Other single reforms were in three states that changed trial procedures — two that changed the burden and standard of proof, and one that changed the test of insanity (see Table 2).

Eight states made changes in their laws "during" Hinckley, the time between the shooting and the acquittal. One state made two reforms — adding the GBMI option and a change in commitment/release. The remaining seven states made single reforms: three in commitment/release, two additions of GBMI, one in the test of insanity and one in the burden and standard of proof (see Table 2).

Twenty-five states that made no changes during or pre-Hinckley did make changes in the post-Hinckley period (see Table 2). Additionally, nine states made changes both pre- and post-Hinckley. Many states made multiple reforms during this period: 64 reforms occurred in 34 states. The most common reform made was in commitment/release (27 reforms in 26 states). Changes in the burden and standard of proof were made in 16 states. Eight states changed the test for insanity; eight states added the guilty but mentally ill option, and four states changed trial procedures.

Reforms that were made in the commitment process for persons acquitted by reason of insanity generally mandate some period of commitment for all such persons. This mandatory commitment is generally temporary "for evaluation," requiring court review at the end of a stated period of time. Distinctions are sometimes made among acquittees by the type of offense of which they were acquitted. Defendants acquitted of more serious crimes involving bodily injury may be automatically and indefinitely committed, while defendants convicted of less serious offenses may be entitled to a hearing to determine whether commitment is proper.

Reforms addressing release of persons acquitted by reason of insanity most often include mandatory court review prior to release of the person. Furthermore, some jurisdictions added provisions for conditional release, a program similar to parole. Only one of these changes could be interpreted outright as allowing more "due process" for insanity acquittees: in Florida the hearing for revocation of conditional release now must occur within seven days instead of "within a reasonable time" as the prior law provided.

In all reform jurisdictions but one (Utah) in which the burden of proof was changed, the burden was shifted from the state to the defendant. In conjunction with this reform, the standard of proof was changed from "beyond a reasonable doubt" to either the preponderance test or to "clear and convincing evidence."

In jurisdictions that altered the test of insanity, seven made changes that restricted the definition and use of insanity as a defense. Four jurisdictions changed from the American Law Institute (ALI) or M'Naughten plus irresistible impulse tests to the simple M'Naughten test; two jurisdictions restricted the use of the insanity defense so that it could not be utilized to negate *mens rea* as a defense to certain types of offenses; and one jurisdiction repealed the plea and the test of insanity altogether. Two jurisdictions, however, expanded the test for insanity by repealing the M'Naughten test and adopting the ALI test.

Discussion

There have clearly been more reforms in the insanity defense during the post-Hinckley time than during a comparable period prior to the shooting and acquittal. While this may reinforce a conclusion that this increased activity resulted from the "notorious" case, there is at least one other plausible conclusion. Although our data cannot directly address the issue of causality, it seems plausible that a 1983 U.S. Supreme Court decision, *Jones v. U.S.*,[10] accounts for much of the observed change being attributed to Hinckley.

The *Jones* decision requires that in states that have an automatic, indefinite commitment of persons acquitted by reason of insanity, the burden of proof must be on the defendant to demonstrate insanity by a preponderance of the evidence. Thus, states that wish to have an automatic, indefinite commitment retained or created must change the burden and standard of proof to comply with *Jones*. Such legal changes in reference to *Jones* could be attributed to states responding to public pressures to make sure "Hinckley couldn't happen in our state." In fact, the precipitant was case law, which at best, was an indirect result of Hinckley.

It is just as likely that these reforms were enacted in compliance with *Jones*. Twelve of 14 changes in the burden of proof at trial occurred in the period following *Jones*. Before attributing causality to the *Jones* decision, however, we must recognize that the legislative process is slow, and that changes occurring on the heels of the *Jones* decision nevertheless may have been initiated in response to Hinckley but not finalized until after *Jones*.

Most insanity defense reforms in recent years have been in the area of commitment and release. Historically, commitment as "not guilty by reason of insanity" was indefinite, with no procedure obligating the state to review the commitment. As a result, such persons often languished in institutions long after they were no longer a danger to themselves or others. The release of persons

Table 1: Insanity Defense Update (as of 12/31/85)

State	Test Used	Locus of Burden of Proof	Standard of Proof	GBMI	No Reforms
Alabama	ALI	D	Prep.		
Alaska	M'N	D	Prep.		x
Arizona	M'N	D	Prep.	x	
Arkansas	ALI	D	Prep.		
California	M'N	D	Prep.		
Colorado	M'N	S	BYRD		
Connecticut	ALIm	D	Prep.		
Delaware	M'N	D	Prep.		
District of Columbia	ALI	D	Prep.	x	
Florida	M'N	S	BYRD		x
Georgia	M'N	D	Prep.		
Hawaii	ALI	D	Prep.	x	
Idaho	n/a*	D	C&C		
Illinois	ALI	D	Prep.		
Indiana	M'N	D	Prep.	x	
Iowa	M'N	D	Prep.	x	
Kansas	M'N	S	BYRD		
Kentucky	ALI	D	Prep.		x
Louisiana	M'N	D	Prep.	x	
Maine	ALI	D	Prep.		x
Maryland	ALI	D	Prep.		x
Massachusetts	ALI	S	BYRD		
Michigan	ALI	S	BYRD		x
Minnesota	M'N	D	Prep.	x	x
Mississippi	M'N	S	BYRD		
Missouri	ALIm	D	Prep.		x
Montana	n/a*	D	Prep.		
Nebraska	M'N	D	Prep.	x	
Nevada	M'N	D	Prep.		
New Hampshire	Dur.	D	Prep		x
New Jersey	M'N	D	Prep.		
New Mexico	M'N+	S	BYRD		x
New York	M'Nm	D	Prep.	x	
North Carolina	M'N	D	Prep.		
North Dakota	ALIm	S	BYRD		
Ohio	ALI	D	Prep.		
Oklahoma	M'N	S	BYRD		
Oregon	ALI	D	Prep.		
Pennsylvania	M'N	D	Prep.		
Rhode Island	ALI	D	Prep.	x	
South Carolina	M'N	D	Prep.		
South Dakota	M'N	S	BYRD	x	
Tennessee	ALI	S	BYRD	x	
Texas	M'N	D	Prep.		
Utah	n/a*	S	BYRD		
Vermont	ALI	D	Prep.	x	
Virginia	M'N+	D	Prep.		
Washington	M'N	D	Prep.		x
Wisconsin	ALI	D	Prep.		x
Wyoming	ALI	D	Other		x
			Prep.		

Question of sanity relates to *mens rea* at the time of the crime.

Key

ALI = American Law Institute
Dur. = Durham
S = state
BYRD = beyond a reasonable doubt
m = modified
M'N = M'Naughten
D = defense
Prep = preponderance of the evidence
C&C = clear and convincing evidence

Attachment #5 — 6
03-15-93

Table 2: Instances of Insanity Defense Reforms

State	Test Used	Locus of Burden of Proof	Standard of Proof	GBMI	Trial Procedures	Release/ Commitment
Alabama						
Alaska				3		
Arizona		3	3			3
Arkansas						3
California	1,2,3					1
Colorado	3	3				3
Connecticut	3	3	3			3
Delaware				3	3	3
District of Columbia						
Florida						1,3
Georgia		1	1	3		3
Hawaii		2,3	2		1	3
Idaho	3					3
Illinois		3	3	2		3
Indiana	3			2		2,3
Iowa		3	3			3
Kansas						
Kentucky				3		
Louisiana						
Maine						
Maryland		3	3		3	3
Massachusetts						
Michigan				2		
Minnesota		3				3
Mississippi						
Missouri						3
Montana	1			3		
Nebraska		3	3			1,2
Nevada						
New Hampshire		1	1			2,3
New Jersey						
New Mexico				2		
New York		3	3			3
North Carolina					1	2,3
North Dakota	3	3	3		3	3
Ohio						1
Oklahoma					3	3
Oregon	3					1
Pennsylvania		3	3	3		
Rhode Island	1					
South Carolina				3		
South Dakota		3		3		3
Tennessee						3
Texas	3					3
Utah		3	3	3		3
Vermont		3	3			
Virginia						
Washington						3
Wisconsin					1	
Wyoming		3	3			

Key

1 = Pre-Hinckley (1/78 - 3/81)
2 = During Hinckley (4/81 - 6/82)
3 = Post-Hinckley (7/82 — 9/85)

Table 3: Statutory and Case Law Citations

State	Statutory Compilation	NGRI Citation	GBMI Citation
Alabama	Ala. Code	§15-16-2	
Alaska	Alas. Stat.	§12.47.010	§12.47.030
Arizona	Ariz. Rev. Stat. Ann.	§13-502A; §13-502B	
Arkansas	Ark. Stat. Ann.	§41-601	
California[1]	Cal. Evidence Code	§522	
Colorado	Colo. Rev. Stat.	§16-8-101(1); §16-8-104 §16-8-105(2)	
Connecticut	Conn. Gen. Stat.	§53a-12; §53a-13	
Delaware	Del. Code Ann.	11 §304a; 11 §401	11 §401(b)
District of Columbia	D.C. Code Ann.	§24-301	
Florida	Fla. R.Cr. Proc.	§3.217	
Georgia	Ga. Code Ann.	§26-702; §26-703; §27-1503	§26-702; §26-703; §27-1503
Hawaii	Hawaii Rev. Stat.	§704-402; §704-408	
Idaho	Idaho Code	§18-207	
Illinois	Ill. Ann. Stat.	§6-2; §6-2(e)	§6-2(c)(d)
Indiana	Ind. Code Ann.	§35-41-3-6; §35-41-4-1(b)	§35-36-2-3(4)
Iowa	Iowa Code Ann.	§701-4	
Kansas[2]	Kan. Stat. Ann.		
Kentucky	Ky. Rev. Stat. Ann.	§504.020; §500.070	§504.130
Louisiana	La. Rev. Stat. Ann.	R.S. 14:14; Art. 652	
Maine	Me. Rev. Stat. Ann.	17-A §39	
Maryland	Md. Ann. Code	§12-108; §12-109	
Massachusetts[3]			
Michigan[4]	Mich. Comp. Laws Ann.	§768.21(a)	§330.1400a
Minnesota	Minn. Stat. Ann.	§611.026	
Mississippi[5]			
Missouri	Mo. Ann. Stat.	§552.030	
Montana[6]	Mont. Code Ann.	§46-14-201	§46-14-311
Nebraska[7]	Neb. Rev. Stat.	§29-2203	
Nevada[8]	Nev. Rev. Stat.		
New Hampshire[9]	N.H. Rev. Stat. Ann.	§628.2 (II)	
New Jersey	N.J. Stat. Ann.	§2C: 4-2	
New Mexico[10]	N.M. Uniform Jury Instructions	§41.01	§31-9-3
New York	N.Y. Penal Law	§40.15	
North Carolina[11]			
North Dakota	N.D. Cent. Code	§12.1-04-03; §12.1-01-03(2)	
Ohio[12]	Ohio Rev. Code Ann.	§2943.03; §2901.05	
Oklahoma[13]	Okla. Stat. Ann.	21 §152	
Oregon	Or. Rev. Stat.	§161.305; §161.055	
Pennsylvania	Pa. C.S.A. (Purdon)	18 §315; 18 §315(b)	18 §314
Rhode Island[14]			
South Carolina	S.C. Code	§17-24-10	§17-24-20
South Dakota[15]	S.D. Codified Laws Ann.		§25A-25-13
Tennessee[16]			
Texas	Tex. Code Crim. Proc.	§2.04; §8.01	
Utah[17]	Utah Code Ann.	§76-2-305	§64-7-2-8; §77-35-21.5
Vermont	Vt. Stat. Ann.	13 §4801	
Virginia[18]			
Washington	Wash. Rev. Code Ann.	§10.77.030(2)	
West Virginia[19]			
Wisconsin	Wis. Stat. Ann.	§971.15; §971.175	
Wyoming	Wyo. Stat.	§7-11-305	

1. *People v. Drew*, 149 Cal. Rep. 275; 583 P.2d 1318 (Cal. 1978).
2. *State v. Granerholz*, 654 P.2d 395 (Kan. 1982); *State v. Roaderbaugh*, 673 P.2d 1166 (Kan. 1982).
3. *Commonwealth v. Brown*, 434 N.E.2d 973 (Mass. 1982); *Commonwealth v. Nassar*, 406 N.E.2d 1286 (Mass. 1980).
4. NGRI, *People v. Savoie*, 349 N.W.2d 139 (Mich. 1984); GBMI, *Michigan v. John*, 341 N.W.2d 861 (Mich. Ct. App. 1983).
5. *Herron v. State*, 287 So. 2d 759 (Miss. 1974).
6. *State v. Doney*, 636 P.2d 1384 (Mont. 1981).
7. *State v. Lamb*, 330 N.W.2d 462 (Neb. 1983).
8. *Pooie v. State*, 625 P.2d 1163 (Nev. 1981); *State v. Behiter*, 29 P.2d 100 (Nev. 1934).
9. *State v. Plummer*, 374 A.2d 431 (N.H. 1977).
10. *State v. Wilson*, 514 P.2d 603 (N.M. 1973).
11. *State v. Wickers*, 291 S.E.2d 599 (N.C. 1982).
12. *State v. Staten*, 267 N.E.2d 122 (Ohio 1971).
13. *Munn v. State*, 658 P.2d 482 (Okla. 1983).
14. *State v. Johnson*, 399 A.2d 469 (R.I. 1979).
15. *State v. Kost*, 290 N.W.2d 482 (S.D. 1980).
16. *State v. Clayton*, 656 S.W.2d 344 (Tenn. 1983); *Stacy v. Love*, 679 F.2d 1209 (6th Cir. 1982).
17. *State v. Baer*, 638 P.2d 517 (Utah 1981).
18. *Davis v. Commonwealth*, 204 S.E.2d 272 (Va. 1974); *Price v. Commonwealth*, 323 S.E.2d 106 (Va. 1984).
19. *State v. Rhodes*, 274 S.E.2d 920 (W.Va. 1981); *State v. Bias*, 301 S.E.2d 776 (W.Va. 1983).

Attachment #5 — 8
03-15-93

criminally committed as well as civilly committed patients was historically based on unilateral discretionary power of the hospital director.[11] As Wexler observes, NGRI individuals have "had an easier route into and a more difficult route out of the institutions than have their civilly committed counterparts."[12] This in large part reflects the desire to protect the public from the release of these individuals without assurance that they are no longer a danger.[13] The trend toward more due process protections for persons acquitted due to insanity and the public's demand for protection has led to a similar result. Many jurisdictions either require (for protection) or permit (for due process) court review of the commitment at various intervals. The result is more court involvement in the disposition and supervision of persons acquitted by reason of insanity.

Of course, the ultimate question about any reform is what difference did it make? It is to this question that our current work is addressed and to which other research must be directed to produce informed public policy.

Lisa Callahan, Ph. D., is a research scientist for the Bureau of Planning and Evaluation Research at the New York State Office of Mental Health in Albany. Connie Mayer, J.D., is a clinical instructor at the Disabilities Law Clinic, Albany School of Law. Henry J. Steadman, Ph.D., is Chief of the Bureau of Planning and Evaluation Research at the New York State Office of Mental Health in Albany.

Footnotes

1. Steadman and Cocozza, "Public Perceptions of the Criminally Insane," 29 *Hospital and Community Psy.* 457 (1978).

2. The work reported here discusses both pre- and post-Hinckley. However, the focus is on the post-Hinckley reforms.

3. Steadman and Morrissey, "Assessing the Impact of Insanity Defense Reforms," Albany, N.Y.: N.Y.S. Office of Mental Health, 1984; Steadman and Morrissey, "The Insanity Defense: Problems and Prospects for Studying the Impact of Legal Reforms," 484 *Annals* 115 (1986).

4. Klofas and Weisheit, "Pleading Guilty But Mentally Ill: Adversarial Justice and Mental Health." Presented at the XII International Congress on Law and Psychiatry (June 18, 1986); Smith and Hall, "Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study," 16(1) *J. of Law Ref.* 75 (1982); Criss and Racine, "Impact of Change in Legal Standard for Those Adjudicated Not Guilty By Reason of Insanity," 8(3) *Bull. of Acad. of Psych. and Law* 261 (1980).

5. Geis and Meier, "Abolition of the Insanity Plea in Idaho: A Case Study," 477 *Annals* 72 (1985).

6. Gest, "Hinckley Bombshell: End of Insanity Pleas?" *U.S. News and World Report*, July 5, 1985, at 12; Isaacson, "Insanity On All Counts," *Time*, July 5, 1982, at 22.

7. *See* Gutheil and Appelbaum, *Clinical Handbook of Psychiatry and the Law*. N.Y.: McGraw-Hill Book Co. (1982).

8. McGraw, Farthing-Capowich and Keilitz, "The 'Guilty But Mentally Ill' Plea and Verdict: Current State of the Knowledge," 30 *Vill. Law Rev.* 117 (1978).

9. Some law reporters present only new law, not prior law.

10. *Jones v. U.S.*, 103 S. Ct. 3043 (1983).

11. Wexler, *Mental Health Law*. NY: Plenum Press (1983).

12. *Ibid.* at 123.

13. ABA First Draft Criminal Justice Mental Health Standards (July 1983).

National Computerized System Provides Information on Services for Disabled Children

The National Information System for Health Related Services (NIS) was funded in response to the President's initiative declaring 1983-1993 to be the "Decade of Disabled Persons." The centerpiece of the System is a computerized database of information about tertiary or specialized services available to developmentally disabled and chronically ill children. The NIS currently serves eight southeastern states.

The National Information System offers three distinct features: (1) free access, via a 1-800 telephone line, to disabled individuals, parents, physicians and other health professionals; (2) the human interaction between the consumer and well-trained counselor resulting in direct referral to appropriate service agencies; and (3) periodic follow-ups on the referrals to ensure appropriate referrals.

Initially, this system will focus on specialized medical, education and other health related services emphasizing diagnosis, treatment and support for developmentally disabled and chronically ill children. As needs are identified, the system will systematically expand to encompass services for all developmentally disabled and chronically individuals.

By making a single telephone call to 1-800-922-9234 (in South Carolina, call 1-800-922-1107), anyone can find the organization providing the specialized service within their own state. If the service is not offered in that state, NIS can easily look to neighboring states or anywhere in the country.

The National Information System is being developed through the joint efforts of the Center for Developmental Disabilities and the Computer Services Division of the University of South Carolina. The system is currently funded for two years by the U.S. Department of Health and Human Services, Division of Maternal and Child Health. Future funding will combine public and private resources with primary funding through private sector initiatives.

For more information, contact: Girish G. Yajnik or Kathy L. Mayfield, National Information System, Center for Developmental Disabilities, 1244 Blossom Street, 5th Floor, Columbia, South Carolina 29208.

Attachment #5 — 9
03-15-93

SEDGWICK COUNTY DISTRICT ATTORNEY

18th Judicial District

Sedgwick County Courthouse
Annex — Second Floor
535 North Main
Wichita, Kansas 67203

CLARK V. OWENS
District Attorney

(316) 268-7281

HENRY H. BLASE
Chief Deputy

TESTIMONY

To: Special Committee on Judiciary

From: Clark V. Owens, District Attorney of Sedgwick County

Re: Proposal No. 21, Insanity Defense

Date: October 21, 1988

House Bills 3098 and 3099 address a series of problem areas that exist in our present law regarding the insanity defense in a criminal prosecution. The verdict of not guilty by reason on insanity can presently be misapplied by juries on account of the law being misleading and the options for the jury are limited. Furthermore, the current release procedures for persons found not guilty by reason of insanity do not adequately protect the public from future acts of violence by the insane criminal defendants.

The bills being considered by this committee will reduce the abuses of the insanity defense by making it more diffucult to utilize by defendants who are not truly insane. For those who are legitimately entitled to the use of the insanity defense, the release procedure from the state mental hospital will be more restrictive to protect innocent citizens from being subjected to future acts of violence.

Guilty But Mentally Ill

In the past 5 years a number of states have passed legislation to add the verdict of guilty but mentally ill to the other options available to a trier of fact in a criminal trial. Under present Kansas law, if the jury concludes that the defendant did in fact commit the acts alleged in the criminal complaint and is raising the issue of insanity, they have only two options in either finding the defendant guilty, or not guilty by reason of insanity.

If the defendant has evidence of significant mental disorder that does not rise to the level of legal insanity, the jury has been known to find the defendant not guilty by reason of insanity so that he can obtain psychiatric treatment. As I will discuss later, the jury gets the incorrect impression that a criminally insane person will be locked in a state mental hospital for a lengthy period of time similar to imprisonment.

1-18-89

In Sedgwick County we experience a case in which a jury found the defendant not guilty by reason of insanity in order that she obtain mental treatment instead of placement in a prison. Virginia Kraus shot and killed her grandmother as she slept in bed. The jury believed that Virginia would receive psychiatric treatment only if they found her not guilty be reason of insanity. They additionally were mistaken in thinking that she would not be released for many years.

Virginia Kraus was not legally insane and she knew it. She told the Sheriff's Officer that transported her to Larned that she had convinced the jury she was crazy and now she had to convince the state hospital that she was not. Virginia was placed on a conditional release within two years of her admission.

I have no doubt that the jury would have found Virginia Kraus guilty but mentally ill if they had been given the option.

Burden Of Proof

Under present Kansas law, once a criminal defendant has raised the defense of insanity it becomes the burden of the State to prove that he was sane at the time of the commission of the crime. In the recent murder prosecution of Gary Cox in Sedgwick County, we were unable to take this case to trial and had to concede the issue of insanity on account of this burden of proof. The jury never got to decide the case. A number of states have passed legislation which requires the defendant to prove his insanity by a preponderance of the evidence. A collection of appellate court decisions discussing these statutes is found at 17 ALR 3d 146.

The State of Oregon has gone as far as requiring that the defendant prove his insanity beyond a reasonable doubt, similar to that proposed in H.B. 3098. While it appears that Oregon is the only State that has gone this far, it has been approved by the Oregon Supreme Court in State v. Grieco 184 Or 253, 195 P2d 183 (1948). Similarly, the United States Supreme Court found this provision to be constitutional in Leland v. Oregon 343 US 790, 96 L ed 1302, 72 S Ct 1002 (1952) and more recently in Jones v. United States 463 US 354, 77 L ed 2d 694, 103 S Ct 3043 (1983).

Placing the burden of proving insanity on the defendant may have an impact in reducing the number of cases in which it is improperly asserted.

Jury Instruction Regarding Commitment and Release Procedures

Kansas law currently requires when insanity is raised as an issue that the jury be advised by instruction that the defendant will be committed to the State Security Hospital for psychiatric treatment. This requirement unfairly misleads the jury in concluding that the public safety will be protected even when the defendant is found not guilty by reason of insanity. The jury is more likely to improperly find the defendant to be legally insane with this instruction.

The case mentioned earlier about Virginia Kraus from Sedgwick County is an example in which this instruction mislead the jury to believe the defendant would be held in a state mental hospital for a long period of time. Our experience shows that the normal stay for a murder defendant found not guilty by reason of insanity is about 2 years.

House Bill 3098 would delete the statutory language that requires this instruction.

Release Procedure for Criminal Defendants Found Not Guilty By Reason of Insanity

There are a few cases in which the defendant truly meets the legal test for criminal insanity. In those cases, the interest of the public safety could be protected with a long term commitment to a secure state mental hospital the same as incarceration in prison. However, in practice it is rare for a violent insane defendant to be held in a secure hospital for more than a couple of years.

The current statutory release procedures require that the insane criminal defendant be released if the Court finds the committed person is no longer likely to cause harm to self or others. The state security hospital provides a highly structured environment in which the defendant is stabilized on medication. The Court feels compelled to release the defendant once his psychiatric condition is stabilized and he is not currently posing a danger to the people around him. This test does not adequately predict the likely danger that the defendant will pose to the community once he is released and not subject to the structure and medication of the hospital.

H.B. 3098 proposes an amendment of the test in determining suitability for release. The Court must find that the committed person will never again be likely to cause harm to self or others in order to release him. This test would allow the Court to hear testimony as to the likely reoccurance of violent behavior when the defendant is outside the structured environment of a hospital.

TESTIMONY ON SENATE BILL No. 8
Re: Proposal No. 21

Mr. Chairman and members of the Judiciary Committee. I am thankful for the efforts of this committee to strengthen the laws relating to the criminally insane.

There is a general opinion among the citizenry of our state that the not guilty by reason of insanity verdict somehow lets the criminal off easy. Therefore, any measure this committee can propose to make it harder for such persons to be released will find favor in the eyes of the public.

I favor Senate bill no. 8 because I am concerned about not guilty by reason of insanity defendants being released from the state security hospital too early. To focus on future conduct rather than just his conduct in the hospital is only sensible and reasonable. Conduct in a controlled environment may be far different than that in society. Thus, I believe a more extensive examination must be given in order to determine that the patient will not be likely to cause harm to self or others in the future.

I would like to call to the committee's attention what I believe to be an inconsistency in lines 34 - 37 of the bill. "Whenever it appears to the chief medical officer of the state security hospital that a person committed under this section is not dangerous to other patients, the officer may transfer the person to any state hospital." I would suggest that the word "patients" be changed to the word "persons" so that it would read "is not dangerous to other persons". Since the proposed changes focus on future conduct, this change in wording would make the bill more consistent with the intended changes. The insanity

aquittee may not act violently toward other patients, but may toward persons on the outside with whom he holds a grudge.

I would also urge the committee to consider drafting a bill to abolish the insanity plea altogether in Kansas. Three other states have done so: Idaho, Montana and Utah.

This, I believe would be the simplest way to correct the inequities and abuses in the present system. That there are inequities in the use of the insanity defense is apparent. Dr. Walter Menninger in his testimony before this committee last October 21 was quoted in the Emporia Gazette of October 22. "Dr. Walt Menninger, representing the Kansas Psychiatric Association, said application of the insanity defense is uneven. He said he has examined some defendants who were clearly delusional but who went to prison.

"I have evaluated persons at the state security hospital (in Larned) who have been found not guilty by reason of insanity in a plea bargained decision where I could find little psychiatric justification for that decision,"he added."

So under the present system some who are insane go to prison, while others who are sane wind up in the state security hospital. Why is this? There are several reasons for such inequity. One is the inexactness of psychotherapy as a science.

Edward F. Dolan Jr. in his book The Insanity Plea (1984) page 54, writes, "Psychiatry, remember, is not yet (and may never be) the exact science that other branches of medicine are. Diagnosis is very much a matter of opinion on the part of the psychiatrists." Again, Dolan says, page 82, "...Even though it comes from medical personnel, much of the opinion must be looked

on as questionable because the precise nature and degree of mental illness can be so difficult to pinpoint beyond doubt."

If insanity were abolished as a defense, we would be freed from the inequities that result from our judicial systems dependence upon the field of psychology.

Would those who are undoubtedly insane be sent to prison? No. The court would have the authority to commit such a person to the state security hospital for safekeeping and treatment.

Another positive result of the abolition of the insanity plea would be that the determination as to what constitutes mental illness would be taken out of the hands of jurors. J. Sanborn Bockoven writing in the"Psychiatry Digest" speaks of "the indefinability of mental illness". If the experts cannot agree how can we expect a panel of laymen to ascertain when it is present?

Mental illness as a term is largely a misnomer. Jay Adams, in his book Competent to Counsel. page 28 states: "Organic malfunctions affecting the brain that are caused by brain damage, tumors, gene inheritance, glandular or chemical disorders, validly may be termed mental illness. But at the same time a vast number of other human problems have been classified as mental illnesses for which there is no evidence that they have been engendered by disease or illness at all."

People have emotional problems caused by sin--theirs or someone elses (e.g., abuse as a child). These emotional problems may result in behavioral problems that are not only socially

unacceptable but criminal. Criminals are people with unresolved personal problems.

Juries are confused by the indefinability of mental illness. They have been known to find a person with severe emotional problems innocent by reason of insanity so that he can obtain psychiatric treatment,despite the fact that he is not legally insane. Abolition of the insanity plea would free the jury from such confusion and abuse of this defense. I strongly urge the committee to draft an amendment to abolish insanity as a defense in Kansas.

Finally, I would remind you that God is a God of Justice. "Righteousness and justice are the foundation of (God's) throne" Psalm 89:14. He holds eách person accountable for his actions. Only those who have not yet reached the age of accountability, and those who have such an incapacity mentally that they cannot know the nature of their acts will escape the application of this universal truth: "Every one of us shall give account of himself to God" Romans 14:12.

Thank you. I will be glad to respond to any questions.

Donald L. Kusmaul, 1001 Elm, Emporia, Kansas 66801

SESSION OF 1989

SUPPLEMENTAL NOTE ON SENATE BILL NO. 8

As Amended by Senate Committee on Judiciary

Brief*

S.B. 8, as amended, requires a court hearing in all cases and a higher standard of proof (e.g. clear and convincing evidence) before any person who has been found not guilty by reason of insanity may be released from a state mental institution. Before releasing such a person, the Court must find by clear and convincing evidence that the individual will not likely cause harm to themselves or others if discharged. The Committee also altered the standard to some degree for transfer from the state security hospital to another state hospital to make the test "not dangerous to other persons" rather than just other patients.

Current law requires a court hearing only when requested by the county or district attorney from the county from which the person was committed and the evidentiary burden of proof or standard is by a preponderance of evidence.

ckground

The bill was recommended by the 1988 interim Special Committee on Judiciary in regard to Proposal No. 21 -- Insanity Defense. The bill, as recommended by the interim Committee, modified the criteria for determining whether a patient may be released from one of "likely to cause harm to self or others" to add the language "in the future if discharged." The Senate Committee determined that the language added little, if anything, to the current standard.

The Committee heard from the former Sedgwick County District Attorney who said many of those persons found not guilty by reason of nity of major criminal offenses were released from state mental iutions after a stay of two years. Others who appeared included an Emporia minister, several relatives of murder victims, a survivor of an attempted murder, and a representative of the Department of Social and Rehabilitation Services. Suggestions included that the state abolish the insanity defense, that the state adopt the guilty but mentally ill jury verdict, that the state shift the burden of proof regarding insanity to the defendant, and a higher standard or burden of proof be adopted regarding the release of those persons from mental institutions who have been found not guilty of a crime by reason of insanity.

* Supplemental Notes are prepared by the Legislative Research Department and do not express legislative intent.

Attachment #5 — 17
03-15-93

STATE OF KANSAS

ELAINE L. WELLS
REPRESENTATIVE, THIRTEENTH DISTRICT
OSAGE AND NORTH LYON COUNTIES
R.R. 1, BOX 166
CARBONDALE, KANSAS 66414
(913) 665-7740

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: AGRICULTURE AND SMALL BUSINESS
INSURANCE
PUBLIC HEALTH AND WELFARE
PENSIONS, INVESTMENTS AND
BENEFITS

TESTIMONY ON S.B. 8

Following the committee hearings in the Senate on this bill, an editorial appeared in the Topeka Capital Journal on January 21st; In God We Trust, A Plea for Justice, "People will be lining up to testify for or against the death penalty when that issue comes before the Legislature next week. A more significant issue drew less attention this week when changes in the state's insanity plea were discussed.

The Senate Judiciary Committee discussed proposals to eliminate the innocent by reason of insanity plea and replace it with a guilty but mentally ill provision.

The change makes sense, not only in the interest of justice, but also in the interest of public safety. In a chilling bit of testimony, one shooting victim of a man who used the insanity plea said she had no idea whether he was still a patient or not. The hospital would not tell news reporters whether he was still being treated, had been released to another facility, or was on the streets again.

A person declared innocent by reason of insanity must undergo treatment at the Larned State Hospital. But he can be released after only six months if the attending psychiatrists determine that the patient is no longer a threat to himself or to other patients. The average stay is 20 months. According to the law, whether he is a threat to the public is not a consideration for release.

One of the suggestions in testimony this week was that the patient not be released until psychiatrists can declare that the person would not harm himself or others in the future. That raises some obvious concern about liability for the state and the attending professionals.

Furthermore, it may be expecting the impossible. In 1983, the American Psychiatric Association disavowed psychiatrists ability to predict whether a person is dangerous, especially "long-term future dangerousness".

More recently, an article in Science magazine reported: "Studies on the prediction of violence are consistent: Clinicians are wrong at least twice as often as they are correct."

The guilty-but-mentally-ill approach would give a safer measure of protection. It would assure treatment, but it also would provide for confinement.

Kansas has had few crimes that would qualify for the death penalty. It has had several in recent memory where the insanity plea has played a part. In the broad picture, a change in the insanity plea will do more to assure public safety than the death penalty.

The Legislature should act accordingly."

Being a Legislator, I have found that changing our laws is a difficult and sometimes lengthy process. We must be sure that what we are doing is not only the will of the people but also is right and good.

Those of you who served on the Judiciary Interim Committee or on last year's Federal and State Affairs Committee know that the reason I am pursuing changes in the law is because of two murders that resulted in the death of a young man and a farmer who lived in my district.....two separate killings, committed almost a year apart by two separate insane men, in separate cities with two separate victims; et one a friend of my son and the other an uncle of a classmate of my son. The loss endured by their families has been further heightened by the inequity of our Insanity Defense laws.

The result of the Senate's work on this bill will help relieve some of the fear these families have about the release of an insanity acquittee. The court hearing process required to release or discharge the acquittee will reassure those families and the public that the individual will not likely cause harm to themselves or others. And, altering the standard for transfer from the state security hospital to another state hospital to make the test "not dangerous to other persons" rather than just other patients will help determine future dangerousness. But, the bill needs to go further.

In a Victims Rights bill we passed to the Senate last week, we required parole hearing notices to be given to victims. I would suggest that notices for these court hearings on the insanity acquittee release or discharge also be given to the victims. This can be done in line 62.

Changing laws on the Insanity Defense has been going on for years in the United States. I've attached to my testimony a copy of an article describing the changes made since 1978. Some of our legislators have said we've worked on this issue before in Kansas. Evidently though, it hasn't been worked enough as the concerns conveyed by the victims and the public indicate the need for more change. As the editorial stated, "the guilty but mentally ill" approach would give a safer measure of protection by providing treatment and confinement.

A balloon has been prepared by the Revisor's Office as a proposed amendment to the bill which was drafted after studying the laws of other states and taking into consideration the concerns addressed at previous hearings on the subject. This amendment is similar to a bill sponsored by myself and twelve other House members (six Republicans and six Democrats). Since S.B. 8 addresses the issue of Insanity Defense, in the interest of time, our bill did not receive a hearing.

The amendment places the burden of proving insanity on the defendent. This was the most widely reform made in the United States. Only twelve, of which Kansas is one, still places the burden on the state.

The amendment also introduces the verdict and plea of "guilty but mentally ill". First it defines mental illness, and then states it can be used only in felony cases and waives the defendents right to trial if the plea is accepted. This should address the concern expressed of criminals pleading mental illness causing a drastic increase in the population at Larned State Hospital. Secondly, it gives the trial judge the right to refuse to accept the plea of guilty but mentally ill.

Third, it establishes that if a defendent makes such a plea that it is an admission of the truth of the charge. Fourth, after the finding or acceptance of a plea of guilty but mentally ill the trial judge will order the defendent to be committed to an appropriate state or local institution for examination to determine treatment, and when the treatment terminates, the defendent will be required to serve the remainder of the sentence imposed. Finally, it provides for a screening investigation to determine if further treatment is necessary after the expiration of the sentence.

In the book, Crime and Madness, the Origins and Evolution of the Insanity Defense, by Thomas Maeder, he stated, "In June 1982, John W. Hinckley, Jr. was acquitted of thirteen criminal counts stemming from an attempted presidential assassination. There was no doubt that he had shot and wounded four people. He had planned the deed well in advance, and taken steps that gave him every hope of success. The only real issue confronting twelve lay jurors was whether a mass of conflicting and sometimes incomprehensible psychiatric testimony proved that, due to mental disease or defect, Hinckley 'lacked substantial capacity to appreciate the wrongfulness of his conduct, or lacked substantial capacity to conform his conduct to the requirements of the law'. After four days of deliberation, the jury concluded that Hinckley's mind should be held blameless for an act his hand had done.

The public respons was one of shock and outrage. An ABC poll taken on the day of the verdict indicated that 76 percent of the American people did not think justice had been done, and that while 90 percent did not think Hinckley should go free even if he eventually recovered from his mental illness, 78 percent felt sure that he would. The U.S. Attorney General called for an end to a doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage, and then to have the door opened for them to return to the society they victimized. The Secretary of the Treasury called the situation "beyond belief" and "absolutely actrocious" while President Reagan himself remained diplomatically silent except to remark, while plugging a federal "anti-crime" bill, that the insanity defense had been "much misinterpreted, and abused" and required "common sense revisions". Delaware soon passed their GBMI bill, and ten other states followed suit. The opposition of acquitting a person who pleads insanity was so strong in three states, they abolished the defense, (Montana in 1979, Idaho in 1982 and Utah in 1983).

David E. Schultz describes in his book, Escape of the Guilty, what a Wisconsin Trial Judge thinks about the Criminal Justice System. "It seems more intent on finding reasons to let admittedly guilty criminals escape punishment than in doing justice for society. He argues that "mind science" is not a science at all, that mental health professionals cannot agree on diagnoses and cannot tell mentally ill from the sane, that "projective tests are not reliable". He critizes the broadening of the insanity defense as another example of judicial legislation that starts on the road to excusing all crimes as determined by factors other than personal blameworthiness.

In a 1986-87 publication of "Journal of Law and Health", Professor Norvel Morris stated, "we don't really have a defense of insanity. What we have is a rarely pleaded defense that is pleaded in sensational cases, or in particularly ornate homicide cases where lawyers, the psychiatrists and the community seem to enjoy their plunge into the moral debate. The

special defense of insanity is a rare genuflection to values we neither achieve nor seek elsewhere in the criminal justice system. I see it as a somewhat hypocritical tribute to a feeling that we had better preserve some rhetorical elements of the moral infrastructure of the criminal law. There is no legal definition of insanity, different standards apply both at different stages of the criminal process, and from one jurisdiction to another, at the same stage."

Practical changes have occurred in the states that have enacted the GBMI legislation. These were the findings of a telephone survey of eleven states who passed the bill. The 136 surveyed were legislators, attorneys, judges, mental health personnel, and correctional officials.

The strengths of GBMI legislation according to the respondents were: provisions for mental health treatment; increased control over and protection from mentall ill offenders; and availability of alternative verdict in criminal proceedings. Fifty-seven percent stated that GBMI offenders are confined longer than NGRI acquittees. This helps to support the idea that this law allows the mentally ill defendant to be removed from society and will be treated for their illness.

In conclusion, Mr. Chairman, and members of the Committee, my interest in this reform occurs not only because I have a concern for the protection from murderers for the people of the State of Kansas, but also because I have seen first hand what our current law can do to the victims and their families when a violent act has been committed by a "so-called "insane person.

If your husband, wife, son, or daughter was killed by the same person would you not plead for this same justice?

I appreciate your diligence and interest in this proposed legislation and I strongly support the passage of this bill, hopefully with the proposed amendments.

Thank you.

SENATE BILL NO. 292
House Judiciary Committee
March 15, 1993

Testimony of Paul Shelby
Assisant Judicial Administrator
Office of Judicial Administration

Mr. Chairman and members of the committee

Thank you for the opportunity to appear before you today to discuss the Judicial Branch's position on Senate Bill No. 292. The bill amends K.S.A. 22-2911, a section of the statutes which deals with district court diversion agreements.

Normally court records are open to the public; however, whenever a statute requires the records to be confidential, our courts will seal the records and open them only on court order or as directed by statute. By this bill, the records of fulfilled diversion agreements are to be made available to any prosecutor or court, but not to the general public.

The Bureau of Investigation and the Division of Vehicles will continue to keep records of whether a person under a diversion agreement did or did not fulfill the terms of the diversion agreement. The Senate committee amendments were technicial in nature.

The purpose of closing court records to the public is to reward a person who has successfully fulfilled a diversion agreement by restoring a small degree of privacy. A person who has worked to demonstrate rehabilitative action would be spared the inconvenience of the public having unrestricted access to details of the diversion agreement.

We support passage of this bill. Thank you.

HOUSE JUDICIARY
Attachment #6
03-15-93

OFFICERS

Wade M. Dixon, President
John J. Gillett, Vice-President
Dennis C. Jones, Sec.-Treasurer
Randy M. Hendershot, Past President

DIRECTORS

William E. Kennedy
Nanette L. Kemmerly-Weber
Julie McKenna
Paul Morrison

Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX (913) 357-6352
EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

TESTIMONY IN SUPPORT OF SENATE BILL NO. 348

The Kansas County and District Attorneys Association appears in support of SB 348, in fact we requested the bill from the Senate Judiciary Committee. The bill appears in exactly the same form as SB 734, which was introduced by the Senate Judiciary Committee in the 1992 Session, which passed the Senate 39 - 0, but died in House Judiciary Committee. This year, the bill passed the Senate 40 - 0.

The purpose of the bill is simple: it amends K.S.A. 1992 Supp. 22-2902 to allow (not require) the parties to include a stipulation of facts as part of a diversion agreement. The concept is not new, having been included as part of the legislative effort to crack down on DUI offenders back in 1982, L. 1982, Ch. 144, Sec. 7.

The policy of diversion is not new, having existed at least informally since biblical times with the admonition of "Go ye, and sin no more". A more formal system of diversion was adopted by the Kansas Legislature in 1978, to attempt to adopt a more uniform, and possibly less discriminatory, system of diversion, K.S.A. 22-2906 et seq. At the request of the Legislature, the Legislative Post Audit Committee conducted a performance audit report of diversion programs in 1985 and presented it to the Legislature in August of 1986. In that year, nearly 11,000 diversions were granted in the jurisdictions studied (80% of the counties and 23 cities with more than 10,000 population). Of the 8620 adult diversions, 5640 were for DUI, 320 were for other traffic offenses, and 1575 were for criminal offenses. More importantly, the average cost of a diversion case was only $105. Besides the cost factor, there is the obvious saving in court docketing time, and, since most offense that are diverted fall into the presumptive sentencing categories, a saving in community corrections and court service officers case load. The benefit to a defendant is obvious. If the diversion program is completed, there is no criminal record. This effect is different than in DUI diversions, which count as a first offense.

There are two current problems with diversion: supervision, and proving the case should the agreement fall through. Where the population is mobile, and the memories of witnesses dim over time, without a stipulation of facts, the case is very difficult to prosecute six months or a year later. The effect of SB 348 enhances the use of diversion programs in that by allowing a stipulation of facts, as part of a diversion agreement, a prosecutor is more likely to offer diversion.

HOUSE JUDICIARY
Attachment #7
03-15-93

WILLIAM E. KENNEDY III
RILEY COUNTY ATTORNEY

GABRIELLE M. THOMPSON
BARRY R. WILKERSON
MICHAEL B. KEARNS
Assistant Riley County Attorneys

THOMAS K. KILGORE
Victim/Witness Coordinator
KATHIE "KATE" SCHLEGEL
Diversion Officer

Carnegie Building, Second Floor
105 Courthouse Plaza
Manhattan, KS 66502-0106

913/537-6390
FAX 537-6334

TESTIMONY FOR PROPOSED AMENDMENT TO K.S.A. 22-2909 et seq,
SUBMITTED BY WILLIAM E. KENNEDY III, RILEY COUNTY ATTORNEY
APPROVED BY KANSAS COUNTY AND DISTRICT ATTORNEYS ASSOCIATION

(Generally approved by the Kansas Legislature last year, but you ran out of time)

The purpose of this amendment is to permit a prosecutor and a criminally accused to contract to acknowledge the accused's part in a crime in the event that the accused fails to fulfill the conditions of the diversion. (The concept is already present in the DUI Statute, the difference being that in the DUI Statute, the criminal acknowledgement is mandatory, whereas in the proposed amendment the acknowledgement is permissive.) The rationale behind the amendment is that prosecutors will be encouraged to permit diversions, thus lowering court time and prosecution time. Defendants, having admitted their criminal activity will be positively encouraged to succeed at the diversion that they requested if the amendment becomes law.

The problem with the situation as it currently exists is that although prosecutors seem to have the authority to request such admission, the wording in the DUI Statute to the effect that they must have this admission coupled with the constitutional requirement that the State prove it's case beyond a reasonable doubt, leads some people to conclude that prosecutors do not have this authority as the statute exists now. If prosecutors do not have this authority, and they grant a diversion, and then perhaps six months after signing a diversion a court determines that the defendant has not followed the terms of the diversion, many times witnesses are gone or memories have failed, evidence has been returned to victims, and the prosecution is stopped. By comparison if the amendment is approved, then the State and victim lose nothing by the delay.

Note that successful completion of a diversion under the present proposed statute is not treated as a conviction as a DUI is, but as an acquittal, thus successful completion of a criminal diversion cannot be used by the prosecution to overcome the presumption of probation. For that reason, it is reasonable to assume that passage of this bill will to some extent lower the prison population, and does carry out the legislature's evident mission to handle all but the most serious crimes at the lowest possible level.

Thank you for your consideration.

Respectfully submitted,

William E. Kennedy III
Riley County Attorney

HOUSE JUDICIARY
Attachment #8
03-15-93