Approved: 4-7-93
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairman, Representative Michael R. O' Neal at 12:45 p.m. on March 24, 1993 in room 313-S of the Statehouse.

All members were present except:

Representative Tom Bradley - Excused
Representative Tim Carmody - Excused
Representative Gilbert Gregory - Excused
Representative David Heinemann - Excused

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the Committee:

Gordon Self, Revisor of Statutes
Matt Lynch, Judicial Council
Lisa Moots, Executive Director, Kansas Sentencing Commission

Hearings on SB 423 were opened concerning crimes, criminal procedure and punishment.

Chairman O 'Neal stated that this is the reconciliation bill which was made necessary because last year the Legislature passed the recodification of the criminal code and at the same time passed the Sentencing Guidelines.

Gordon Self, Revisor of Statutes, briefed the committee on SB 423. This bill reconciles conflicts and makes technical changes that arose from SB 358 & SB 479, both from the 1992 legislative session. This bill also makes clarifications to the law in a limited number of areas. These clarifications are found in the supplement. Gorden also stated that there will be another reconciliation bill introduced next year for all the bills that are enacted this legislative session.

Matt Lynch, Judicial Council, appeared before the committee as a proponent of the bill. He commented that the bulk of the amendments to the substantive offenses in SB 479 were in the penalty provisions necessitated by the Sentencing Guidelines grid. The Criminal Law Advisory Committee reviewed those offenses which were treated differently under SB 358 & SB 479 and developed recommendations to reconcile the two bills. He reviewed the sections where offenses were treated differently. (Attachment #1)

Lisa Moots, Executive Director, Sentencing Commission, appeared before the committee as a proponent of the bill. The Commission added language to make the presumptive probation grid blocks, 6-H and 6-I, allowing the courts to sentence offenders to prison or probation without having to depart with substantial and compelling reasons. The attachment included new crimes as classified by the Commission, as well as amendments offered by the Commission. (Attachment #2)

SB 10 - Commitment and release standards relating to persons acquitted because of insanity and committed after conviction but prior to sentencing.

Jill Wolters, Revisors Office, had a handout which stated that approximately 13 states have the verdict options of guilty but mentally ill and not guilty by reason of insanity. It also included a review of Indiana, Michigan, New Mexico and Pennsylvania's jury instructions. (Attachment #3)

CONTINUATION SHEET

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 12:45 p.m. on March 24, 1993.

Representative Everhart had a handout prepared by Menninger's regarding the guilty but mentally ill concept that appeared in a publication of Mental Disability and The Law. (Attachment #4)

Jill Wolters stated that in other states there is first the finding of mental illness. The key on whether it is insanity or guilty but mentally ill is whether the person knew that their conduct/act was wrong/bad. The definition of mentally ill in HB 2328 came from Michigan.

Chairman O'Neal asked if the committee was to adopt HB 2328, would this be another option in addition to guilty, not guilty, not guilty by reason of insanity.

Wolters stated that it would be adding another option.

Representative Adkins made the comment that insanity is a level of mental illness. He stated that he's not quite sure what will be gained by adding this option.

Chairman O'Neal stated that when the jury is given the option of guilty with no treatment or not guilty by reason of insanity and they acquit but reason of insanity there is the feeling that this person is going to be locked up but the acquitee convinces the doctors that they are not insane and are then released.

Consideration of SB 10 was suspended until the next committee meeting.

The Committee adjourned at 2:30 p.m. The next Committee meeting is March 25, 1993 upon first adjournment in room 313-S.

Judicial Council Recommendations
Contained in 1993 SB 423
House Judiciary Committee
March 24, 1993

During the 1992 session, the legislature passed Sentencing Guidelines (SB 479; L. 1992, ch. 239) and the recodification of the criminal code (SB 358; L. 1992, ch. 298), both effective July 1, 1993. The bulk of amendments to the substantive offenses in SB 479 were changes in the penalty provisions necessitated by the Sentencing Guidelines grid. However, the Sentencing Commission deemed it advisable to add elements in a limited number of sections to subdivide such offenses for penalty purposes. The Criminal Law Advisory Committee of the Judicial Council reviewed those offenses which were treated differently under SB 358 and SB 479 and developed recommendations to reconcile the two bills.

§§ 61 and 62 (pp. 37 and 38). **21-3602 (incest) and 3603 (aggravated incest).** The Judicial Council took the approach in SB 358 of covering unlawful sexual acts with children under 16 under other sex offenses (indecent liberties, rape, criminal sodomy) rather than under the incest provisions. The Sentencing Commission has accepted this approach. However, in SB 479 the Sentencing Commission added a reference in 21-3602 to step and adoptive relatives. The Criminal Law Committee noted different scenarios in which parents of adult children enter into new marriages and create step relationships that had not existed previously. The committee also noted the Judicial Council comment to the 1969 recodification of the criminal code which indicates 21-3602 was intentionally confined to biological relatives. In regard to aggravated incest, the Criminal Law Committee concluded the section would read more clearly if marriage was addressed exclusively in one subsection.

§§ 63 and 64 (pp. 38 and 39). **21-3604 (abandonment of a child).** The Sentencing Commission subdivided this offense based on whether or not the abandonment resulted in immediate physical danger for the child. SB 358 did not amend this section. The Criminal Law Committee was concerned with the potential vagueness of "immediate physical danger" and also noted the significant difference in severity level between abandonment (level 8) and aggravated abandonment (level 5). The Criminal Law Committee recommends a new section on aggravated abandonment which will cover violations of 21-3604 which result in great bodily harm. The Sentencing Commission chose severity level 5 for aggravated abandonment and this is the same penalty the Commission selected for recklessly causing great bodily harm.

§§ 71 and 232 (pp. 43 and 169). **21-3611 (aggravated juvenile delinquency).** The Sentencing Commission subdivided certain of the acts covered by this section based on whether or not they result in a serious threat to life. The Criminal Law Committee noted that the origins of this section predated provisions for waiver of juvenile court jurisdiction by amenability hearings. Apparently, as new situations arose, additional felonies were added to this section so that certain juveniles could be prosecuted as adults. The Criminal Law Committee recommends the more direct approach of confining 21-3611 to running away or escaping from SRS institutions and amending 38-1602 so that juveniles who commit felonies while confined in SRS institutions can be prosecuted as adults for such felonies.

§§ 83 and 84 (pp. 49 and 50). **21-3715 (burglary) and 3716 (aggravated burglary).** SB 358 added a reference in both sections to intent to commit a sexual battery to cover matters formally addressed in the aggravated sexual battery provision. The Sentencing Commission further subdivided 21-3715 based on whether the structure burglarized is a residence. The Criminal Law Committee accepts this subdivision but recommends use of "dwelling" rather than "residence" since dwelling is defined in 21-3110 to mean "a building or portion thereof, a tent, a vehicle or other enclosed space which is used or intended for use as a human habitation, home or residence." "Residence" is defined in 77-201 to mean "a place which is adopted by a person as the person's place of habitation and to which, whenever the person is absent, the person has the intention of returning. . . . "

§§ 85 and 86 (pp. 50 and 51). **21-3718 (arson) and 3719 (aggravated arson).** The Sentencing Commission subdivided arson based on the dollar amount of harm and subdivided aggravated arson based on whether or not it results in a serious threat to life. SB 358 did not amend either of these sections. The Criminal Law Committee was somewhat reluctant to recommend subdividing aggravated arson on the theory the offense presumes a serious threat to life since the use of fire or explosives is inherently uncontrollable. However, the committee recognized that a broad range of conduct can technically fit within the definition of aggravated arson and the potential problems this raises in conjunction with sentencing guidelines. Ultimately, the committee recommended a lower threshhold of risk (substantial risk of bodily harm) to distinguish between violations of aggravated arson for penalty purposes.

§ 112 (p. 66). **21-3810 (aggravated escape).** The Sentencing Commission added language which would make a violation of this section a higher level felony if the escape "is effected or facilitated by the use of violence or the threat of violence against any person." It appeared to the Criminal Law Committee that this distinction was already present under the existing language and it would be simpler to provide the higher penalty for violations of subsection (b).

Property crimes, dollar amount. In a number of property crimes, the dollar amount of harm determines the penalty level. SB 358 amended a number of property crimes to make the dollar amounts consistent and used the amount of $50,000 to distinguish the levels of felonies. In the Sentencing Guidelines bill, the legislature chose to use $25,000. Since $25,000 represents the most recent legislative statement, the Criminal Law Committee recommends using that amount in the property crimes to identify the more serious felonies in the following sections: 21-3701, 3704, 3707, 3720, 3729, 3734, 3755, 3904 and 3905.

§ 264 (pp. 202 and 203). **Inherently dangerous felonies, drive-by shootings.** In adopting SB 358, a new section was added which lists inherently dangerous felonies which will support a charge of felony murder. This list is further amended in section 264 of SB 423. In 1992, the legislature also enacted 21-4219 (which is further amended by section 167 of SB 423) to address drive-by shootings. Felony violations of 21-4219 were stated to support a charge of felony murder. Consequently, section 264 of SB 423 adds felony violations of 21-4219 to the list of inherently dangerous felonies. The first three felonies on the list of inherently dangerous felonies are intentional homicides and were included on the theory a distinct criminal homicide can serve as the underlying felony for felony murder. However, unless such a homicide is

clearly distinct, the merger doctrine continues to apply and prevent such a homicide from serving as an underlying felony for felony-murder purposes. However, the list as amended also includes child abuse and drive-by shootings. It appears to be the legislative intent that child abuse and drive-by shootings should not be subject to the merger doctrine. Accordingly, the Criminal Law Committee recommended the addition of subsection (b) (p. 203, lines 25 through 30, SB 423) to indicate those inherently dangerous felonies which are subject to the merger doctrine.

In reviewing SB 358, the Criminal Law Advisory Committee has developed a limited number of further recommended amendments to the homicide provisions.

Reckless homicides. SB 358 amended 21-3402 to include within murder in the second degree ". . . the killing of a human being committed:

(a) . . .

(b) Unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."

Involuntary manslaughter (21-3404) was amended to include ". . . the unintentional killing of a human being committed:

(a) Recklessly; or
(b) . . . . "

Reckless conduct is defined in 21-3201(3) to mean "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a wanton disregard or complete indifference and unconcern for the probable consequences of such conduct. . . ."

The amendments to 21-3402 and 3404 concerning reckless killings followed the language of the model penal code.

The Sedgwick County District Attorney's Office raised a concern relating to the distinction between reckless murder and reckless manslaughter. At a minimum, it appears the use of the language ". . . complete indifference. . . for the probable consequences . . ." in the definition of reckless conduct may create confusion for a jury when combined with the additional element of "extreme indifference to human life" contained in reckless murder. Consequently, the Criminal Law Committee recommends further amendments to the definition of reckless conduct in 21-3201(3) (SB 423, §17, p. 20, ll. 40-42).

Imperfect justification. SB 358 amended 21-3403 (voluntary manslaughter) to mitigate intentional killings from murder to manslaughter when committed "upon an unreasonable but honest belief that deadly force was justified in self-defense." The further recommended amendments (SB 423, §20, p.21, ll. 27-29) substitute a reference to the justification provisions

of 21-3211 (defense of person), 3212 (defense of dwelling) and 3213 (defense of property other than dwelling) rather than limiting the provision to self-defense. The further amendments are also intended to avoid any argument that an honest but unreasonable belief as to the scope of a justification provision serves as a basis for mitigation. The Criminal law Committee viewed these further changes as consistent with the approach of the model penal code.

Unintentional killings involving the use of excessive force in self-defense (SB 423, §21, p.21, l. 43). The Criminal Law Committee recommends further amending 21-3404 (involuntary manslaughter) to include unintentional killings committed "during the commission of a lawful act in an unlawful manner." The recommendation is based on cases exemplified by State v. Gregory, 218 Kan. 180 (1975) and State v. Warren, 5 Kan.App.2d 754 (1981) which discussed unintentional killings involving the use of excessive force in self-defense. The cases characterize such homicides as unintentional killings during the commission of a lawful act (self-defense) in an unlawful manner (excessive force). Since there was an intent to inflict injury, the idea that the homicide was committed recklessly was specifically rejected. The Criminal Law Committee was concerned such cases wouldn't necessarily be covered as reckless killings under involuntary manslaughter and since they are unintentional killings, they would not be covered by any other homicide provision.

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(Revised 01/93)

State of Kansas

KANSAS SENTENCING COMMISSION

To: House Judiciary Committee

From: Lisa Moots

Date: March 24, 1993

Re: Senate Bill 423 - Reconciliation

21-3411 Aggravated assault of a law enforcement officer
21-3415 Aggravated battery of a law enforcement officer when there is a possibility of great bodily harm

These are both severity level 6 crimes which, if the offender has no prior record, have a presumptive prison sentence. The Commission added language to make the presumptive probation grid blocks, 6-H and 6-I, border boxes which will allow the sentencing court to sentence to prison or probation without having to depart with substantial and compelling reasons.

21-3410 Aggravated assault

This is a severity level 7 crime which also carries a presumption for probation under certain circumstances related to the offender's criminal history. The Commission added language to convert the presumptive probation grid block blocks to border boxes which will allow the sentencing court to sentence to prison or probation without having to depart for substantial and compelling reasons when a firearm is used in the commission of the crime.

The Commission classified new crimes:

Description	Current Class	Ranking
Infliction of injury to a police dog	A Misd.	Nonperson
Receipt/use of drug proceeds - this will be in Chapter 21 of the K.S.A.'s	C Fel.	7 Nonperson
Mistreatment of dep. adult - physical	D Fel.	6 Person
Mistreatment of dep. adult - financial or omission of care	A Misd.	Person
Stalking - first offense	B Misd.	Person
Stalking - second & subsequent	A Misd.	Person
Abortion of a viable fetus	A Misd.	Person
Perf. abortion on an unemancipated minor	A Misd.	Person
Disclosure of minor's ID or court record of abortion	B Misd.	Nonperson
Funeral picketing	B Misd.	Person
Drive-by shooting-unoccupied dwelling	E Fel.	8 Nonperson
Drive-by shooting-occupied, but no apprehension of bodily harm	D Fel.	7 Person
Drive-by shooting - resulting bodily harm	C Fel.	5 Person
H.I.V. crime	A Misd.	Person

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We classified previously unranked crimes, located in chapters other than 21 of the K.S.A.'s:

Statute	Description	Ranking
8-116(a)&(c)	Vehicles; vehicle identification number offenses - E felony	10
19-3519	Water districts; fraudulent claims $50 or less - A misdemeanor; greater than $50 - D felony. This crime should be classified according to the amount of the fraudulent claim as a severity level 7, 9 nonperson or an A misdemeanor with $500 and $25,000 cut-offs as with other property crimes. This will require a change of elements.	A Nonperson Misdemeanor 9 Nonperson and 7 Nonperson
25-2409	Elections; election bribery - D felony	7
25-2411	Elections; election perjury - E felony	9
24-2412	Elections; election forgery - E felony	8
25-2414	Elections; possessing false or forged election supplies - E felony	9
25-2417	Elections; bribery of an election official - D felony	7
25-2418	Elections; bribe acceptance by an election official - D felony	7
25-2420	Elections; election fraud by an election officer - E felony	10
25-2421	Elections; election suppression - E felony	10
25-2422	Elections; unauthorized voting disclosure - E felony	10
25-2423	Elections; election tampering - E felony	8
25-2425	Elections; voting machine fraud - E felony	10
25-2426	Elections; printing and circulating imitation ballots - E felony	10
25-2428	Elections; destruction of election supplies - E felony	9
25-2429	Elections; destruction of election papers - E felony	9
25-2431	Elections; false impersonation of a voter - E felony	9
25-4414	Electronic/electromechanical voting system fraud - E felony	10
25-4612	Optical scanning equipment fraud - E felony	10
34-293	Grain storage; issuance of receipt for warehouseman's grain - E felony	10
34-295	Grain storage; negotiation of receipt of encumbered grain - E felony	10
39-717(b)	Welfare assistance; illegal disposition over $150 - E felony This crime should be classified based on the amount of the disposition using $500 and $25,000 cut-offs	A Misdemeanor 9 and 7
50-1013	Consumer protection; loan broker act; penalty - E felony	10
55-156	Oil & gas; protection of water prior to abandoning well - E felony	10
55-157	Oil & gas; cementing in of surface casing - E felony	10
55-904	Oil & gas; disposal of salt water (second and subsequent) - E felony	10
65-2859	Healing arts; filing false documents - E felony	8
65-2861	Healing arts; false swearing - E felony	9
65-3441(b)	Hazardous wastes; unlawful acts (11) - E felony	10
65-3441(c)	Hazardous wastes; unlawful acts (1-11, aggravated) - C felony	6
74-8717(b)	Lottery; forgery of lottery ticket - D felony	8
74-8718(f)	Lottery; unlawful sale of lottery ticket (second and subsequent) -	

	D felony	9
74-8719(f)	Lottery; unlawful purchase of lottery ticket (second and subsequent) - D felony	9
74-8810(i)	Parimutuel racing; prohibited acts - E felony	8

In the juvenile section, we inadvertently left out decay rules for felonies listed in level 4 of the drug grid. We clarified the decay rule to apply if the offender's current crime of conviction is committed after the offender reaches the age of 25. We also added a provision that off-grid felonies will never decay.

We changed the manner of classifying out-of-state crimes for criminal history to accept the out-of-state classification of felony or misdemeanor. Then Kansas has the responsibility to determine whether the crime was a person or nonperson felony.

Aggravated vehicular homicide was repealed by the Judicial Council's bill and merged into involuntary manslaughter. We amended the section, which treats each DUI as a person felony for criminal history when the current crime of conviction is aggravated vehicular homicide, to reference the involuntary manslaughter statute.

The journal entry was adjusted slightly to strike aggravating factors which did not pass as part of the Sentencing Guidelines law. We added space in the presentence investigation reports for listing the category I sentence as well as the sentence under the criminal history category of the offender. We also added identification numbers on some of the forms which will aid the Commission in the monitoring of the effects of Sentencing Guidelines. Language outlining the journal entry of revocation was added. We had included the forms last year. However, we had left out the statutory language which stated the requirements of the form.

The sentencing grids were amended slightly. The only change in the nondrug grid is that the nondrug heading is now one word. On the drug grid, the Commission had classified the first possession of cocaine or narcotics as a presumptive probation crime in boxes 3-H and 3-I. When the Judicial Counsel lowered the penalty on this crime from a class C to a D felony, the Commission followed, by reclassifying first possession at severity level 4, which is presumptive probation in boxes G, H and I. The first sale of cocaine or narcotics remains at severity level 3, and presumes imprisonment for all criminal histories. Therefore, the bifurcated boxes are now unnecessary.

Other proposed amendments that have not previously been submitted are attached in balloon form for the Committee's consideration.

provisions of this section shall not apply to crimes committed on or after July 1, 1993.

Sec. 242. K.S.A. 1991 Supp. 21-4606b is hereby amended to read as follows: 21-4606b. ~~(1)~~ *(a)* If probation is not granted pursuant to K.S.A. 21-4606a, and amendments thereto, the presumptive sentence for a person convicted of a class D or E felony shall be assignment to a community correctional services program on terms the court determines.

~~(2)~~ *(b)* In determining whether to impose the presumptive sentence provided by this section, the court shall consider whether any of the following aggravating circumstances existed:

~~(a)~~ *(1)* Whether the crime is a felony violation of the uniform controlled substances act or an attempt to commit such an offense;

~~(b)~~ *(2)* whether the crime is a crime specified in article 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated or an attempt to commit such an offense; or

~~(c)~~ *(3)* any prior record of the person's having been convicted of a felony or having been adjudicated to have committed, while a juvenile, an offense which would constitute a felony if committed by an adult.

(c) The provisions of this section shall not apply to crimes committed on or after July 1, 1993.

Sec. 243. K.S.A. 1991 Supp. 21-4608 is hereby amended to read as follows: 21-4608. ~~(1)~~ *(a)* When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively as the court directs. Whenever the record is silent as to the manner in which two or more sentences imposed at the same time shall be served, they shall be served concurrently, except as provided in subsections ~~(3),~~ ~~(4)~~ ~~and~~ ~~(5)~~ *(c), (d) and (e).*

~~(2)~~ *(b)* Any person who is convicted and sentenced for a crime committed while on probation, assignment to a community correctional services program, parole or conditional release for a misdemeanor shall serve the sentence concurrently with or consecutively to the term or terms under which the person was on probation, assigned to a community correctional services program or on parole or conditional release, as the court directs.

~~(3)~~ *(c)* Any person who is convicted and sentenced for a crime committed while on probation, assigned to a community correctional services program, on parole or on conditional release for a felony shall serve the sentence consecutively to the term or terms under

which the person was on probation, assigned to a community correctional services program or on parole or conditional release.

~~(4)~~ *(d)* Any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released.

~~(5)~~ *(e)* Any person who is convicted and sentenced for a crime committed while such person is incarcerated and serving a sentence for a felony in any place of incarceration shall serve the sentence consecutively to the term or terms under which the person was incarcerated.

~~(6)~~ *(f)* The provisions of this subsection relating to parole eligibility shall be applicable to persons convicted of crimes committed prior to January 1, 1979, but shall be applicable to persons convicted of crimes committed on or after that date only to the extent that the terms of this subsection are not in conflict with the provisions of K.S.A. 22-3717 and amendments thereto. In calculating the time to be served on concurrent and consecutive sentences, the following rules shall apply:

~~(a)~~ *(1)* When indeterminate terms run concurrently, the shorter minimum terms merge in and are satisfied by serving the longest minimum term and the shorter maximum terms merge in and are satisfied by conditional release or discharge on the longest maximum term if the terms are imposed on the same date.

~~(b)~~ *(2)* When concurrent terms are imposed on different dates, computation will be made to determine which term or terms require the longest period of incarceration to reach parole eligibility, conditional release and maximum dates, and that sentence will be considered the controlling sentence. The parole eligibility date may be computed and projected on one sentence and the conditional release date and maximum may be computed and projected from another to determine the controlling sentence.

~~(c)~~ *(3)* When indeterminate terms imposed on the same date are to be served consecutively, the minimum terms are added to arrive at an aggregate minimum to be served equal to the sum of all minimum terms and the maximum terms are added to arrive at an aggregate maximum equal to the sum of all maximum terms.

~~(d)~~ *(4)* When indeterminate sentences are imposed to be served consecutively to sentences previously imposed in any other court or the sentencing court, the aggregated minimums and maximums shall be computed from the effective date of the subsequent sentences which have been imposed as consecutive. For the purpose of determining the sentence begins date and the parole eligibility and

(1)

(2) If a person is sentenced to prison for a crime committed on or after July 1, 1993 while the person was incarcerated for an offense committed prior to July 1, 1993, and the person is not eligible for the retroactive application of the sentencing guidelines act, the new sentence shall not be aggregated with the old sentence but shall begin when the person is paroled or reaches the conditional release date on the old sentence, whichever is earlier. the offender was past his or her conditional release date at the time the new offense was committed, the new sentence shall not be aggregated with the old sentence but shall begin when the person is ordered released by the Kansas parole board or reaches the maximum sentence date on the old sentence, whichever is earlier. The new sentence shall then be served as otherwise provided by law. The period of postrelease supervision shall be based on the new sentence.

Attachment #2 — 5
03-24-93

which is expressly forbidden by law or ~~willfully~~ *intentionally* omits to perform any duty imposed by law, upon conviction, shall be guilty of a class A *nonperson* misdemeanor. The insolvency of an investment company is deemed fraudulent for the purposes of this section, unless its affairs appear upon investigation to have been administered clearly, legally, and with the same care and diligence that agents receiving a compensation for their services are bound, by law, to observe.

Sec. 9. K.S.A. 16-637 is hereby amended to read as follows: 16-637. A director, officer or employee of an investment company, who concurs in any vote or act by which it is intended to make a loan or purchase a contract in violation of this law, upon conviction, shall be guilty of a class A *nonperson* misdemeanor.

Sec. 10. K.S.A. 16-638 is hereby amended to read as follows: 16-638. Any director, officer or employee of any investment company, who makes or maintains, or attempts to make or maintain, a deposit of such company's funds with any other person on condition, or with the understanding, express or implied, that the person receiving such deposit make a loan or advance, directly or indirectly, to any director, officer, or employee of the company so making or maintaining or attempting to make or maintain such deposit, upon conviction, shall be guilty of a class A *nonperson* misdemeanor.

Sec. 11. K.S.A. 16-639 is hereby amended to read as follows: 16-639. Every officer or employee of any investment company who sells investment certificates knowing that the investment company is insolvent, upon conviction, shall be guilty of a class A *nonperson* misdemeanor.

Sec. 12. K.S.A. 1992 Supp. 17-1267 is hereby amended to read as follows: 17-1267. (a) Any person who ~~willfully~~ *intentionally* violates any provision of this act except K.S.A. 17-1264, and amendments thereto, or who ~~willfully~~ *intentionally* violates any rule and regulation adopted or order issued under this act, or who ~~willfully~~ *intentionally* violates K.S.A. 17-1264, and amendments thereto, knowing the statement made to be false or misleading in any material respect, shall upon conviction be guilty of a felony. A conviction for a violation of K.S.A. 17-1253, and amendments thereto, shall be a ~~class D~~ *severity level 6, nonperson* felony. All other convictions for violation under this act shall be a ~~class E~~ *severity level 7, nonperson* felony. ~~Any violation of this act committed on or after July 1, 1993, resulting in a loss of $25,000 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment.~~ No person may be imprisoned for the violation of any rule and regulation or order if such person proves

this language should not be stricken

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~~A misdemeanor.~~ Any violation of the provisions of this section ~~committed on or after July 1, 1993,~~ is a class A nonperson misdemeanor.

Sec. 15. K.S.A. 21-2501, as amended by section 32 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-2501. (a) It is hereby made the duty of every sheriff, police department or countywide law enforcement agency in the state, immediately to cause two sets of fingerprint impressions to be made of a person who is arrested if the person:

(1) Is wanted for the commission of a felony ~~and,~~. On or after July 1, 1993, *fingerprints shall be taken if the person is wanted for the commission of a felony or* a class A or B misdemeanor~~,~~ or *a violation of a county resolution or municipal ordinance which would be the equivalent of a class A or B misdemeanor under state law;*

(2) is believed to be a fugitive from justice;

~~(2)~~ *(3)* may be in the possession at the time of arrest of any goods or property reasonably believed to have been stolen by the person;

~~(3)~~ *(4)* is in possession of firearms or other concealed weapons, burglary tools, high explosives or other appliances believed to be used solely for criminal purposes;

~~(4)~~ *(5)* is wanted for any offense which involves sexual conduct prohibited by law or for violation of the uniform controlled substances act; or

~~(5)~~ *(6)* is suspected of being or known to be a habitual criminal or violator of the intoxicating liquor law.

(b) *The court shall ensure, upon the offender's ~~conviction~~ of a felony or an A or B misdemeanor, that the offender has been processed and fingerprinted.*

(c) Fingerprint impressions taken pursuant to this section shall be made on the forms provided by the department of justice of the United States or the Kansas bureau of investigation. The sheriff, police department or countywide law enforcement agency shall cause the impressions to be forwarded to the Kansas bureau of investigation at Topeka, Kansas, which shall forward one set of the impressions to the federal bureau of investigation, department of justice, at Washington, D.C. A comprehensive description of the person arrested and such other data and information as to the identification of such person as the department of justice and bureau of investigation require shall accompany the impressions.

~~(c)~~ *(d)* A sheriff, police department or countywide law enforcement agency may take and retain for its own use copies of fingerprint impressions of a person specified in subsection (a), together with a

first appearance, or in any event before final disposition

or a city ordinance violation comparable to a class A or B misdemeanor under a Kansas criminal statute

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Involuntary manslaughter is a ~~class D~~ *severity level 5, person* felony.

Sec. 22. K.S.A. 21-3405, as amended by section 7 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3405. Vehicular homicide is the unintentional killing of a human being committed by the operation of an automobile, airplane, motor boat or other motor vehicle in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances.

Vehicular homicide is a class A *person* misdemeanor.

Sec. 23. K.S.A. 21-3406, as amended by section 8 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3406. Assisting suicide is intentionally advising, encouraging or assisting another in the taking of the other's life which results in a suicide or attempted suicide.

Assisting suicide is a ~~class E~~ *severity level 9, person* felony.

Sec. 24. K.S.A. 21-3409, as amended by section 46 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3409. Assault of a law enforcement officer is an assault, as defined in K.S.A. 21-3408 and amendments thereto, committed against a uniformed or properly identified state, county or city law enforcement officer while such officer is engaged in the performance of such officer's duty.

~~Assault of a law enforcement officer is a class A misdemeanor.~~ Assault of a law enforcement officer ~~committed on or after July 1, 1993,~~ is a class A person misdemeanor.

Sec. 25. K.S.A. 21-3410, as amended by section 10 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3410. Aggravated assault is an assault, as defined in K.S.A. 21-3408 and amendments thereto, committed:

(a) With a deadly weapon;

(b) while disguised in any manner designed to conceal identity; or

(c) with intent to commit any felony.

Aggravated assault is a ~~class D~~ *severity level 7, person* felony.

Sec. 26. K.S.A. 21-3411, as amended by section 48 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3411. Aggravated assault of a law enforcement officer is an aggravated assault, as defined in K.S.A. 21-3410 and amendments thereto, committed against a uniformed or properly identified state, county or city law enforcement officer while such officer is

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Aggravated assault committed with a firearm shall be subject to the provisions of subsection (h) of section 4 of chapter 239 of the 1992 Session Laws of Kansas, a... amendments thereto

~~(i)~~ *(A)* Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; or

~~(ii)~~ *(B)* causing the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another; or

~~(c)~~ *(3)* engaging in any of the following acts with a child who is not married to the offender and who is under 14 years of age:

~~(i)~~ *(A)* Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

~~(ii)~~ *(B)* soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

~~(2)~~ *(b)* Aggravated indecent liberties with a child *as described in subsection (a)(1)* is a ~~class~~ C *severity level 3, person* felony. *Aggravated indecent liberties with a child as described in subsections (a)(2) and (3) is a severity level 4, person felony.*

Sec. 49. K.S.A. 21-3505, as amended by section 23 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3505. ~~(1)~~ *(a)* Criminal sodomy is:

~~(a)~~ *(1)* Sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal;

~~(b)~~ *(2)* sodomy with a child who is not married to the offender and who is 14 or more years of age but less than 16 years of age; or

~~(c)~~ *(3)* causing a child 14 or more years of age but less than 16 years of age to engage in sodomy with any person or animal.

~~(2)~~ *(b)* Criminal sodomy as provided in subsection ~~(1)(a)~~ *(a)(1)* is a class B *nonperson* misdemeanor. Criminal sodomy as provided in subsections ~~(1)(b)~~ ~~and~~ ~~(1)(c)~~ *(a)(2) and (3)* is a ~~class~~ C *severity level 3, person* felony.

Sec. 50. K.S.A. 21-3506, as amended by section 24 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3506. *(a)* Aggravated criminal sodomy is:

~~(a)~~ *(1)* Sodomy with a child who is not married to the offender and who is under 14 years of age;

~~(b)~~ *(2)* causing a child under 14 years of age to engage in sodomy with any person or an animal; or

~~(c)~~ *(3)* sodomy with a person who does not consent to the sodomy

subsections (a)(1) and (a)(3)

subsection (a)(2)

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Sec. 187. K.S.A. 21-4407, as amended by section 229 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-4407. Receiving a sports bribe is:

(a) Accepting, agreeing to accept or soliciting by a sports participant of any benefit from another person upon an understanding that such sports participant will thereby be influenced not to give such participant's best efforts in a sports contest; or

(b) Accepting, agreeing to accept or soliciting by a sports official any benefit from another person upon an understanding that such official will perform such official's duties improperly.

~~Receiving a sports bribe is a class A misdemeanor.~~ Receiving a sports bribe ~~committed on or after July 1, 1993,~~ is a class A nonperson misdemeanor.

Sec. 188. K.S.A. 21-4408, as amended by section 230 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-4408. Tampering with a sports contest is seeking to influence a sports participant or sports official, or tampering with any animal or equipment or other thing involved in the conduct or operation of a sports contest, in a manner contrary to the rules and usages governing such contest and with intent to influence the outcome of such contest.

~~Tampering with a sports contest is a class E felony.~~ Tampering with a sports contest ~~committed on or after July 1, 1993,~~ is a severity level 9, nonperson felony.

Sec. 189. Section 234 of chapter 239 of the 1992 Session Laws of Kansas is hereby amended to read as follows: Section 234. (a) A person who has been convicted of a felony may, in addition to ~~or instead of~~ the ~~imprisonment~~ *sentence* authorized by law, be ~~sentenced~~ *ordered* to pay a fine which shall be fixed by the court as follows:

(1) For any off-grid felony crime~~, including murder in the first degree, treason and aircraft piracy, and for any third conviction for sales of illegal controlled substances pursuant to K.S.A. 65-4127a and 65-4127b and amendments thereto or any drug crime~~ *ranked in severity level 1*, a sum not exceeding $500,000.

(2) For ~~nondrug felony crimes~~ ranked in severity levels 1 ~~to~~ *through* 5 ~~*or any drug crime ranked*~~ *in severity levels 2 or 3*, a sum not exceeding $300,000.

(3) For ~~nondrug felony crimes~~ ranked in severity levels 6 ~~to~~ *through* 10 ~~*or any drug crime ranked*~~ *in severity level 4*, a sum not exceeding $100,000.

(b) A person who has been convicted of a misdemeanor ~~may~~, in addition to or instead of the imprisonment authorized by law, *may*

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K.S.A. 21-4501 and amendments thereto; and

(2) the court may fix a maximum sentence of not less than the least nor more than three times the greatest maximum sentence provided for the crime by K.S.A. 21-4501 and amendments thereto.

(c) If a defendant is convicted of a felony other than a felony specified in article 34, 35 or 36 of chapter 21 of Kansas Statutes Annotated, having been convicted at least twice before for any such felony offenses or comparable felony offenses under the laws of another state, the federal government or a foreign government, the trial judge shall sentence the defendant as follows, upon motion of the prosecuting attorney:

(1) The court shall fix a minimum sentence of not less than the greatest nor more than two times the greatest minimum sentence authorized for the crime for which the defendant is convicted by K.S.A. 21-4501 and amendments thereto; and

(2) the court may fix a maximum sentence of not less than the least nor more than two times the greatest maximum sentence provided for the crime by K.S.A. 21-4501 and amendments thereto.

(d) If any portion of a sentence imposed under K.S.A. 21-107a, and amendments thereto, or under this section, is determined to be invalid by any court because a prior felony conviction is itself invalid, upon resentencing the court may consider evidence of any other prior felony conviction that could have been utilized under K.S.A. 21-107a, and amendments thereto, or under this section, at the time the original sentence was imposed, whether or not it was introduced at that time, except that if the defendant was originally sentenced as a second offender, the defendant shall not be resentenced as a third offender.

(e) The provisions of this section shall not be applicable to:

(1) Any person convicted of a felony of which a prior conviction of a felony is a necessary element;

(2) any person convicted of a felony for which a prior conviction of such felony is considered in establishing the class of felony for which the person may be sentenced; or

(3) any felony committed on or after July 1, 1993.

(f) A judgment may be rendered pursuant to this section only after the court finds from competent evidence the fact of former convictions for felony committed by the prisoner, in or out of the state.

~~(g) The provisions of this section shall not apply to crimes committed on or after July 1, 1993.~~

Sec. 191. K.S.A. 1992 Supp. 21-4602 is hereby amended to read as follows: 21-4602. As used in K.S.A. 21-4601 through 21-4621, and

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This language should not be deleted

category or through a departure for substantial and compelling reasons subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution. *In felony cases, the court may include confinement in a county jail not to exceed 30 days, which need not be served consecutively, as a condition of probation or community corrections placement;*

(4) assign the defendant to a community correctional services program in presumptive nonprison cases *or through a departure for substantial and compelling reasons* subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution;

(5) assign the defendant to a conservation camp for a period not to exceed 180 days;

(6) assign the defendant to a house arrest program pursuant to K.S.A. 21-4603b and amendments thereto;

(7) order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by subsection (3) of K.S.A. 21-4502 and amendments thereto; or

(8) impose any appropriate combination of (1) ~~and~~ ~~(2)~~ ~~or,~~ (2), (3), (4), (5), (6), and (7).

In addition to or in lieu of any of the above, the court shall order the defendant to submit to and complete an alcohol and drug evaluation, and pay a fee therefor, when required by subsection (4) of K.S.A. 21-4502 and amendments thereto.

In imposing a fine the court may authorize the payment thereof in installments. In releasing a defendant on probation, the court shall direct that the defendant be under the supervision of a court services officer. If the court commits the defendant to the custody of the secretary of corrections or to jail, the court may specify in its order the amount of restitution to be paid and the person to whom it shall be paid if restitution is later ordered as a condition of parole or conditional release.

The court in committing a defendant to the custody of the secretary of corrections shall fix a term of confinement within the limits provided by law. In those cases where the law does not fix a term of confinement for the crime for which the defendant was convicted, the court shall fix the term of such confinement.

(b) Dispositions which do not involve commitment to the custody of the secretary of corrections shall not entail the loss by the defendant of any civil rights.

(c) This section shall not deprive the court of any authority conferred by any other Kansas statute to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose

When probation, assignment to community corrections, parole, conditional release, or postrelease supervision is revoked due to a conviction for a new felony, a consecutive sentence is mandated as described in K.S.A. 21-4608 and amendments thereto. In this case, the court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction presumes a nonprison sentence. Such action does not constitute a departure.

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(3) *Except as provided in subsections (c)(4) and (c)(5),* the total period in all cases shall not exceed 60 months, or the maximum period of the prison sentence that could be imposed whichever is longer. ~~If the defendant is convicted of nonsupport of a child the period may be continued as long as the responsibility for support continues. If the defendant is ordered to pay full or partial restitution, the period may be continued as long as the amount of restitution ordered has not been paid. The court may modify or extend the offender period of supervision, pursuant to a modification hearing and a judicial finding of necessity. Such extensions may be made for a maximum period of five years or the maximum period of the prison sentence that could be imposed, whichever is longer, inclusive of the original supervision term.~~ Nonprison sentences may be terminated by the court at any time.

(4) If the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. If the defendant is ordered to pay full or partial restitution, the period may be continued as long as the amount of restitution ordered has not been paid.

(5) The court may modify or extend the offender's period of supervision, pursuant to a modification hearing and a judicial finding of necessity. Such extensions may be made for a maximum period of five years or the maximum period of the prison sentence that could be imposed, whichever is longer, inclusive of the original supervision term.

Sec. 197. K.S.A. 1991 Supp. 21-4619, as amended by section 247 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-4619. (a) Except as provided in subsections (b) and (c), any person convicted in this state of a traffic infraction, misdemeanor or a class D or E felony, or for crimes committed on or after July 1, 1993, a ~~crime in~~ *nondrug crimes ranked in* severity levels 6 through 10 *or any* ~~drug crime~~ *ranked in severity level* 4, may petition the convicting court for the expungement of such conviction if three or more years have elapsed since the person: (1) Satisfied the sentence imposed; or (2) was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence.

(b) Except as provided in subsection (c), no person may petition for expungement until five or more years have elapsed since the person satisfied the sentence imposed or was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence, if

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such person was convicted of a class A, B or C felony, or for crimes committed on or after July 1, 1993, if *convicted of* an off-grid crime or ~~falls within~~ *any nondrug crime ranked in* severity levels 1 through 5 *or any* ~~drug crime~~ *ranked in severity levels 1 through 3*, or:

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(1) Vehicular homicide, as defined by K.S.A. 21-3405 and amendments thereto or as prohibited by any law of another state which is in substantial conformity with that statute;

(2) a violation of K.S.A. 8-1567 and amendments thereto, or a violation of any law of another state, which declares to be unlawful the acts prohibited by that statute;

(3) driving while the privilege to operate a motor vehicle on the public highways of this state has been cancelled, suspended or revoked, as prohibited by K.S.A. 8-262 and amendments thereto or as prohibited by any law of another state which is in substantial conformity with that statute;

(4) perjury resulting from a violation of K.S.A. 8-261a and amendments thereto or resulting from the violation of a law of another state which is in substantial conformity with that statute;

(5) violating the provisions of the fifth clause of K.S.A. 8-142 and amendments thereto, relating to fraudulent applications or violating the provisions of a law of another state which is in substantial conformity with that statute;

(6) any crime punishable as a felony wherein a motor vehicle was used in the perpetration of such crime;

(7) failing to stop at the scene of an accident and perform the duties required by K.S.A. 8-1602, 8-1603 or 8-1604, and amendments thereto, or required by a law of another state which is in substantial conformity with those statutes;

(8) violating the provisions of K.S.A. 40-3104 and amendments thereto, relating to motor vehicle liability insurance coverage; or

(9) a violation of K.S.A. 21-3405b, and amendments thereto.

(c) There shall be no expungement of convictions for the following offenses or of convictions for an attempt to commit any of the following offenses: (1) Indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto; (2) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto; (3) *criminal sodomy as defined in subsection (a)(2) or (a)(3) of K.S.A. 21-3505 and amendments thereto; (4)* aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto; ~~(4) enticement of a child as defined in K.S.A. 21-3509 and amendments thereto;~~ (5) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto; (6) aggravated indecent

acquired or possessed was ~~$100 or more~~ *at least $500 but less than $25,000. Any person convicted of violating the provisions of this section shall be guilty of a severity level 7, nonperson felony if the value of the assistance sold or otherwise disposed of, purchased, acquired or possessed was $25,000 or more.*

None of the money paid, payable, or to be paid, or any tangible assistance received under this act shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Sec. 238. K.S.A. 1992 Supp. 40-247 is hereby amended to read as follows: 40-247. An insurance agent or broker who acts in negotiating or renewing or continuing a contract of insurance including any type of annuity by an insurance company lawfully doing business in this state, and who receives any money or substitute for money as a premium for such a contract from the insured, whether such agent or broker shall be entitled to an interest in same or otherwise, shall be deemed to hold such premium in trust for the company making the contract. If such agent or broker fails to pay the same over to the company after written demand made upon such agent or broker, less such agent's or broker's commission and any deductions, to which by the written consent of the company such agent or broker may be entitled, such failure shall be prima facie evidence that such agent or broker has used or applied the premium for a purpose other than paying the same over to the company. An agent or broker who violates the provisions of this section shall be guilty of a: ~~(1) Class D~~ *(a) Severity level 7, nonperson* felony if the value of the insurance premium is ~~$50,000~~ *$25,000* or more; ~~(2) class E~~ *(b) severity level 9, nonperson* felony if the value of the insurance premium is at least $500 but less than ~~$50,000~~ *$25,000*; or ~~(3)~~ *(c)* class A *nonperson* misdemeanor if the value of the insurance premium is less than $500, except that if the value of the insurance premium is less than $500 and such agent or broker has, within five years immediately preceding commission of the crime, been convicted of violating this section two or more times shall be guilty of a ~~class E~~ *severity level 9, nonperson* felony.

Sec. 239. K.S.A. 1992 Supp. 50-1013 is hereby amended to read as follows: 50-1013. (a) Any person who willfully violates any provision of this act or knowingly violates any cease and desist order issued under this act commits a ~~class E~~ *severity level 10, nonperson* felony.

(b) Prosecution for any crime under this act must be commenced within five years after the alleged violation. A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other

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Any violation of this act committed on or after July 1, 1993 resulting in a loss of $25,000 or more, regardless of its location on the sentencing grid block, shall have

be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. If an offense is classified in grid blocks 5-H, 5-I or 6-G, the court may impose an optional nonprison sentence upon making the following findings on the record:

(1) An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and

(2) the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or

(3) the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence if the offense is classified in grid blocks 5-H, 5-I or 6-G shall not be considered a departure and shall not be subject to appeal.

(g) The sentence for the violation of K.S.A. 21-3411, aggravated assault against a law enforcement officer or K.S.A. 21-3415, aggravated battery against a law enforcement officer and amendments thereto which places the defendant's sentence in grid block 6-H or 6-I shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence, if the offense is classified in grid block 6-H or 6-I, shall not be considered departure and shall not be subject to appeal.

Sec. 270. Section 5 of chapter 239 of the 1992 Session Laws of Kansas is hereby amended to read as follows: Section 5. (a) For the purpose of sentencing, the following sentencing guidelines grid for drug crimes shall be applied in felony cases under the uniform controlled ~~substance~~ *substances* act for crimes committed on or after July 1, 1993:

add "a"

(h) The sentence for a violation of K.S.A. 21-3410, aggravated assault, committed with a firearm, which places the defendant's sentence in grid block 7-C, 7-D, 7-E, 7-F, 7-G, 7-H or 7-I, shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence, if the offender is classified in these grid blocks shall not be considered a departure and shall not be subject to appeal.

, or 5 felony, or a drug severity level 1, 2 or 3 felony, if committed by an adult, will not decay.

(6) All juvenile adjudications which would constitute a person felony will not decay or be forgiven.

(7) All class A misdemeanor convictions, class B person misdemeanors and class B select nonperson misdemeanors shall be considered and scored. Class C misdemeanors will not be considered and scored.

(8) Unless otherwise provided by law, unclassified felonies, *and* class A and B misdemeanors ~~and unclassified misdemeanors~~, shall be considered and scored as nonperson crimes for the purpose of determining criminal history.

(9) Prior convictions of a crime defined by a statute which has since been repealed shall be scored using the classification assigned at the time of such conviction.

(10) Prior convictions of a crime defined by a statute which has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes.

(c) (1) One prior criminal history unit will be assigned for each previous conviction event. Jurisdiction is the court in which the criminal action has been filed.

(2) (A) When multiple sentences in a prior single judicial proceeding are imposed concurrently, the defendant shall be considered to have one conviction for criminal history purposes and the crime of conviction having the highest crime seriousness ranking shall be counted in the offender's criminal history. All other convictions, whether sentenced consecutively or concurrently, shall be counted parately in the offender's criminal history.

(B) Person felony convictions will always take precedence over nonperson felony convictions, otherwise the most severe crime within the multiple counts making up a prior conviction event will be used to assess the prior criminal history score for the current event.

(C) In multiple misdemeanor convictions, person misdemeanor convictions will be used to assess the prior history score for the current event.

delete

Sec. 275. Section 11 of chapter 239 of the 1992 Session Laws of Kansas is hereby amended to read as follows: Section 11. In addition to the provisions of section 10 *of chapter 239 of the 1992 Session Laws of Kansas and amendments thereto*, the following shall apply determining an offender's criminal history classification as con- ied in the presumptive sentencing guidelines grid for nondrug crimes and the presumptive sentencing guidelines grid for drug crimes:

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(1) A system shall be developed whereby good behavior by inmates is the expected norm and negative behavior will be punished; and

(2) the amount of time which can be earned by an inmate and subtracted from any sentence is limited to an amount equal to 20% of the prison part of the sentence.

(b) Any time which is earned and subtracted from any presumptive sentence of any inmate pursuant to good time calculation shall be added to such inmate's time of postrelease supervision.

(c) The secretary of corrections is hereby authorized to adopt rules and regulations to carry out the provisions of this act regarding good time calculations. Such rules and regulations shall provide circumstances upon which *an* inmate may earn good time credits and for the forfeiture of earned credits and such circumstances may include factors substantially related to program and work participation and conduct and the inmate's willingness to examine and confront the past behavior patterns that resulted in the commission of the inmate's crimes.

Sec. 283. Section 24 of chapter 239 of the 1992 Session Laws of Kansas is hereby amended to read as follows: Section 24. (a) The sentencing grid for nondrug crimes as provided in section 4 ~~X~~ and the sentencing grid for drug crimes as provided in section 5 ~~X~~ shall be applied for crimes committed before July 1, 1993, as provided in this section.

(b) (1) Except as provided in subsection (d), persons who committed crimes which would be classified in a ~~grid block which has a presumptive disposition of nonimprisonment in the sentencing guidelines grid for nondrug crimes or the sentencing guidelines grid for drug crimes~~, in grid blocks ~~5-H~~, 5-I or 6-G of the ~~sentencing guidelines grid for~~ nondrug ~~crimes~~ or in grid blocks 3-H or 3-I of ~~the sentencing guidelines grid for drug crimes~~, if sentenced pursuant to the Kansas sentencing guidelines act, and were sentenced prior to July 1, 1993, shall have their sentences modified according to the provisions specified in the Kansas sentencing guidelines act.

(2) Except as provided in subsection (d), offenders on probation, *or parole* for crimes ~~which would be~~ classified ~~in a grid block which has a presumptive disposition of nonimprisonment in the sentencing guidelines grid for nondrug crimes or the sentencing guidelines grid for drug crimes, in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-H or 3-I of the sentencing guidelines grid for drug crimes, if sentenced pursuant to the Kansas sentencing guidelines act,~~ committed prior to ~~July 1~~, ~~1993~~, who have such probation, *or parole* revoked shall have their

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→ of Chapter 239 of the 1992 Kansas Session Laws

→ of Chapter 239 of the 1992 Kansas Session Laws

→ presumptive nonimprisonment grid block on either grid,

grid →

→ the drug grid, pursuant to the provisions in section 5(c) of Chapter 239 of the 1992 Kansas Session Laws, and amendments thereto,

assignment to community corrections, conditional release

→ in subsection (b)(1), committed prior to July 1, 1993,

assignment to community corrections, conditional release

sentences modified according to the provision specified in the Kansas sentencing guidelines act.

(c) (1) Except as provided in subsection (f), the department of corrections shall conduct a review of all persons who committed crimes and were sentenced prior to July 1, 1993, *and are* ~~*incarcerated*~~ *in the custody of the secretary of corrections as of that date.* The department shall prepare a sentencing guidelines report *on all such* ~~*incarcerated*~~ *inmates except those who have convictions for crimes which, if committed on or after July 1, 1993, would constitute a severity level 1, 2, 3 or 4 felony on the sentencing guidelines grid for nondrug crimes or a severity level 1, 2 or 3 felony on the sentencing guidelines grid for drug crimes,* which shall review and determine what the person's sentence as provided by the crime severity and criminal history grid matrix established by the Kansas sentencing commission guidelines act would be as if the crime were committed on or after July 1, 1993. A copy of the report shall be transmitted to the ~~person who committed the crime, the prosecution officer who originally prosecuted such person~~ *inmate, the county or district attorney for the county from which the inmate was sentenced,* and the sentencing court.

(2) In determining the criminal history classification, the department of corrections shall conduct a reasonable search of the inmate's file and available presentence report, and make a reasonable inquiry of the Kansas bureau of investigation and the federal bureau of investigation, for other records of criminal or juvenile convictions which would affect the criminal history classification.

(3) The department of corrections shall have access to any juvenile records maintained by the Kansas bureau of investigation or the department of social and rehabilitation services for use in determining the person's criminal history classification.

(4) The criminal history classification as determined by the department of corrections shall be deemed to be correct unless objection thereto is filed by either the person or the prosecution officer within the 30-day period provided to request a hearing. If an objection is filed, the sentencing court shall determine the person's criminal history classification. The burden of proof shall be on the prosecution officer regarding disputed criminal history issues.

(5) The department of corrections shall complete and submit to the appropriate parties the report on all ~~persons *incarcerated*~~ *inmates* with a controlling sentence which, if committed on and after July 1, 1993, would constitute a severity level 9 or 10 felony on the sentencing guidelines grid for nondrug crimes by August 15, 1993.

(6) The department of corrections shall complete and submit to

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the appropriate parties the report on all ~~persons~~ ~~*incarcerated*~~ *inmates* with a controlling sentence which, if committed on and after July 1, 1993, would constitute a severity level 7 or 8 felony on the sentencing guidelines grid for nondrug crimes ~~and a severity level 3 or 4 felony on the sentencing guidelines grid for drug crimes~~ by October 15, 1993.

(7) The department of corrections shall complete and submit to the appropriate parties the report on all ~~persons~~ ~~*incarcerated*~~ *inmates* with a controlling sentence which, if committed on and after July 1, 1993, would be classified in grid blocks 5-H, 5-I ~~or~~, 6-G, *6-H or 6-I* of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-H or 3-I of the ~~sentencing guidelines for drug crimes felony~~ by December 1, 1993.

(d) (1) Within 30 days of the issuance of such report, the person who committed the crime and the prosecution officer shall have the right to request a hearing *by filing a motion with the sentencing court,* regarding conversion to a sentence under the Kansas sentencing guidelines act to be held in the jurisdiction where the original criminal case was filed. The secretary of corrections shall be provided *written* notice of any request for a hearing. If a request for a hearing is not filed within 30 days of the issuance of the report, the department shall convert the person's sentence to one provided for under the sentencing guidelines and provide notification of that action to the person, the prosecution officer, and the court in the jurisdiction where the original criminal case was held. The conversion by the department of corrections to the sentencing guidelines shall be to the mid-point of the range in the applicable grid box. *The secretary of corrections shall be authorized to implement a converted sentence as provided in this section, if the secretary has not received written notice of a request for a hearing by the close of normal business hours on the fifth business day after expiration of the 30-day period.*

(2) In the event a hearing is requested and held, the court shall determine the applicable sentence as prescribed by the Kansas sentencing guidelines act.

(3) In the event a hearing is requested, the court shall schedule and hold the hearing within 60 days after it was requested and shall rule on the issues raised by the parties within 30 days after the hearing.

(4) Such offender shall be represented by appointed counsel pursuant to the provisions of K.S.A. 22-4501 *et seq.* and amendments thereto.

(5) Nothing contained in this section shall be construed as re-

imprisoned

imprisoned

drug grid, pursuant to the ~~special rule~~ provision in section 5(c) of Chapter 239, 1992 Kansas Session Laws and amendments thereto,

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quiring the appearance in person of the offender or creating such a right of appearance in person of the offender at the hearing provided in this section regarding conversion to a sentence under the Kansas sentencing guidelines act.

(6) The court shall enter an order regarding the person's sentence and forward that order to the secretary of corrections who shall administer the sentence.

(e) If a sentence is converted as provided by this section, then all the rights and privileges accorded by the Kansas sentencing guidelines act shall be applicable. A person's sentence shall not be increased in length through a conversion to one under sentencing guidelines.

(f) In the case of any person to whom the provisions of this section shall apply, who committed a crime prior to July 1, 1993, but was sentenced after July 1, 1993, the sentencing court shall impose a sentence as provided pursuant to law as the law existed prior to July 1, 1993, and shall compute the appropriate sentence had the person been sentenced pursuant to the Kansas sentencing guidelines.

Sec. 284. K.S.A. 8-116, 8-262, as amended by section 27 of chapter 239 of the 1992 Session Laws of Kansas, 8-287, as amended by section 28 of chapter 239 of the 1992 Session Laws of Kansas, 8-1568, as amended by section 29 of chapter 239 of the 1992 Session Laws of Kansas, 12-4106, as amended by section 30 of chapter 239 of the 1992 Session Laws of Kansas, 12-4404, 12-4507, 16-636, 16-637, 16-638, 16-639, 19-3519, 21-1801, as amended by section 31 of chapter 239 of the 1992 Session Laws of Kansas, 21-2501, as amended by section 32 of chapter 239 of the 1992 Session Laws of Kansas, 21-2501a, as amended by section 33 of chapter 239 of the 1992 Session Laws of Kansas, 21-3201, as amended by section 2 of chapter 298 of the 1992 Session Laws of Kansas, 21-3402, as amended by section 4 of chapter 298 of the 1992 Session Laws of Kansas, 21-3403, as amended by section 5 of chapter 298 of the 1992 Session Laws of Kansas, 21-3404, as amended by section 6 of chapter 298 of the 1992 Session Laws of Kansas, 21-3405, as amended by section 7 of chapter 298 of the 1992 Session Laws of Kansas, 21-3406, as amended by section 8 of chapter 298 of the 1992 Session Laws of Kansas, 21-3409, as amended by section 46 of chapter 239 of the 1992 Session Laws of Kansas, 21-3410, as amended by section 10 of chapter 298 of the 1992 Session Laws of Kansas, 21-3411, as amended by section 48 of chapter 239 of the 1992 Session Laws of Kansas, 21-3412, as amended by section 11 of chapter 298 of the 1992 Session Laws of Kansas, 21-3414, as amended by section 12 of chapter 298 of the 1992 Session Laws of Kansas, 21-3415, as amended by section

rectional institution.

Sec. 29. K.S.A. 21-3414, as amended by section 12 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3414. ~~(1)~~ *(a)* Aggravated battery is:

~~(a)~~ ~~(i)~~ *(1) (A)* Intentionally causing great bodily harm to another person or disfigurement of another person; or

~~(ii)~~ *(B)* intentionally causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted; or

~~(iii)~~ *(C)* intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted; or

~~(b)~~ ~~(i)~~ *(2) (A)* recklessly causing great bodily harm to another person or disfigurement of another person; or

~~(ii)~~ *(B)* recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted.

~~(2)~~ *(b)* Aggravated battery as described in subsection ~~(1)(a)~~ *(a)(1)(A)* is a ~~class~~ ~~C~~ *severity level 4, person* felony. *Aggravated battery as described in subsections (a)(1)(B) and (a)(1)(C) is a severity level 7, person felony.* Aggravated battery as described in subsection ~~(1)(b)~~ *(a)(2)(A)* is a ~~class~~ ~~D~~ *severity level 5, person* felony. *Aggravated battery as described in subsection (a)(2)(B) is a severity level 8, person felony.*

Sec. 30. K.S.A. 21-3415, as amended by section 13 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3415. Aggravated battery against a law enforcement officer is an aggravated battery, as defined in subsection ~~(1)(a)~~ *(1)* of K.S.A. 21-3414 and amendments thereto, committed against a uniformed or properly identified state, county, or city, law enforcement officer while the officer is engaged in the performance of the officer's duty.

Aggravated battery against a law enforcement officer is a ~~class~~ ~~B~~ *severity level 3, person* felony. *A person convicted of aggravated battery against a law enforcement officer shall be subject to the provisions of subsection (g) of section 4 of chapter 239 of the 1992 Session Laws of Kansas and amendments thereto.*

Sec. 31. K.S.A. 21-3416, as amended by section 55 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-3416. Unlawful interference with a firefighter is knowingly and intentionally interfering with, molesting or assaulting as defined in K.S.A. 21-3408 and amendments thereto, any firefighter

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where great bodily harm is inflicted.
Aggravated battery against a law enforcement officer is a level 6 person felony if there is a possibility that great bodily harm could have been inflicted.

TO: HOUSE JUDICIARY COMMITTEE

FROM: JILL WOLTERS, ASSISTANT REVISOR

DATE: March 23, 1993

RE: SB 10, Guilty but mentally ill/not guilty by reason of insanity.

Approximately 13 states have the verdict options of guilty but mentally ill and not guilty by reason of insanity. The following is a review of four states jury instructions including Indiana, Michigan, New Mexico and Pennsylvania.

INDIANA (Indiana Pattern Jury Instructions, Criminal, 2d ed., 1991, vol. 2, 11.01 through 11.19)

In Indiana, to find a person not guilty by reason of insanity, the jury would decide that as a result of a mental disease or defect, the defendant was unable to appreciate the wrongfulness of the conduct . Mental disease or defect is defined as a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but does not include an abnormality manifested only by repeated unlawful or anti-social conduct.

To find the defendant guilty but mentally ill, the jury would find that the defendant did not suffer from any mental disease or defect and that the defendant did appreciate the wrongfulness of the conduct but suffered from a psychiatric disorder which substantially disturbs a person's thinking, feeling or behavior and impairs the person's ability to function.

If the defendant raise the defense of insanity, the burden rests upon the defendant to prove insanity by a preponderance of the evidence.

MICHIGAN (Michigan Criminal Jury Instructions, 2d ed., 1992/1993, Supplement, vol. 1, CJI2d 7.9 through 7.14)

Michigan defines mental illness as a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life. To be legally insane in Michigan, the defendant must first be mentally ill and also lack substantial capacity to appreciate either the wrongfulness of the conduct or to conform the defendant's conduct to the requirements of the law such defendant is charged with violating.

To find the defendant guilty but mentally ill, the jury must find the defendant committed the crime, that the defendant was mentally ill at the time of the crime, and that the defendant was not legally insane at the time of the crime.

The state must prove beyond a reasonable doubt that the defendant was legally sane at the time of the alleged crime.

NEW MEXICO (New Mexico Jury Instructions--Criminal, Chapter 51, 14-5101 through 14-5111)

In New Mexico, a defendant was insane at the time of the

crime if the defendant because of a mental illness did not know what he/she was doing was wrong or understand the consequences of the act; did not know the act was wrong; or could not prevent himself/herself from committing the act. Mental disease is defined as a specific disorder of the mind which both substantially affects mental processes and substantially impairs behavior controls. This specific disorder must be a long-standing disorder.

The state must prove beyond a reasonable doubt that the defendant was legally sane at the time of the alleged crime.

PENNSYLVANIA (Pennsylvania Suggested Standard Criminal Jury Instructions, 6th Supp., Pa.SSJI (Crim) 5.01A and 5.01B.)

In Pennsylvania, a person is legally insane if at the time of committing an alleged crime, he/she is laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he/she is doing or, if he/she does know the nature and quality of the act, he/she does not know that what he/she is doing is wrong.

Mental disease or defect means a disease or infirmity of the mind as distinguished from a mere fault of character, personality, temperament or social adjustment.

Guilty but mentally ill means that at the time of the crime the defendant was not so mentally abnormal as to be relieved from blame and criminal punishment for what he/she did but that he/she was abnormal enough to make him/her a likely candidate for special therapeutic treatment.

The defendant has the burden of proving an insanity defense by a preponderance of the evidence.

Indiana Pattern Jury Instructions
Criminal 2d ed, 1991, Vol. 2

Instruction No. 11.01. Sample Elements Instruction.

I.C. 35-42-1-1, I.C. 35-41-3-6, I.C. 35-41-4-1, I.C. 35-36-1-1, I.C. 35-36-2-3.

The crime of murder is in part defined as follows:

A person who knowingly or intentionally kills another human being commits murder, a felony.

To convict the defendant of the crime of murder, the State must have proved each of the following elements:

The defendant

1. knowingly or intentionally
2. killed [*name*].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty.

If the State did prove each of these elements beyond a reasonable doubt, and the defendant also proved by a preponderance of the evidence that at the time of such conduct, as the result of a mental disease or defect, he was unable to appreciate the wrongfulness of the conduct, then you should find the defendant not responsible by reason of insanity.

If you find the State did prove each of these elements beyond a reasonable doubt and you further find at the time of such conduct he did not suffer from any mental disease or defect, and that he did appreciate the wrongfulness of his conduct, but you do find at the time of said acts he had a psychiatric disorder which substantially disturbed his thinking, feeling or behavior and impaired his ability to function, then you should find the defendant guilty but mentally ill of murder, a felony.

If the State did prove each of these elements beyond a reasonable doubt and you have considered and rejected the defense of insanity and the idea of mental illness, you should find the defendant guilty of murder, a felony.

Comments

The terms "mentally ill," "insanity," "burden of proof" and "murder" are defined by law. See I.C. 35-36-1-1, I.C. 35-41-3-6, I.C. 35-41-4-1 and I.C. 35-42-1-1; Instruction Nos. 11.03, 11.07, 11.05 and 11.01.

Instruction No. 11.03. Mentally Ill — Definition.

I.C. 35-36-1-1.

The term "mentally ill" means having a psychiatric disorder which substantially disturbs a person's thinking, feeling or behavior and impairs the person's ability to function; "mentally ill" also includes having any mental retardation.

Instruction No. 11.05. Plea and Burden of Proof.

I.C. 35-41-4-1.

A plea of not guilty has been entered. The burden rests upon the State of Indiana to prove to each of you, beyond a reasonable doubt, each and every essential element of the charge contained in the [information] [indictment].

The defendant has also raised the defense of insanity. On the issue of insanity, the burden rests upon the defendant to prove to each of you, by a preponderance of the evidence, that he was not responsible by reason of insanity at the time of the offense charged.

The fact that a charge has been filed, the defendant arrested and brought to trial is not to be considered by you as any evidence of guilt.

Instruction No. 11.07. Definition of Defense of Insanity.

I.C. 35-41-3-6 (1984).

The defense of insanity is defined by law as follows:

A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

"Mental disease or defect" means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or anti-social conduct.

Instruction No. 11.09. Preponderance of Evidence.

Preponderance of the evidence, as it applies to the issue of insanity, means that you must be convinced from a consideration of all the evidence in the case that the defendant was more probably insane than sane. The number of witnesses testifying on that issue for one side or the other is not necessarily of the greater weight. Evidence which convinces you most strongly of its truthfulness is of the greater weight.

Instruction No. 11.11. Reasonable Doubt.

A reasonable doubt is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation.

If, after considering all of the evidence, you have reached such a firm belief that the defendant has committed the act charged that you would feel safe to act upon that conviction, without hesitation, in a matter of the highest concern and importance to you, when you are not required to act at all, then you will have reached that degree of certainty which excludes reasonable doubt.

If you have reached that certainty, you should then consider the issue of insanity. If you are convinced from all of the evidence in the case that the defendant was more probably sane than insane at the time of the act charged, then you will have reached that degree of certainty that authorizes conviction.

If you are convinced from all of the evidence in the case that the defendant was more probably insane than sane, then you should find the defendant not responsible by reason of insanity.

Instruction No. 11.13. Presumption of Innocence.

Under the law of this State, you must presume that the defendant is innocent. To overcome the presumption of innocence, the State must have proved the defendant is guilty beyond a reasonable doubt of each essential element of the crime charged.

Since the defendant is presumed to be innocent, he is not required to present any evidence to prove his innocence. However, in this case on the sole issue of not responsible by reason of insanity the defendant has the burden of proving he was insane at the time of the act charged by a preponderance of the evidence.

Instruction No. 11.15. Temporary Insanity.

Temporary insanity is recognized by the law as well as insanity of a longer period.

It is not necessary for the defense to show the defendant had a prior history of mental illness, nor to show he is still suffering from a continuing mental disease or defect. These are just some circumstances which you may consider with all other circumstances to determine whether the defendant was legally responsible for his actions on [*date*].

Instruction No. 11.17. Expert Witnesses — Procedure.

I.C. 35-36-2-2.

Under Indiana law, when a defendant in a criminal case enters a special plea of not responsible by reason of insanity, the court is required to appoint [two] [three] disinterested [psychiatrists] [physicians] [psychologists] to examine the defendant. The court is further required to call those [psychiatrists] [physicians] [psychologists] to testify at trial concerning their opinion about the defendant's sanity at the time of the offense.

The fact that these [psychiatrists] [physicians] [psychologists] are called as witnesses by the court does not mean the court necessarily approves or sanctions their testimony. You should weigh, evaluate, and scrutinize the testimony of the court's psychiatric witnesses in the same manner you would the witnesses called by the defendant and the State.

Instruction No. 11.19. Expert Testimony — Weight.

The jury is not bound by the definitions or conclusions of experts who have testified as to what is a mental disease or mental defect. Mental disease or mental defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus, you are instructed to consider expert testimony in light of all other testimony presented concerning the development, adaptation and functioning of his mental and emotional processes and behavior controls and not necessarily accept the ultimate conclusions of the experts as to the defendant's legal sanity or insanity. This is your decision and only your decision. You must decide the extent of the defendant's mental disability, if any.

Michigan Criminal Jury Instructions 2nd ed.
1992/1993 Supplement vol. 1

CJI2d 7.9
The Meanings of Mental Illness, Mental Retardation and Legal Insanity

(1) One of the defenses that will be raised in this case is that the defendant was legally insane at the time of the crime. Under the law, mental illness and legal insanity are not the same. A person can be mentally ill and still not be legally insane. Because of this, and because the law treats people who commit crimes differently depending on their mental state at the time of the crime, it is important for you to understand the legal meanings of "mental illness," "mental retardation," and "legal insanity."

(2) "Mental illness" is defined by law as a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life.

(3) "Mental retardation" means significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment of adaptive behavior.

(4) To be legally insane, a person must first be either mentally ill or mentally retarded, as I have defined those conditions. But that is not enough. To be legally insane, the person must, because of his mental illness or mental retardation, lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law he is charged with violating.

Use Note

If the defendant plans to assert an insanity defense, an instruction such as this one *must be given* before testimony is presented on the issue. MCLA 768.29a(1), MSA 28.1052(1)(1). Filing a notice of intent to assert an insanity defense is *not* the same as actually asserting the defense at trial. Before trial, the court should ask if the defendant plans to raise the insanity defense. If he does not, the court should not give this instruction. The statute mandates that definitions of mental illness *and* mental retardation be given. If defendant's counsel does not want the definition of mental retardation (or mental illness) because it is inappropriate and

section (a) of K.S.A. 65-4127a and amendments thereto. An offender's criminal history score on the horizontal axis does not include prior convictions of an unlawful act contained in K.S.A. 65-4127a or 65-4127b and amendments thereto.

Sec. 274. Section 10 of chapter 239 of the 1992 Session Laws of Kansas is hereby amended to read as follows: Section 10. (a) Criminal history categories contained in the sentencing guidelines grid for nondrug crimes and the sentencing guidelines grid for drug crimes are based on the following types of prior convictions: Person felony adult convictions, nonperson felony adult convictions, person felony juvenile adjudications, nonperson felony juvenile adjudications, person class A misdemeanor adult convictions, nonperson class A misdemeanor adult convictions, person class A misdemeanor juvenile adjudications, nonperson class A misdemeanor juvenile adjudications, person class B misdemeanor adult convictions, select class B nonperson misdemeanor adult convictions, person class B misdemeanor juvenile adjudications and select class B nonperson misdemeanor juvenile adjudications.

(b) *A B nonperson select misdemeanor is a special classification established for weapons violations. Such classification shall be considered and scored in determining an offender's criminal history classification.*

(c) The following are applicable to determining an offender's criminal history classification:

(1) Only verified convictions will be considered and scored.

(2) All prior adult felony convictions, *including expungements,* will be considered and scored ~~including expungements~~.

(3) There will be no decay factor applicable for adult convictions.

(4) Except as otherwise provided, *a* juvenile ~~adjudications~~ *adjudication*, which would have been a nonperson class D or E felony if committed before July 1, 1993, or a *nondrug* level 6, 7, 8, 9 or 10, *or drug level 4,* nonperson felony if committed on or after July 1, 1993, or a misdemeanor if committed by an adult, ~~that occurred between the ages of 13 and 18 will decay when the offender reaches age 25~~ *will decay if the current crime of conviction is committed after the offender reaches the age of 25.*

(5) *For convictions of crimes committed before July 1, 1993, a* juvenile ~~adjudications~~ *adjudication* which would constitute a ~~person~~ class A, B or C felony ~~before July 1, 1993, or a level 1, 2, 3, 4 or 5 person felony if committed on or after July 1, 1993~~, if committed by an adult, will not decay. *For convictions of crimes committed on or after July 1, 1993, a juvenile adjudication which would constitute an off-grid felony, a nondrug severity level 1, 2,*

Except as otherwise provided, all convictions, whether sentenced consecutively or concurrently, shall be counted separately in the offender's criminal history.

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confusing, the CJI Committee suggests that the defendant place a waiver on the record prior to trial.

Although the CJI Committee thinks the terms in this instruction could be explained more clearly, it has chosen to follow statutory language. See commentary to CJI2d 7.11 for a discussion of the definition of terms.

When instructing prior to deliberation, use CJI2d 7.11.

History

CJI2d 7.9 was CJI 7:8:01.

Commentary

MCLA 768.29a(1), MSA 28.1052(1)(1) requires the trial judge to instruct on the statutory definitions of mental illness, retardation and legal insanity before any testimony is presented on the issue. The court's failure to instruct, even without a request, requires reversal. *People v Girard*, 96 Mich App 594, 293 NW2d 639 (1980); *People v Mikulin*, 84 Mich App 705, 270 NW2d 500 (1978).

CJI2d 7.11
Legal Insanity; Mental Illness; Mental Retardation: Burden of Proof

(1) The defense of legal insanity has been raised in this case. It is very important for you to remember that mental illness and legal insanity are not the same. A person can be mentally ill and still not be legally insane. The law treats people who commit crimes differently depending on their mental state at the time of the crime.

(2) Before you may consider the defendant's mental state, you must be convinced beyond a reasonable doubt that the defendant committed each of the alleged acts. Now, because there has been evidence that might show that the defendant was legally insane, the prosecutor must also prove beyond a reasonable doubt that the defendant was legally sane at the time of the alleged crime. It is important for you to remember that the defendant does not have to prove that he was legally insane.

(3) When you deliberate, you must consider separately whether the defendant was mentally ill [or mentally retarded] and whether he was legally insane. You must use the definitions I gave you. I will repeat those definitions, and then describe what you should do.

(4) "Mental illness" is defined by law as a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life.

(5) "Mental retardation" means significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment of adaptive behavior.

(6) To be legally insane, a person must first be either mentally ill or mentally retarded, as I have defined those conditions. But that is not enough. To be legally insane, the person must, because of his mental illness or mental retardation, lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law he is charged with violating.

(7) To decide whether the defendant was legally insane

at the time of the crime, you should go through the following two steps:

(8) Step one. Has the prosecutor proved beyond a reasonable doubt that the defendant was not mentally ill [or mentally retarded] at the time of the crime? If you are convinced beyond a reasonable doubt that the defendant was not mentally ill [or mentally retarded] at the time of the crime, then he was not legally insane. On the other hand, if you have such a reasonable doubt, you should go on to the next step.

(9) Step two. Has the prosecutor proved beyond a reasonable doubt that the defendant had the substantial ability both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law he is charged with violating?

(10) If you are convinced beyond a reasonable doubt that the prosecutor has done so, then the defendant is not legally insane. If the prosecutor has failed to do so, then the defendant is legally insane and you must find him not guilty by reason of insanity.

Use Note

A waiver of the definition of mental retardation may be appropriate when there is no issue of retardation, although the statute apparently mandates that such an instruction be given.

History

CJI2d 7.11 was CJI 7:8:02A–7:8:06, 7:8:13.

Commentary

MCLA 330.1400a, MSA 14.800(400a) defines mental illness.

MCLA 330.1500(h), MSA 14.800(500)(h) defines mental retardation.

MCLA 768.21a(1), MSA 28.1044(1)(1) defines legal insanity.

MCLA 768.20a, MSA 28.1043(1) and MCLA 768.21, MSA 28.1044 require preliminary notice of an intent to raise an insanity defense. When the defense fails to file such notice, the trial judge need not instruct *sua sponte* on insanity. *People v Munn*, 25 Mich App 165, 181 NW2d 28 (1970).

A person is legally insane if, as a result of mental illness or mental retardation, that person lacks substantial capacity either to appreciate the

wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. MCLA 768.21(a)(1), MSA 28.1044(1)(1).

When the court chooses to define legal sanity instead of legal insanity, a mentally ill person must be shown to possess both substantial capacity to appreciate the wrongfulness of his or her conduct and the ability to conform his or her conduct to the requirements of the law. *People v Gasco*, 119 Mich App 143, 326 NW2d 397 (1982).

It is error for a trial court to instruct a jury that to acquit by reason of insanity it must find that the accused could not appreciate that his or her acts were wrong *and* could not conform his or her conduct to the requirements of the law, since legal insanity must be found where *either* of those conditions exists. However, in *People v Mazzie*, 137 Mich App 60, 357 NW2d 805 (1984), *aff'd*, 429 Mich 29, 413 NW2d 1 (1987), such an instruction did not require reversal where the judge also instructed the jury that insanity requires a finding that the accused is mentally ill and that, if the jury found that the accused was not insane but mentally ill and was guilty, it must return a guilty but mentally ill verdict. The jury returned a straight guilty verdict. The court held that under those circumstances it was clear that the jury found the accused was not mentally ill.

Insanity and mental illness are separate defenses with different consequences. If a defendant is found mentally ill, he may be not guilty; guilty but mentally ill; or, if he or she lacks substantial capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law, not guilty by reason of insanity. *People v Smith*, 119 Mich App 91, 362 NW2d 434 (1982).

Even though the defendant offers evidence of insanity, this does not preclude, nor should the jury be told that it cannot return, a not guilty verdict. *People v Deneweth*, 14 Mich App 604, 165 NW2d 910 (1968).

In Michigan, sanity is not an element the prosecution must prove in its case-in-chief. Rather, a defendant who raises an insanity defense has the burden of going forward with evidence of insanity. Once the defendant presents such evidence, the burden shifts to the prosecution to prove the defendant sane beyond a reasonable doubt. *In re Certified Question (Duffy v Foltz)*, 425 Mich 457, 390 NW2d 620 (1986); *People v Murphy*, 416 Mich 453, 331 NW2d 152 (1982).

Although a defendant is presumptively sane, the amount of evidence needed to overcome the presumption is minimal. *People v Savoie*, 419 Mich 118, 349 NW2d 139 (1984). However, the defendant must do more than merely assert an insanity defense to become entitled to jury determination of the issue. A jury cannot be allowed to rely on mere speculation or conjecture. *People v Livingston*, 57 Mich App 726, 226 NW2d 704 (1975), *remanded*, 396 Mich 818, 238 NW2d 360 (1976).

Jurors may no longer be instructed on the disposition of a person found not guilty by reason of insanity. Disposition is controlled by the Mental Health Code, MCLA 330.1001 et seq., MSA 14.800(1) et seq., and involves contingencies so numerous that neither the jury nor anyone else can predict disposition. *People v Goad*, 421 Mich 20, 364 NW2d 584 (1984).

CJI2d 7.12
Definition of Guilty but Mentally Ill

(1) There is another verdict that is completely different from the verdict of not guilty because of insanity. This is called "guilty but mentally ill."

(2) To find the defendant guilty but mentally ill, you must find the following beyond a reasonable doubt:

(3) First, you must find that the defendant committed the crime.

(4) Second, you must find that the defendant was mentally ill at the time of the crime, using the definition I gave you.

(5) Third, you must find that, at the time of the crime, the defendant was not legally insane, using the definition I gave you.

Use Note

MCLA 768.29a(2), MSA 28.1052(1)(2) requires an instruction on guilty but mentally ill whenever there is an instruction on insanity. *People v Mikulin*, 84 Mich App 705, 270 NW2d 500 (1978). A guilty but mentally ill instruction cannot be waived by the defendant. *People v Ritsema*, 105 Mich App 602, 307 NW2d 380 (1981).

History

CJI2d 7.12 was CJI 7:8:09.

Commentary

MCLA 768.36(1), MSA 28.1059(1) creates the guilty but mentally ill verdict.

The Michigan Supreme Court has held that this verdict does not impermissibly encourage jury compromise or violate due process. *People v Ramsey*, 422 Mich 500, 375 NW2d 297 (1985).

A major purpose in creating the verdict was to limit the number of persons who, in the eyes of the legislature, were improperly relieved of criminal responsibility by the insanity verdict. *Id.*

The trial court should not instruct jurors on the disposition of a defendant found guilty but mentally ill. *People v Goad*, 421 Mich 20, 364 NW2d 584 (1984).

CJI2d 7.13
Insanity at the Time of the Crime

You must judge the defendant's mental state at the time of the alleged crime. You may consider evidence about his mental condition before and after the crime, but only to help you judge his mental state at the time of the alleged crime.

History

CJI2d 7.13 was CJI 7:8:11.

Commentary

A person is not responsible for criminal conduct if at the time of such conduct he or she lacks the substantial capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. *See* MCLA 768.21a(1), MSA 28.1044(1)(1); *People v Murphy*, 416 Mich 453, 461–462, 331 NW2d 152 (1982); Model Penal Code §4.01.

Although the question for the jury is whether the defendant was insane at the time of the offense, evidence of the defendant's conduct and mental condition before and after the offense may be relevant in deciding that question. *See People v Woody*, 380 Mich 332, 335–338, 157 NW2d 201 (1968); *Murphy*, 416 Mich at 465–466.

CJI2d 7.14
Permanent or Temporary Insanity

Legal insanity may be permanent or temporary. You must decide whether the defendant was legally insane at the time of the alleged crime.

Use Note

The committee recommends that this instruction be given if requested.

History

CJI2d 7.14 was CJI 7:8:12.

Commentary

The jury needs to determine only whether the defendant was insane at the time of the offense. See commentary to CJI2d 7.13. The duration of the defendant's insanity is not controlling. *People v Jordan*, 51 Mich App 710, 713, 216 NW2d 71 (1974).

Michigan does not recognize a separate doctrine of "temporary" insanity and has warned against feigned offers of such a defense. *People v Finley*, 38 Mich 482, 483 (1878). The *Finley* case was cited in *People v Wright*, 58 Mich App 735, 739, 228 NW2d 807 (1975), where the court affirmed a jury instruction that included the following: "One who indulges in that convenient form of insanity referred to as temporary or emotional insanity, which lasts just long enough to enable him to commit an act of violence, is not relieved from criminal responsibility."

New Mexico

CHAPTER 51

Justification and Defense

PART A. INSANITY AND INCOMPETENCY

14-5101. Insanity; jury procedure.[1]

There is an issue in this case as to the defendant's mental condition at the time the act was committed. You will be given alternative verdict forms [for each crime charged][2] as follows:

["guilty" of .....;[3]
"guilty" of .....;
"not guilty";
"not guilty by reason of insanity";
"guilty but mentally ill"][4].

Only one of these forms is to be completed [for each crime charged].[2]

You will first consider whether the defendant committed the crime.

If you determine that the defendant committed the act charged, but you are not satisfied beyond a reasonable doubt that he was sane at the time, you must find him not guilty by reason of insanity.

If you find that the defendant is guilty, you should then consider if the defendant was mentally ill at the time.

If you find that the defendant is guilty of the crime charged, but he was mentally ill at the time, you should find him "guilty, but mentally ill."

If you find that the defendant is guilty and was not insane or mentally ill at the time of the commission of the offense, you should return a verdict of guilty.

In determining the defendant's mental condition at the time the act was committed, you may consider all of the evidence, including [testimony of medical experts][5] [testimony of lay witnesses] [acts and conduct of the defendant].

USE NOTE

1. This instruction should be given prior to 14-5102 and 14-5103. This instruction must be modified if more than one offense is charged. If there is more than one defendant, the name of the defendant raising an insanity defense should be used.
2. Use the bracketed language when there is more than one crime charged.
3. Insert name of greater of offense [offenses].
4. Use only applicable verdicts.
5. Use only applicable bracketed alternative.

Committee commentary. — This instruction does not deal specifically with the problem of burden of proof. Initially, there is a presumption that the defendant is sane. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971). Once the defendant introduces evidence which creates a reasonable doubt as to his sanity, the state must prove that the defendant is sane beyond a reasonable doubt. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973). However, the state is not required to present any evidence on the issue, and it may instead simply rely on the presumption. State v. Wilson, supra. See generally, Annot., 17 A.L.R.3d 146 (1968).

Although the instruction requires the jury to find that the defendant was insane at the time of the commission of the offense, evidence of the defendant's mental condition before and after the commission of the offense may be considered by the jury in arriving at its determination. State v. James, 85 N.M. 230, 51 P.2d 556 (Ct. App. 1973).

In New Mexico, the jury is not required to first determine if the defendant committed the elements of the crime and then proceed to the question of insanity. State v. Victorian, 84 N.M. 491, 494, 505 P.2d 436, 439 (1973). This instruction slightly modifies the holding in *Victorian* by suggesting that the jury first find that the acts have been committed. This does not necessarily mean that they have to find the elements of the crime. Defense counsel may want to point out in closing argument that, if the jury is not persuaded that the crime was committed, the defendant is entitled to a verdict of not guilty. A determination of not guilty by reason of insanity by the jury is a prerequisite to a determination of present sanity by the judge under Rule 5-602 of the Rules of Criminal Procedure. Rule 5-602A(2) of the Rules of Criminal Procedure requires the jury to return a special verdict if it finds that the defendant is not guilty by reason of insanity. However, the jury has no right to know the consequences of a verdict of "not guilty by reason of insanity." State v. Chambers, 84 N.M. 309, 502 P.2d 599 (1972).

Evidence of the defendant's mental condition may be presented by expert and lay witnesses. Since the jury is the final decision-maker on the question of insanity, it is up to them to decide whether to afford greater weight to expert testimony. "The purpose of psychiatry is to diagnose and cure mental illnesses, not to assess blame for acts resulting from these illnesses. The law seeks to find facts and assess accountability. . . ." Psychiatric testimony, however, is relevant evidence in determining accountability. State v. Dorsey, 93 N.M. 607, 609, 603 P.2d 717 (1979).

COMPILER'S ANNOTATIONS

One accused of crime is presumed to be sane. However, if the defendant introduces competent evidence reasonably tending to support insanity at the time of the alleged offenses, then an issue is raised as to the mental condition of the accused, and it becomes the duty of the jury to determine the issue from the evidence independent of the presumption of sanity. However, if the jury disbelieves the evidence as to the defendant's claimed insanity, then the presumption stands. State v. Armstrong, 82 N.M. 358, 482 P.2d 61 (1971).

There is a presumption of sanity which must be rebutted by the defendant, whereupon the jury shall make its determination. State v. Torres, 82 N.M. 422, 483 P.2d 303 (1971).

And burden on defendant to overcome presumption. — The burden of proof is upon the state to prove that the defendant is sane beyond a reasonable doubt; however, in the first instance, this burden is met or satisfied by the presumption that the defendant is sane. It then becomes the duty of the defendant and upon him is the onus or burden of going forward with evidence to overcome this presumption. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

Insanity is question of fact which ordinarily is decided by trier of facts, and where the testimony of the experts was not the only competent evidence touching on the defendant's mental condition, their testimony was not conclusive on this issue. State v. Victorian, 84 N.M. 491, 505 P.2d 436 (1973).

Court determines whether evidence sufficient to take insanity question to jury. — When the defendant has put in evidence reasonably tending to show him insane, the problem is then to determine whether it is sufficient to take the case to the jury and this is a question for the court to determine; however, if there has been adduced competent evidence reasonably tending to support the fact of insanity, it is the duty of the court to instruct on the question of insanity. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971) aff'd, 85 N.M. 230, 511 P.2d 556 (Ct. App. 1973).

Jury should be instructed to consider first whether defendant is guilty of crime charged, without consideration of the question of insanity. Should the defendant be found not guilty, there would be no necessity for further consideration. Should the defendant be found guilty, then the jury would determine whether the defendant is not guilty by reason of insanity. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

Consideration of insanity before elements of offense not reversible error. — Where the jury may possibly have considered the issue of sanity before considering whether the defendant had in fact

committed the essential elements of the crimes charged, it cannot be said to be reversible error. State v. Victorian, 84 N.M. 491, 505 P.2d 436 (1973).

Evidence sufficient to warrant insanity instruction. — Evidence in a trial for aggravated battery that the defendant was a chronic alcoholic with organic brain damage was sufficient to warrant an instruction on the issue of sanity or mental illness as a defense. State v. Crespin, 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974).

Evidence not sufficient to require insanity instruction. — Where the evidence shows nothing more than the temporary effects of drug intoxication, on which the trial court instructed the jury, and where the defendant does not have a diseased mind, the evidence is not sufficient upon which to require an instruction on insanity. State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

A psychiatrist's testimony that the defendant had no organic brain damage or psychological damage, that the defendant's history of paint sniffing included instances when he would become violent and feel that devils were chasing him, but that in connection with the killing, the psychiatrist was of the opinion that the defendant knew what he was doing when he did it and that it was an impulsive act, was insufficient to raise a factual issue concerning a true disease of the mind and insufficient to raise a factual issue as to substantial impairment of behavior controls, and the trial court did not err in refusing the requested insanity instruction. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

Testimony by lay witnesses that the defendant was mentally disturbed and that, when committing the offense, he did not act, or look, normal, together with the defendant's testimony that he sniffed paint during periods of stress and when upset, and that when he sniffed he did not know what he was doing and went off on trips, was insufficient to raise a factual issue concerning a true disease of the mind and was insufficient to raise a factual issue concerning a substantial impairment of behavior controls, and the court did not err in refusing an insanity instruction. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

Instruction found proper. — An instruction stating that: "In order to find the defendant not guilty by reason of insanity you must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind: (1) did not know the nature and quality of the act; (2) did not know that it was wrong; (3) was incapable of preventing himself from committing it," was correct. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972).

Law reviews. —For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 31 to 45.

Instructions in criminal case in which defendant pleads insanity as to his hospital confinement in the event of acquittal, 11 A.L.R.3d 737.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

22 C.J.S. Criminal Law §§ 56, 58 to 60.

14-5102. Insanity.[1]

The defendant was insane at the time of the commission of the crime if, because of a mental disease, as explained below, he:

[did not know what he was doing or understand the consequences of his act,] [or][2]
[did not know that his act was wrong,] [or]
[could not prevent himself from committing the act].

A mental disease is a specific disorder of the mind which both substantially affects mental processes and substantially impairs behavior controls. This specific disorder must also be a long-standing disorder. It must extend over a considerable period of time, as distinguished from a momentary condition arising under the pressure of circumstances.

The term mental disease does not include a personality disorder or an abnormality manifested only by repeated criminal conduct or by other anti-social conduct.

USE NOTE

1. This instruction should immediately follow the elements instruction and Instruction 14-5101. Instruction 14-5103 should immediately follow this instruction.
2. Use only the alternatives established by the evidence.

Committee commentary.
Test.

New Mexico employs a test for determining insanity which combines the traditional "right/wrong" analysis with the "irresistible impulse" test. That is, the jury is given three separate ways in which to find a defendant insane: the defendant did not know what he was doing or understand the consequences of his act; the defendant did not know his act was wrong; and, third, the defendant could not prevent himself from committing the act. The first two tests come from the *M'Naghten* case, 10 Clark & F.200, 8 Eng. Rep. 718 (1843). The third test — "irresistible impulse" — was added as a result of the 1954 case, State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

It is not enough, however, that the defendant can prove the existence of one of these three states of mind. It must most importantly be shown that the

mental condition of the defendant is a result of a long-standing mental disorder. While no court has undertaken to give a definitive definition of mental disease or mental illness it is clear what is not included within this concept. It does not include a personality disorder or "an abnormality manifested only by repeated unlawful or antisocial conduct." American Law Institute, Model Penal Code, Section 4.01. (See for example Indiana Pattern Jury Instructions, Criminal, Section 10.11, and Oregon Instructions for Criminal Cases, Instruction 403.02.)

The New Mexico Supreme Court added its own exclusion in State v. White, supra, when it stated:

> The insanity of which we speak does not comprehend an insanity which occurs at a crisis and dissipates thereafter. The insanity of which we speak is a true disease of the mind, normally extending over a considerable period of time, as distinguished from a sort of momentary insanity arising from the pressure of circumstances.

Id. at 330, 270 P.2d at 730 (emphasis added).

In other words, there must be a causal connection between the actual long-standing mental disease and the alleged criminal acts of the defendant. It would be possible for a jury to find that a defendant was guilty of a criminal offense, even though he was in fact suffering from a long-standing mental disease, if he did know what he was doing, that it was wrong, and he was able to control his impulses. (See commentary to 14-5103, Determination of mentally ill.)

Although the instruction requires the jury to find that the defendant was insane at the time of the commission of the offense, evidence of the defendant's mental condition before and after the commission of the offense may be considered by the jury in arriving at its determination. State v. James, 85 N.M. 230, 511 P.2d 556 (Ct. App. 1973).

Since the courts have never stated how long a disease must be present in order to be "long-standing" this is a decision that must be made by the jury after considering all the evidence presented by both sides relevant to the defendant's mental condition. A person could have a long-standing mental disease which laid dormant until certain conditions arose causing the disease to manifest itself in an uncontrollable act. In this case, as long as the act was a result of the disease, the defendant could be found insane.

Presumption/Burden of proof.

"Sanity is the normal condition of man and insanity an abnormal state. In the absence of anything to the contrary, the presumption is that the defendant is sane and is criminally responsible for his act." State v. Roy, 40 N.M. 397, 403, 60 P.2d 646 (1936). This presumption remains viable throughout the entire criminal proceeding, and the state is entitled to present no evidence concerning sanity if it so chooses. Even at a risk of losing the case, the state could choose not to rebut the defendant's evidence of insanity. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973). As far back as 1892, the case law in New Mexico puts an affirmative burden on the defendant to produce evidence tending to prove insanity. Faulkner v. Territory, 6 N.M. 464, 30 P. 905 (1892).

> This statement of the law does not mean, though, that the burden is of such a nature as to necessitate a proof beyond a reasonable doubt, nor necessarily that the proof must be by a preponderance of evidence, . . . but it means that when the defense of insanity has been set up the burden is on the defendant to submit sufficient evidence to at least produce in the minds of the jury a reasonable doubt of the guilt of the accused, under the instructions, that he must have been insane when he committed the deed.

Id. at N.M. 483.

Even this burden can be removed from the defendant if the state offers any evidence as to the insanity of the defendant. State v. Moore, 42 N.M. 135, 76 P.2d 19 (1938). In a more recent case, the court has held that once the defendant introduces some "competent evidence to support the allegation of insanity" it is then the state's burden to disprove insanity (or prove sanity) beyond a reasonable doubt. State v. Lopez, 91 N.M. 779, 581 P.2d 872 (1978).

Although the United States Supreme Court has held that it is not a violation of due process to put the burden of proving insanity on the defendant, LeLand v. Oregon, 343 U.S. 790 (1952), only 22 states take this view. 9 Wigmore on Evidence § 2501 (1981).

When instruction is to be given.

Common practice indicates that rarely, if ever, will the trial judge refuse to give the insanity instruction if the slightest bit of evidence on the subject has been offered. This is not necessarily the rule, however.

> [W]hen all the evidence is in, if there has been adduced competent evidence reasonably tending to support the fact of insanity urged by the defendant as a defensive issue in the case, it is the duty of the court to instruct on the question of insanity. Otherwise, the court may properly refuse such instruction.

State v. Roy, supra at N.M. 404.

In addition to refusing to give the instruction based on insufficient evidence, the judge can refuse on the grounds that the defense was not timely raised, i.e., insanity defense brought up after prosecution had presented case resulted in prejudice to prosecution, and instruction properly refused. State v. Young, 91 N.M. 647, 579 P.2d 179 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d, cert. denied, 439 U.S. 957 (1978).

Rule 5-602 of the Rules of Criminal Procedure mandates that notice of an insanity defense be given at arraignment or within 20 days thereafter, unless the court waives this time for good cause.

COMPILER'S ANNOTATIONS

Mental disease includes abnormal condition of mind which substantially affects mental or emotional processes and substantially impairs behavior controls. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

Test for insanity. — The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind: (1) did not know the nature and quality of the act; or (2) did not know that it was wrong; or (3) was incapable of preventing himself from committing it, and satisfactory proof of the existence of one or more of the three tests is sufficient to bar a guilty verdict. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

Test one of actual willpower. — A requested jury instruction on insanity that the defendant must have been "deprived of the normal governing power of the will" was erroneous, since the test was whether

defendant was deprived of his actual willpower, not ordinary or reasonable willpower. State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

Insanity contemplated normally extends over considerable period of time. — The insanity of which this instruction speaks does not comprehend an insanity which occurs at a crisis and dissipates thereafter; the insanity of which this instruction speaks is a true disease of the mind, normally extending over a considerable period of time, as distinguished from a sort of momentary insanity arising from the pressure of circumstances. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975); State v. Marquez, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

The insanity defense does not comprehend an insanity which occurs at a crisis and dissipates thereafter. It is a true disease of the mind, that is, any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls, normally extending over a considerable period of time, rather large in extent or degree, as distinguished from a sort of momentary insanity arising from the pressure of circumstances. State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Idea of excitement or impulse has no place in instruction. — A requested instruction on insanity that the defendant must have been "so wrought up" as to be deprived of the governing power of the will was erroneous, since the idea of excitement or impulsive action has no place in such an instruction. State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

Presumption of continuing insanity not raised by evidence of prior insanity. — Any evidence of prior insanity is admissible, but does not give rise to a presumption of continuing insanity and is merely another item for the jury's consideration. State v. Torres, 82 N.M. 422, 483 P.2d 303 (1971), overruled on other grounds, State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973).

Where expert medical testimony established reasonable doubt existed as to defendant's mental illness at the time of the burglary owing to his compulsion to obtain goods with which to finance his drug habit, the defendant was entitled to an instruction on this issue and in refusing to instruct on the defense of insanity, the trial court erred. State v. Flores, 82 N.M. 480, 483 P.2d 1320 (Ct. App. 1971).

14-5103. Determination of mentally ill.[1]

The defendant was mentally ill at the time of the commission of the crime if a substantial disorder of thought, mood or behavior impaired his judgment at the time of the commission of the offense.

If you find beyond a reasonable doubt that the defendant committed the act charged you may find him guilty but mentally ill at the time of the commission of the offense.

USE NOTE

1. This instruction is to be given when Instruction 14-5102 has been given. It may also be given when there is not sufficient evidence to give Instruction 14-5102. It may also be given when Instruction 14-5110 or 14-5111 has been given because of evidence of a mental disease or disorder.

Statutory reference. — 31-9-3 NMSA 1978.

Committee commentary. — Instruction 14-5103 was prepared subsequent to the enactment of Section 31-9-3 NMSA 1978 which provides for a finding of "guilty but mentally ill." Section 31-9-3 NMSA 1978 provides that a finding of "guilty but mentally ill" may be made only in a case in which the insanity of the defendant is in issue. The committee believed that this instruction should also be given if the jury has been presented an instruction on inability to form a deliberate or specific intent to commit an offense. In either case, the notice requirements of Rule 5-602 of the Rules of Criminal Procedure for the District Courts must have been followed.

COMPILER'S ANNOTATIONS

"Guilty but mentally ill" instruction may be given where inability to form specific intent asserted. — Although 31-9-3 NMSA 1978 specifies that the instruction on "guilty but mentally ill" shall be given when the defendant asserts the defense of insanity, the supreme court in approving this instruction broadened the instances wherein such an instruction may be given to include instances where a defendant asserts the defense of an inability to form a specific intent. State v. Page, 100 N.M. 788, 676 P.2d 1353 (Ct. App. 1984).

14-5104. Determination of present competency.[1]

Evidence has been presented concerning the defendant's competency to stand trial. The defendant has the burden of proving by the greater weight of the evidence that he is mentally incompetent to be tried.

[Before considering whether the defendant committed the crime charged, you must make a determination of his competency to stand trial.][2] A person is competent to stand trial if he:

1. understands the nature and significance of the criminal proceedings against him;
2. has a factual understanding of the criminal charges; and
3. is able to assist his attorney in his defense.

As to this issue only, your verdict need not be unanimous. When as many as ten of you have agreed as to whether the defendant is competent to stand trial, your foreman must sign the proper form. If your verdict is that the defendant is incompetent, you will immediately return to open court without proceeding further. If your verdict is that the defendant is competent, you should proceed to consider the defendant's guilt or innocence.

USE NOTE

1. This instruction is to be given upon request of the defendant only if the evidence raises a reasonable doubt as to the defendant's competency to stand trial and this issue is submitted to the jury.

2. Delete bracketed material if this determination of competency is to be made by a jury other than the jury deliberating the guilt or innocence of the defendant.

Committee commentary. — Prior to 1967, a similar instruction was routinely given to the jury if a defendant has claimed that he was not competent to stand trial. See e.g., State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966); State v. Folk, 56 N.M. 583, 247 P.2d 165 (1952). The basis for the instruction was an 1855 statute which provided for "commitment" of a person "if upon the trial . . . such person shall appear to the jury charged with such indictment to be a lunatic . . .." Code 1915, § 4448. See Territory v. Kennedy, 15 N.M. 556, 110 P. 854 (1910).

The 1855 statute was repealed in 1967 by N.M. Laws 1967, ch. 231, § 1, compiled as § 41-13-3.1. Article II, Section 12 of the New Mexico Constitution and Rule 5-602 of the Rules of Criminal Procedure require the issue of competency to stand trial be submitted to the jury if the trial judge has a reasonable doubt regarding the issue of the defendant's competency. See State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977); State v. Chavez, 88 N.M. 451, 541 P.2d 631 (1975); and the committee commentary to Rule 5-602 of the Rules of Criminal Procedure. Absent an abuse of discretion, the trial judge's determination that there is not a reasonable doubt will not be overturned. See State v. Noble, supra at p. 363.

The defendant has the burden of proving by a preponderance or greater weight of the evidence that he is not competent to stand trial. State v. Ortega, supra, at p. 19. See also UJI Civil Instruction 13-304.

It is only necessary for ten members of the jury to decide the issue of competency, as proceedings to ascertain the competency to stand trial are civil proceedings. Article II, Section 12 of the New Mexico Constitution provides that the legislature may provide that verdicts in civil cases may be rendered by less than an unanimous vote of the jury. Section 38-5-17 NMSA 1978 provides for verdicts of ten in civil cases.

Although the New Mexico appellate decisions on competency to stand trial have all involved incompetency because of some mental illness or disease, Instruction 14-5104 is not limited to incompetency by reason of mental illness. It is clear that a mentally retarded (developmentally disabled) deaf mute who can neither read nor write and who is unable to communicate with his attorney may be incompetent to stand trial even though not suffering from any mental disease. See Jackson v. Indiana, 406 U.S. 715 (1972).

In the federal courts and New Mexico the test of present competency to stand trial is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). It is a violation of due process to try a person who does not have these capabilities.

COMPILER'S ANNOTATIONS

Compiler's notes. — Section 4448, Code 1915, referred to in the next-to-last sentence in the first paragraph of the committee commentary, was compiled as 41-13-3, 1953 Comp., before being repealed by Laws 1967, ch. 231, § 1.

Laws 1967, ch. 231, § 1, referred to in the second paragraph of the committee commentary, was compiled as 41-13-3, 1953 Comp., prior to its repeal by Laws 1972, ch. 71, § 18. Section 2 of Laws 1967, ch. 231 enacted 41-13-3.1, 1953 Comp., relating to determination of present competency, which is presently compiled as 31-9-1 NMSA 1978.

Presumption of sanity does not deny the defendant due process of law. — It merely gives the defendant the burden of going forward with evidence of insanity; if he meets this burden, his sanity must be proved by the state beyond a reasonable doubt; if he fails to meet this burden, by introducing no evidence of insanity, by offering evidence disbelieved by the jury or by offering evidence insufficient to rebut the presumption, the presumption of sanity decides the issue. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Instruction cannot cover situation where there is existing ruling that defendant is incompetent and incompetency is to be redetermined by the jury, because in that situation the state has the burden of persuading the fact finder that the defendant is competent to stand trial. State v. Santillanes, 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978).

Evidence not sufficient to raise reasonable doubt as to competency. — See State v. Coates, N.M. , 707 P.2d 1163 (1985).

Issue not preserved where no objection made nor instruction offered. — Where the defendant di not offer an instruction on competence to stand trial, nor did he object to the instructions given the jury, this issue was not properly preserved for appeal. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 62, 63.

22 C.J.S. Criminal Law § 940(2).

PART B. INTOXICATION

14-5105. Voluntary intoxication.[1]

Evidence has been presented that the defendant was intoxicated from use of [alcohol] [drugs]. An act committed by a person while voluntarily intoxicated is no less criminal because of his condition. If the evidence shows that the defendant was voluntarily intoxicated when allegedly he committed the crime[s] of . . . . . , that fact is not a defense.

USE NOTE

1. No instruction on this subject shall be given. (See Instructions 14-5110 and 14-5111 for special instructions for specific intent crimes.)

Committee commentary. — Under New Mexico law, the defense of voluntary intoxication depends upon whether the crime is characterized as a general intent crime or one characterized as a specific intent crime. If the crime is a specific intent crime, the defense is available to negate the so-called specific intent. See generally reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

The UJI instructions cover the defense for the specific intent crimes. Instruction 14-5110 is used for a willful and deliberate first degree murder where intoxication can negate the deliberate intention to take away the life of another person. For nonhomicide crimes, Instruction 14-5111 is used where intoxication can negate the element of intent to do a further act or achieve a further consequence.

Prior to the adoption of these instructions, it was a common practice to advise the jury that intoxication was not a defense to a general intent crime. The committee believed that the better practice would be to not give an instruction for those crimes. In the event that one of the crimes being considered by the jury is a specific intent crime, Instruction 14-5110 or 14-5111 will limit the defense to that crime. If there is no specific intent crime, and evidence of voluntary intoxication is admitted on some issue other than intent, the committee believed the instruction would be misleading.

COMPILER'S ANNOTATIONS

Voluntary drug intoxication falls in same classification as voluntary alcohol intoxication. State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

Voluntary drunkenness instruction error for specific intent offense. — An instruction that voluntary drunkenness is no excuse or justification for a crime was erroneous in a trial for aggravated battery, a specific intent offense. State v. Crespin, 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974).

Diminished capacity instruction properly refused. — Although the defendant had been drinking and taking barbiturates, it was not error to refuse an instruction on diminished capacity when the effect of intoxication on the defendant's state of mind was covered in another instruction. State v. Rushing, 85 N.M. 540, 514 P.2d 297 (1973).

Evidence insufficient to raise drug intoxication question. — Evidence that the defendant used an unspecified amount of demerol on the evening that a conspiracy to commit burglary was formed, along with descriptions of the defendant as "stoned" or "high" (explained in that he could not walk or communicate "too good and had to lay down and take it easy"), along with testimony that he took some other unspecified drugs the next morning and was "high" when he left the house en route to the burglary, that he drove the car on one errand prior to the burglary and climbed a pipe to the roof of the burglarized store with the intention of warning his comrades about the presence of the police, was too vague and insufficient to raise a jury question as to drug intoxication in connection with either crime. State v. Watkins, 88 N.M. 561, 543 P.2d 1189 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Where the jury believed that defendant had necessary felonious intent, this denies an appellate court the right, as a court of review, to grant relief, because the court does not sit as a second jury, and whether a defendant was so intoxicated as to be

unable to form the necessary intent is a matter for the jury. State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 44, 107.

Modern status of rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Effect of voluntary drug intoxication upon criminal responsibility, 73 A.L.R.3d 98.

22 C.J.S. Criminal Law §§ 65 to 68, 70, 72.

14-5106. Involuntary intoxication.

Evidence has been presented that the defendant was intoxicated but that the intoxication was involuntary.

Intoxication is involuntary if:[1]

[a person is forced to become intoxicated against his will]

[a person becomes intoxicated by using (alcohol)[2] (drugs) without knowing the intoxicating character of the (alcohol)[2] (drugs) and without willingly assuming the risk of possible intoxication].

If the defendant was involuntarily intoxicated and as a result of such intoxication he:[3]

[did not know what he was doing or understand the consequences of his act] [or]

[did not know that his act was wrong] [or]

[could not prevent himself from committing the act]

then you must find him not guilty.

The burden is on the state to prove beyond a reasonable doubt that this defense of involuntary intoxication as just explained does not apply.

USE NOTE

1. Use only the applicable bracketed provision.
2. Use only the applicable source of the intoxication.
3. Use only the applicable insanity alternatives.

Committee commentary. — The committee found no reported New Mexico decisions involving the defense of involuntary intoxication. Some commentators have suggested that the defense is nonexistent. However, intoxication can result from the mistaken use of a liquor or narcotic substance. See generally Perkins, Criminal Law 894 (2d ed. 1969). In that instance, it is as if the defendant was rendered mentally ill by an act over which he had no control. Consequently, this instruction includes the elements of mental illness, the test of insanity similar to that in Instruction 14-5101. See Perkins, supra, at 898.

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 108.

When intoxication deemed involuntary so as to constitute defense to criminal charge, 73 A.L.R.3d 195.

22 C.J.S. Criminal Law §§ 69, 72.

PART C. INABILITY TO FORM INTENT

14-5110. Inability to form a deliberate intention to take away the life of another.[1]

Evidence has been presented that the defendant was [intoxicated from use of (alcohol) (drugs)][2] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was .....[3], and if so, what effect this had on the defendant's ability to form the deliberate intention to take away the life of another.

If the defendant was not capable of forming a deliberate intention to take the life of another, you must find him not guilty of a first degree murder by deliberate killing. [The deliberate intention to take away the life of another required for a first degree murder by deliberate killing is not an element of ..... If you find the defendant not guilty of first degree murder by deliberate killing, you must proceed to determine whether or not he is guilty of .....][4]

USE NOTE

1. This instruction may be given only for a willful and deliberate murder and should immediately follow Instruction 14-201 when the defendant has relied on the defense of "diminished responsibility" or "inability to form specific intent." If, in a "mental disease or disorder" case, the defendant has also relied on the complete defense of insanity, this instruction should follow Instruction 14-5101.

2. Use only the applicable bracketed phrase. If intoxication is in issue, use only the applicable source of intoxication.

3. Repeat bracketed and parenthetical words used in the first sentence.

4. Where the defendant can be found guilty of another first degree murder, second degree murder or manslaughter, i.e., any unlawful killing other than a first degree murder by deliberate killing, these bracketed sentences must be given and the name of the crime or crimes inserted in the blanks.

Committee commentary. — The willful and deliberate first degree murder is the only homicide requiring a so-called "specific intent" under New Mexico law. State v. Tapia, 81 N.M. 274, 276, 466 P.2d 551, 553 (1970); State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972). The intent required is "express malice," i.e., the deliberate intention unlawfully to take away the life of a fellow creature. State v. Smith, 26 N.M. 482, 488, 194 P. 869 (1921). Voluntary alcoholic and drug intoxication, State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971), and mental disorders, State v. Padilla, 66 N.M. 289, 347 P.2d 312, 78 A.L.R.2d 908 (1959), may negate this intent. The defense of inability to form a "specific intent" is analogous to the defense of insanity. State v. Holden, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

State v. Smith, supra, states that a willful and deliberate murder requires specific intent. See commentary to Instruction 14-201. The same case also indicates that if the facts conclusively show that the murder was perpetrated by means of lying in wait, torture or poison, the means supply specific intent. In addition, both felony murder and the so-called depraved mind murder do not require a specific intent, since intent is implied as a matter of law. See commentaries to Instructions 14-202 and 14-203.

The extent of the defense in drug use situations is unclear. If limited to narcotic drugs as defined in the Controlled Substances Act, the defense will have a limited application. See §§ 30-31-2P and 30-31-6 & 30-31-7 NMSA 1978. For example, marijuana is no longer defined as a narcotic drug under the statute, although its use and possession are still prohibited.

Two transition problems occur with the use of this instruction. The supreme court has made it clear that the defense is not available for second degree murder. State v. Chambers, supra; State v. Tapia, supra. See also State v. Lunn, 88 N.M. 64, 537 P.2d 672 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976). Because the committee recognized that the jury may have difficulty making the distinction between a deliberate intention to take the life of another and an intent to kill or do great bodily harm, the bracketed sentences are included so that the jury is told to consider other homicide offenses not requiring specific intent.

When the defense involves a mental disease or disorder, the defendant probably will have attempted to show insanity as a complete defense. See State v. Padilla, supra. The jury will undoubtedly have trouble with the distinction between insanity and inability to form specific intent. The use note therefore provides that the insanity instruction be given first. The insanity instruction contains an optional paragraph which must be given when the inability-to-form-specific-intent instruction follows.

COMPILER'S ANNOTATIONS

Inability to form an intention is distinct from the inability to control emotions and the inability to stop oneself from committing a crime, and unless there is evidence that the defendant could not have formed the requisite intent, this instruction is improper. State v. Lujan, 94 N.M. 232, 608 P.2d 1114 (1980).

Evidence required to instruct on intoxication. — To authorize an instruction on intoxication, the record must contain some evidence showing or tending to show that defendant consumed an intoxicant and the intoxicant affected his mental state at or near the time of the homicide. The instruction does not, however, require expert evidence regarding the effect of intoxication upon defendant's ability to form a deliberate intent to kill. State v. Privett, N.M. , 717 P.2d 55 (1986).

Law reviews. — For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 106 to 109.

Modern status of rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Effort of voluntary drug intoxication upon criminal responsibility, 73 A.L.R.3d 98.

22 C.J.S. Criminal Law §§ 29 to 32, 56, 58 to 60.

14-5111. Inability to form intent to do a further act or achieve a further consequence.[1]

Evidence has been presented that the defendant was [intoxicated from the use of (alcohol) (drugs)][2] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was .....[3] and, if so, what effect this had on the defendant's ability to form the intent to .....[4].

If the defendant was not capable of forming such intent to .....[4], you must find him not guilty of.....[5].

[Intent to .....[4] is not an element of the crime of .....[6]. If you find the defendant not guilty of .....[5], you must proceed to determine whether or not he is guilty of the crime of .....[6].]

USE NOTE

1. This instruction is used for the intoxication or mental disease defense for a crime which includes an element of intent to do a further act or achieve a further consequence. It may not be used for a homicide crime. See Instruction 14-5110. When the defense is based on a "mental disease or disorder" and the defendant has also relied on the complete defense of insanity, this instruction should follow Instruction 14-5511. Otherwise, the instruction should follow the elements instruction for the crime or crimes with the intent element.

2. Use only the applicable bracketed phrase. If intoxication is in issue, use only the applicable source of intoxication.

3. Repeat the bracketed and parenthetical words used in the first sentence.

4. Repeat the applicable intent to do a further act or achieve a further consequence from the essential elements instruction of the crime.

5. Name the crime charged or lesser included offense which contains an intent to do a further act or achieve a further consequence.

6. Name any other offenses or lesser included offense which does not have an intent to do a further act or achieve a further consequence and for which an instruction is being given to the jury.

Committee commentary. — This instruction embodies the defense of involuntary intoxication or mental disease short of "complete insanity" which will negate a specific intent in a nonhomicide crime. See, e.g., State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968). This instruction may be used only for nonhomicide crimes containing an element of intent to do a further act or achieve a further consequence. See also the reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

COMPILER'S ANNOTATIONS

Instruction inapplicable to general intent. — Voluntary intoxication from the use of alcohol or drugs is not a defense to the question of whether a defendant had a general criminal intent. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

But intoxication may be shown in all cases of crimes requiring specific intent, to negate the existence of such an intent. State v. Rayos, 77 N.M. 204, 420 P.2d 314 (1967).

Question of intent matter for jury. — Where a defendant claims that he was so intoxicated as to be unable to form the necessary intent, then the question of intent is a matter for the jury. State v. Rayos, 77 N.M. 204, 420 P.2d 314 (1967).

Diminished capacity instruction refused upon lack of evidence. — Where the record does not contain any evidence which reasonably tends to show that the defendant's claimed intoxication rendered him incapable of acting in a purposeful way, a tendered instruction on diminished capacity was properly refused. State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980).

Procedure tending to simplify instruction not error. — Where the jury was instructed as to each count of a particular crime and these instructions were followed by one instruction as to the specific intent required for that particular crime, after which the trial court instructed, on the basis of this instruction concerning alcohol, drugs and mental disease or disorder, applying this instruction to the specific intent crimes by naming them in the instruction, the procedure followed by the trial court tended to simplify the instructions and avoid confusion, and was not in error. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

The application of a specific intent instruction to several counts involving the same specific intent crime was not a substantial modification of this instruction. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

Evidence sufficient to show intent to hold girl against will. — Evidence that the defendant bound and gagged a girl and her mother, raped the mother and stated that the girl and her mother were to take the defendant out of state was sufficient to show an intent to hold the girl for service against her will. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), rev'd in part on other grounds, 90 N.M. 191, 561 P.2d 464 (1977).

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 106 to 109.

Modern status of rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Effect of voluntary drug intoxication upon criminal responsibility, 73 A.L.R.3d 98.

22 C.J.S. Criminal Law §§ 29 to 32, 56, 58 to 60.

PART D. MISTAKE

14-5120. Ignorance or mistake of fact.

Evidence has been presented that the defendant believed that .....[1] If the defendant [acted][2] [omitted to act] under an honest and reasonable belief in the existence of those facts, you must find him not guilty.

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. Describe the facts constituting a mistake of fact.

2. Use only the applicable bracketed language depending on whether the defendant is relying on a commission or omission.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 4.35. The committee found no reported New Mexico decisions on this issue. See generally LaFave & Scott, Criminal Law 356 (1972), and Perkins, Criminal Law 939 (2d ed. 1969).

COMPILER'S ANNOTATIONS

Mistake of fact common-law defense. — At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the person is indicted an innocent act was a good defense. State v. Gonzales, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Mistake of fact concept included in intent instruction involving mental state. — Whenever an intent instruction involving the defendant's mental state is given, the mistake of fact concept is automatically included and does not merit a separate instruction. State v. Griscom, 101 N.M. 377, 683 P.2d 59 (Ct. App. 1984).

Instruction given where evidence defendant believed fact that, if true, made conduct lawful. — To entitle himself to an instruction on mistake of fact, there must be some evidence that at the time in question, the defendant entertained a belief of fact that, if true, would make his conduct lawful. State v. Gonzales, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Instruction improper where evidence showed active "aiding and abetting." — In a prosecution for attempted murder, the defendant's tendered mistake-of-fact instruction, based on his "omission to act" did not correctly state the law applicable to the case, where the evidence showed that the defendant actively "aided and abetted" the crime. State v. Johnson, N.M. , 707 P.2d 1174 (Ct. App. 1985).

Requested instruction on mistake of fact in bank robbery properly refused. — Where the defendant knew that another was going to rob the bank, went to the bank, not to stop the robbery, but with the purpose of preventing any shooting, a requested instruction on mistake of fact was properly refused. State v. Roque, 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

As in embezzlement prosecution, defendant believed he was authorized to expend public funds. — The defendant is not entitled to a mistake-of-fact instruction in a prosecution for embezzlement for using public funds belonging to his employer to pay for the travel expenses of his spouse, who is not employed by the same employer and who has not performed any public service, on the ground that he believed in good faith he was owed money by his employer, where there is no evidence that he in fact believed he possessed the legal authority to expend public funds for his spouse's travel. State v. Gonzales, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Refusal of mistake-of-fact instruction in child

Pennsylvania Suggested Standard Criminal Jury Instruct.
6th Suppl.
cite as Pa.S SJI (Crim) ____

5.01A (Crim) INSANITY

(1) Because the defendant has asserted an insanity defense, you will have to consider four possible verdicts. You will have to think about the special verdicts of "not guilty by reason of legal insanity" and of "guilty but mentally ill" in addition to the ordinary verdicts of "guilty" and "not guilty." (It may help you understand my subsequent instructions if you keep in mind why the law permits these two special verdicts. The verdict of not guilty by reason of legal insanity labels a defendant as sick rather than bad. It signifies that in the eyes of the law the person, because of mental abnormality at the time of the crime, does not deserve to be blamed and treated as a criminal for what he did. The verdict of guilty but mentally ill labels a defendant as both bad and sick. It means that in the law's eyes that person, at the time of the crime, was not so mentally abnormal as to be relieved from blame and criminal punishment for what he did but that he was abnormal enough to make him a likely candidate for special therapeutic treatment.)

(2) Legal insanity excuses any crime including (murder) (_____). A defendant has a complete defense to an otherwise criminal act if he was legally insane at the time he committed the act. The test for insanity is legal not medical. (Persons whom medical experts would diagnose as mentally disordered or whom laymen would call crazy might or might not be insane when judged by the legal test.) A person is legally insane if at the time of committing an alleged crime, he is laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he is doing or, if he does know the nature and quality of the act, he does not know that what he is doing is wrong. Stated more simply, a person is legally insane if at the time of committing an alleged crime he is, as the result of mental disease or defect, either incapable of knowing what he is doing, or if he does know what he is doing, is incapable of judging that it is wrong.

(3) The defendant has the burden of proving an insanity defense by a preponderance of the evidence. "By a preponderance" means by the greater weight of the evidence. Therefore you can find the defendant not guilty by reason of legal insanity only if you are satisfied beyond a reasonable doubt that he committed the otherwise criminal act charged and you are also satisfied by a preponderance of the evidence, *first* that he had a mental disease or defect at the time of the act, and *second* that as a result of that disease or defect -- here the insanity defense has two alternative branches -- *either* the defendant was incapable of knowing what he was doing *or* the defendant was incapable of judging that what he was doing was wrong.

The term "mental disease or defect" means a disease or infirmity of the mind as distinguished from a mere fault of character, personality, temperament or social adjustment.

("Incapable of knowing what he was doing" refers to the defendant's ability to know the physical aspects of his act. Ask yourselves: Was the defendant aware of his physical act? Was he aware of the [possibly] harmful consequences of his act? [_____.])

("Incapable of judging that what he was doing was wrong" refers to the defendant's ability to judge the legal and moral aspects of his act. Ask yourselves: Was the defendant aware that he ought not to do the act because it was either legally or morally wrong? [Even though a person believes that an act is right under his own individual moral code, he is not insane if he knows that the act is wrong under society's generally accepted moral standards.] [_____.])

[(4) I instruct you that the following (condition does not by itself) (conditions do not by themselves or in combination with each other) amount to legal insanity: (anger) (rage) (social maladjustment) (lack of self-control) (impulsiveness) (psychoneurosis) (emotional instability) (_____).]

[(5) I instruct you that (intoxication from alcohol or drugs) (or) (addiction to alcohol or drugs) does not by itself amount to legal insanity. (Nor does the combination of intoxication and addiction amount to legal insanity.) (_____.)]

(6) "Guilty but mentally ill" becomes a possible verdict when a defendant offers but fails to prove a legal insanity defense. You may return this verdict if you are satisfied beyond a reasonable doubt that the defendant committed the crime alleged and you are also satisfied by a preponderance of the evidence – that is, by the greater weight of the evidence – that the defendant, although not legally insane, was mentally ill at the time of the crime.

(7) The term "mentally ill" is another term with a special legal meaning. For our purposes a person is mentally ill if he, at the time of a crime and as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. (I instruct you that the following [condition does not by itself] [conditions do not by themselves or in combination with each other] amount to mental illness _____.)

[(8) Comparing the definitions of "legal insanity" and "mental illness" we can see that they both require a mental disease or defect which is something more than faulty character, personality, temperament or social adjustment. Their definitions differ, however, with regard to the incapacitating effect necessary for legal insanity on the one hand or mental illness on the other. Legal insanity requires that the defendant be incapable either of knowing what he is doing or of judging its wrongfulness. Mental illness requires only that the defendant lack substantial capacity either to appreciate the wrongfulness of what he is doing or to obey the law. Loosely speaking, mental illness is the broader term. It covers a greater range of abnormal conditions than legal insanity. (_____.)]

(9) When you determine the questions of legal insanity and mental illness you should consider all the relevant evidence including (the testimony of witnesses regarding the acts, words, conversations, behavior and appearance of the defendant at, and close to, the time of the alleged crime) (the testimony of the expert witnesses) (the testimony of ordinary witnesses concerning the defendant's general mental condition) (_____). The critical time when legal insanity or mental illness must exist in order to affect the verdict is at the time when the alleged criminal act was committed. Although you may consider evidence of the defendant's mental condition before and after

that time you may consider it only to help you determine his mental condition (and state of mind) at the time of the alleged crime.

(10) In determining questions of legal insanity and guilt, you really should not concern yourself with what will happen to the defendant if you find him not guilty – whether he will be set free or whether he will be confined to a mental hospital for treatment. You should apply the law that I give you to decide the case and assume that, whatever your verdict, the authorities will make a wise disposition of the defendant. I will tell you, however, that when a defendant is found not guilty by reason of legal insanity he is subject to an immediate court proceeding to decide whether he should be committed to a mental treatment facility. If committed, his commitment should continue until he is no longer dangerous to others or to himself.

(11) I will tell you also that a defendant who is found guilty but mentally ill may be given any sentence which may lawfully be imposed on any person convicted of the same crime. However, before imposing sentence, the court must hold a hearing and make findings concerning the defendant's current mental condition and need for treatment. The law provides that a defendant who is severely mentally disabled and in need of treatment at the time of sentencing shall, consistently with available resources, be furnished such treatment as is psychiatrically or psychologically indicated for his mental illness. The "Mental Health Procedures Act" dictates where and how he will be treated, for example, whether in prison or in a mental treatment facility.

[(12) To sum up, you have four alternative verdicts to think about. Two are the ordinary verdicts of "guilty" and "not guilty"; the other two are the special verdicts of "not guilty by reason of legal insanity" and "guilty but mentally ill."

In order to find the defendant not guilty by reason of legal insanity you must be satisfied beyond a reasonable doubt that he committed the otherwise criminal act charged and you must also be satisfied by a preponderance of the evidence *first* that at the time of the act the defendant had a mental disease or defect and second that as a result of that disease or defect the defendant was either incapable of knowing what he was doing, or if he did know what he was doing, was incapable of judging that it was wrong. (A verdict of not guilty by reason of legal insanity like every other verdict must be unanimous. If you all find the defendant not guilty but none of you, or only some of you, do so on the ground of legal insanity, then your verdict should be a simple not guilty.)

In order to find the defendant guilty but mentally ill you must be satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged and you must also be satisfied by a preponderance of the evidence that the defendant, although not legally insane, had a mental disease or defect at the time of the crime and that as a result of that disease or defect the defendant lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.]

SUBCOMMITTEE NOTE

This instruction is appropriate when the defendant's sanity at the time of an alleged offense is an issue at trial and when 18 Pa. C.S. §§314, 315 and 42 Pa.C.S. §9727 are applicable. These sections were added by the Act of December 15, 1982, P.L. 1262, No. 286 (effective in 90 days); they confirm M'Naghten's rule as the sole test for legal insanity, return the burden of proof to the defendant, provide for findings of guilty but mentally ill and provide for the disposition of persons who are found to be guilty but mentally ill.

The instruction is likely to require tailoring to the evidence and contentions of the particular case. A lot of the material within parentheses or brackets consists of explanations and a summing up that may be omitted if the court wants a brief instruction. With modifications, the instruction can be used when the issue of mental responsibility is tried before a separate jury in a bifurcated trial under Mental Health Procedures Act §404(c), 50 P.S. §7404(c). On the question of when is bifurcation proper see *Commonwealth v. Jermyn*, 516 Pa. 460, 533 A.2d 74 (1987) (bifurcation is not justified merely because defendant wants to assert a claim of innocence that is factually inconsistent with his insanity defense).

Whenever instructing on insanity, the court should charge on the guilty but mentally ill alternative even though the defendant objects to such a charge, see *Commonwealth v. Trill*, ____ Pa. Super. ____, 543 A.2d 1106 (1988).

Much of the evidence relevant to a sanity issue is likely to consist of expert testimony. See Instructions 4.10A, 4.10B, and 4.11 for instructions on expert testimony. It may be desirable to emphasize in proper cases that the jurors are not bound by the experts and that expert testimony can be effectively rebutted by the testimony of lay witnesses, see, e.g., *Commonwealth v. Belmonte*, 349 Pa. Super. 1, 502 A.2d 1241 (1985). The jurors may convict or acquit, notwithstanding the opinions of the experts, in accordance with their own evaluation of the total evidence, see *Commonwealth v. Demmitt*, 456 Pa. 475, 321 A.2d 627 (1974). Over the years the Pennsylvania Supreme Court has been divided on the general reliability and value of expert testimony regarding sanity in criminal cases. For a long time, the prevailing members of the court held such evidence in relatively low esteem, see, e.g., *Commonwealth v. Carluccetti*, 369 Pa. 190, 85 A.2d 391 (1952); *Commonwealth v.Tomlinson*, 446 Pa. 241, 284 A.2d 687 (1971). A majority of the court now looks more approvingly on psychiatric evidence, see, e.g., *Commonwealth v. Weinstein*, 499 Pa. 106, 451 A.2d 1344 (1982); *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976); *Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286 (1972).

In appropriate situations the court may point out the relevance of evidence offered on the issue of insanity to the question of whether the required mens rea has been proven, see *Commonwealth v. Bernadette Reilly*, ____ Pa. ____, ____ A.2d ____ (October 17, 1988) (relationship between insanity defense and malice element of third degree murder is circumstantial rather than direct; the two may overlap and evidence in support of insanity may be considered in determining if state has proven malice).

This instruction is largely derived from earlier versions of Instruction 5.01A that, in whole or part, have been approved or accepted without being questioned by the Pennsylvania appellate courts, see, e.g., *Commonwealth v. Banks*, 513 Pa. 318, 521 A.2d 1 (1987); *Commonwealth v. Belmonte, supra*. See also *Commonwealth v. Cain*, 349 Pa. Super. 500, 503 A.2d 959 (1986). The trial court's excellent insanity charge in *Commonwealth v. Banks, supra*, includes legal principles and felicitous phrasing that inspired some of the changes made in this instruction.

Subdivision (1) reminds the jury of its option to return a general acquittal. The jury must be told of this option even if the defendant relies exclusively on the insanity defense at the trial, see

Commonwealth v. Edwards, 294 Pa. 335, 147 A.2d 313 (1959). See also *Commonwealth v. Jermyn*, *supra* (Commonwealth bears the burden of proving defendant guilty beyond a reasonable doubt even when he invokes an insanity defense). But see the concurring opinion of Judge Beck in *Commonwealth v. Trill*, *supra* (plea of not guilty by reason of insanity acknowledges guilt).

This instruction embodies the M'Naghten right-wrong test which has been confirmed by Crimes Code §§314(d) and 315 to be the sole test for legal insanity in Pennsylvania. Previous to the enactment of those sections, the Pennsylvania Supreme Court had, over repeated dissents, rejected other tests of full, legal insanity, including irresistible impulse and inability to adhere to the right, see, e.g., *Commonwealth v. Tomlinson*, *supra*; *Commonwealth v. Ahearn*, 421 Pa. 311, 218 A.2d 561 (1966); *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98 (1960); *Commonwealth v. Vogel*, 440 Pa. 1, 268 A.2d 89 (1970); *Commonwealth v. Weinstein*, 442 Pa. 70, 274 A.2d 182, *cert. den.*, 404 U.S. 846 (1971); and *Commonwealth v. Mosler*, 4 Pa. 264 (1846). Crimes Code §§314(d) and 315 seem to refute any possible contention that *Mosler* and *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 693 (1971) currently allow a narrow homicidal mania-irresistible impulse defense. In 1976, the Supreme Court in *Commonwealth v. Walzack*, *supra* recognized a "diminished capacity" defense to first degree murder and overruled prior cases, such as *Tomlinson*, *Ahearn* and the 1971 *Weinstein* case to the extent that they rejected that defense. It is assumed that new Sections 314(d) and 315 do not overturn this diminished capacity defense which is in reality more a rule admitting expert evidence than a substantive law defense.

With respect to the content of subdivision (2), the first version of the *M'Naghten* test is taken from Crimes Code §315(b) which follows the classic language of the original House of Lord's opinion. The second simpler formulation is taken largely from *Woodhouse*, *supra*, and *Vogel*, *supra*. See also *Commonwealth v. Banks*, *supra*. The General Assembly did not intend for §315(b) to alter the prior law regarding the substantive definition of insanity, see *Commonwealth v. Sohmer*, ____ Pa. ____, 546A.2d 601 (1988) (citing, *inter alia*, *Woodhouse* as representative of prior law).

The point in (2) that legal insanity is synonymous with neither expert nor lay notions of mental soundness is made in *Commonwealth v. Carluccetti*, 369 Pa. 190, 200, 85 A.2d 391, 395 (1952) (legal versus medical) and *Commonwealth v. Hicks*, 483 Pa. 305, 311, 396 A.2d 1183, 1185-6 (1979) (insanity is more than a layman's approximation of the degree of mental soundness necessary to possess the requisite mental state; it is a societal judgment as to the minimum mental capacity necessary for criminal responsibility).

Subdivision (3) places the burden of both raising and proving insanity on the defendant as required by Crimes Code §315(a), see *Commonwealth v. Bernadette Reilly*, *supra* (constitutionality, history and rationale of placing burden on defendant). This instruction says nothing about any presumption of sanity. References in a jury instruction to the presumption are unnecessary and not very helpful, see *Demmitt*, *supra*, 456 Pa. at 483, 321 A.2d at 632 (concurring opinion of Justice Nix).

The partial definition of "mental disease or defect" in subdivision (3), was originally synthesized by the subcommittee from cases such as *Commonwealth v. Ahearn*, *supra*, in which the Supreme Court said that certain specific conditions do not constitute legal insanity, see also *Commonwealth v. Banks*, *supra*. The optional explanations of "incapable of knowing what he was doing" and "incapable of judging that what he was doing was wrong" find support in *Commonwealth v. Banks*, *supra*, and W.R. LaFave and A.W. Scott, Jr., *Criminal Law* §4.2(b) (2nd Ed., 1986).

Subdivisions (4) and (5) invite the judge to forestall possible juror misconception that certain abnormal states or conditions shown in the evidence might constitute legal insanity. *Quaere* just how far can a judge go in relating the terminology and diagnoses of psychiatrists and psychologists to the legal language of the insanity test? E.g., In Pennsylvania, can the judge tell the jury that a psychosis is a mental disease or defect? or that antisocial (sociopathic, psychopathic) personality is not?

Subdivision (4) is supported by *Ahearn, supra*, subdivision (5) is supported by *Commonwealth v. Hicks, supra* (acute voluntary intoxication is not a mental disease or defect and hence not insanity) and *Commonwealth v. Plank*, 329 Pa. Super. 446, 478 A.2d 872 (1984) (chronic alcoholism is not a mental disease or defect and hence not insanity). *Caveat.* When instructing that specific abnormalities do not alone or in combination constitute a mental disease or defect or legal insanity, the court must be careful not to overstate the point. For example, in a case where an expert witness gives admissible testimony that a particular abnormality is a cause, symptom or otherwise evidence of legal insanity, the court must not deny the abnormality its proper relevance.

In some cases, the cause of a defendant's mental disease or defect may arouse antipathy and tempt a jury to deny a valid insanity defense, e.g., where the mental disease or defect resulted from drug abuse or syphilis. In such cases the court should instruct that, if insanity exists, the cause is irrelevant, see *Commonwealth v. Plank, supra.*

Subdivisions (6) and (7) apprise the jury of its option of returning a verdict of guilty but mentally ill. They are based on Crimes Code §314 and *Commonwealth v. Sohmer, supra. Sohmer* reinterprets Section 314 so that neither party has the burden of proving mental illness. Rather the jury, using the evidence offered on the issue of insanity, must determine whether the evidence of mental illness preponderates. The test for mental illness in Section 314 is identical to the ALI-Model Penal Code test for insanity. For explanations of ALI insanity that would be helpful in dealing with the guilty but mentally ill alternative see W.R. LaFave and A.W. Scott, Jr., *supra* §4.3(d); *Model Penal Code, Tentative Draft No. 4*, 156-60 (1955); *United States v. Brawner*, 471 F.2d 969 (1972). *Brawner* indicates the phrase "mental disease or defect" (which in Pennsylvania is part of both legal insanity and guilty but mentally ill) may usefully be defined as including "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." This definition dovetails nicely with the Model Penal Code test for insanity and hence with Pennsylvania's verdict of guilty but mentally ill. While the definition is also compatible with Pennsylvania's cognitive test for insanity, the subcommittee does not recommend its use. The references to emotional processes and to behavior controls (volition) might confuse some jurors.

Subdivision (9) points out general kinds of evidence the jurors should consider on the issues of legal insanity and mental illness. The instruction lumps the two together because much of the evidence that is relevant to one issue will be relevant to the other. However, the court may wish to discuss relevance with more specificity in some situations, for example, in a case where there is evidence of irresistible impulse relevant to mental illness (capacity to conform conduct) but not to legal insanity, cf. *Commonwealth v. Weinstein*, 499 Pa. 106, 451 A.2d 1344 (1982) (a diminished capacity case).

Subdivision (10) complies with the requirement of *Commonwealth v. Mulgrew*, 475 Pa. 271, 380 A.2d 349 (1977) that, in order to alleviate jurors' fears that a dangerously insane defendant might be turned loose and to avert a consequent unwarranted conviction, the jury should be instructed concerning possible psychiatric treatment and commitment of the defendant if he is acquitted on the ground of insanity. See also *Commonwealth v. McCann*, 503 Pa. 178, 469 A.2d 126 (1983); Mental Health Procedures Act §§301, 304, 305, and 406; 50 P.S. §§7301, 7304, 7305, and 7406. *McCann* holds that a *Mulgrew* charge need not be given *sua sponte* in every case, and that, in the circumstances of a particular case, it may be reasonable for defense counsel not to request the charge. *McCann* leaves open the issue of the propriety of telling a jury details of the commitment and release process that would follow an insanity acquittal, so that the jury can judge the risks consequent to that process. See also *Commonwealth v. Belmonte, supra.*

Subdivision (11) is based on Section 9727 of Title 42. It acquaints the jury generally with the consequences of a verdict of guilty but mentally ill.

Probably no area of the criminal law presents greater conceptual and linguistic difficulties than the insanity defense. The following ideas may be useful in recognizing and handling difficulties:

(a) The insanity defense deals with facts that are ultimately theoretical and speculative – the workings and pathology of individual human minds on particular occasions in the past.

(b) The defense calls for decisions that sometimes can only be rough approximations – separating candidates for therapy and indefinite commitment from persons who should be punished as criminals. See *Commonwealth v. Bernadette Reilly*, *supra*. (insanity defense is addressed solely to penological concerns, i.e., to whether the defendant should receive punishment or treatment for conduct which is wrongful).

(c) The defense seeks to guide and constrain jurors' determinations while inevitably leaving them some freedom to make decisions, as representatives of the community, that reflect their own views of morality and social policy.

(d) Considering the amorphous nature of the subject and the shortcomings of language, there is no demonstrably best charge for communicating all aspects of the defense to a jury. This is true even in a single jurisdiction where insanity law is "settled". Appellate courts naturally tolerate considerable variation in charging language, see e.g., *Commonwealth v. Banks*, *supra*.

(e) An insanity charge should give the jurors some sense of the special nature of their task. It should apprise them of their role vis a vis the experts, see e.g., *United States v. Brawner*, *supra* (discusses relative roles of jury and experts and problems of communication regarding psychiatric disorder and legal insanity). In Pennsylvania, the charge should also impress on the jurors that the insanity test (M'Naghten) they are to apply (i) is a very demanding test (ii) requires a condition akin to illness and (iii) focuses on cognition, intellect and reason (rather than on volition and emotion).

The *Banks* case, *supra*, illustrates the kind of conceptual and linguistic problems that a judge might think about when framing an insanity charge. In *Banks*, the judge charged that the defendant must be "completely and totally" unable to understand the nature and quality of his act or to distinguish between right and wrong. Should a judge tell the jury that they must find "total" incapacity? The subcommittee does not do so in this instruction 5.01A. On the one hand, the phrases "totally unable" or "totally incapable" are somewhat redundant. The language may suggest to some jurors an impossibly demanding test for insanity, a standard that even a raving lunatic could never meet. On the other hand, if there is a danger that expert testimony or argument of counsel has suggested to the jurors that the test is a "substantial incapacity" test (this may have happened in *Banks*), the judge could set them straight by speaking of "total" incapacity. If a judge wants to instruct in terms of "total", maybe he should tell the jury that the test is: was the defendant "*realistically speaking*, totally . . ." Obviously, at some point the search for the right word becomes more nice than productive. At that point, the judge can let the jury supply meaning to the insanity defense.

In *Banks*, the defendant challenged the judge's charge. The defendant argued that, under *M'Naghten*, "knowledge" of the nature and quality of the act encompasses "a rational appreciation . . . of all the social and emotional implications involved in the act and a mental capacity to measure and foresee the consequences of the violent conduct." The Supreme Court rejected the defendant's position as misperceiving the nature of the *M'Naghten* test or seeking to alter it. The Court said that legal sanity "is demonstrated by the murderer's *knowledge* that he or she has killed and the *knowledge* that it was wrong." (Emphasis added). The kind of insanity charge advocated by the

defendant would be overly generous to defendants: it would require more knowledge for sanity than *M'Naghten* requires; its wording, including the term "appreciates" would subtly enlarge the focus beyond cognitive impairments to include emotional impairments.

One of the best, concise, general treatments of mental responsibility for crime, including the insanity defense, is in W.R. LaFave and A.W. Scott, Jr., *Criminal Law* (2d ed., 1986) §§4.1-4.10.

ADDITIONAL REFERENCES

Pennsylvania

J.W. Oler, Jr., PENNSYLVANIA CRIMINAL LAW: DEFENDANT'S MENTAL STATE (Michie Co., 1986).

A.A. Murphy, *Legally Insane or Guilty but Mentally Ill: A Suggested Jury Instruction*, 88 Dick. L. Rev. 344 (1984).

General

Am. Bar Assn., CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, FIRST TENT. DRAFT (1983).

W.K. Gaylen, M.D., THE KILLING OF BONNIE GARLAND (1982).

A.S. Goldstein, THE INSANITY DEFENSE (1967).

5.01B (Crim) DIMINISHED CAPACITY — RELEVANCE OF EXPERT TESTIMONY TO SPECIFIC MENS REA

(1) As I told you earlier, you cannot find the defendant guilty of first degree murder unless you are satisfied beyond a reasonable doubt that he had the specific intent to kill. A specific intent to kill is a fully formed intent to kill of which the defendant was conscious. The defendant asserts that as a result of an abnormal mental condition he was at the time of the killing incapable of that kind of intent. Obviously, you cannot find him guilty of first degree murder unless you are satisfied beyond a reasonable doubt that the defendant's claim is wrong and that he was capable of the specific intent to kill.

(2) In determining the questions of whether the defendant was capable of having, and did in fact have, a specific intent to kill, you should consider all the relevant evidence including the expert testimony concerning the existence and effect of any abnormal mental condition.

SUBCOMMITTEE NOTE

This instruction or a comparable instruction on relevance is appropriate when the jury has heard psychiatric or other expert testimony in a first degree murder prosecution on the issue of whether the defendant was able to and did in fact form the requisite specific intent to kill. Additional, more specific instructions may be needed if portions of the expert testimony are either irrelevant or not obviously germane to specific intent. The court may also give general instructions on the evaluation of expert testimony (see Instructions 4.10A, 4.10B, 4.11) and on proof of intent by circumstantial evidence (see Instruction 7.10B).

This instruction is derived from *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976) as explicated in *Commonwealth v. Zettlemoyer*, ____ Pa. ____, 454 A.2d 937 (1982) and *Commonwealth v. Weinstein*, ____ Pa. ____, 451 A.2d 1344 (1982). *Walzack* held that psychiatric testimony is admissible to negate the element of specific intent required for first degree murder. The court expressly overruled the contrary holdings of a line of prior cases including *Commonwealth v. Weinstein*, 442 Pa. 70, 274 A.2d 182 (1971) and *Commonwealth v. Ahearn*, 421 Pa. 311, 218 A.2d 561 (1966). The court labeled the doctrine which it reorganized in *Walzack* "diminished capacity" since it relates to the accused's ability to perform a specified cognitive process, see *Walzack supra* at n.6. It said that an accused offering evidence under the theory of diminished capacity concedes general criminal liability. The thrust of the doctrine is to challenge the capacity of the actor to possess a particular state of mind required for commission of a certain degree of the crime charged, *Walzack*, 468 Pa. at 220-1, 360 A.2d at 919, 920.

Date of Last Revision
October 1983

In *Zettlemoyer* and *Weinstein* (1982), the Supreme Court has indicated that trial courts should keep the doctrine of diminished capacity within bounds by employing quite strict standards of relevancy when ruling on the admissibility of expert (and lay) testimony and when instructing the jury on such testimony. In *Zettlemoyer*, the court said that testimony is irrelevant unless it speaks to mental disorders affecting the cognitive functions of deliberation and premeditation necessary to formulate a specific intent. Testimony that is merely testimony as to irresistible impulse or inability to control self would be irrelevant while testimony as to ability to think and to formulate and carry out a plan or design would be relevant. See also *Weinstein* (1982). In *Zettlemoyer* the court backed away from the trial judge's charge on diminished capacity that it had earlier characterized as proper in *Commonwealth v. Sourbeer*, 492 Pa. 17, 422 A.2d 116 (1980).

In *Walzack supra*, the court left open the question of whether the doctrine of diminished capacity should apply to other specific mens rea crimes. In the opinion of the Subcommittee, it should not. First degree murder is unique both in terms of the severity of the penalty and the quality and intensity of the intent required by the legislative definition. Compare, for example, the "intent to deprive" required for theft under Crimes Code § 3921 with the willful, deliberate and premeditated intent to kill required for first degree murder. A person who could not form an "intent to deprive" would probably qualify for the complete insanity defense and would have no need for diminished capacity doctrine. Applying the type of anaylsis used in *Walzack* it would appear that when the crime charged is not first degree murder, the probative value of psychiatric evidence of diminished capacity would be outweighed by dangers of unduly complicating the issues, confusing the jury and prolonging the trial. The *Zettlemoyer* and *Weinstein* (1982) decisions seem to presage that diminished capacity will be limited by the Supreme Court to murder in the first degree.

Section 315, added to the Crimes Code by Act of December 15, 1982, P.L. 1262, No. 286, provides that the "mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense" when the defendant was legally insane under M'Naghten test. In the opinion of the Subcommittee, Section 315 is not meant to abolish the doctrine of diminished capacity which is essentially a rule regarding the admissibility of expert testimony relevant to an element of the crime, rather than a substantive defense.

Menninger

March 23, 1993

Representative Denise Everhart -

In March, 1989, I prepared a brief note on behalf of the Kansas Psychiatric Society with reference to the Guilty but Mentally Ill concept. Attached herewith is a copy of that statement which is still applicable. Also appended herewith is a discussion of the concept which appeared in a prior year publication on Mental Disability and the Criminal Law - I apologize for the fact that I do not have the precise volume and year of this reference, but you will find a discussion beginning on Page 714 and continuing to 716 on the concept of Guilty but Mentally Ill. It notes that at that point the Guilty but Mentally Ill verdict seemed not needed.

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HOUSE JUDICIARY
Attachment #4
03-24-93

Menninger

March 24, 1989

TO WHOM IT MAY CONCERN:

RE: Amended Senate Bill No. 263
Introducing the Concept of Guilty But Mentally Ill

The concept of the guilty but mentally ill verdict is raised because of dissatisfaction with the insanity defense. There is concern on the part of many that a person who has committed a serious crime is somehow getting off if he is found not guilty by reason of insanity. The introduction of this verdict has been intended to diminish the number of people found not guilty by reason of insanity. In fact, in Michigan as well as other states which have adopted this provision, there has not been a decrease in the number of persons found not guilty by reason of insanity, Indeed, an American Bar Association study found a 15% increase in the number of persons found not guilty by reason of insanity in Illinois following the introduction of this concept.

It is a mistake to change the law on the basis of a highly emotional reaction of some individuals to one or two troubling crimes. Presently, Kansas statutes adequately provide for finding a mentally ill offender guilty and referring him for treatment at the State Security Hospital upon the issuance of an order from the sentencing judge "for treatment in lieu of sentencing." Once the offender has received the maximum benefit of psychiatric treatment in the Security Hospital, the offender is returned to court for final sentencing. The guilty but mentally ill concept simply creates an unnecessary, new category of offenders. The Kansas Psychiatric Society opposes its introduction.

Sincerely,

W. Walter Menninger, M.D.
In Behalf of the Kansas Psychiatric Society

The Menninger Foundation
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(c) Premenstrual syndrome ☐☐ Unlike PTSD and pathological gambling, what has been called "premenstrual syndrome" imbalances, thought by some to cause sudden mood shifts resulting in violent behavior,[257] has not been defined as a mental illness by the American psychiatric community.[258] However, in a handful of criminal cases in Europe it has served as the basis for excusing women from criminal responsibility,[259] which has led to speculation that under certain circumstances it could form the basis for a successful insanity defense in the United States, although there are as yet no reported cases in which such an attempt has been made.[260] But the prospects for success are dubious, given the vagueness of the condition and its symptoms. First, there is still considerable dispute as to whether a condition definable as a premenstrual syndrome even exists, let alone whether it should be acknowledged for purposes of determining criminal responsibility. The existing studies have succeeded in ascribing criminal behavior to the menstrual cycle only after the fact. It has also been pointed out that many of the symptoms characterizing the syndrome are not uniquely associated with women but rather are often experienced by both men and women while under stress.[261] Second, public policy implications in giving legal recognition to the syndrome are troubling, given that this would conflict with, among other things, political efforts—championed particularly by women's groups—to refute arguments that women behave unpredictably because of their menstrual cycle.

B. Guilty but Mentally Ill (GBMI)

Dissatisfaction with the insanity defense combined with the belief that it cannot constitutionally be abolished has led numerous states to seek a compromise verdict called "guilty but mentally ill" (GBMI).[262] The underlying reason for creating the GBMI verdict is to decrease the number of people found not guilty by reason of insanity. Michigan, the first state to adopt this verdict, did so in 1975.[263] Since then, approximately 20% of the states have followed suit, most of those in direct response to the Hinckley verdict of 1981.[264]

The GBMI verdict takes two forms. One type is the Michigan law, the model for most of the other states adopting the verdict. Following the presentation of the insanity defense, there are four possible verdicts: (1) not guilty, (2) guilty, (3) not guilty by reason of insanity (NGRI), or (4) guilty but mentally ill. For a verdict of guilty but mentally ill it must be proven that the defendant (1) is guilty of the offense charged, (2) was mentally ill when he committed the offense, but (3) was not legally insane at the time he committed the offense.[265] While most states require proof of each of these elements beyond a reasonable doubt, Alaska and Kentucky provide that guilt must be proven beyond a reasonable doubt but that only a preponderence of evidence is needed to establish mental illness at the time the crime was committed.[266]

The other version of the GBMI verdict excludes the insanity defense and thus leaves only three possible verdicts: (1) not guilty, (2) guilty, or (3) guilty and suffering from a mental disease or defect. As of May 1985, Montana was the only state to have adopted this form of the GBMI verdict.[267] Under the Montana statute, if the mental state element of a crime is not proven, an evaluation may be ordered to determine if the defendant is "not guilty by reason of lack of mental state."[268] Apparently, this version of the law also permits an initial finding of guilty with a finding at the sentencing stage that the defendant needs mental treatment.

At the time of the adoption of the GBMI law in Michi-

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on this issue see Comment, Beating the Odds: Compulsive Gambling as an Insanity Defense—*State v. Lafferty*, 14 Conn. L. Rev. 841, 865 (1982).

257. D'Orban & Dalton, Violent Crime and the Menstrual Cycle, 10 Psychological Med. 353 (1980).

258. Premenstrual Syndrome is not recognized in DSM—III, *supra* note 253.

259. In at least four criminal cases in England and one in France, premenstrual syndrome constituted the basis for excusing a woman for criminal responsibility. Dalton, Cyclical Criminal Acts in Premenstrual Syndrome. The Lancet, Nov. 15, 1980, at 1070-71.

260. Women on Trial: New Defense, Nat'l L. J., Feb. 15, 1982, at 1; PMS Case Ends with Guilty Plea, Nat'l. L.J. Nov. 15, 1982, at 36.

261. See Horney, Menstrual Cycles and Criminal Responsibility, 2 Law & Hum. Behav. 25-26 (1978), for a good discussion of whether the symptoms really form a unique syndrome and the flaws in the existing studies that have identified premenstrual syndrome. It has been pointed out that some of the symptoms include feeling "bloated," constipation, diarrhea, insomnia, or sleeping all day.

262. See table 12.5, col. 8, e.g., Alaska, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, Montana, New Mexico, Pennsylvania, South Dakota, Utah, and Vermont.

263. Mich. Comp. Laws Ann. § 768.36(3) (1968 & Supp. 1982), Mich. Stat. Ann. § 28.1059 (Supp. 1983-84). In part the Michigan law was adopted because of a state court decision in People v. McQuillan, 221 N.W.2d 567 (Mich. 1974), which held that insanity acquittees had to be treated the same as other persons where civil commitment was sought. This decision resulted in the release of 79% of the confined insanity acquittees, two of whom committed an additional violent act, one a murder and the other a brutal rape. Project: Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study, 16 J. L. Reform, 77-79 (1982) [hereinafter cited as Project].

264. Before the Hinckley verdict, Georgia, Illinois, Indiana, and Michigan had enacted GBMI, in part in response to defendants raising the insanity defense in crimes that outraged the public. The remaining states adopted the verdict after the jury verdict finding Hinckley not guilty by reason of insanity. Although it appears that by fall 1985 the move to adopt GBMI verdicts had slowed down, it is likely to be revived in those states where a crime occurs which enrages the public when the defendant raises and/or succeeds with the insanity defense.

265. See, e.g., Mich. Stat. Ann. § 28.1059 (Supp. 1983-84); N.M. Stat. Ann. § 31-9-3 (Supp. 1983). The wording is usually identical in each of the state GBMI laws.

266. Alaska Stat. § 12.47.040(b) (1980 & Supp. 1982); Ky. Rev. Stat. Ann. § 504.130 (Baldwin 1975 & Supp. 1982).

267. Mont. Code Ann. §§ 46-14-201, 46-14-210 (1981).

268. Mont. Code Ann. § 46-14-301 (1981).

guilt, it was argued that the verdict would decrease the number of persons acquitted by reason of insanity while at the same time assuring treatment of the "guilty" mentally ill within the correctional setting.[269] Each defendant found guilty but mentally ill would be evaluated upon entry into the correctional system and be provided the mental health services indicated by the evaluation.[270] In addition, the law made it possible to mandate outpatient treatment for the convicted person as part of a sentence of probation or upon release on parole.

The GBMI has been criticized on a number of accounts: the overlapping definitions[271] raise questions about whether a jury or an expert witness can understand clearly the distinction between being guilty but mentally ill and not guilty by reason of insanity;[272] juries will misuse the verdict as a compromise device, finding someone guilty but mentally ill when a finding of not guilty by reason of insanity might have been more appropriate;[273] the verdict is a legal hoax or fraud,[274] a political response to public outrage about a particular case, and it gives the illusion that something positive has been done when in reality there has been little if any change in what happens to criminal defendants pleading mental incapacity;[275] the verdict is potentially harmful to the defendant who raises the insanity defense and then is found GBMI.[276]

While successful legal challenges have not yet been mounted against the GBMI verdict, the concept is susceptible to attack in three areas: the possibility that the defendant's constitutional rights are violated by his being denied the ability to invoke the insanity defense; the possibility that jury instructions cannot be framed to meaningfully and coherently distinguish between the insanity defense standard and the guilty but mentally ill standard; and the lack of treatment programs available within the correctional facility to which the person found GBMI is sentenced.

Because Michigan has had a GBMI verdict for the longest period of time, and all forensic evaluations are done at the Center for Forensic Psychiatry in Ann Arbor, the Michigan experience affords the best setting for evaluating the GBMI verdict. The two primary goals of the GBMI law in Michigan—to decrease the number of persons acquitted by reason of insanity and to simplify jury instructions—have not been achieved. Since 1976 the number of persons found NGRI has remained essentially constant,[277] suggesting that defendants who would formerly have received an acquittal by reason of insanity are still likely to do so. As for those receiving the GBMI verdict, 60% have done so through the plea bargaining process. An additional 20% have been found GBMI in bench trials.[278] Only a very small percentage of defend-

269. See, e.g., Robey, Guilty But Mentally Ill, 6 A.A.P.L. Bull. 374, 379-80 (1978).

270. Under the Michigan model, once a person has been found guilty but mentally ill the court may impose any sentence that the defendant could have received by virtue of being found guilty. Only Delaware and Kentucky require that persons found GBMI be given treatment that can be provided either within the correctional system or by transfer to the state mental health system. Del. Code Ann. tit. 11, § 408(b) (Supp. 1984); Ky. Rev. Stat. Ann. § 504.250 (Baldwin 1975 & Supp. 1982).

If, under the Montana law, the defendant is found not guilty by reason of lack of mental state, the defendant can be committed to the state mental hospital. The defendant may also introduce his mental condition at sentencing, and he can be given any sentence the judge believes is appropriate, including sentencing to the state mental hospital for a period not to exceed the maximum sentence the defendant could have received had he been convicted of the crime.

271. E.g., in Illinois "insanity" is defined as follows: "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Ill. Ann. Stat. ch. 38, § 6-2(a) (Smith-Hurd 1977 & Supp. 1983-84). "Guilty but mentally ill" means a person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, and who is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill. For the purposes of this section "mental illness" or "mentally ill" means a substantial disorder of thought, mood, or behavior that afflicted a person at the time of the commission of the offense and impaired that person's judgment, but not to the extent that he was unable to appreciate the wrongfulness of his behavior or was unable to conform his conduct to the requirements of law." *Id.* at § 6-2(c) & (d).

272. The Constitutionality of Michigan's Guilty But Mentally Ill Verdict, 12 U. Mich. J.L. Ref. 188 (1978), in which the author points out:

> To be found GBMI, a defendant must have been mentally ill, but not legally insane, when he committed the offense. Yet it is hard to imagine "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life" that may not also be a substantial incapacity "either to appreciate the wrongfulness of . . . conduct or to conform . . . conduct to requirements of law."

Id. at 196 (notes omitted; ellipses in original). This description incorporates both the insanity and guilty but mentally ill standards.

273. Comment, Guilty But Mentally Ill: An Historical and Constitutional Analysis, 53 J. Urb. L. 474, 492 (1976).

274. This view has been taken by both legal scholars and practicing criminal attorneys in news media accounts. See, e.g., B.A. Weiner, Guilty But Mentally Ill: New Plea in Criminal Cases Fools Public, Chicago Sun-Times, Aug. 5, 1981, at 52 col. 1; Interview with Barbara Weiner, AMA News, Aug. 6, 1982, at 3.

275. The GBMI verdict does not guarantee treatment for the defendant while incarcerated. Although incarcerated persons are entitled to some level of medical and psychiatric treatment, it could be provided by existing laws. In People v. McLeod, 256 N.W.2d 214 (Mich. Ct. App. 1979), the trial court recognized a right to receive treatment, which the court held could not occur in the prison system. But many states have provisions for transfer from the correctional system to the mental health system for mentally ill inmates. See also Criminal Justice Mental Health Standards, *supra* note 112, 7-10.3 Commentary, and in this chapter § V D, Treatment, *infra*.

276. A label of GBMI may preclude the prisoner's placement in more open prison programs such as prison camps and also may negatively influence a parole board's decision on parole. Blunt & Stock, Guilty But Mentally Ill: The Michigan Experience 11 (paper presented at the Annual Meeting of the American Academy of Psychiatry and Law, Portland, Or., Oct. 1983). (This unpublished paper can be obtained by writing to the authors at the Center for Forensic Psychiatry, P.O. Box 2040, Ann Arbor, Mich. 48106.)

For the prisoner who is inappropriately labeled "mentally ill," adjustment in prison may be more difficult because he will be stigmatized by this designation.

277. Blunt & Stock, *supra* note 276, at 6. Michigan finds an average of 54 people NGRI a year, or 7% of those who raise the defense.

278. Smith & Hall, Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study, 16 U. Mich. J.L. Ref. 77, 94 (1982).

ants receive this verdict through jury trials. Apparently, the most important determinant of whether someone will be acquitted by reason of insanity or found GBMI is the recommendation of the Center for Forensic Psychiatry.[279] A study done by the staff of the center concluded with the following assessment:

> It seems that the GBMI verdict is a superfluous one as it pertains to mental health treatment. It has had virtually no impact on the number of NGRI adjudications or the handling of persons after the NGRI verdict. It does have potential for positive use in the mandatory mental health treatment of those placed on probation, and does give the trier of fact an alternative verdict. The verdict appears to be an attempt to recognize diminished capacity or responsibility without any diminished sentence or significant rights to treatment beyond those granted to all prisoners in the State of Michigan.[280]

Whether this assessment will be true for the other states that have adopted this verdict will become known only in time. At this point, the Michigan experience appears to support claims by critics that the GBMI verdict is not needed,[281] that it accomplishes little,[282] and that despite widespread touting of GBMI as an answer to controversial insanity verdicts, it in fact avoids few or none of the perceived problems of the traditional defense. The one apparent advantage in the GBMI approach—the possibility for mandating outpatient treatment upon return to the community—is offset by the fact that many of those found GBMI have no mental illness that is amenable to treatment.[283]

9. Abolition

Proposals for modifications of the insanity test have been accompanied periodically by calls for outright abolition of the defense.[284] Historically, the constitutionality of eliminating the defense has always been dubious.[285] Before 1930, three states had tried to abolish the defense; their laws were struck down on grounds of violation of the right to a jury trial and/or of due process.[286] The reasons or theories offered for abolition of the insanity defense have varied according to different theories of criminal justice.[287]

The early proposals, growing out of the belief that long-term confinement in hospitals for the criminally insane was inhumane, tended to regard inquiry into the offender's state of mind as futile and advocated focusing instead on how to rehabilitate and treat the offender.[288] Other proposals, in recognition of the significant changes in use of the defense and disposition of the insanity acquittee, tend to emphasize deterrence and protection of society. Thus, Norval Morris has suggested that the best use of psychiatric resources would be in the prevention and treatment of crime rather than in determinations of legal culpability.[289] He elaborates that "[t]he accused's mental condition should be relevant [only] to the question of whether he did or did not, at the

279. *Id.* at 97. In 96% of the cases in which the defendant was later found guilty or GBMI, the Forensic Center had previously determined that he did not meet the requirements for an insanity defense.

280. Blunt & Stock, *supra* note 276, at 11.

281. Judges and juries are continuing to find defendants NGRI at least as often as they did before the GBMI alternative, and the evidence suggests that they are rarely entering the verdict when they would previously have found the person NGRI. Unpublished statistics for Illinois reveal a 15% increase in the number of NGRIs since 1981, when the GBMI law became effective. In that two-year period approximately 100 people were found GBMI, according to Daniel Cuneo, Director of Research, Chester Mental Health Center, Chester, Ill.

282. Preliminary indications from Illinois reveal that the GBMI verdict is most frequently stipulated to, often as part of a plea bargain, where the defendant may have faced the death penalty. (Information secured by telephone survey of prosecutors from the largest Illinois counties.) Except in death penalty cases there is no logical reason for a defense attorney to stipulate to a GBMI finding, since care for mentally ill prisoners in Illinois is given within the Department of Corrections, as appears to be the case in most states that have enacted a GBMI statute.

283. An analysis by the Center for Forensic Psychiatry in Michigan determined that almost all the people found GBMI were sociopaths and thus not suffering from an illness amenable to treatment. Blunt & Stock, *supra* note 276.

284. In 1911 Dr. William White proposed abandonment when he recommended that the jury be confined to determining if the accused were the transgressor. M.S. Guttmacher, The Role of Psychiatry in Law 93 (1968).

285. See Welhofen, *supra* note 210, at 477-80 for a discussion of the constitutional aspect.

286. In 1909 the state of Washington adopted a statute that provided that insanity at the time of the crime would no longer be a defense that could be raised by the defendant, but the statute left it within the power of the trial court, sitting without a jury, to find the accused insane at the time of commission of the offense and order him to a mental institution. Rem. & Bal. Code 2259 (1909 Wash. Laws ch. 249, § 7). This law was struck down as a violation of the defendant's right to a jury trial. State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).

In 1928 Mississippi enacted a provision to the effect that insanity was not a defense to murder: on conviction the defendant would be imprisoned for life, except that the governor could transfer him to a hospital for the insane if his condition warranted it. Miss. Code 1930 ch. 75, §§ 1927 & 1928 (1928 Miss. Laws). The Mississippi Supreme Court held that the statute violated due process. Sinclair v. State, 132 So. 561 (Miss. 1931).

Also in 1928 Louisiana enacted a law providing that in the case of a plea of insanity, the defendant was to be tried before a "lunacy commission," which could commit him if he were found insane. If he was found sane, a trial would be ordered and the defendant would be precluded from reraising the insanity defense. Act No. 17 Ex. Sess. 1928, amending Code of Crim. Proc. art. 266. The Louisiana Supreme Court struck down the statute as violating due process and the right to a jury trial. State v. Lange, 123 So. 639 (La. 1929).

287. See in this chapter § III A, Introduction, *supra*.

288. Wootton advocated that the mens rea (guilty mind) concept be discarded and that the individual's mental state be considered only at the posttrial disposition, with the choices ranging from immediate release to various types of hospitalization. B. Wootton, Crime and the Criminal Law chs. 2 & 3 (1965). Hart, on the other hand, argued that the mens rea concept should be retained but that a mental abnormality did not by itself negate it. Medical testimony would be permitted only at the posttrial disposition. H.L.A. Hart, The Concept of Law (1961).

289. Morris, Psychiatry and the Dangerous Criminal, 41 S. Cal. L. Rev. 514, 515 (1968). See app. at 544 for a summary of several of the arguments advanced for abolishing the defense of insanity. For another proposal see Shwedel & Roether, The Disposition Hearing: An Alternative to the Insanity Defense, 49 J. Urb. L. 711 (1972).