Approved: 2-5-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:05 a.m. on January 26, 1993 in Room 514-S of the Capitol.

All members were present except: All present.

Committee staff present: Michael Heim, Legislative Research Department
Jerry Ann Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Sue Krische, Committee Secretary

Conferees appearing before the committee:

Brenda Hagerman, Legal Counsel, Larned State Hospital
Representative Elaine Wells
Ron Smith, Kansas Bar Association
Dean Raymond Spring, Washburn University School of Law
Jim Clark, Kansas County and District Attorneys Association
Nancy Goodall, Kansas Bankers Association

Others attending: See attached list

SB 10 - Commitment and release standards relating to persons acquitted because of insanity and committed after conviction but prior to sentencing. Re Proposal No. 25

Brenda Hagerman, Legal Counsel, Larned State Hospital, testified that Kansas statutes regarding the commitment and release of the criminally insane should be amended in response to a U.S. Supreme Court decision in Foucha v. Louisiana (Attachment 1). She explained that SB 10 proposes that K.S.A. 22-3428, 22-3428a, and 22-3431 be amended to provide that the legal determination for a decision to release shall be as to whether or not the defendant continues to suffer from a mental illness. In addition, the bill includes an amendment to the statutes to require that a second hearing be held shortly after the criminal verdict to determine the current mental illness of the defendant. Ms. Hagerman stated SB 10 also reflects the needed due process changes for K.S.A. 22-3431 governing disposition upon completion of treatment by requiring a hearing, a status forensic report from the psychiatric institution and notice of hearing.

Drafts of amendments to two other forensic statutes were provided with Ms. Hagerman's testimony expanding the word "physician" to include the term "physician or licensed psychologist" in the statute governing the plea of insanity. The second change would be a requirement that the criminal court cannot accept a plea bargain where the defendant enters a plea of not guilty by reason of insanity unless there is prima facie evidence confirming the existence of the insanity.

Representative Elaine Wells appeared to encourage the Committee to support an amendment to Kansas statutes to include a plea of "guilty but mentally ill." Representative Wells has introduced this legislation in the House.

Ron Smith, Kansas Bar Association, introduced Dean Raymond Spring, Washburn University School of Law, who has written extensively on the subject of mental health law. Dean Spring testified on behalf of the Kansas Bar Association in support of SB 10 and cited in his written testimony two aspects in which the bill should be amended (Attachment 2). He stated that during proceedings prescribed in the bill a provision should be incorporated for the Court to appoint an attorney if the defendant currently has no attorney. Secondly, he stated the bill should designate who has the burden of proof in hearings on release. Dean Spring testified in opposition to the adoption of the "guilty but mentally ill verdict" in Kansas. He also noted that adoption of the civil Chapter 59 definition of "mentally ill" incorporates the criteria of "the capacity to make a rational treatment decision" into the criminal statute where that criteria may not apply.

Jim Clark, Kansas County and District Attorneys Association, testified in support of SB 10 with the reservation that only the elements of mental illness and danger be included in the definition of "mentally ill" in this statute (Attachment 30). He does not feel the other two elements in the Chapter 59 definition for civil commitment apply in the criminal proceeding. Mr. Clark supports the adoption of the "guilty but mentally ill verdict" and provided the Committee a copy of 1989 HB 2336 concerning this plea (Attachment 4).

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:05 a.m. on January 26, 1993.

APPROVAL OF MINUTES

Senator Oleen moved that the minutes of January 14, 20, 21, and 22, 1993 be approved as presented. Senator Bond seconded. Motion carried.

INTRODUCTION OF BILLS

Nancy Goodall, Kansas Bankers Association, requested introduction of a bill amending the current Prudent Man standard to Prudent Investor standards for trustees and others in a fiduciary capacity (Attachment 5). Senator Bond moved introduction of the bill. Senator Martin seconded. Motion carried.

The meeting was adjourned at 11:00 a.m. The next meeting is scheduled for Wednesday, January 27.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 1-26-93

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Julene Mashburn		AG office
Nancy Lindberg		AG office
SHERYL SANDERS	TOPEKS	KS. ALLIANCE FOR THE MENTALLY ILL
Paul Shelby	Topeka	OJA
Ron Smith	"	KS Bar
KEITH R LANDIS	"	CHRISTIAN SCIENCE COMM ON PUBLICATION FOR KS
NANCY GOODALL	"	KS Bankers Assoc
LAURA BOGGAN	" "	Sen. Karrs office
Chip Wheelen	Topeka	KS Psychiatric Soc
M. Hauver	"	Cap-Journal
RAY SPRING	"	Washburn (appear for K. Bar)
NANCY KINDLING	Topeka	LWVK
TIM VOTH	Topeka	KAPS
JIM CLARK	TOPEKA	KCDAA

Brenda Hagaman

KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Donna L. Whiteman, Secretary

BEFORE THE SENATE JUDICIARY COMMITTEE
TESTIMONY CONCERNING THE CRIMINALLY INSANE
COMMITMENT AND RELEASE
SB 10
January 26, 1993

Mr. Chairman and Members of the Committee:

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

In addition, the Kansas Supreme Court in an unpublished decision captioned Simmons v. Sanborn, et al., (No. 68,004) dealt with a patient at Topeka State Hospital who was under the

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committing authority of K.S.A. 22-3430 (care and treatment in lieu of confinement). The Kansas Supreme Court said, "...(W)e suggest that the reach of Foucha may render Simmon's continued commitment in Topeka State Hospital without a sentencing hearing or a commitment hearing a violation of his due process rights." Following this reasoning, the Kansas statutory provisions that rely upon a determination of dangerous alone have now been found improper and will need to be amended to bring them into line with the Foucha requirement.

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

Secondly, we think the Foucha decision also makes Kansas' automatic commitment provisions after a verdict of not guilty by reason of insanity unconstitutional and subject to challenge.

Accordingly, K.S.A. 22-3428 should also be amended to require that a second hearing be held shortly after the criminal verdict to determine the current mental illness of the defendant. This proceeding would eliminate a challenge based on the argument that while the not guilty by reason of insanity verdict answered the question of whether or not the defendant suffered from a mental illness at the time of the commission of the crime, it does not address the question of whether they are currently mentally ill and can rightfully be forced to accept confinement in a psychiatric hospital or to undergo psychiatric treatment. We are concerned that the passage of time between the time the criminal act was committed and the date by which the defendant can be brought to trial and a verdict returned makes the legal presumption of mental illness contained in the automatic commitment subject to a Foucha type challenge. SB 10 proposes that this second hearing would use the legal definition of mental illness as set out in K.S.A. 59-2902 and the clear and convincing standard required by our mental illness commitment laws. The courts are familiar with these matters already and, in fact, this is very similar to the process followed in the case of someone incompetent to stand trial.

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

if the defendant still needs psychiatric care, and can effectively detain a defendant in a psychiatric hospital even when the defendant is not amenable to such treatment.

We would also suggest amendments to two (2) other forensic statutes. K.S.A. 22-3219 is the statute governing the plea of insanity. We would suggest the word "physician" be expanded to include the term "physician or licensed psychologist" to reflect the language used in other forensic statutes. The second change would be a requirement that the criminal court can not accept a plea bargain where the defendant enters a plea of not guilty by reason of insanity unless there is prima facia evidence confirming the existence of the insanity. Currently a defendant in Kansas can plead insanity without any legal foundation for the plea. Statistics gathered on November 5, 1992 indicated there were 27 insanity acquittees hospitalized at State Security Hospital. A review of their files revealed that out of the 27 patients, only 8 patients had a M'Naghten evaluation performed by State Security Hospital. Out of these 8 patients, only 5 patients were found to be legally insane at the time of the commission of their crime. While we recognize M'Naghten evaluations can be performed by other hospitals and mental health professionals, and indeed this may have been the case with some of these patients, it appears there has been a clear misuse of the insanity defense by defendants to avoid the full legal ramifications of their criminal acts. Some of these 27 patients were mentally ill when they were admitted to State Security Hospital, and may have been mentally ill at the time of

the commission of their crime, but mental illness is not equal to being found legally insane under the M'Naghten standard.

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

Thank you for considering these statutory changes.

Presented by: Brenda West Hagerman
Legal Services, Larned State Hospital

Section 1. K.S.A. 1992 Supp. 22-3219 is hereby amended to read as follows: 22-3219. (1) Evidence of mental disease or defect excluding criminal responsibility is not admissible upon a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice of such defendant's intention to assert the defense of insanity or other defense involving the presence of mental disease or defect. Such notice must be served and filed before trial and not more than ~~thirty~~ 30 days after entry of the plea of not guilty to the information or indictment. For good cause shown the court may permit notice at a later date.

(2) A defendant who files a notice of intention to assert the defense of insanity or other defense involving the presence of mental disease or defect thereby submits and consents to abide by such further orders as the court may make requiring the mental examination of the defendant and designating the place of examination and the physician or ~~physicians~~ licensed psychologist by whom such examination shall be made. No order of the court respecting a mental examination shall preclude the defendant from procuring at such defendant's own expense an examination by a physician or licensed psychologist of such defendant's own choosing. A defendant requesting a mental examination pursuant to K.S.A. 22-4508 and amendments thereto may request a physician or licensed psychologist of such defendant's own choosing. The judge shall inquire as to the estimated cost for such examination and shall appoint the requested physician or licensed psychologist if such physician or licensed psychologist agrees to accept compensation in an amount in accordance with the compensation standards set by the board of supervisors of panels to aid indigent defendants. A report of each mental examination of the defendant shall be filed in the court and copies thereof shall be supplied to the defendant and the prosecuting attorney.

(3) The court shall not accept a plea bargain where the defendant enters a plea of not guilty by reason of insanity unless there is prima facia evidence confirming the existence of the insanity. Such prima facia evidence shall consist of, but not be limited to, an examination conducted by a physician or licensed psychologist which concludes the defendant was legally insane at the time of the commission of the crime.

Sec. 4. K.S.A. 1992 Supp. 22-3430 is hereby amended to read as follows: 22-3430. (a) If the report of the examination authorized by K.S.A. 22-3429 and amendments thereto shows that the defendant is in need of psychiatric care and treatment, that such treatment may materially aid in the defendant's rehabilitation and that the defendant and society are not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to: (1) The state security hospital or any county institution provided for the reception, care, treatment and maintenance of mentally ill persons, if the defendant is convicted of a felony; or (2) any state or county institution provided for the reception, care, treatment and maintenance of mentally ill persons, if the defendant is convicted of a misdemeanor. The court may direct that the defendant be detained in such hospital or institution until further order of the court or until the defendant is discharged under K.S.A. 22-3431 and amendments thereto. No period of detention under this section shall exceed the maximum term provided by law for the crime of which the defendant has been convicted. ~~The trial judge shall, at the time of such commitment, make an order imposing liability upon the defendant, or such person or persons responsible for the support of the defendant, or upon the county or the state, as may be proper in such case, for the cost of admission, care and discharge of such defendant~~ The cost of care and treatment provided by a state institution shall be assessed in accordance with K.S.A. 59-2006 and amendments thereto.

(b) No defendant committed to the state security hospital pursuant to this section upon conviction of a felony shall be transferred or released from such hospital except on recommendation of the staff of such hospital.

(c) The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentence to a jail, or to the custody of the director of penal institutions had been imposed in this case.

JUDICIARY COMMITTEE OF THE KANSAS SENATE
HEARINGS ON S.B. 10
January 26, 1993

SUMMARY OF TESTIMONY OF RAYMOND L. SPRING:

In Foucha v. Louisiana, ___US___, 112 S.Ct. 1780 (1992) the Supreme Court of the United States held unconstitutional provisions of Louisiana law which permitted holding persons aquitted of criminal charges on the ground of insanity in mental institutions beyond the time when they were no longer mentally ill, if it could not be adequately demonstrated that they were no longer dangerous to others. In summary, what the court held in Foucha was that it was the fact of mental illness, coupled with dangerousness to others, which justified detention in a mental institution. When the fact of mental illness no longer existed, dangerousness alone could no longer justify such a detention.

The Kansas statutes addressed in S.B. 10 are essentially the same as the Louisiana statutes in this particular, thus it is necessary to amend them to conform to the decision in Foucha. The kansas Bar Association, on whose behalf I appear, supports S.B. 10. There are, however, two aspects in which the bill should be amended:

1. At three points in S.B. 10 there is reference to notification of pending hearing to be sent to the defendant's or patient's attorney. Those points are at p.1, line 39, p. 2, line 43, and p. 7, line 21. It is possible at any of the stages of the proceedings in question that the attorney who formerly represented the individual may no longer be acting in that capacity. It would seem appropriate to provide at each of these points that the court should appoint counsel for the defendant or patient if there is presently no attorney acting in that capacity.

2. At two points in section 1 of the bill - at p.1, line 42 through p.2, line 6, and at p.3, lines 22 - 26 - the question of the burden of proof in hearings on release is covered. In both cases the language provides, in essence, that if the court finds by clear and convincing evidence that the person is no longer a mentally ill person, the person shall be released, but if the court finds by clear and convincing evidence that the person continues to be a mentally ill person, then the person shall remain in the hospital. It simply doesn't work to put the burden of proof on both sides. What is the court to do if the evidence is not convincing either way?

On which side should the burden rest? I believe the legislature has the option to go either way. If the intention of section 1(b), (c) and (d) is to establish what amounts to a civil committment proceeding at this stage, then the burden of proving mental illness by clear and convincing evidence should rest on the state in this and all further proceedings, as it does in a chapter 59 committment proceeding. The United States Supreme Court has,

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however, made it clear that when a person is committed pursuant to a finding of not guilty by reason of insanity, it is constitutionally permissible to place the burden of proof on that individual to show that (s)he is no longer a proper subject for confinement. Jones v. U.S., 463 US 354 (1983). It should be noted, however, that the burden placed on the individual in Jones was a preponderance of the evidence, not the heavier burden of "clear and convincing". The majority in Foucha clearly reaffirmed Jones, and in neither case was the weight of the burden that could be placed on the individual addressed. In the proceeding for review of the committment at the request of the patient (section 2 of S.B. 10) the burden of proof by clear and convincing evidence that the patient is no longer a mentally ill person is placed clearly on the patient. Placing the burden on the individual at prior proceedings would be consistent with this section. If the burden in prior stages is placed on the state, then this section should be changed for consistency.

3. There has been some suggestion that there may now be a new attempt to reintroduce the concept of "Guilty But Mentally Ill" as a response to Foucha. The Kansas Bar Association has consistently opposed this concept for three principal reasons:

a) Guilty but mentally ill is an undisguised end run around the insanity defense. It was conceived (first in Michigan) in the idea that juries would substitute this finding for the finding of not guilty by reason of insanity; that persons who "did the deed" would be locked up under a criminal sentence even though they may not have been mentally responsible for their conduct, but that treatment for their mental illness in the correctional system would be mandated. The KBA recognizes that for over 2000 years civilized peoples have recognized that people whose thinking is so disorganized as a result of illness as to not be responsible for their actions are not criminals. In a state like Kansas, which applies the strict M'Naghten rule as the test of insanity, the successful use of the insanity defense is rare; in cases involving actual violence it is extremely rare. It has, and should retain, a legitimate place in our system of criminal law.

b) If it is argued that Guilty But Mentally Ill provides treatment for persons found guilty of crimes which may reduce their predisposition to criminal conduct on their release, the simple answer is that our law already provides that. KSA 22-3430 and 3431 give the trial judge the authority to order a person convicted of a crime to a state hospital or security hospital for treatment pending sentencing.

c) In fact, the addition of the Guilty But Mentally Ill option did not work out in Michigan and other states as expected. What resulted in Michigan in the ensuing years was that essentially the same number of persons were found not guilty by reason of

insanity as before, but an additional group, almost equal in number, were found Guilty But Mentally Ill. The result was a tremendous unforseen burden of psychiatric care placed on the correctional system and a major unanticipated fiscal problem. Illinois appears to have a comparable result. The remaining states that adopted a Guilty But Mentally Ill option (apparently 10) appear either to have no published studies of the results, or adopted other changes in the law which invalidated comparison. See: Slobogin, "The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come", 53 George Washinton Law Review 494; Smith & Hall, "Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study", 16 U. Mich. J.L. Ref 7.

It is also worthy of note that the American Bar Association's Criminal Justice Mental Health Standards, the American Psychiatric Association's Statement on the Insanity defense, and the National Mental Health Association's Commission on the Insanity Defense all have recommended against adoption of Guilty But Mentally Ill.

Kansas County & District Attorneys Association

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Testimony in Support of the **Guilty But Mentally Ill Verdict**

A Proposed Amendment to Senate Bill No. 10

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

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

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

This additional, or alternative, verdict has withstood constitutional challenges, and is currently in effect in several other states, including Michigan; and has been considered by this Legislature several times in the past. KCDAA feels that under the mandate of the Foucha decision, now is the time to consider the guilty but mentally ill verdict. We have attached a copy of the Michigan statute and the rationale behind it, taken from the case of People v. Ramsey, 71 ALR4TH 661, which is the basis for an extensive annotation on the verdict of guilty but mentally ill.

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and, therefore, he should be allowed to challenge the constitutionality of the verdict. Boyd's argument is more straightforward. He contends that the submission of the guilty but mentally ill verdict to the jury encouraged the jury to return that verdict as a compromise between the verdict of guilty and the verdict of not guilty by reason of insanity. We will treat the arguments of both defendants jointly.

[1] A fair trial is a right guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Therefore, our task is to decide if the guilty but mentally ill verdict violates principles of fairness by, according to defendants, deflecting a jury's attention from the issues of guilt or innocence by adding an irrelevant verdict which brings the risk of impermissible jury compromise.[1] We must stress, however, that we are not concerned with the wisdom of the verdict. Arguments that a statute is unwise or results in bad policy should be addressed to the Legislature. Our concern here is only whether the statute is invalid because it denies criminal defendants a fair trial.[2]

M.C.L. § 768.36(1); M.S.A. § 28.1059(1) provides:

"If the defendant asserts a defense of insanity in compliance with section 20a [MCL 768.20a; MSA 28.1043(1)], the defendant may be found 'guilty but mentally ill' if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:

"(a) That the defendant is guilty of an offense.

"(b) That the defendant was mentally ill at the time of the commission of that offense.

"(c) That the defendant was not legally insane at the time of the commission of that offense."

M.C.L. § 768.21a; M.S.A. § 28.1044(1) defines insanity:

"A person is legally insane if, as a result of mental illness

1. Amicus curiae Michigan Psychiatric Society, branch of American Psychiatric Society, also contends that the guilty but mentally ill verdict is unconstitutional because it creates an irrational distinction. The society contends that, in psychiatric terms, the definitions of mental illness and insanity are identical. We note that claim was contradicted by the testimony of psychologist Dr. Steven Bank in *Boyd,* who found Boyd mentally ill but not insane. In any event, it is not the custom of this Court to decide constitutional issues raised by amici, but not the parties, and we express no opinion on the matter.

2. Ramsey also contends that we must review this case to determine if the Legislature used the least intrusive means to accomplish its purpose, citing *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), an equal protection case. We do not find that standard applicable to the due process challenge made here.

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. . . that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."

Finally, mental illness is defined in M.C.L. § 330.1400a; M.S.A. § 14.800(400a) as:

"[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."

The history of the guilty but mentally ill verdict is well set forth in Smith & Hall, *Evaluating Michigan's guilty but mentally ill verdict: An empirical study,* 16 U. of Mich.J.L.Ref. 77 (1982). For our purposes here, it suffices to state that the statute was a reaction to this Court's decision in *People v. McQuillan,* 392 Mich. 511, 221 N.W.2d 569 (1974). Following that decision, a large number of persons found not guilty by reason of insanity, whom professionals had determined to be presently sane, were released from institutions, with tragic results. Two of the released persons soon committed violent crimes. See Comment, *Guilty but mentally ill: An historical and constitutional analysis,* 53 U. of Det.J.Urban L. 471, 471-472 (1976); Robey, *Guilty but mentally ill,* 6 Bull of Am. Ass'n of Psychiatry 374-375. Amid public outcry, the Legislature responded with the guilty but mentally ill verdict.

The major purpose in creating the guilty but mentally ill verdict is obvious. It was to limit the number of persons who, in the eyes of the Legislature, were *improperly* being relieved of all criminal responsibility by way of the insanity verdict. As stated in the House analysis of the bill creating the verdict, one argument in favor of the verdict was that:

"The new verdict will help a jury. Perhaps because there seems to be a tendency for people to assume that someone who commits a particularly offensive crime 'must be insane,' juries frequently find defendants in such cases 'not guilty by reason of insanity.' Sometimes, however, the defendants are not legally insane, and although it may well have been the intent of the jury that such defendants be committed for a long period, they must be automatically released under a Michigan Supreme Court ruling of September, 1974." Third Analysis of HB 4363, Michigan House Legislative Analysis Section (July 15, 1975).

There is nothing impermissible about such a purpose. It is well within the power of the Legislature to attempt to cure what it sees to be a misuse of the law.[3] What we must decide, however, is whether the verdict acts to deny defendants a fair trial.

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3. A study by the Center for Forensic Psychiatry in September of 1974 indicated that of some 350 persons found not guilty by reason of insanity

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HOUSE BILL No. 2336

By Representatives Wells, Bryant, Crowell, Francisco, Freeman, Graeber, Hurt, Lacey, Lowther, Rezac, Teagarden, Turnbaugh and Wiard

2-8

AN ACT concerning crimes and criminal procedure; relating to the defense of insanity; providing for a finding or plea of guilty but mentally ill in certain cases; amending K.S.A. 22-3209, 22-3429 and 22-3430 and K.S.A. 1988 Supp. 22-3210 and 22-3431 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) As used in this section, "mentally ill" means having 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.

(b) If a defendant asserts a defense of insanity in compliance with K.S.A. 22-3219, and amendments thereto, the defendant may be found guilty but mentally ill if, after trial, the trier of fact finds beyond a reasonable doubt that the defendant:

(1) Is guilty of an offense;

(2) was mentally ill at the time of commission of the offense; and

(3) was not legally insane at the time of the commission of the offense.

(c) When a defendant asserts a defense of insanity in compliance with K.S.A. 22-3219, and amendments thereto, and the reports of the defendant's mental examination have been filed with the court, the trial judge may permit the defendant to withdraw the plea of insanity and enter a plea of guilty but mentally ill. The plea of guilty but mentally ill shall not be accepted by the court unless:

(1) It has been approved by the prosecuting attorney;

(2) the trial judge, with the defendant's consent, has examined the reports filed pursuant to K.S.A. 22-3219, and amendments

thereto, has held a hearing on the issue of the defendant's mental illness at which both parties may present evidence and is satisfied that the defendant was mentally ill at the time of the offense to which the plea is entered; and

(3) the requirements of K.S.A. 22-3210, and amendments thereto, are met.

New Sec. 2. Any person prosecuted for a criminal offense may plead that such person was not guilty because of insanity at the time of the offense or guilty but mentally ill and in such cases the burden shall be upon the defendant to prove insanity or mental illness beyond a reasonable doubt.

Sec. 3. K.S.A. 22-3209 is hereby amended to read as follows: 22-3209. ~~(1)~~ *(a)* A plea of guilty is admission of the truth of the charge and every material fact alleged ~~therein~~ *in the charge*.

(b) A plea of guilty but mentally ill is admission of the truth of the charge and every material fact alleged in the charge and is an assertion that the defendant was mentally ill, as defined by section 1, but not legally insane at the time of the crime charged.

~~(2)~~ *(c)* A plea of *nolo contendere* is a formal declaration that the defendant does not contest the charge. When a plea of *nolo contendere* is accepted by the court, a finding of guilty may be adjudged ~~thereon~~ *on the plea*. The plea cannot be used against the defendant as an admission in any other action based on the same act.

~~(3)~~ *(d)* A plea of not guilty denies and puts in issue every material fact alleged in the charge.

~~(4)~~ *(e)* If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty on behalf of the defendant.

Sec. 4. K.S.A. 1988 Supp. 22-3210 is hereby amended to read as follows: 22-3210. (a) Before or during trial a plea of guilty, *guilty but mentally ill* or *nolo contendere* may be accepted when:

(1) The defendant or counsel for the defendant enters such plea in open court; ~~and~~

(2) in felony cases the court has informed the defendant of the consequences of the plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea; ~~and~~

(3) in felony cases the court has addressed the defendant personally and determined that the plea is made voluntarily with

derstanding of the nature of the charge and the consequences of the plea; ~~and~~

(4) the court is satisfied that there is a factual basis for the plea; *and*

(5) in the case of a plea of guilty but mentally ill, the requirements of section 1 are met.

(b) In felony cases the defendant must appear and plead personally ~~and~~. A verbatim record of all proceedings at the plea and entry of judgment thereon shall be made.

(c) In traffic infraction and misdemeanor cases the court m allow the defendant to appear and plead by counsel.

(d) A plea of guilty, *guilty but mentally ill* or *nolo contendere*, for good cause shown and within the discretion of the court, may be withdrawn at any time before sentence is adjudged. To correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea.

Sec. 5. K.S.A. 22-3429 is hereby amended to read as follows: 22-3429. *(a) Subject to the provision of subsection (b),* after conviction and ~~prior to sentence and~~ as part of the presentence investigation authorized by K.S.A. 21-4604, *and amendments thereto,* the trial judge may order the defendant committed to ~~a state hospital or any suitable local mental health~~ *an appropriate state or local institution or* facility for mental examination, evaluation and report.

(b) After a finding or acceptance of a plea of guilty but mentally ill, the trial judge shall order the defendant committed to an appropriate state or local institution or facility for mental examination, evaluation and report.

(c) If adequate private facilities are available and if the defendant is willing to assume the expense thereof ~~such~~, commitment *pursuant to this subsection* may be to a private hospital.

(d) A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant.

(e) A defendant may not be detained for more than 120 days under a commitment made under this section.

Sec. 6. K.S.A. 22-3430 is hereby amended to read as follows: 22-3430. *(a)* If the report of ~~the~~ *an* examination authorized by ~~the preceding section~~ *subsection (a) of K.S.A. 22-3429, and amendments thereto,* shows that the defendant is in need of psychiatric care and treatment ~~and that such~~, *that* treatment may materially aid in ~~his~~ *the defendant's* rehabilitation and that the defendant and society ~~is~~ *are* not likely to be endangered by permitting the defendant to receive ~~such~~ psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge ~~shall have power to commit such defendant to any state or county institution provided~~ *may commit the defendant to an appropriate state or local institution or facility* for the reception, care, treatment and maintenance of mentally ill persons. *Otherwise, the judge shall sentence the defendant in the manner provided by law.*

(b) If the report of an examination authorized by subsection (b) of K.S.A. 22-3429, and amendments thereto, shows that the defendant is in need of psychiatric care and treatment, the trial judge shall commit the defendant to an appropriate state or local institution or facility for the reception, care, treatment and maintenance of mentally ill persons. Otherwise, the judge shall sentence the defendant in the same manner as a defendant convicted of the same crime.

(c) The court may direct that the defendant be detained in ~~such institution~~ *an institution or facility pursuant to this section* until further order of the court or until the defendant is discharged under K.S.A. 22-3431, *and amendments thereto.*

(d) No period of detention under this section shall exceed the maximum term provided by law for the crime of which the defendant has been convicted.

(e) The trial judge ~~shall~~, at the time of ~~such~~ commitment, *shall* make an order imposing liability upon the defendant, ~~or such person or~~ persons responsible for the support of the defendant, ~~or upon~~ the county or the state, as may be proper ~~in such case~~, for the cost of admission, care and discharge of ~~such~~ *the* defendant.

(f) The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with ~~like~~ *the same* effect as if sentence to a jail, or to the custody of the ~~director of penal institutions~~ *secretary of corrections* had been imposed ~~in this case~~.

Sec. 7. K.S.A. 1987 Supp. 22-3431 is hereby amended to read as follows: 22-3431. Whenever it appears to the chief medical officer of the institution to which a person has been committed under K.S.A. 22-3430, and amendments thereto, that such person is not dangerous to self or others and that such person will not be improved by further detention in such institution, such person shall be returned to the court where convicted ~~and shall be sentenced, committed, granted probation, assigned to a community correctional services program or discharged~~. *At that time, the court may discharge the defendant or impose any sentence which could be imposed on a defendant convicted of the crime that the defendant committed,* as the court deems best under the ~~circumstance~~ *circumstances.* The time spent in a state or county institution pursuant to a commitment under K.S.A. 22-3430, and amendments thereto, shall be credited against any sentence~~, confinement or imprisonment~~ imposed on the defendant.

Sec. 8. K.S.A. 22-3209, 22-3429 and 22-3430 and K.S.A. 1988 Supp. 22-3210 and 22-3421 are hereby repealed.

Sec. 9. This act shall take effect and be in force from and after its publication in the statute book.

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January 27, 1993

BANK IV

Senator Jerry Moran, Chairman
Senate Judiciary Committee
Topeka, Kansas

RE: Prudent Investor Rule Legislation

Dear Senator Moran and Members of the Committee:

The Trust Division of the Kansas Bankers Association submits legislation amending the current Prudent Man standard for trustees and others in a fiduciary capacity. This standard basically mirrors the way portfolios are currently managed by most trust departments and trust companies.

The main diversions from the old "prudent man" rule are:

1. Total portfolio strategy - This is a test of conduct and not of individual performance results.
2. A risk and return analysis is the basis for investment decisions, rather than an absolute prohibition against risky or speculative investments.
3. Diversification of investments stressed.
4. Investment functions may be delegated.

Many of the traditional concepts continue to apply or have been restated:

1. Consideration of trust purpose and beneficiary circumstances more pronounced.
2. Trustee must exercise reasonable care, skill and caution.
3. Underscores duty to avoid unwarranted and unreasonable expenses.
4. Underscores trustee's duty of impartiality between beneficiaries, viewing the portfolio as a whole.
5. Trustee has a duty to diversify even original investments unless there is a good reason not to do so.

We urge your review and passage of this legislation.

Sincerely,

Nancy Goodall

Nancy Goodall, Chairman
Legislative Committee
Trust Division, Kansas Bankers Association

SJ
1-26-93
Attachment 5