Approved March 30, 1989
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Martha Jenkins at
Vice- Chairperson

3:30 ~~a.m.~~/p.m. on March 13, 1989 in room 313-S of the Capitol.

All members were present except:

Representatives Crowell, Everhart, O'Neal, Peterson, Roy and Whiteman, who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Randy Hearrell, Judicial Council
Paul Shelby, Office of Judicial Administrator
Jerry Donaldson, Legislative Research Department
Representative Elaine Wells
Joan Turnbull, Carbondale
Licha Nicholson, Wichita
Ron Smith, Kansas Bar Association
Ron Wurtz, Public Defender's Office
Donald L. Kusmaul, Emporia

Written testimony was submitted by:

Beverly DeWeese Hilbish, Emporia
Carl DeWeese, Americus
Marilyn L. Cristmore, Topeka
Clark V. Owens, Wichita
Gordon Risk, A.C.L.U.
Chip Wheelen, Kansas Psychiatric Society
Jan Maxwell, Director of Legal Services, S.R.S.
Professor Raymond L. Spring, Kansas Bar Association
Judge Robert A. Thiesson, Wichita

HEARING ON S.B. 11 - Municipal Courts, recordkeeping requirements - Re: Proposal No. 23

Randall Hearrell, Judicial Council, testified S.B. 11 is the result of a study by the Judicial Council and an interim study by the legislature. S.B. 11 amends the Kansas Code of Procedure for Municipal courts to require municipal judges to make reports and furnish information when requested by any departmental justice or judicial administrator and removes a similar provision requiring clerks of the municipal court to make such reports. This bill was a small part of the Statewide Public Defender and District Attorney interim study.

Paul Shelby, Office of Judicial Administrator, testified in support of S.B. 11, especially lines 49 through 52 "(d) The municipal judge shall promptly make such reports and furnish the information requested by any departmental justice or the judicial administrator in the manner and form prescribed by the Supreme Court".

The hearing on S.B. 11 was closed.

HEARING ON S.B. 8 - Commitment of persons found not guilty by reason of insanity - Re: Proposal No. 21

Jerry Donaldson, Legislative Research Department, informed the Committee S.B. 8 was the result of a 1988 interim study of Proposal No. 21--Insanity Defense. The request for the interim study came from three bills in the 1988 legislature, H.B. 3050, 3098 and 3099. Two of the bills would have changed current law regarding the release of someone committed to a mental institution who had been found not guilty by reason of insanity. These bills would have changed the criteria for release from "is not likely to be a danger to self or others" to" will never again be likely to cause harm to self or others". The other bill, H.B. 3099, would have enacted a finding of guilty but mentally ill. S.B. 8, as amended by the Senate Judiciary Committee, would require a court

hearing in all cases and a higher standard of proof as "clear and convincing evidence", that the individual will not likely cause harm to themselves or others, if discharged, before any person who has been found not guilty by reason of insanity may be realeased from a state mental institution. The bill was also amended to make the test "not dangerous to other persons", rather than just other patients, for transfer from the state security hospital to another state hospital.

A question was raised by a Committee member whether changing the standard from preponderance of evidence, to clear and convincing evidence, would raise constitutional questions. Also questioned was whether H.B. 2200 and H.B. 2199, the Victims' Rights bills, would affect S.B. 8.

Representative Elaine Wells testified the Senate Judiciary Committee discussed proposals to eliminate the innocent by reason of insanity plea and replace it with a guilty but mentally ill provision. She stated the guilty but mentally ill approach would give a safer measure of protection. It would assure treatment, but it also would provide for confinement. She also suggested that notices for court hearings on the insanity acquitee release or discharge should also be given to the victims. This could be added to line 62 of the bill, see Attachment I.

Representative Wells submitted an amendment to S.B. 8. The amendment places the burden of proving insanity on the defendant, and introduces the verdict and plea of "guilty but mentally ill" to be used only in felony cases and waives the defendant's rights to trial if the plea is accepted. It gives the trial judge the right to refuse to accept the plea of guilty but mentally ill, and establishes that if a defendant makes such a plea that it is an admission of the truth of the charge. After a finding or acceptance of a plea of guilty but mentally ill, the trial judge will order the defendant to be committed to an appropriate state or local institution for examination to determine treatment and when treatment terminates, the defendant will be required to serve the remainder of the sentence imposed. It also provides for a screening investigation to determine if further treatment is necessary after the expiration of the sentence, see Attachment II.

In answer to Committee questions, Representative Wells replied this bill would not eliminate the not guilty by reason of insanity. The intent of the bill is that the defendant would be required to serve the remainder of the sentence imposed, in a penal institution, after the termination of treatment.

Written testimony was distributed to the Committee in support of S.B. 8 from Donald L. Kusmaul of Emporia, see Attachment III; Beverly DeWeese Hilbish of Emporia, see Attachment IV; Carl DeWeese of Americus, see Attachment V; Marilyn L. Cristmore of Topeka, see Attachment VI; and Clark V. Owens of Wichita, (former District Attorney of Sedgwick County), see Attachment VII. The written testimony submitted were copies of testimony that had been given at previous hearings on the Insanity Defense.

Joan Turnbull told the Committee about the murder of her son Michael Turnbull in a Wichita, Kansas, Nautilus Fitness Center. The defendant was found not guilty by reason of insanity. She said the defendant is insane but he is guilty of murder. She asked that the Legislature provide a more stringent law, see Attachment VIII.

Licha Nicholson testified for her husband, Lynn Nicholson, who was shot at the Nautilus Fitness Center in Wichita, Kansas. She related her husband's experiences of the shooting and his health problems since the shooting. She also submitted copies of his testimony before the Senate Judiciary Committee on January 18, 1989 and before the House Federal and State Affairs Committee on March 23, 1988, see Attachment IX.

Ron Smith, Kansas Bar Association, informed the Committee Professor Raymond Spring was unable to appear and testify, however, copies of his testimony on the Insanity Defense before the 1988 interim committee will be furnished the Committee. Mr. Smith asked that before the Committee takes action on S.B. 8, Professor Spring's comments on the not guilty by reason of insanity rule, guilty but mentally ill rule, the ALI volitional test or the M'Naghten rule should be considered, see Attachment X.

Mr. Smith said the Kansas Bar Association opposes changing the burden of proof to the defendant.

A Committee member asked that staff research whether there had been any constitutional problems in the states that had changed or considered changing the burden of proof to the defendant.

Ron Wurtz, Public Defender's office, testified in opposition to changing to "clear and convincing evidence". He said K.S.A. 22-3430 provides when a defendant is certified that he is no longer mentally ill, then sentencing is instituted. He was opposed to explaining four different verdicts to a jury.

Chip Wheelen, Kansas Psychiatric Society, submitted written testimony opposing S.B. 8, see Attachment XI.

Jan Maxwell, Director of Legal Services, Social and Rehabilitation Services, submitted written testimony supporting S.B. 8 in the form it was referred out of the Senate Judiciary Committee, see Attachment XII.

Gordon Risk, American Civil Liberties Union of Kansas, submitted written testimony in opposition to S.B. 8, see Attachment XIII.

The hearing on S.B. 8 was closed.

It should be noted the attached testimony of Robert A. Thiessen, Municipal Judge, Wichita was received after the hearing on S.B. 11 was closed. Judge Thiessen opposes S.B. 11, see Attachment XIV.

The Committee meeting was adjourned at 5:00 p.m. The next meeting will be Tuesday, March 14, 1989 at 3:30 p.m. in room 313-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY DATE: March 13, 1989

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
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Joan Turnbull	Carbondale KS RR1 BOX153 66414	
BARBARA RISK	2416 SONSET CT TOPEKA KS 66604	
RONALD E. WURTZ	121 E 6TH #C Topeka, KS 66603	
Randy Hearrell	TOPEKA KS	KS JUD. Council
Jim Clark	TOPEKA	KCDAA
Paul Shelby	Topeka	OJA
JAN HALEY MAXWELL	TOPEKA	SRS
Mary I. Slaybaugh	Topeka	SRS
Ron Smith	"	KS Bar Assn
Blaine Wells	Carbondale	Leg.

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TOPEKA

HOUSE OF
REPRESENTATIVES

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

TESTIMONY ON S.B. 8

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

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

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

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

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

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

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

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

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

The Legislature should act accordingly."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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Insanity Defense Reform in the United States — Post-Hinckley

by Lisa Callahan, Connie Mayer and Henry J. Steadman

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

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

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

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

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

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

Study Design

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

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

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

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

Findings

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

Key

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

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Table 2: Instances of Insanity Defense Reforms

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

Key

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

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Table 3: Statutory and Case Law Citations

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

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

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

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

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Footnotes

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

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

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

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

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

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

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

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

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

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

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

12. *Ibid.* at 123.

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

National Computerized System Provides Information on Services for Disabled Children

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

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

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

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

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

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

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As Amended by Senate Committee

Session of 1989

SENATE BILL No. 8

By Special Committee on Judiciary

Re Proposal No. 21

12-21

AN ACT concerning criminal procedure; relating to commitment of persons found not guilty by reason of insanity; amending K.S.A. 22-3428 and 22-3428a and repealing the existing sections.

providing for a finding or plea of guilty but mentally ill in certain cases; 22-3209, 22-3210, 22-3429, 22-3430, 22-3431,

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

Section 1. K.S.A. 22-3428 is hereby amended to read as follows: 22-3428. (1) When a person is acquitted on the ground that the person was insane at the time of the commission of the alleged crime, the verdict shall be not guilty because of insanity and the person shall be committed to the state security hospital for safekeeping and treatment. A finding of not guilty by reason of insanity shall constitute a finding that the acquitted person committed an act constituting the offense charged or an act constituting a lesser included crime, except that the person did not possess the requisite criminal intent. A finding of not guilty because of insanity shall be prima facie evidence that the acquitted person is presently likely to cause harm to self or others.

(2) Whenever it appears to the chief medical officer of the state security hospital that a person committed under this section is not dangerous to other ~~patients~~ *persons*, the officer may transfer the person to any state hospital. ~~Any person committed under this section may be granted convalescent leave or discharge as an involuntary patient after 30 days' notice has been given to the district or county attorney, sheriff and district court of the county from which the person was committed.~~

(3) ~~Within 15 days after the receipt of the notice provided for in subsection (2), the district or county attorney may request~~

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~~that a hearing on the proposed leave or discharge be held.~~ *Any person committed under this section may be granted conditional release or discharge as an involuntary patient pursuant to this subsection. The chief medical officer of the state security hospital or the state hospital where the patient is under commitment shall give notice to the district court of the county from which the person was committed that the patient is ready for such proposed release or discharge. Such notice shall include, but not be limited to: (a) Identification of the patient; (b) the course of treatment; (c) a current assessment of whether the patient is likely to cause harm to self or others if released or discharged; (d) recommendations for future treatment, if any; and (e) recommendations regarding conditional release or discharge, if any.* Upon receiving ~~the request~~ *such notice*, the district court shall order that a hearing be held on the proposed ~~leave~~ *release* or discharge. The court shall give notice of the hearing to the state hospital where the patient was transferred *and to the district or county attorney and sheriff of the county from which the person was originally ordered committed* and shall order the involuntary patient to undergo a mental evaluation by a person designated by the court. A copy of all orders of the court shall be sent to the involuntary patient and the patient's attorney. The report of the court ordered mental evaluation shall be given to the district or county attorney, the involuntary patient and the patient's attorney at least five days prior to the hearing. The hearing shall be held within 30 days after the receipt by the court of the ~~district or county attorney's request~~ *chief medical officer's notice*. The involuntary patient shall remain in the state hospital until the hearing on the proposed ~~leave~~ *release* or discharge is to be held. At the hearing, the court shall receive all relevant evidence, including the written findings and recommendations of the chief medical officer of the state security hospital or the state hospital where the patient is under commitment, and shall determine whether the patient ~~continues to~~ *will* be likely to cause harm to self or others ~~*in the future*~~ *if released or discharged*. The patient shall have the right to present evidence at such hearing and to cross-examine any witnesses called by the district or county attorney. At the conclusion of the hearing, if the court finds *by clear and convincing evidence* that the patient ~~con-~~

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~~tinues to~~ *will not* be likely to cause harm to self or others ~~*in the future*~~ *if released or discharged,* the court shall order the patient ~~to remain in the state hospital, otherwise the court shall order the patient~~ discharged or conditionally released, *otherwise the court shall order the patient to remain in the state security hospital or state hospital where the patient is under commitment.* If the court finds ~~from~~ *by clear and convincing* evidence presented at the hearing that the *release or* discharge of the patient ~~is~~ *will* not *be* likely to cause harm to self or others ~~*in the future*~~ if the patient continues to take prescribed medication or to receive periodic psychiatric or psychological treatment, the court may order the patient conditionally released in accordance with subsection (4). If the court orders the conditional release of the patient, the court may order as an additional condition to the release that the patient continue to take prescribed medication and report as directed to a person licensed to practice medicine and surgery to determine whether or not the patient is taking the medication or that the patient continue to receive periodic psychiatric or psychological treatment.

(4) In order to insure the safety and welfare of a patient who is to be conditionally released and the citizenry of the state the court may allow the patient to remain in custody at a facility under the supervision of the secretary of social and rehabilitation services for a period of time not to exceed 30 days in order to permit sufficient time for the secretary to prepare recommendations to the court for a suitable reentry program for the patient. The reentry program shall be specifically designed to facilitate the return of the patient to the community as a functioning, selfsupporting citizen, and may include appropriate supportive provisions for assistance in establishing residency, securing gainful employment, undergoing needed vocational rehabilitation, receiving marital and family counseling, and such other outpatient services that appear beneficial. If a patient who is to be conditionally released will be residing in a county other than the county where the district court that ordered the conditional release is located, the court shall transfer venue of the case to the district court of the other county and send a copy of all of the court's records of the proceedings to the other court. In all cases of conditional release the court shall: (a) Order that the patient be placed

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under the temporary supervision of state parole and probation services, district court probation and parole services or any appropriate private agency; and (b) require as a condition precedent to the release that the patient agree in writing to waive extradition in the event a warrant is issued pursuant to K.S.A. 22-3428b and amendments thereto.

(5) At any time during the conditional release period, a conditionally released patient, through the patient's attorney, or the county or district attorney of the county in which the district court having venue is located may file a motion for modification of the conditions of release, and the court shall hold an evidentiary hearing on the motion within 15 days of its filing. The court shall give notice of the time for the hearing to the patient and the county or district attorney. If the court finds from the evidence at the hearing that the conditional provisions of release should be modified or vacated, it shall so order. If at any time during the transitional period the designated medical officer or supervisory personnel or the treatment facility informs the court that the patient is not satisfactorily complying with the provisions of the conditional release, the court, after a hearing for which notice has been given to the county or district attorney and the patient, may make orders: (a) For additional conditions of release designed to effect the ends of the reentry program, (b) requiring the county or district attorney to file an application to determine whether the patient is a mentally ill person as provided in K.S.A. 59-2913 and amendments thereto, or (c) requiring that the patient be committed to the state security hospital or any state hospital. In cases where an application is ordered to be filed, the court shall proceed to hear and determine the application pursuant to the treatment act for mentally ill persons and that act shall apply to all subsequent proceedings. The costs of all proceedings, the mental evaluation and the reentry program authorized by this section shall be paid by the county from which the person was committed.

(6) In any case in which the defense of insanity is relied on, the court shall instruct the jury on the substance of this section.

(7) As used in this section and K.S.A. 22-3428a and amendments thereto, "likely to cause harm to self or others" has the meaning provided by K.S.A. 59-2902 and amendments thereto.

Sec. 2. K.S.A. 22-3428a is hereby amended to read as follows: 22-3428a. (1) Any person found not guilty because of insanity who remains in the state security hospital or a state hospital for over one year pursuant to a commitment under K.S.A. 22-3428 and amendments thereto shall be entitled annually to request a hearing to determine whether or not the person ~~continues to~~ *will* be likely to cause harm to self or others ~~*in the future*~~ *if discharged*. The request shall be made in writing to the district court of the county where the person is hospitalized and shall be signed by the committed person or the person's counsel. When the request is filed, the court shall give notice of the request to: (a) The county or district attorney of the county in which the person was originally ordered committed, and (b) the chief medical officer of the state security hospital or state hospital where the person is committed. The chief medical officer receiving the notice, or the officer's designee, shall conduct a mental examination of the person and shall send to the district court of the county where the person is hospitalized and to the county or district attorney of the county in which the person was originally ordered committed a report of the examination within 20 days from the date when notice from the court was received. Within five days after receiving the report of the examination, the county or district attorney receiving it may file a motion with the district court that gave the notice, requesting the court to change the venue of the hearing to the district court of the county in which the person was originally committed, or the court that gave the notice on its own motion may change the venue of the hearing to the district court of the county in which the person was originally committed. Upon receipt of that motion and the report of the mental examination or upon the court's own motion, the court shall transfer the hearing to the district court specified in the motion and send a copy of the court's records of the proceedings to that court.

(2) After the time in which a change of venue may be requested has elapsed, the court having venue shall set a date for the hearing, giving notice thereof to the county or district attorney of the county, the committed person and the person's counsel. If there is no counsel of record, the court shall appoint a counsel for the committed person. The committed person shall have the right to procure, at the person's

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own expense, a mental examination by a physician or licensed psychologist of the person's own choosing. If a committed person is financially unable to procure such an examination, the aid to indigent defendants provisions of article 45 of chapter 22 of the Kansas Statutes Annotated shall be applicable to that person. A committed person requesting a mental examination pursuant to K.S.A. 22-4508 and amendments thereto may request a physician or licensed psychologist of the person's own choosing and the court shall request the physician or licensed psychologist to provide an estimate of the cost of the examination. If the 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, the judge shall appoint the requested physician or licensed psychologist; otherwise, the court shall designate a physician or licensed psychologist to conduct the examination. Copies of each mental examination of the committed person shall be filed with the court at least five days prior to the hearing and shall be supplied to the county or district attorney receiving notice pursuant to this section and the committed person's counsel.

(3) At the hearing the committed person shall have the right to present evidence and cross-examine the witnesses. The court shall receive all relevant evidence, including the written findings and recommendations of the chief medical officer of the state security hospital or state hospital where the person is under commitment, and shall determine whether the committed person ~~continues to~~ ***will*** be likely to cause harm to self or others ~~*in the future*~~ *if discharged*. At the hearing the court may make any order that a court is empowered to make pursuant to subsections (3), (4) and (5) of K.S.A. 22-3428 and amendments thereto. If the court finds ***by clear and convincing evidence*** the committed person ~~is no longer~~ ***will not be*** likely to cause harm to self or others ~~*in the future*~~ *if discharged*, the court shall order the person discharged; otherwise, the person shall remain committed or be conditionally released.

(4) Costs of a hearing held pursuant to this section shall be assessed against and paid by the county in which the person was originally ordered committed.

Sec. 3. K.S.A. 22-3428 and 22-3428a are hereby repealed.

Insert the attached and renumber remaining sections accordingly

22-3209, 22-3210, 22-3429, 22-3430, 22-3431,

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Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

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New Sec. 3. (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, only in felony cases, if, after trial, the trier of fact finds beyond a reasonable doubt that the defendant:

(1) Is guilty beyond a reasonable doubt 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.

(d) If the plea of guilty but mentally ill is not accepted by the court or is withdrawn by the defendant, the judge who presided at the hearing on mental illness shall not preside at

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the trial.

New Sec. 4. 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, if prosecuted for a felony, 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. 5. 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. 6. K.S.A. 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~~

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(3) in felony cases the court has addressed the defendant personally and determined that the plea is made voluntarily with understanding 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 may 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. 7. 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.

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(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. 8. 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.

~~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.~~

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(d) 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.

(e) 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. 9. K.S.A. 22-3431 is hereby amended to read as follows: 22-3431. (a) 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.

(b) A defendant receiving treatment pursuant to K.S.A. 22-3430, and amendments thereto, may not be released on furlough, under K.S.A. 22-3726, and amendments thereto, work release, under K.S.A. 75-5267 et seq. or parole.

(c) Not less than 30 days before the expiration of the sentence of a defendant found guilty but mentally ill, the secretary of corrections shall file an application, under K.S.A. 59-2913, and amendments thereto, for a hearing to determine the

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need for further treatment of the defendant if the:

(1) Defendant is still receiving treatment under K.S.A. 22-3430, and amendments thereto; and

(2) secretary has good cause to believe that the defendant is suffering from a mental illness that causes the defendant to be dangerous to self or others.

(d) AS used in this section, "mental illness" means the definition specified in section 3.

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TESTIMONY ON SENATE BILL No. 8

Re: Proposal No. 21

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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TESTIMONY ON INSANITY DEFENSE

Mr. Chairman and members of the committee, thank you for the opportunity to testify on this bill.

You have the opportunity this legislative session to introduce a law that will save innocent lives. If the proposed bill becomes law, it will prevent first time offenders from becoming repeat offenders. You have the opportunity to set a precedent to provide judges and juries with a much needed alternative.

I am here because I believe our present laws are not effective enough at coping with crime. I am here representing my father. He is not here with us today because he was brutally murdered by a man he had never met. Our current laws are protecting his murderer at all costs, with little regard for justice.

My father saw the need for this type of legislation many years before this bill was introduced in the House of Representatives. In 1970, he served as jury member on a first degree murder trial. The woman accused of the murder had poured a flammable liquid on her thirteen year old daughter and set her on fire. The girl lived for three days and told her half-sister what had happened. The woman also admitted to her son that she had poured kerosene on the girl before setting her on fire.

This woman had previously been a patient in the Topeka State Hospital, but had been released 19 months prior to

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the murder. She had been released because it was the opinion of her psychiatrist that she was mentally sound and able to function in society.

Following the fire the woman was returned to the Topeka State Hospital, where she was examined by a psychiatrist. This psychiatrist testified at the trial that he had diagnosed the woman as suffering "schizophrenia, paranoid type."

Even though the jury was convinced the woman had committed the act, they felt obligated to find her not guilty by reason of insanity. This verdict was reached because the jury felt compelled to base their verdict on the psychiatrist's opinion.

From that time on, my dad felt the need for a possible verdict of insane, but guilty. It seems ironic that my dad served on this jury and desired an alternative several years ago. Now he is dead, and the attorney representing his murderer has said that when the case goes to trial, he will plead not guilty by reason of insanity.

Sunday, March 6, 1988 began like any other Sunday. My family attended Calvary Baptist Church as always with no idea the day would end in such tragedy and injustice.

I was sitting with my family on the back pew of the church when the side door opened and a man walked in and changed our lives forever. We later learned that his name is Cheun Phon Ji, a graduate of Emporia State University with a master of Business Administration.

None of us would have ever guessed that he was carrying several guns and hundreds of rounds of ammunition. None

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of us would have guessed that my father would never come home with us again.

Once Ji entered the church, he pulled out a gun and started firing. I don't remember diving on the floor. All I remember is crawling and pushing as hard as I could to get toward the front of the church. I felt a sharp, stinging pain in my arm. When I looked down and saw the blood, I realized I had been shot. The shooting ended, and I very cautiously got up off the floor.

That was when I saw my dad. He was slumped forward in the pew and blood was spurting from his back. He was losing so much blood, I just knew he was dead. There wasn't even time to say "I love you, Dad."

At the hospital they told me he was dead. I felt so helpless, angry and sad. I wanted to go back and stop this terrible stranger from murdering my dad. I wanted to tell my dad that I loved him.

It was very hard telling my older sister and brother what had happened, but telling my four year old sister was even harder. At first when she saw my arm she was very concerned about whether or not I was all right. She wanted to know if it hurt. Then she realized that Dad wasn't with us. "Where's Daddy?" she asked. When we told her what had happened, she cried and cried. She kept asking "Why did that bad man kill my daddy?" and "Why did that bad man shoot my sister?" My family didn't have an answer, and we still don't.

This past June I got married. Although this was a

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wonderful occasion, something was missing. I had always dreamed that my dad would be there to walk me down the aisle, but he wasn't there. He should have been there, but instead there were painful memories of what had happened and why he wasnt there.

This summer was especially hard on my mom because August 11 should have been their twenty fifth wedding anniversary. Instead of celebrating the occasion with dad she was forced to spend it alone.

My youngest sister Melissa is in Kindergarten this year. She often comes home crying because the other boys and girls talk about their daddy's. She keeps telling us how she misses her daddy and how she wishes he could come back.

There are no easy answers. The man who murdered my dad has not been tried because the judge places complete confidence on the opinion of one man. This man, a psychiatrist from Larned State Hospital believes Ji is incompetent to stand trial. I disagree.

On the day of the shooting, I was taken from the church to an ambulance. The police had captured Ji and were taking him away.

I saw him as I was getting into the ambulance. I yelled at him, "I hate you! You killed my dad!"

He was yelling back at me also, but what I remember most was his face. He was sneering and proud, and his look of total satisfaction made me so angry. There was no remorse, no regret, only satisfaction. I felt angry,

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frustrated, and helpless, but there was nothing I could do.

Ji had driven straight to Emporia from California. He brought with him several guns, several hundred rounds of ammunition, handcuffs, rope, tape and a meat cleaver. He was obviously planning something. Ji was stopped for speeding on the turnpike shortly before arriving in Emporia. The amount of time that elapsed between when he was stopped and when he arrived at the church was less than 30 minutes. This left him no time to go anywhere else in Emporia. He left the turnpike and went directly to the church. A boy at the church witnessed Ji pacing back and forth on the sidewalk before church began.

At the competency hearing I repeatedly heard the psychiatrist say, "In my opinion." The judge based his decision on this man's opinion. Even though psychiatrist are trained in their professions, they have no way of guaranteeing that a one time offender will not repeat his actions upon being released.

What if you or someone you love had been in our congregation that day? It much easier to remain passive when you are not directly involved. However, as more and more crimes go unpunished, criminals realize the punishment is at most mild if not nonexistent. This leads to an increased crime rate and an increased probability that next time your life could be ended or permanently scarred. You have the opportunity now to make a difference. This is not a replacement for the verdict of Not Guilty By Reason of Insanity, rather

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an alternative that is long overdue.

If you have any questions I'd be happy to respond.

Beverly DeWeese Hilbish, Citizen of Emporia

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Mrs

TESTIMONY ON THE INSANITY DEFENSE

Thank you, Mr. Chairman and members of the committee, for the opportunity to testify.

Tom DeWeese was my brother. On March 6th, I held him across my arms as he died. He was brutally murdered by a man he had never even seen before. If the men of the church had not stopped this man, he might have murdered all the people at the church that day. Or he might have murdered other innocent citizens in Emporia.

Laws are supposed to provide justice. Too often, they don't. A person who has committed murder should pay for that crime. Instead, these criminals receive an expense-paid vacation. and the bill is paid by the taxpayers. The State of Kansas provides board and room, medical and dental care for prisoners. Many people outside cannot afford to pay these for themselves.

The purpose of the justice system is to protect the people. However, many citizens feel that they are not being protected and that the laws are not just. The "not-guilty-by-reason-of-insanity" plea encourages crime, in many cases. People believe they can commit any crime and then pretend that they were insane. Failure to punish the criminal shows others that they can imitate the same crime and get away with it.

One example of how the justice system fails involves shootings in elementary schools. In May, a woman "with a history of bizarre behavior" entered an elementary school

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in Illinois and began shooting. She killed one child and wounded several others. Within the past month, a man who "had been in and out of a hospital psychiatric ward over the past eight months" entered an elementary school in South Carolina and began shooting. An eight-year-old girl was killed and ten people were wounded. The man, described as "fascinated by crime stories," said that he was copying the shooting in Illinois.

None of the children from either incident will ever forget. They will all be emotionally scarred for life. When our justice system is unable to protect innocent children in their classrooms, a change is necessary.

When will these laws be changed? Will it be when the lawmakers' children are brutally murdered in their classrooms? Will it be when a lawmaker holds his own brother as he dies?

Carl DeWeese, Americus, Kansas

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TESTIMONY
Marilyn L. Christmore

To introduce myself: I am Marilyn Christmore a resident of Topeka. I received a Bachelor of Science in Education degree from Emporia State University and a Master of Science in Social Work from the University of Kansas. I am a former teacher and now am a program director for in-home health services for frail elderly and handicapped persons.

I am also the sister of Dorothy DeWeese, whose husband Tom was killed on March 6, 1988, in Emporia, Kansas, by a man he had never seen before. Tom had been my brother-in-law for almost twenty-five years.

Tom and Dorothy met while in college at Emporia State (then KSTC). They married and began teaching in high schools in Kansas. After the death of Tom's parents, they moved to the DeWeese family farm near Americus. With the birth of the first of their five children, Dorothy quit teaching to be a fulltime wife and mother.

The priorities of their lives were God, church, family, and education. The children were encouraged to do well in school and did so. Tom did some teaching at Emporia State as well as farming. When Dorothy returned to work after the four older children were in school, Tom tenderly helped care for Melissa the little blonde "tag along".

Life was not always easy for Dorothy and Tom as it sometimes is not easy for all of us; but it was a happy life rooted in love of God, love of family, and love and respect for their neighbors and country.

On March 6, 1988, in a few short seconds this family's life changed forever through no action of their own. The children lost a father. Some psychology books maintain that five year olds don't understand the finality of death. Melissa did. I will never forget how she cried and cried on that Sunday after she had asked why there was blood on the church carpet.

Dorothy lost a husband and inherited the responsibility of five children and a farm. Her face was white with shock in the emergency room that day. The loss reached on to Tom's brothers, in-laws, church members (some of whom were injured), and friends and neighbors. Many others even far removed from the scene, were shocked to hear that a man could lose his life while worshipping in his church.

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Now, we are dealing with that loss. My Sister, through her faith and strength of character, has accepted the reality of Tom's death. She has made remarkable progress in moving ahead to provide as normal a life as possible for her children after the loss of their father.

When an act of this violent nature is committed with no question as to who committed it, we would expect that person to be incarcerated for the safety of not only those already hurt by their actions but society as a whole. After all, does one have the right to randomly kill and maim and then walk free?

What we have discovered is that the matter can not be completely put to rest because this man may be free.

If he killed someone he didn't know in a senseless act, how do we know who will be his next target? My family has suffered enough already. I don't want them to suffer more. I am concerned for the safety of my sister, my niece, and others who have testified against this man. Who can predict how, when, or where he might choose his next victim or victims?

The final point that I would like for you to consider is that PSYCHIATRY LIKE ANY MEDICAL PROFESSION AND PROBABLY MORE SO IS NOT AN EXACT SCIENCE. IF PSYCHIATRISTS COULD ACCURATELY PREDICT AND CURE HUMAN EMOTIONAL, PSYCHOLOGICAL, AND BEHAVIORIAL PROBLEMS; WOULD WE HAVE SUICIDES IN EVEN NOTED MENTAL INSTITUTIONS, REPEAT ADMISSIONS, AND MANY PSYCHIATRIC CONDITIONS WITH NO "CURE"?

PSYCHIATRISTS USE A BODY OF KNOWLEDGE AND THEORIES, WHICH IS CONTINUALLY CHANGING, TO MAKE JUDGMENTS. THEY ARE NOT TOTALLY FREE OF THEIR OWN BELIEFS, BIASES, AND IDEOLOGIES. THERE ARE NO ABSOLUTE METHODS OR THEORIES BY WHICH ONE CAN GUARANTEE HUMAN BEHAVIOR.

My concern is that my family's life would again be tragically altered through no action of our own under our system as it now exists.

I am not interested in revenge. That won't bring Tom back. I am interested in being able to return to as normal a life as possible. I am interested in the rights of all of us to the freedom to live a life free of violence, to enjoy our families, and live without fear. Isn't that what our servicemen fought and died for? Isn't that what being an American is supposed to be all about?

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att VI

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CLARK V. OWENS
District Attorney

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HENRY H. BLASE
Chief Deputy

TESTIMONY

To: Special Committee on Judiciary

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

Re: Proposal No. 21, Insanity Defense

Date: October 21, 1988

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

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

Guilty But Mentally Ill

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

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

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

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

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

Burden Of Proof

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

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

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

Jury Instruction Regarding Commitment and Release Procedures

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

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

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

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

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

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

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

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(1)

STATEMENT OF

JOAN TURNBULL ON

"NOT GUILTY BY REASON OF INSANITY"

BEFORE

HOUSE JUDICIARY COMMITTEE

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

I AM JOAN TURNBULL, MOTHER OF MICHAEL TURNBULL WHO WAS MURDERED FEBUARY 26, 1987 IN A WICHITA, KANSAS NAUTILUS FITNESS CENTER.

THE VIOLENT AND DEADLY ATTACK WAS COMMITTED WITH A HANDGUN BY A MAN NAMED GARY COX. HE ENTERED THE FITNESS CENTER, REMOVED A GUN FROM A DUFFEL BAG AND COMMENCED FIRING. HE CARRIED OUT THIS CRIME WITHOUT KNOWONING ANY OF THE INDIVIDUALS IN THE CENTER. BESIDES MICHAEL'S DEATH THREE OTHERS WERE WOUNDED, ONE OF WHICH STILL REQUIRES MEDICAL TREATMENT.

ON FEBRUARY 10, 1988 GARY COX WAS FOUND "NOT GUILTY BY REASON OF INSANITY". MICHAEL'S DEATH CERTIFICATE STATES THAT HE WAS MURDERED. MICHAEL AND THE OTHER VICTIMS ARE INNOCENT. GARY COX IS INSANE BUT HE IS GUILTY OF MURDER.

WHEN GARY LEFT THE FITNESS CENTER AFTER THE SHOOTING INCIDENT HE REGISTERED AT A MOTEL UNDER A FALSE NAME. THIS INDICATES TO ME THAT HE MADE A RATIONAL DISISION TO AVOID BEING PICKED UP BY THE WICHITA AUTHORITIES.

THIS TRAGEDY ENLIGHTENED ME TO SOME FACTS I HAD NOT PREVIOUSLY REALIZED.

THAT INDIVIDUALS FOUND "NOT GUILTY BY REASON OF INSANITY" CAN BE RELEASED FROM CUSTODY AS EARLY AS SIX months, AND THE AVERAGE CONFINEMENT IS ONLY TWO YEARS NO MATTER WHAT THE CRIME IS.

THAT MORE THAN ONE THIRD OF THE OFFENDERS ARE ARRESTED AGAIN AFTER COMMITTING ANOTHER CRIME, SOME OF WHICH ARE VIOLENT.

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THIS OFFERS PROOF THAT IT IS NEXT TO IMPOSSIBLE FOR A PSYCHIATRIST ROVIDE POSSITIVE ASSURANCE THAT THE SUBJECT INDIVIDUALS WILL NOT COMMIT ANOTHER CRIME OF THE SAME NATURE. DR. HERBERT MODLIN, REPRESENTING THE KANSAS PSYCHIATRIC SOCIETY, SAID "ABOUT THE BEST WE CAN PREDICT THE LIKLYHOOD OF FUTURE VIOLENCE IS ONLY ABOUT ONE THIRD OF THE TIME."

FINALLY, THAT PATIENTS MAY BE GIVEN MEDICATION THAT ONLY HIDES THE SYMPTOMS OF MENTAL ILLNESS. WHERE UPON RELEASE THEY SOMETIMES CEASE TAKING THEIR MEDICATION AND RELASPE BASK INTO THEIR FOMER MENTAL STATE.

WHILE A PERSONS PSYCHOLOGICAL STATE IS A VAILD CONSIDERATION IN THE COURT ROOM. THIS CASE NONETHELESS POINTS UP AN INADEQUACY OF A SYSTEM THAT ALLOWS A MURDER TO GO VIRTUALLY UNASWERED FOR.

I CIRCULATED A PETITION LAST YEAR TO GET THE "GUILTY BUT INSANE VERDICT ADDED TO KANSAS CRIMINAL CODE. THERE WERE OVER 4,000 SIGNATURES OBTAINED IN A TWO WEEK PERIOD. BECAUSE OF MY JOB, THERE WERE NO DOOR TO DOOR SOLICATIONS. INSTEAD THE PETITIONS WERE PLACED PRIMARILY IN BUSINESS PLACES. THE RESPONSE WAS OVERWHELMING AMONG THOSE WHO CAME INTO CONTACT WITH MY PROPOSAL. I HAVE NO PERSONAL INVOLVEMENT WITH OVER 80% OF THE INDIVIDUALS WHO SIGNED IT. I ONLY HEARD OF TWO PEOPLE WHO WERE ASKED AND DIDN'T WANT SIGN IT. ONE SAID HE MIGHT WANT TO KILL HIS WIFE AND IF HE DID HE WOULD PLEAD,"NOT GUILTY BY REASON OF INSANTIY." THE OTHER ONE HAD A DAUGHTER WHO WAS A MENTAL PATIENTAND SHE WAS'NT SURE HOW SHE FELT ABOUT IT.

ACOORDING TO A PUBLIC OPINION POLL,IN NEWS WEEK, 87% OF THOSE,VIEW THE CURRENT AS A "LOOP HOLE" AND 79% WANT THE "NOT GUILTY BY REASON OF INSANITY" PLEA ABOLISHED.

BASED ON THESE FACTS, IT IS IN MY OPINION THAT THE CURRENT STATIS ON THE INSANTITY PLEA DOES NOT PROVIDE ADEQUATE PROTECTION OUR SOCIETY FEELS IT DESERVES.

THIRTY EIGHT STATES NOW HAVE LAWS THAT PLACE THE BURDEN OF PROOF OF INSANITY ON THE DEFENDANT. TWELVE STATES HAVE ADDED AGUILTY BUT INSANE.

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ON THE DAY OF GARY COX'S HEARING IN WICHITA, I WAS INFORMED BY THE DISTRICT ATTORNEY THAT THEY WOULD ACCEPT THE DEFENDANTS PLEA OF "NOT GUILTY BY REASON OF INSANITY" BEFORE IT WAS EVER PRESENTED TO THE JUDGE.

WHEN THE HEARING COMMENCED, THE JUDGE ASKED IF COX NEEDED TO BE PRESENT. THE ATTORNEYS ANSWERED YES AND HE WAS BROUGHT INTO THE ROOM. THE DISTRICT ATTORNEY SUBMITTED PAPERS TO THE JUDGE WHO SILENTLY STUDIED THEM FOR ABOUT TEN MINUTES. NEXT, THE JUDGE ASKED COX'S ATTORNEY AND THE DISRICT ATTORNEY IF THE AGREED WITH THE DOCUMENTS HE HELD AND BOTH ANSWERED YES. COX WAS ASKED THE SAME QUESTION AND THE ANSWER WAS YES. THE JUDGE STATED THAT HE ACCEPTED THEM AS PRESENTED. COX WAS ESCORTED FROM THE ROOM AND RECESS WAS CALLED.

THE ENTIRE PROCEDURE LASTED ABOUT ELEVEN MINUTES. THE PLEA,"NOT GUILTY BY REASON OF INSANITY" WAS ACCEPED BECAUSE NO PROOF WAS SUBMITTED THAT GARY COX WAS SANE. IT SEEMED TO ME THAT THE DEFENDANT WAS TREATED ABOUT THE SAME AS SOMEONE WHO HAD COMMITTED A TRAFFIC VIOLATION.

GARY COX WAS DIAGNOSED AS A PARANOID-SCHIZOPHRENIC WHICH IS USUALLY CONSIDERED AN INCURABLE ILLNESS BUT CAN BE CONTROLLED BY MEDICATION IN SOME INSTANCES. I WAS TOLD HE HAD BEEN KNOWN TO DISCONTINUE HIS MEDICATION

THE MORNING PRIOR TO THE MURDER, POLICE WERE SUMMONED BECAUSE COX WAS HOLDING A GUN TO ALADY'S HEAD. WHEN THE OFFICERS QUESTIONED COX" HE ACTED LIKE IT WAS A SOCIAL CALL HE WAS LAUGHING AND TRYING TO CHANGE THE SUBJECT." THE LADY SAID. THE POLICE CHOOSE TO BELIEVE GARY COX.

I BELIEVE THE PRESENT INSANTITY DEFENSE WEAKENS TRUST IN THE JUDICIAL SYSTEM. THE IMPRESSION IS THAT GARY COX GOT AWAY WITH MURDER; THAT A PSYCHIATRIST, NOT A JUDGE WAS IN CONTROL OF THE PROCESS.

I BELIEVE MORE EMPHASIS SHOULD BE PUT ON WHAT THE DEFENDANT MIGHT BE CAPABLE OF DOING IN THE FUTURE THAT MIGHT BRING HARM TO HIMSELF OR

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OF 'S AS OPPOSED TO THEIR PRESENT CONDITION ON MEDICATION IN A CONTF ED ENVIROMENT.

I FURTHER BELIEVE THE KANSAS LEFISEATURE SHOULD USE ITS WISDOM TO PROVIDE A MORE STRINGENT LAW. SUCH ACTION CAN PROVIDE ADDED SAFTEY TO YOUR FAMILY AND ALL KANSAS FAMILIES. THANK YOU VERY MUCH FOR LETTING ME TESTIFY.

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Santa Fe school officials recall shooting victim

By SHERRY PIGG
Capital-Journal state staff writer

CARBONDALE — Michael Turnbull's friends and former classmates were looking forward to this weekend, according to officials at Santa Fe Trail High School in rural Carbondale. Now, they will never forget the weekend, but for the wrong reasons.

Turnbull, 18, a former football player and wrestler at the Osage County school, was shot to death Thursday night while he exercised at Universal Nautilus health club in Wichita. A suspect has been apprehended in connection with the shooting, according to Wichita police.

"It's ironic that it happened this weekend," said assistant high school principal Bruce Cook. "The state high school wrestling tournament is going on down in Wichita this weekend. Some of our kids were going down there and stay in his apartment in Wichita. They were really looking forward to renewing ac-

— Associated Press

MICHAEL TURNBULL
... killed in Wichita shootings

quaintances and seeing people they hadn't seen in a while."

Bob Von Stein, who coached Turnbull during his four-year football career at the school, said Friday that Turnbull of rural Carbondale was "a good, solid young man" who planned a career in auto mechanics.

According to the coach, Turnbull moved to Wichita last fall and enrolled in the Wichita Automotive Institute.

"He was hardworking, dependable, and never complained," recalled the coach. "He got along well with others and was just pleasant to be around."

Cook said Turnbull, a May 1986 graduate, excelled in both football and wrestling at SFT. He received letters in both sports, Cook said.

"He was pretty active as far as athletics was concerned," Cook said. "He was a pretty average kind of kid. He was very outgoing, courteous and friendly. He had a lot of friends."

Cook said Turnbull was an above-average student in the classroom who could best be described as "an over achiever" when it came to athletics.

"He didn't always get to play as much as he wanted in football, but he stuck it out and tried very hard," Cook said. "He got where he was in wrestling because he worked at it."

Von Stein, who spent much of the day Friday answering media inquiries, said a lot of the students at the high school seemed "sort of stunned" by the incident.

"They are not knowing what to say," Von Stein said. "I've seen them standing around in groups of two or three just talking quietly."

Cook said although most of the students had already heard about the shooting before they arrived at school Friday, school officials were trying to provide as much information and support as they could.

"For most of them this is the first time they have had to deal with a death," he said. "We read an announcement to the students and we observed a moment or two of silence in the high school."

Turnbull's obituary appears on page 28.

V.F. 3/13/87

Osage County youth killed in shootings

WICHITA (AP) — A Wichita man was charged with first-degree murder and three counts of attempted murder Friday in the shooting death of one man and the wounding of three others at an exercise center.

Gary Cox, 26, was ordered held in lieu of $250,000 bail and a public defender was appointed to represent him. His next court appearance was scheduled for Wednesday in Sedgwick County District Court.

Cox was arrested without incident early Friday at a south Wichita motel about six hours after the shootings at the Universal Nautilus fitness center. Police said they found him with the help of informants and because he used his real name when he signed in at the exercise center.

Authorities said a gunman walked calmly into the health club in southeast Wichita at about 7:15 p.m. Thursday, displayed a membership card and signed the club register.

Investigators said the man pulled a large-caliber handgun from a duffel bag, knelt and held the gun with both hands as he fired four or five shots toward a group of men lifting weights. No motive for the shooting has been determined.

"Everybody dropped to the floor at once. It was like somebody just took a hatchet and cut down a bunch of flowers," said Tim Freed, 20, an Oaklawn man who was one of about 20 members in the club Thursday night.

Witnesses told police the gunman tried unsuccessfully to reload his weapon, then yelled: "Now I'm going to get my automatic." He ran out the back door but didn't return.

The dead man was identified as Michael R. Turnbull, 18, of Carbondale, who had won a membership at the health club a few months earlier in a radio station contest. Turnbull was graduated from high school in 1986 and had been attending the Wichita Automotive and Electronics Institute.

The three injured in the shooting were Lynn Nicholson, 35, who was in fair condition at St. Joseph Medical Center with a stomach wound; William R. Neal, 26, who suffered a superficial thigh wound and was released after treatment at a hospital, and Jerrod B. Kackley, 13, who suffered a superficial hand wound and was treated at the scene.

Police said they were called to investigate an incident that allegedly involved Cox nearly 12 hours before the shootings. A neighbor reported Cox had grabbed her around the neck and held a gun to her head, police said.

"He said 'Freeze, I'm going to shoot you,'" Patricia Bauer said during an interview Friday.

A police spokesman said he didn't know why Cox wasn't arrested following the incident with Bauer at his apartment building.

Assistant District Attorney Greg Waller said he hasn't received any evidence concerning the alleged attack on Bauer.

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TO: THE KANSAS HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE

FROM: LICHA NICHOLSON
3501 S. 159TH STREET EAST
WICHITA, KANSAS 67230

SUBJECT: TESTIMONY ON THE INSANITY PLEA

DATE: MARCH 13, 1989

I have traveled here to the State Capitol alone today. I have made this similar trek to Topeka with my husband, Lynn Nicholson, who has spoken here at the Capitol on three other occasions regarding the insanity plea.

I regret to say that my husband Lynn will not be able to attend todays hearing because he is recuperating from recent major surgery which has left him "temporarily incapacitated". Lynn's recent surgery has marked his fourth major surgery since he was shot two years ago on February 26th at the Nautilus Fitness Center in Wichita, Kansas. All four surgeries have stemmed from the shooting two years ago, and, Lynn still walks with the bullet embedded against a muscle near his spine.

Lynn has not had the opportunity, within the last two years, to regain his physical strength back to a 100% capacity, however, I do see Lynn being very patient and content with his present physical stamina. He knows the healing process will take time. Lynn has developed a different kind of strength though, a kind of strength that is accompanied by the compassion he has always had.

On the evening of February 26th, 1987, Lynn and our twelve year-old son attended the Nautilus Fitness Center. Lynn was exercising in one room while our son, Justin, was swimming in an adjacent room that was separated by a glass wall. Gary Cox walked into the facility and shot randomly in the exercise room with a .357 magnum. Someone in the pool area grabbed Justin and exited through the rear door to escape the shooting spree. Within seconds the shooting was over; Gary Cox had disappeared into the night. Justin re-entered the club insearch for his dad. Through the glass wall Justin could see his dad lying on the floor. Justin walked up to his dads side, still dripping wet from his swim trunks, to see how his dad was doing. Being the person Lynn is, Lynn calmy instructed Justin to return to the locker room to change to some dry clothes and shoes. Lynn didn't want to worry Justin.

When I recieved word about the shooting incident I was also informed that a young man had died in the shooting spree. When I saw Lynn in the trauma unit at the hospital I didn't want to tell him about the young mans death. I knew how Lynn would react. The first words that Lynn said to me while in the trauma unit was " Licha, there was a young kid lying next to me when I got shot, he got shot too ... find out how he is - he didn't look too good". I promised Lynn that I would find out -- but, I already knew. I didn't want to tell Lynn just yet, I knew how Lynn would react if he knew. I was being selfish, I wanted Lynn to concentrate solely on himself. I had kept Mike Turnbull's death from Lynn throughout the night. While in ICU with Lynn I stepped out of his room for **five** minutes to grab a cup of coffee --- when I returned Lynn said to me, " The young kid died didn't he". Lynn had asked the nurse about Mike and she told him that

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Mike had died. " Why did he have to die - he was so young - why couldn't it have been me - he had such a long life ahead of him". I knew that was how Lynn was going to react.

Although Lynn has been "temporarily incapacitated" on and off for two years, he has shifted his energy towards the good will of his future and the future of those who will fall helplessly into a situation similar to his.

Lynn holds no anger within him, just concern and compassion for the present and future victims. Lynn, myself, and others here today would like future victims **NOT** have to experience what we question today. Are people like Gary Cox and others who have committed such violent crimes being released prematurely ? How do we know if Gary Cox has been released today ? If released, is Gary Cox mentally competent and capable of not repeating the same crime ?

If passed, the proposal before you today regarding a change in the release requirements for people like Gary Cox would piece a final part of a puzzle for Lynn and many others who have fallen victims to such violent crimes.

Thank You

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Testimony before
the Kansas Senate Judiciary Committee
Senate Bill #8

1.)
18 .N89

by: Lynn Nicholson, Shooting Victim
3501 S. 159th E.
Wichita, Ks. 67230

On February 26th, 1987 while working out at the Nautilaus Fitness Center on south Oliver in Wichita, Kansas, I was shot. Gary Cox walked in an opened fire killing Micheal Turnbull and injuring 3 others including myself.

I came here today reluctantly. I want so much for this portion of my life to be behind me. I have made my peace. I do not dwell upon why this happened. But it did happen and it is'nt over for me yet. I am reminded daily of what happened by the sight of my scared torso in the mirror, by the constant abdominal discomfort I feel, by the lack of energy I have and the periodic re-run of the shooting in my mind.

This will be the third time that I have come before a Kansas legislative committee about this issue. As you may well know a couple of proposals for changing the laws regaurding the

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insanity plea have been considered. The present proposal before you, changing the release requirements, makes the most sense to me. I do not seek revenge, only protection for society, from people like Gary Cox who have committed violent crimes and are likely to do it again. The victims and all of society have the right to be assured that these people are not released when there is a likelihood they may be violent again. Many of these people seem to be better when in the institution under supervision and proper medication. Many are known to quit taking their medication when released. The chances of their old violent behavior returning is then quite high I believe. Today I don't even know if Gary Cox is still at Larned or released to some less secure facility or walking the streets. This is a scary thought to me. I would like to see not only the release process tightened, but be assured that as a victim I have the right to be a part of that process. If victims are not allowed to be part of the process then

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they should at least be notified upon release of the assailant.

As lawmakers you serve a great purpose. Before you is an opportunity to use your power to improve Life in KANSAS.

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TO: KANSAS HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE 23MAR88

FROM: LYNN NICHOLSON, SHOOTING VICTIM
3501 S. 159th E.
WICHITA, KANSAS 67230

SUBJECT: TESTIMONY ON THE INSANITY PLEA, HOUSE BILL 3098

On February 26th, 1987 while working out at the Nautilaus Fitness Center on south Oliver in Wichita, Kansas, I was shot. I was standing in the middle of the exercise floor and saw a man by the front desk walking towards me. I thought nothing of this, because people came into the workout place all the time. The man, Gary Cox, and I made eye contact and then I bent over to do a stretching exercise - touching my right ankle with my hands while keeping my legs straight. I heard a loud "bang" then I felt myself go flying through the air landing on my back. My back hurt tremendously and I could not feel my legs. Time seemed to be in slow motion, since I was at first very confused but knew I had been shot by the time I heard the second shot. There were 4 or 5 shots total, I saw people diving for safety and heard them screaming. When the shots stopped , the man with the gun said " I'm going to put it on automatic now". All was silent, he spoke very calm, with intent. It was as though he wanted to savor the moment of being in control. I was sure that he was going to shoot again and would surely shoot me again, but he didn't , he just left.

Someone asked if everyone was alright, and I raised my arm to get his attention and tell him I had been hit. I asked where my son, Justin, was and if he was ok. I wanted to know that he was ok and I wanted him to be near me. They found him and brought him to me. He was ok. I told him that I knew I would be ok too. He was strong for me.

As I lay on the examining table in the trauma unit at the hospital, I gave a description of the man to a policeman. I felt comforted that I was able to do that because I was sure it would help to catch the man who had done this.

I remember being told that the man had been caught while I was in intensive care, and seeing his picture on television. I felt comforted again, because I knew they had the right man, he couldn't hurt anyone now. The system was working.

The doctors tell me that only with God's help and a positive attitude was I able to survive. I knew I would be ok, I set that in my mind. It was the only way I could think. I would be ok. The neurologist was surprised that I could walk, but I wasn't because I knew I would be ok. The bullet had struck my spinal column and shattered the vertebra. I knew everything would be ok. I had faith in God, I had good doctors, I had faith in the legal system. The legal system would take care of Gary Cox. He would never hurt anyone again. He was in jail. Bail was so high he couldn't get out.

The first operation revealed that the bullet did surprisingly little damage , for a .357 caliber, to my abdomen. It had entered my left side where the rib is short. It did not strike a rib. It passed between all of my organs and intestines

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without tearing them up, only a lot of bruising. The doctor said, "If you bent over in the exact position and I took an ice pick ,I couldn't insert it into your abdomen and do as little damage as the bullet did". No doubt that God was taking care of me and the legal system was taking car of Gary Cox. I didn't have to concern myself with him. I was going to be ok. A week later , I had to have another operation to remove 6 inches of intestine that had fused to my bladder because of the bruising caused by the bullet. Urinating air is not normal. Still I was positive. I was glad to be alive. I prayed for myself and even for Gary Cox. The legal system would take care of him, I didn't need to be bitter. Bitter is negative, I was always positive. I felt better every day than the day before after the operation. I was going to be ok.

On March 20th I recieved a summons to appear in court for the preliminary hearing . I couldn't go because I was recovering. I was looking forward to seeing the system work. I wanted to testify. I wanted to help make sure Gary Cox would never go free. The hearing got postponed and I never got to appear in court.

In July while I was on a business trip my wife, Licha, attended a hearing in which Gary Cox was found incompetent to stand trial. He was sent to the mental institution for treatment. I felt this was only a prolonging of the the process. I knew that sometimes the system worked slowly but I knew that it would be ok, since he would be kept locked up.

Then in September I started having severe abdominal pains. It took 2 weeks of hospitalization with no food or water to determine that the problem was scar tissue on my intestines. I knew it would be ok, though. I took the weekend off from the hospital and then had my third operation. I was pretty well back to normal by Thanksgiving, but by Christmas the abdominal pain had started again. An adjustment of my diet and the pain from the continuing scar tissue became more tolerable. Another operation will be required some day - no way to tell how long.

Finally nearly one year from the shooting, I got the word that Cox was found competent to stand trial. Finally the legal system was working. On wednesday, February 10th, 1988, I went to the "trial" of Gary Cox ! The judge took 11 minutes to read Cox's statement of admission and the psychiatrists statement that he is a paranoid schizophenic. Then the judge found him not guilty by reason of insanity. This means that in a couple of years he will probably get out of the mental institution, unless the law is changed to make it more difficult for release. There is no guarantee that if released he will not do something like this again.

If Gary Cox is innocent in this crime, who is guilty? I have spent 5 weeks in the hospital, had 3 major operations, lost my drivers liscense, and live with constant abdominal discomfort. But I'll be ok if the laws change so that people who commit these crimes are never allowed to be free. I do not want revenge, I want society to be protected from people who commit violent crimes reguardless of whether they are sane or insane.

Lynn Nichols

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KANSAS BAR ASSOCIATION

March 13, 1989

The Honorable Rex Crowell
State Representative
State Capitol Building, Room #431N
Topeka, KS 66612

Dear Rex:

As I mentioned on the hearing on SB 8, the insanity defense, Monday afternoon, I had hoped Professor Spring could have made a presentation on this bill. I have included herewith a copy of his summer interim presentation which spoke to many of the same issues you heard today. Dean Spring is the author of Patients, Psychiatrists & Lawyers: Law and the Mental Health System, to be published this spring by Anderson Press as a law school textbook on this subject.

The Burden of Proof issue is discussed in the first four pages. As the starred paragraphs indicate, Dean Spring says that if we require the defendant to prove insanity but keep the M'Naghten rule, it raises conflicting instructions to the jurors that may confuse them. Further, as the American Bar Association recommendations show, placing the burden of proof on the defendant should occur only when the ALI test for insanity is used. In other words, if we keep M'Naghten, the change of the burden is inconsistent with what the jury must decide based on judicial instructions. None of the conferees, including Rep. Wells, is suggesting Kansas go to the ALI test of insanity.

Dean Spring's discussion of the Michigan "guilty but mentally Ill rule" begins at page 5.

I've also enclosed Walter Menninger's October 21, 1988 presentation to the summer interim study concerning proposal #21. His statistics show the use of the insanity defense in Kansas, and other comments of a background nature. I hope you can find time to read this before beginning any discussions on SB 8. Let me know if I can answer any questions. Thank you.

Cordially,

Ron Smith,
Legislative Counsel

enc: Dr. Menninger's statement
Dear Spring's statement

1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601-1037 • FAX (913) 234-3813 • Telephone (913) 234-5696

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STATEMENT ON ISSUES RESPECTING THE INSANITY DEFENSE
presented by
Raymond L. Spring
on behalf of the Kansas Bar Association

Three issues regarding the administration of the insanity defense within the context of Kansas criminal law are presented by House Bills 3050, 3098, and 3099. They are: assignment of burden of proof (H.B. 3050, § 1 and H.B. 3098, § 1), criteria for release of NGRI acquitees from the state security hospital (H.B. 3050, §§ 3(1) and 3(3), and H.B. 3098, §§ 3(1) and 3(3)) and the proposed new alternative finding or plea of "guilty but mentally ill" (H.B. 3099). It is the position of the Kansas Bar Association that adoption of these proposals is not in the best interest of the state.

BURDEN OF PROOF

House Bills 3050 and 3098, in § 1 of each bill, provide for a change in the burden of proof from the present requirement that the state establish the sanity of the defendant beyond a reasonable doubt, as a part of the general requirement that in any criminal prosecution it is incumbent upon the state to prove beyond a reasonable doubt every fact necessary for a conviction.[1] These proposals would shift the burden of proof on the insanity issue to the defendant, requiring that he or she prove insanity beyond a reasonable doubt. In short, these proposals, if adopted, would mean that the trier of fact (judge or jury) could render the verdict "not guilty by reason of insanity" only if *convinced* of the defendant's insanity, where presently that verdict is rendered if the defendant's sanity is reasonably in doubt. This sounds, without careful examination, as though the public would be better protected under these proposals. In fact, the exact opposite is the case.

In order to understand the rationale for placing, *and keeping*, the burden of proof of sanity on the state, it is necessary to recall the origins of the insanity defense. For over two thousand years the condition that we describe as "insanity" has been linked directly to the idea that the criminal law punishes only those who act with criminal intent, or *mens rea*. The principle that one ought to be punished only if he or she could be "blamed" for the conduct was reflected in Roman law, which held that "mentally disabled persons were legally incapable of obligating themselves by delictual acts such as theft, for the offender could not form the intent to take the property of another."[2] The same concept is reflected in early writings in the English common law courts (although for a time in the 12th and 13th centuries it appears that

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the *procedure* in such cases was conviction and pardon, just as in cases of accidental killing). Sir Edward Coke reflected in 1603 that since the *non compos mentis* was unable to form the felonious intent that was at the very heart of murder or felony, he could not be convicted of such crimes.[3] Coke quoted with approval the 13th century formulation by Bracton that "A madman (furiosus) is one who does not know what he is doing, who lacks in mind and reason and is not far removed from the brutes."[4] Other early statements of the insanity defense in the common-law courts amounted to no more or less than attempts to define, in instructions to juries, what kind of person it was who could be found to lack the capacity for criminal intent. Thus in 1550 it was said: "So if a man *non sanae memorae* kills another . . . he has not broken the law, because he had no memory or understanding . . .and therefore. . . there is no fault in him. . .."[5] And in 1724: "If a man be deprived of his reason and consequently of his intention he cannot be guilty. . .. [I]t is not every kind of frantic humour . . . that points him out to be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment; . . .".[6]

Thus it was that in 1843 the Judges of King's Bench, in response to questions posed in the House of Lords following the trial and insanity acquittal of Daniel M'Naghten, framed a statement which cast the insanity test solely in terms of cognition - the capacity to understand :

> ". . . .[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."[7]

For the purpose of further discussion about the appropriate allocation of the burden of proof in insanity cases, it is extremely important to keep in mind that the M'Naghten rule - which has its roots firmly in the concepts of *mens rea* or criminal intent - is the rule applicable in Kansas.[8] We are *not* here concerned with allocation of the burden of proof if the insanity test involved were the ALI test with the "volitional" prong, or the Durham "product" rule. Those tests have been considered and repeatedly rejected by the Kansas Courts.[9]

It is clearly true that the language of the M'Naghten rule indicates that the *defendant* must prove his or her *in*sanity, and the early interpretations by courts in this country appear to be mixed. All began with the principle that a criminal trial began with an existing presumption that the defendant was sane, and the question was whether the defendant was to overcome that presumption by raising a reasonable doubt as to sanity, or whether the

defendant had to go further and actually persuade the judge or jury (either by a preponderance of the evidence or sometimes beyond a reasonable doubt) of his or her insanity. Kansas early came down on the side of those recognizing the link between insanity and the requirement of criminal intent, concluding in 1873 that the burden of proof was upon the state to prove sanity, just as every other essential element of the crime, beyond a reasonable doubt.[10]

The first consideration of this issue by the United States Supreme Court, and perhaps the most thorough judicial analysis of the issue undertaken even to the present day, was in *Davis v. United States*[11] in 1895. After considering the diverse decisions of various lower courts on the subject, the Court, in a unanimous opinion authored by Mr. Justice Harlan said:

> "We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime.
>
> * * *
>
> . . . .In a certain sense it may be true that where the defence is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. *But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.*
>
> * * *
>
> . . . .As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. *How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as*

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to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit the crime?" [Emphasis added]

Davis, however, was a case involving federal law and was not expressly founded on constitutional doctrine. Thus 57 years later when the Supreme Court considered *Leland v. Oregon*,[12] a case involving a state rule requiring that the defendant prove his insanity beyond a reasonable doubt, the Court did not consider *Davis* controlling. There the court held that the state could constitutionally impose that burden on a defendant, *so long as the jury was charged that they must find every element of the crime, including the elements involving criminal intent, beyond a reasonable doubt.*

Although there are those who argue that *Leland* has been weakened by subsequent decisions, specifically *In re Winship*[13] and *Mullaney v. Wilbur*,[14] it cannot be said that placing the burden of proof of insanity on the defendant is clearly unconstitutional. Today about half of the states do so. What can be said is that, *in a state which follows the M'Naghten rule*, it is illogical to do so, and more, it may be more dangerous to the public.

It is illogical to place the burden of proof on the defendant in a M'Naghten rule state because under M'Naghten cognition, or the capacity for understanding, is the *only* test of insanity. At the same time, cognition is essential to the criminal intent requirement, or *mens rea*, of every crime. Thus the two concepts are irretrievably linked. While it is possible to *say* they may be separated, as did the Supreme Court in *Leland*, it is impossible to do so. While half the states place the burden of proving insanity on the defendant, only seven or eight of those states utilize the M'Naghten rule as the sole test of insanity.[15] The struggles of jurors in those states in attempting to follow necessarily conflicting instructions are of course not statistically available. It is because of this nexus of M'Naghten insanity and criminal intent that the American Bar Association takes the position that the burden of proof of sanity should be on the prosecution in states applying a M'Naghten-type test, but in states applying the ALI test the burden of proving insanity should be on the defendant.[16]

Retaining the present rule in Kansas is also sound policy from the viewpoint of public safety. Prior to 1800 there was no special disposition for criminal defendants who were acquitted because of evidence that they lacked criminal capacity. They were, as all other acquitted defendants, simply released. Concern over the return of such persons to the streets led, in that year to the adoption in England of the "Criminal Lunatics Act", which provided for the first time for a special verdict - "not guilty by reason of insanity" - and further provided that such persons not be released, but be kept in strict custody at the pleasure of the Crown. This was the forerunner of the Kansas dispositional procedures for persons found NGRI.

Consider the present application of Kansas law vs. future application should the burden of proof of insanity be placed on the defendant. Under present law the result of a criminal trial involving the insanity defense is in all cases (except the extremely rare case in which it might be determined that the defendant did not commit the act) that the defendant is confined somewhere - either in prison or in the security hospital. This will no longer be true if the burden of proof of insanity is transferred to the defendant. If, upon considering the evidence, the jury has reasonable doubt whether, because of his mental condition, the defendant knew what he was doing at the time of the alleged crime the defendant cannot be convicted because criminal intent has not been shown beyond a reasonable doubt. But can the defendant then be found not guilty by reason of insanity? No, because the jury only has reasonable doubt of sanity - it is not sure of insanity beyond a reasonable doubt, nor even persuaded by a preponderance of the evidence (if such a lesser standard were applied). That leaves only one other available verdict: *not guilty* - and the consequence of that verdict is that the defendant is simply released. Thus the public safety is better served by providing for the special verdict of insanity where reasonable doubt of sanity exists, than by requiring that insanity be affirmatively proved.

GUILTY BUT MENTALLY ILL

This innovation in verdict form was conceived in Michigan in 1975 and, though it did not replace the insanity defense directly, its purpose was clearly to decrease the number of persons found not guilty by reason of insanity (and thus referred to civil commitment process under Michigan law), redirecting them (having been found guilty) to the correctional system with mandatory treatment.[17] GBMI has been adopted in 11 states, most of them immediately in the aftermath of the Hinckley assassination attempt on President Reagan. Since then there has been little further apparent interest in the state legislatures in adopting GBMI. The probable reason is the emerging documentation of the failure of GBMI to achieve its intended results.

Studies in Michigan since GBMI was adopted indicate no decline whatsoever in the number of persons found not guilty by reason of insanity. What Michigan reaped instead was a substantial harvest of *additional* persons referred, through the GBMI verdict, for psychiatric treatment in the correctional system. What was then found, upon evaluation of this new group of GBMI inmates, was that almost all were sociopaths, and thus not amenable to any form of treatment.[18] Studies in Illinois appear to be producing similar results; the number of persons found not guilty by reason of insanity has in fact increased in that state since its adoption of guilty but mentally ill in 1981.[19] It would seem to require little discussion to point out that at this time the state of Kansas is not in a good position to receive into the correctional system

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large numbers of *additional* persons for mandatory psychiatric evaluation and treatment!

A further reason for not adopting the provision for a finding of guilty but mentally ill is that its positive aspect is already present in Kansas law. Clearly it is appropriate for persons in need of treatment for mental illness to receive such treatment. That truism applies to persons convicted of crime as much as to other persons. Kansas law already provides for that, in the power given the judge to order the convicted defendant hospitalized, where it appears appropriate, with sentencing to follow treatment.[20]

STANDARD FOR RELEASE OF NGRI'S

To mandate that a person shall be confined to a hospital, there to remain until a finding can be made that the individual will *never again* be likely to cause harm is to impose a life sentence without hope of parole. Mental health professionals are not able to make such predictions; near-term predictions are difficult enough, but forever is impossible. Most studies of accuracy in the prediction of dangerous behavior show that future dangerousness is over predicted more than half of the time.[21]

The NGRI under the shadow of such a requirement for release is in a position very comparable to the situation existing at one time with respect to persons deemed incompetent to stand trial. A few years ago the common practice was to hospitalize persons determined incompetent for trial "until restored". For some that meant forever, where their condition was such that there was little or no hope of improvement. In 1972 the United States Supreme Court held that the states could no longer constitutionally do so. After a reasonable period for evaluation and determination of the individual's condition, confinement could only be continued on the basis of a determination of an existing present condition warranting confinement, as in civil commitment.[22]

Kansas' current statutes pertaining to release of persons committed to state hospitals as NGRI provide standards as "tough" as any in the nation. Release requires an explicit finding that the individual is no longer dangerous. That standard has been held constitutionally permissible and should be retained.

ENDNOTES

1. In re Winship, 397 US 358 (1970)
2. Brakel, Parry & Weiner, The Mentally Disabled and the Law, 1985, p. 10
3. Beverley's Case, 76 Eng. Rep. 1118 (K.B. 1603)
4. Id.
5. Reniger v Fogossa, 75 Eng. Rep. 1 (1550)
6. Rex v Arnold, 16 Howell St. Trials 695 (1724)
7. 8 Eng. Rep. 718, 722
8. State v Smith, 223 Kan 203 (1977)
9. Id.; State v Andrews, 187 Kan 458 (1961)
10. State v Crawford, 11 Kan 32 (1873)
11. 160 US 469 (1895)
12. 343 US 790 (1952)
13. Supra, n. 1
14. 421 US 684 (1975)
15. Brakel, supra, n. 1, pp 769-775
16. Id., p. 721
17. Id., p. 714
18. Id., p. 715
19. Id., p. 716, n. 282
20. K.S.A. 22-3429 et seq.
21. See, e.g., Steadman, "Employing Psychiatric Predictions of Dangerous Behavior: Policy vs. Fact" (In DANGEROUS BEHAVIOR; A PROBLEM IN LAW AND MENTAL HEALTH, National Institute of Mental Health, 1978, pp. 123-133
22. Jackson v Indiana, 406 US 715 (1972)

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COMMENTARY on Proposal No. 21: "Examine the insanity defense, including the issue of future likelihood to cause harm to self or others."

Remarks for: Special Committee on Judiciary, Kansas State Legislature
21 October 1988

by: W. Walter Menninger, M.D.
on behalf of the Kansas Psychiatric Society

Introduction

Seven years ago, following the assassination attempt on President Reagan by John Hinckley and Hinckley's subsequent trial which resulted in a finding of "not guilty by reason of insanity," there were reverberations in legislatures throughout the country. Concern was repeatedly expressed that the so-called "insanity" defense was too lenient, and numerous proposals were made to abolish or modify the definition and application of that defense in criminal cases.

These days, there continues to be great public concern about the threat of crime; there is much support to solve the problem by locking more and more people up, both the well and the sick. There is a tendency of the public to over-react to dramatic offenses. In this climate, it is easy to lose one's sense of perspective and hard to know what is most likely to bring about a meaningful improvement in the criminal justice system.

Seven years ago, it was my privilege to address another interim Special Committee on the Judiciary on the issue: "To determine if the insanity defense should be retained in Kansas." After reviewing the commentary I made at that time, I find the issues little changed. Then, as now, the insanity defense is a subject of considerable controversy and confusion. Then, as now, the topic is one which provokes some highly emotional arguments. Then, as now, the issues include a sense of outrage that someone who has clearly perpetrated an offense should nonetheless be found "not guilty" by reason of insanity (NGRI); and after such a verdict, when and under what circumstances should he be released.

Attention is usually called to these questions after some particularly distressing offense has been committed by an emotionally disturbed person. In reality, the actual application of this defense is uneven. I have examined defendants who were clearly delusional and disorganized to a degree which would fully justify a finding of not guilty by reason of insanity, but the jury was reluctant to accept that opinion because of a wish to punish the offender and be assured he was imprisoned. In contrast, I have evaluated persons at the State Security Hospital who had been found not guilty by reason of insanity in a plea bargained decision where I could find little psychiatric justification for that decision.

The public perception is that the finding of "not guilty by reason of insanity" is a frequent phenomenon, although the use of the insanity defense is not that common. In Kansas, over the ten year period from July 1976 through

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(6)

June 1986, an average of 12 persons each year (total of 122) were found not guilty by reason of insanity and sent to the State Security Hospital in Larned. Only ten percent of those individuals committed murder (7) or rape (5). The most common offenses were aggravated battery (27) and aggravated assault (19); and the range of offenses included auto theft, criminal damage to property over $100, terroristic threat, and arson.

How to process mentally ill offenders in the criminal justice system is a vexing problem. Traditionally, behavior which is beyond the control of the individual has been excused to some degree. The origin of the insanity defense is in that premise. As explained by Larry O. Gostin, legal director of MIND, the British National Association for Mental health:

> The law of excuses is a deeply entrenched concept in Anglo-American jurisprudence which has persisted since the middle ages. The excusing conditions of necessity, mistake, duress and diminished mental capacity all embrace the unitary principle that a person is not culpable, and cannot be held criminally responsible, if he had no control over his behavior. All the excusing conditions, then, involve a state of involuntariness. They are jurisprudential reflections of the intuitive moral statement, "I couldn't help myself." An excuse is based on the assumption that the actor's behavior is damaging and is to be deplored, but external or internal conditions which influence the act deprive the actor of choice; this negates or mitigates penal liability. (1)

Expressed a bit differently is the Michigan Supreme Court's justification for the insanity defense:

> The question of whether sick people are to be treated for their illness or punished for it is a question which touches the very heart of judicial consciousness of a civilized system of jurisprudence.... It is essential to the dignity of the jurisprudence of this State that we do not punish mental disorder. (2)

Issues Before This Committee

The House Bills 3098 and 3099 presented in the last legislative session propose three significant changes in the handling of mentally ill offenders.

Issue # 1 — Burden of Proof. New Section 1. of HB 3098 changes the responsibility for the burden of proof from the prosecution to prove sanity beyond a reasonable doubt to the defendant to prove insanity beyond a reasonable doubt. This issue is primarily a legal, rather than a psychiatric, issue; and we would defer any opinion on this matter to legal scholars such as Professor Ray Spring, from whom you will be hearing later today, speaking on behalf of the Kansas Bar Association.

Issue # 2 — Duration of Confinement/Criteria for Release. Section 3. of HB 3098 makes a substantial modification in the criteria for release of a person found not guilty by reason of insanity through the substitution of the words "will ever again" for "continues to be likely to cause harm to self or others."

Excusing offenders because of mental illness presents a dilemma. In fact, there are some persons whose emotional delusions may recur and prompt them to commit another serious offense. The actual number of these individuals is small, but the public reaction to their behavior is substantial. In the State of Michigan, in 1974, the Supreme Court required authorities to release persons found not guilty by reason of insanity unless they were still sufficiently dangerous and mentally ill to merit civil commitment.(3) The year following this decision, approximately 64 persons were released after civil hearings in which they were found to no longer satisfy the criteria for involuntary commitment. Two of those 64 committed a violent crime shortly after release, prompting considerable public outrage.

This dilemma of excusing behavior because it is due to illness, and yet fearing repetition of the behavior, is put this way by Gostin:

> The conflict is between retribution and compassion, between culpability and humanitarianism.... A second conflicting value... concerns our affect and response toward an insane offender. Our jurisprudential and moral view is that he is not culpable and, in keeping with the law of excuses, he should not be exposed to criminal sanctions. Our emotional and utilitarian feeling, however, is apprehension concerning his future behavior and a desire to prevent it. Our fear is that the same mental process which deprived the actor of choice and triggered the charged offense will repeat itself.(4)

It is therefore quite understandable that the law has some safeguard for the protection of society and a process for review of release plans for any persons found not guilty by reason of insanity. However, we believe that the safeguards which now exist in the statute are reasonable and appropriate. To create a standard or criterion of "will never again cause harm" presents an impossible task. No one can make such a prediction. Certainly, behavioral scientists, including psychiatrists and psychologists, cannot do so. We may attempt to make short or near term predictions of dangerous behavior, but no one can anticipate future events or factors that may prompt or preclude future harmful behavior.

The net effect of such revised wording is to literally sentence any person found "not guilty by reason of insanity" to the state security hospital for life, without parole. Besides being subject to constitutional challenge, the practical effect of this modification would be to eventually require an increase in the size of the state security hospital, and to diminish the beds available for treatment of mentally ill prisoners in the ever-increasing state prison population. For these reasons, we would strongly oppose the suggested revision of Section 3 as outlined in HB 3098.

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(7)

Issue # 3 -- New Verdict of "Guilty But Mentally Ill." Following the outcry in Michigan when two of the 64 released NGRI offenders committed another violent offense, the legislature quickly enacted a statute to create a new finding for criminal cases, known as "guilty but mentally ill." Essentially, HB 3099 proposes Kansas adopt the same procedure, which has been enacted in at least 11 other states.

On its face, such a proposal sounds attractive. It presents to the trier of fact an option to acknowledge the presence of mental illness, but to still hold the offender fully accountable and subject him to the full penalty warranted by the offense. Further, the concept is consistent with the belief of most psychiatrists that people should be held accountable for their behavior.

However, you should be clear just what you are doing or intend to accomplish by such legislation. In Michigan, the expectation was that such legislation would reduce the number of insanity pleas. Such was not the case. Not only did it not diminish the number of defendants found not guilty by reason of insanity; but, according to the clinical director of the Michigan Center for Forensic Psychiatry, it failed to live up to its humanitarian promise. Essentially, it just created a new category of offenders who were identified as guilty, but mentally ill, half of whom did not show signs of mental illness when examined in the prison. Yet, it was the responsibility of the department of corrections to provide special facilities and treatment programs for this new class of offenders.

Presently, Kansas statutes have a provision 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 sentence." Once the offender has received the maximum benefit of psychiatric treatment in the State Security Hospital, the offender is returned to the court for final sentencing.

Overall, from a practical standpoint, there is little to be gained by enactment of the "guilty but mentally ill" concept. Since our statutes already provide for referring mentally ill offenders for treatment, we oppose HB 3099.

Thank you for providing us the opportunity to present these views for your consideration.

#

References:

(1) Gostin, Larry O. "Justification for the Insanity Defense in Great Britain and the United States: The Conflicting Rationales of Morality and Compassion." Bulletin of American Academy of Psychiatry and the Law, 9:12-27, 1981, p. 12.
(2) People v. Griffes, 13 Mich. App. 299, 164 N.W. 2nd 426 (1968).
(3) People v. McQuillan, 392 Mich. 511 (1974).
(4) Gostin. Op cit. p. 13-14.

Kansas Psychiatric Society

1259 Pembroke Lane
Topeka, KS 66604
Telephone: (913) 232-5985
or (913) 235-3619

March 13, 1989

TO: House Judiciary Committee

FROM: Kansas Psychiatric Society Chip Wheelen

SUBJECT: Senate Bill 8, As Amended by Senate Committee

The Kansas Psychiatric Society appreciates this opportunity to express our opposition to SB 8 in its current form. Amendments adopted by the Senate Committee will make it necessary that before a person may be released from the state security hospital, that a court must find by clear and convincing evidence that the individual will not likely cause harm to self or others if discharged. By contrast, current law requires that the court find by a preponderance of the evidence, that an individual will not likely cause harm to self or others.

The more stringent burden of proof requirement could have the practical effect of imposing life sentences on every person who may be committed to the state security hospital as a result of a verdict of not guilty by reason of insanity. In this context, it is very important to keep in mind that the majority of individuals who are committed to the state security hospital because of verdicts of not guilty by reason of insanity, have committed other than what you would consider the most heinous of crimes. The most common offenses are aggravated battery and aggravated assault and the range of offenses includes auto theft, criminal damage to property, terroristic threat and arson. We respectfully submit that these crimes most certainly would not demand a life sentence if the individual were prosecuted under normal circumstances. Only very few of the individuals who are committed to the state security hospital are there because of crimes such as murder or rape.

Perhaps it is important to point out that even the current standards can potentially result in a life sentence for the offender if the medical staff of the state security hospital never determines that the individual is ready to be released. The Senate Committee amendments to SB 8 appear to be a response to the distraught individuals who have appeared so many times before legislative committees demanding that the punishment must be equal to the crime regardless of whether the offender was mentally ill or not. It is certainly understandable why an individual who has lost a family member or a friend because of the acts of a mentally ill person would insist upon retribution. We respectfully submit, however, that mentally ill persons are not fully cognizant of either the nature of the crime nor the consequences if they commit the crime. Therefore, it is

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characteristic of a humane legislature to prescribe psychiatric treatment for such individuals rather than punishment. That is not to say that the conditions at the state security hospital at Larned are any better than the conditions at correctional facilities. The fundamental difference is that the mentally ill prisoners at Larned receive psychiatric treatment in lieu of the more traditional forms of rehabilitation that may be provided at other correctional institutions.

We would remind the Committee that the issues being considered by you at this time are not new. There were hearings conducted during the 1988 Legislative Session as well as during the 1988 Interim. The Kansas Psychiatric Society did support Senate Bill 8 as introduced by the Special Interim Committee on Judiciary. We do not, however, support Senate Bill 8 in its current amended form.

We do apologize that a representative could not be present for this hearing, but because of conflicts it was not possible. We wish to express our appreciation to you for taking the time to read this testimony and for considering our comments. We are also enclosing for your information a copy of the testimony provided on 1988 Proposal No. 21 pertaining to the insanity defense. This testimony was prepared and presented by one of our members, W. Walter Menninger, M.D., who has an extensive background in the field of forensic psychiatry.

CW:nb

Enc.

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These days, there continues to be great public concern about the threat of crime; there is much support to solve the problem by locking more and more people up, both the well and the sick. There is a tendency of the public to over-react to dramatic offenses. In this climate, it is easy to lose one's sense of perspective and hard to know what is most likely to bring about a meaningful improvement in the criminal justice system.

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WINSTON BARTON, SECRETARY

March 15, 1989

The Honorable Representative Michael R. O'Neal
Chairperson
House Judiciary Committee
Kansas Legislature
Statehouse, Room 426 South
Topeka, KS 66612

Re: Senate Bill 8

Dear Representative O'Neal:

Please let me introduce myself. I am Jan Haley Maxwell, attorney for Topeka State Hospital. In prior hearings before the Senate Judiciary Committee, Tim Owens, Chief Counsel for the department, appeared. Also, John Badger, SRS staff attorney, and I appeared over several days to answer specific questions raised by the Senate Judiciary Committee regarding many of the proposed changes to the Act for Commitment of Persons Found Not Guilty by Reason of Insanity. The agency had input to the present revisions and amendments of Senate Bill 8.

I was unable to stay until the close of the hearings on March 13, 1989, on Senate Bill 8. I was prepared to testify on behalf of Senate Bill 8 for the agency. The agency supports the bill in the form it was referred out of the Senate Judiciary Committee.

I am very appreciative of the opportunity to present the perspective of the department regarding this proposed legislation.

Sincerely,

Jan Haley Maxwell

Jan Haley Maxwell, J.D.
Director of Legal Services

JHM:mmm

c: Tim Owens, Chief Counsel
John Badger

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S.B. #8

I am Gordon Risk, a psychiatrist and president of the American Civil Liberties Union of Kansas, here to speak in opposition to S.B. #8.

Kansas law currently creates as a separate class of mentally ill individuals, those who have been acquitted of a crime on the grounds that they were insane at the time of its commission. Although the crime may or may not have been violent, "a finding of not guilty because of insanity shall be prima facie evidence that the acquitted person is presently likely to cause harm to self or others." This makes no sense. A person found not guilty by reason of insanity is not guilty of the crime charged. This individual should not be involuntarily confined unless he meets the criteria for civil commitment. A defendant found not guilty by reason of insanity should not be involuntarily confined immediately following the verdict unless the crime charged is a violent one and then only for the minimum period necessary to determine whether it is appropriate to institute civil commitment procedures.

In a civil commitment proceeding the state must prove that an individual is mentally ill, unable to appreciate his need for treatment, and dangerous to himself or others through a preponderance of evidence, before that individual can be involuntarily confined. The burden is on the state to prove that the individual's liberties should be curtailed, and it must periodically re-establish its case to justify continuing commitment. I am not aware of evidence that would indicate that ordinary civil commitment procedures would not adequately protect society from those individuals found not guilty by reason of insanity.

This bill, of course, would make it more difficult, perhaps impossibly difficult, for these individuals to bring their confinement to an end. How does a confined individual generate clear and convincing evidence that he will not cause harm to self or others once outside the hospital? People will be incarcerated for longer periods of time, with absolutely no evidence that longer incarceration and inpatient treatment produce greater remission of symptoms. Current law governing the release of individuals found not guilty by reason of insanity is evidently working well, since no examples have been produced of its failure. If that is the case, if current law is protecting the public, and if conditionally released individuals are experiencing a remission of symptoms through appropriate, mandated, psychiatric treatment, and not committing violent crimes, then individual liberties would be diminished by this bill with no increase in public safety. It is not the place of the state to diminish liberty for no reason.

There have been terrible murders committed in Kansas by apparently deranged individuals. The tragedy of this bill is that it would not have prevented any of them, since none of the individuals had been acquitted of a crime by reason of insanity, committed to Larned, and released on a conditional basis. In the process of curtailing liberty, this bill will not help the actual situation at all. That would probably require money and more politically difficult choices: perhaps more money for mental health, to improve its quality and make it more accessible; perhaps money to help the downtrodden young, so that fewer of them grow up to be warped and damaged adults; perhaps gun control. This bill implicitly promises the citizens of Kansas greater security, but will not deliver. The citizens should not be deceived.

House Judiciary
3/13/89
Attachment XIII

THE CITY OF WICHITA

ROBERT A. THIESSEN, Judge Div. I
THOMAS A. BUSH, Judge Div. II
HAROLD E. FLAIGLE, Judge Div. III
MAURICE MOWREY, Clerk of the Court
JOHN J. EISENBART, Chief Probation Officer

MUNICIPAL COURT
CITY HALL — THIRD FLOOR
455 NORTH MAIN STREET
WICHITA, KANSAS 67202
COURT CLERK
(316) 268-4431
JUDGES CHAMBERS
(316) 268-4629
CHIEF PROBATION OFFICER
(316) 268-4582

March 10, 1989

Rep. Michael R. O'Neal, Chairperson
House Judiciary Committee
State Capital Building
Topeka, Kansas 66612

Re: Senate Bill 11

Ladies and Gentlemen:

The City of Wichita appears in opposition to SB 11. This bill would mandate that municipal court judges provide whatever reports or information that might be requested by the judicial administrator or Supreme Court. Our concerns are as follows:

1. There is no need for new legislation in this area. K.S.A. 12-4108 already requires that such information be provided by the municipal clerks, which are the record keepers. We feel that there has been no showing that new legislation would provide any needed information.

2. To the best of my belief, the municipal judges of Kansas as a group were not aware of the interim study or hearings in this area. Our court and other judges have not had the opportunity to study this bill. We would request time to study it and learn of the reasons for it.

3. There is an underlying concern of the intent behind this bill. More importantly, if new reports or information is being sought by this bill, we are concerned about the unknown costs, requirements, and burdens on the municipal courts.

In conclusion, we do not see a need for this legislation. If there is, however, we would respectfully request that there be time for more study of the issues involved.

Very truly yours,

Robert A. Thiessen, Judge

House Judiciary
3/13/89
Attachment XIV