Approved: April 7, 1995
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on February 15, 1995 in Room 313-S-of the Capitol.

All members were present except:
Representative David Adkins - Excused
Representative Clyde Graeber - Excused
Representative Candy Ruff - Excused
Representative Vince Snowbarger - Excused

Committee staff present: Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Representative Jill Grant
Lisa Moots, Executive Director Kansas Sentencing Commission
Jim Clark, Kansas County & District Attorney Association

Others attending: See attached list

Hearings on **HB 2424** - Rape increased to a severity level 1, person felony; criminal discharge of a firearm which results in bodily harm increased to a severity level 3, person felony & **HB 2425** - Penalty for rape is increased to severity level 1; penalty for criminal discharge of firearm at an occupied building or vehicle which results in bodily harm, were opened.

Representative Jill Grant appeared before the attorney as a proponent of both the proposed bills. Both of the bills alter the severity level of two crimes: Rape would change from a severity level 2 to a level 1 and drive-by shooting resulting in bodily harm from a severity level 5 to a level 3. **HB 2425** would also double the sentencing table numbers for severity levels 1 through 3 for all nine categories of criminal histories on the non-drug grid. These changes will require additional bed space but this issue is not something that would need to be considered at this time. (Attachment 1)

Jim Clark, Kansas County & District Attorneys Association, appeared before the committee as a proponent of **HB 2424**. This change is a recognition of the serious nature of both offenses. (Attachment 2)

Lisa Moots, Executive Director Kansas Sentencing Commission, appeared before the committee on both the proposed bills. She stated that doubling the sentences is consistent with the sentencing guidelines structure and much easier to deal with than the persistent offenders proposals. The Commission had concerns with the change of severity level of criminal discharge at an occupied building. They felt that it was inconsistent with the severity levels assigned to the various forms of aggravated battery. (Attachment 3)

Attorney General Carla Stovall and Representative Deena Horst did not appear before the committee but requested that their written testimony be included in the minutes. (Attachments 4 & 5)

Hearings on **HB 2424 & HB 2425** were closed.

Hearings on **HB 2331** - Repealing not guilty by reason of insanity; creating the defense of lack of mental state, were opened.

Chairman O'Neal explained that last year Dean Spring appeared on a similar bill and while explaining why guilty but mentally ill was not the way to go he suggested that the repeal of the insanity defense would be a better option. The committee liked his idea and the bill was amended to reflect the option. The bill passed the House but was held up in the Senate. Therefore, it was reintroduced again this year.

Ron Smith, appeared on behalf of Dean Spring as a proponent to the bill. He provided the committee with information as to what other states have done with the insanity defense. Currently, there are four other states that do not have the option of "not guilty by reason of insanity". If the jury finds the defendant not guilty they are then asked if it was based upon the fact that he was suffering from a mental defect. If the answer is yes, they would be punished the same way as those found "not guilty by reason of insanity". There is no fundamental right to an insanity defense in criminal law.(Attachment 6)

Hearings on **HB 2331** were closed.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S-Statehouse, at 3:30 p.m. on February 15, 1995.

HB 2324 - Nonprobate transfers of real property & **HB 2351** Nonprobate transfer of motor vehicles

Chairman O'Neal announced that with the permission of the committee he would request that these two bills would be referred to the Judicial Council .

HB 2311 - Tort claims acts; maximum amount of award

Representative Mays made a motion to report **HB 2311** favorably for passage. Representative Nichols seconded the motion.

Representative Goodwin made a substitute motion to amend line 22 after (a) to read "and the provisions of K.S.A. 75-6111 do not apply" Representative Heinemann seconded the motion. The motion carried.

Representative Rutledge made a motion to amend line 22 to read "not more than $500,000". Representative Yoh seconded the motion. Representative Grant commented that "not exceeding" reads better. With permission of the second Representative Rutledge changed his motion to read "for an amount not exceeding $500,000. The motion carried.

Representative Nichols made a motion to strike "upon recovery of damages" in line 20. Representative Howell seconded the motion. The motion carried.

Representative Mays made a motion to report **HB 2311** favorably for passage as amended. Representative Nichols seconded the motion. The motion carried.

HB 2263 - District court judges positions created by K.S.A. 20-355 shall not be considered a civil appointment to state office pursuant to K.S.A. 46-234

Representative Garner made a motion to report **HB 2263** favorably for passage. Representative Goodwin seconded the motion. The motion carried.

HB 2412 - Include in the crime of perjury presenting false testimony to a legislative committee.

The committee discussed the issue that the Legislature had Joint Rules that allow for the censor of a member if he/she does anything inappropriate and yet those who the Legislature relies upon to give information don't have any laws or guidelines to abide by. It was unanimous that most lobbyists do good work and are truthful, however, several legislators felt that they had been lied to several times since they had been elected. The committee requested that staff research what other states do and provide a copy to the committee.The committee gave support to the development of Joint Rules to address the presenting of false testimony.

The next meeting is scheduled for February 16, 1995.

HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/15/95

NAME	REPRESENTING
Jan Johnson	Dept of Corrections
Lisa Roots	KSC
Jan Maxwell	Dept of SRS
Conda Byrne	Mennonite
Chip Wheelen	KS Medical Society
and	KS Psychiatric Society
David Beale	
JAMES CLARK	KCDAA
Paul Shelby	OJA
Sherry C Diel	KS Advocacy & Protective Services
James Crawford	Intern
Kay Mettner	HOW
Jerilyn Brandsberry	KTLA
Linda McCluney	KS Insurance Dept.
Greg Tygman	DOB

STATE OF KANSAS

JILL GRANT
REPRESENTATIVE, FIFTY-FIFTH DISTRICT
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TOPEKA

COMMITTEE ASSIGNMENTS
BUSINESS COMMERCE AND LABOR
JUDICIARY
LOCAL GOVERNMENT

HOUSE OF
REPRESENTATIVES

HOUSE JUDICIARY COMMITTEE
HB2424 and HB2425

To provide more uniform sentences for crimes committed in Kansas, the 1992 Legislature passed the Kansas Sentencing Guidelines Act. The Act provides tables for judges to follow when sentencing criminals. Sentences under the Act are determined by 1) the Severity Level of the crime, and 2) the criminal's "criminal history." The Act applies to individuals who committed crimes after July 1, 1993. Much concern and controversy has surrounded the implementation of the Act. In particular, questions have been raised regarding whether the sentencing tables are realistic and/or stringent enough for certain crimes. HB2424 and HB2425 have been introduced in response to such concerns. These bills are simple and straightforward. Both bills alter the severity level of two crimes. Rape (K.S.A. 21-3502(a)(1)) is currently a severity level 2 crime and Criminal Discharge of a Firearm at an Occupied Dwelling or Vehicle Resulting in Bodily Harm, a/k/a "Drive-by Shooting" (K.S.A. 21-4219 (c)) is currently a severity level 5 crime. These bills propose to raise Rape from a severity level 2 to a severity level 1 crime, and Drive-by Resulting in Bodily Harm from a severity level 5 to a severity level 3 crime. HB2425 goes one step further by doubling the sentencing table numbers for severity levels 1 through 3 for all nine categories of criminal histories on the Non-Drug Grid. Although doubling these numbers may seem harsh, I believe this is actually a reasonable and responsible manner in which to address the inequities of sentences under the guidelines with regard to 24 of the most severe crimes in Kansas. It is important to understand that severity levels one through three apply only to the 24 crimes listed in Exhibit A of my testimony.

A legitimate concern regarding this proposed legislation will be to what extent these alterations will impact our inmate population. The Kansas Department of Corrections has provided fiscal notes with regard to both bills. While I must concede that these changes will result in the

House Judiciary
2-15-95
Attachment 1

growth of the state's inmate population, I am pleased to report that there will not be significant immediate impact, due to the fact that the bill is drafted narrowly to apply to a relatively small number of severe crimes. Specifically, it is projected that enactment of HB2425 would result in a mere 1% increase (8 inmates) in our inmate population after 5 years. The projected inmate population is as follows:

	Projected Population Under Current Law	Projected Population Under HB2425	Difference
5 yrs.	857	865	8
10 yrs.	1180	1681	501
15 yrs.	1218	2124	906
20 yrs.	1218	2370	1152
22 yrs. (anticipated leveling off)	1218	2447	1229

(IT SHOULD BE NOTED THAT THESE PROJECTIONS ASSUME NO INMATE MORTALITY. CLEARLY, INMATE MORTALITY WILL RESULT IN A REDUCTION OF THE ACTUAL POPULATION.)

So although additional prison "bed space" will certainly be needed, there is much time to address these future needs. It may be that future measures may be taken to reduce the presumed sentences for certain crimes, such as some Drug Grid Crimes which the January 1995 Legislative Post Audit Report regarding the implementation of the Act addressed. Specifically, it was noted that judges and prosecutors contacted by the post auditors consistently questioned whether sentences for certain drug crimes were proportionate to their severity. While I do not offer or support amendments to the Drug Grid at this time, I raise this as a point of information and/or interest simply to indicate that there are options available to equalize the State's projected inmate population. And there is time to study and/or implement these options, due to the fact that the fiscal/bed space impact of HB2425 will not be immediately significant.

I urge your support of HB2425. Should the wisdom of this committee not afford the favorable passage of HB2425, in the alternative I would ask for your support of HB2425.

EXHIBIT "A"

HOUSE JUDICIARY COMMITTEE
HB2425

CRIMES AFFECTED BY THE PROPOSED CHANGED IN THE SENTENCING GUIDELINES.

APPLICABLE STATUTE	CRIME	SEVERITY LEVEL	
		CURRENT	CHANGES
21-3401	ATTEMPTED MURDER 1	1	
21-3402(a)	INTENTIONAL MURDER 2	1	
21-3421	AGGRAVATED KIDNAPPING	1	
21-3801	ATTEMPTED TREASON	1	
21-3401	CONSPIRACY MURDER 1	2	
21-3502(a)(1)	**RAPE**	**2**	**1**
21-3502(a)(2)	RAPE CHILD <14 YOA	2	
21-3506(a)(1)	AGGRAVATED SODOMY CHILD <14	2	
21-3506(a)(2)	AGGRAVATED SODOMY	2	
21-3801	CONSPIRACY TREASON	2	
21-3401	SOLICITATION MURDER 1	3	
21-3403	VOLUNTARY MANSLAUGHTER	3	
21-3415(b)(1)	AGG. BATT.-LEO INTENT. GREAT BOD. HARM	3	
21-3420	KIDNAPPING	3	
21-3427	AGGRAVATED ROBBERY	3	
21-3504(a)(1)	AGG. INDECENT LIB. INTERCOURSE>=14 BUT<16	3	
21-3504(a)(3)	AGG. INDECENT LIB.-FONDLING<14	3	
21-3505(a)(2)	CRIMINAL SODOMY>=14 BUT <16	3	
21-3505(a)(3)	CRIM. SOD. CAUSING TO ENGAGE>=14 BUT<16	3	
21-3719(b)(1)	AGG. ARSON-SUB. RISK OF BODILY HARM	3	
21-3801	SOLICITATION OF TREASON	3	
21-4219(b)	**CRIM. DISCHARGE FIREARM BOD. HARM**	**5**	**3**

THESE ARE THE ONLY CRIMES INCLUDED IN SEVERITY LEVELS 1 THROUGH 3. PLEASE NOTE THAT THIS LIST ALSO INCLUDES THE PROPOSED CHANGES IN SEVERITY LEVEL FOR **RAPE** AND **CRIMINAL DISCHARGE OF A FIREARM RESULTING IN BODILY HARM** (I.E. DRIVE-BY).

ELEMENTS OF RAPE AND ITS PENALTIES FOR MIDWESTERN STATES

	STATUTE NUMBER	ELEMENTS	PENALTY RANGE
OKLAHOMA	1114	FORCE THREAT OF FORCE	**DEATH** OR IMPRISONMENT NOT LESS THAN 5 YEARS
COLORADO	18-3-402(1)	FORCE OR THREAT OF FORCE	5 YEARS PAROLE TO 12 YEARS IMPRISONMENT
		SERIOUS BODILY INJURY ARMED WITH DEADLY WEAPON	5 TO 24 YEARS IMPRISONMENT MUST BE SENTENCED TO MIDPOINT BUT NOT MORE THAN 2X MAXIMUM
NEBRASKA	28-319	FORCE OR THREAT OF FORCE	MAX 20 YEARS IMPRISONMENT OR $25,000 OR BOTH 1 YEAR IMPRISONMENT MINIMUM
		SECOND OFFENSE	**NOT LESS THAN 25 YEARS NOT ELIGIBLE FOR PAROLE**
MISSOURI	566.03	BY FORCIBLE COMPULSION	**LIFE IMPRISONMENT** OR NOT LESS THAN 5 YEARS NOR MORE THAN 30
		SERIOUS BODILY HARM USE OF DEADLY WEAPON	**DEATH LIFE IMPRISONMENT** OR 20 YEARS OR MORE
KANSAS	21-3502	FORCE OR FEAR	
		FIRST OFFENSE (NO RECORD)	5.5 YEARS TO 6.5 YEARS
		WITH 1 PERSON FELONY	9.5 YEARS TO 10.5 YEARS
		WITH 3 PERSON FELONIES	23 TO 25.5 YEARS

ELEMENTS OF RAPE AND ITS PENALTIES FOR MIDWESTERN STATES

	STATUTE NUMBER	ELEMENTS	PENALTY RANGE	
OKLAHOMA	1114	FORCE THREAT OF FORCE	**DEATH** OR IMPRISONMENT NOT LESS THAN 5 YEARS	
COLORADO	18-3-402(1)	FORCE OR THREAT OF FORCE	5 YEARS PAROLE TO 12 YEARS IMPRISONMENT	
		SERIOUS BODILY INJURY ARMED WITH DEADLY WEAPON	5 TO 24 YEARS IMPRISONMENT MUST BE SENTENCED TO MIDPOINT BUT NOT MORE THAN 2X MAXIMUM	
NEBRASKA	28-319	FORCE OR THREAT OF FORCE	MAX 20 YEARS IMPRISONMENT OR $25,000 OR BOTH 1 YEAR IMPRISONMENT MINIMUM	
		SECOND OFFENSE	**NOT LESS THAN 25 YEARS** **NOT ELIGIBLE FOR PAROLE**	
MISSOURI	566.03	BY FORCIBLE COMPULSION	**LIFE IMPRISONMENT** OR NOT LESS THAN 5 YEARS NOR MORE THAN 30	
		SERIOUS BODILY HARM USE OF DEADLY WEAPON	**DEATH LIFE IMPRISONMENT** OR 20 YEARS OR MORE	
KANSAS	21-3502	FORCE OR FEAR		**CHAGES PER HB 2424**
		FIRST OFFENSE (NO RECORD)	5.5 YEARS TO 6.5 YEARS	7.6 YEARS TO 8.5 YEARS
		WITH 1 PERSON FELONY	9.5 YEARS TO 10.5 YEARS	12.5 YEARS TO 13.9 YEARS
		WITH 3 PERSON FELONIES	23 TO 25.5 YEARS	30 .8 YEARS TO 34 YEARS

ELEMENTS OF RAPE AND ITS PENALTIES FOR MIDWESTERN STATES

	STATUTE NUMBER	ELEMENTS	PENALTY RANGE	
OKLAHOMA	1114	FORCE THREAT OF FORCE	**DEATH** OR IMPRISONMENT NOT LESS THAN 5 YEARS	
COLORADO	18-3-402(1)	FORCE OR THREAT OF FORCE	5 YEARS PAROLE TO 12 YEARS IMPRISONMENT	
		SERIOUS BODILY INJURY ARMED WITH DEADLY WEAPON	5 TO 24 YEARS IMPRISONMENT MUST BE SENTENCED TO MIDPOINT BUT NOT MORE THAN 2X MAXIMUM	
NEBRASKA	28-319	FORCE OR THREAT OF FORCE	MAX 20 YEARS IMPRISONMENT OR $25,000 OR BOTH 1 YEAR IMPRISONMENT MINIMUM	
		SECOND OFFENSE	**NOT LESS THAN 25 YEARS** **NOT ELIGIBLE FOR PAROLE**	
MISSOURI	566.03	BY FORCIBLE COMPULSION	**LIFE IMPRISONMENT** OR NOT LESS THAN 5 YEARS NOR MORE THAN 30	
		SERIOUS BODILY HARM USE OF DEADLY WEAPON	**DEATH LIFE IMPRISONMENT** OR 20 YEARS OR MORE	
KANSAS	21-3502	FORCE OR FEAR		**CHANGES PER HB 2425**
		FIRST OFFENSE (NO RECORD)	5.5 YEARS TO 6.5 YEARS	15.3 YEARS TO 17.2 YEARS
		WITH 1 PERSON FELONY	9.5 YEARS TO 10.5 YEARS	25 YEARS TO 27.8 YEARS
		WITH 3 PERSON FELONIES	23 TO 25.5 YEARS	61.6 YEARS TO 68 YEARS

9-1

Rounded to nearest year

PROPOSED CHANGES IN SENTENCING GUIDELINES IN MONTHS

CRIM. HISTORY CATEGORY		A 3+ PERSON FELONIES	B 2 PERSON FELONIES	C 1 PERSON 1 NONPERSON FELONIES	D 1 PERSON FELONY	E 3+ NONPERSON FELONIES	F 2 NONPERSON FELONIES	G 1 NONPERSON FELONY	H 2+ MISDEM.	I 1 MISDEM. NO RECORD
SEVERITY LEVEL										
1	HIGH	816	772	356	334	308	282	254	232	206
	MID	776	732	340	316	292	268	244	220	194
	LOW	740	692	322	300	276	254	230	208	184
2	HIGH	616	576	270	250	230	210	192	172	154
	MID	584	548	256	238	218	200	182	164	146
	LOW	552	520	242	226	206	190	172	154	136
3	HIGH	412	380	178	166	154	138	128	118	102
	MID	388	360	170	156	146	132	120	110	98
	LOW	368	344	160	148	136	124	114	102	92

PROPOSED CHANGES IN SENTENCING GUIDELINES IN YEARS

CRIM. HISTORY CATEGORY		A 3+ PERSON FELONIES	B 2 PERSON FELONIES	C 1 PERSON 1 NONPERSON FELONIES	D 1 PERSON FELONY	E 3+ NONPERSON FELONIES	F 2 NONPERSON FELONIES	G 1 NONPERSON FELONY	H 2+ MISDEM.	I 1 MISDEM. NO RECORD
SEVERITY LEVEL										
1	HIGH	68	64	30	28	26	24	21	19	17
	MID	65	61	28	26	24	22	20	18	16
	LOW	62	58	27	25	23	21	19	17	15
2	HIGH	51	48	23	21	19	18	16	14	13
	MID	49	46	21	20	18	17	15	14	12
	LOW	46	43	20	19	17	16	14	13	11
3	HIGH	34	32	15	14	13	12	11	10	9
	MID	32	30	14	13	12	11	10	9	8
	LOW	31	29	13	12	11	10	10	9	8

PROPOSED CHANGES IN SENTENCING GUIDELINES IN MONTHS

CRIM. HISTORY CATEGORY		A 3+ PERSON FELONIES	B 2 PERSON FELONIES	C 1 PERSON 1 NONPERSON FELONIES	D 1 PERSON FELONY	E 3+ NONPERSON FELONIES	F 2 NONPERSON FELONIES	G 1 NONPERSON FELONY	H 2+ MISDEM.	I 1 MISDEM. NO RECORD
SEVERITY LEVEL										
1	HIGH	816	772	356	334	308	282	254	232	206
	MID	776	732	340	316	292	268	244	220	194
	LOW	740	692	322	300	276	254	230	208	184
2	HIGH	616	576	270	250	230	210	192	172	154
	MID	584	548	256	238	218	200	182	164	146
	LOW	552	520	242	226	206	190	172	154	136
3	HIGH	412	380	178	166	154	138	128	118	102
	MID	388	360	170	156	146	132	120	110	98
	LOW	368	344	160	148	136	124	114	102	92

PROPOSED CHANGES IN SENTENCING GUIDELINES IN YEARS

CRIM. HISTORY CATEGORY		A 3+ PERSON FELONIES	B 2 PERSON FELONIES	C 1 PERSON 1 NONPERSON FELONIES	D 1 PERSON FELONY	E 3+ NONPERSON FELONIES	F 2 NONPERSON FELONIES	G 1 NONPERSON FELONY	H 2+ MISDEM.	I 1 MISDEM. NO RECORD
SEVERITY LEVEL										
1	HIGH	68.00	64.33	29.67	27.83	25.67	23.50	21.17	19.33	17.17
	MID	64.67	61.00	28.33	26.33	24.33	22.33	20.33	18.33	16.17
	LOW	61.67	57.67	26.83	25.00	23.00	21.17	19.17	17.33	15.33
2	HIGH	51.33	48.00	22.50	20.83	19.17	17.50	16.00	14.33	12.83
	MID	48.67	45.67	21.33	19.83	18.17	16.67	15.17	13.67	12.17
	LOW	46.00	43.33	20.17	18.83	17.17	15.83	14.33	12.83	11.33
3	HIGH	34.33	31.67	14.83	13.83	12.83	11.50	10.67	9.83	8.50
	MID	32.33	30.00	14.17	13.00	12.17	11.00	10.00	9.17	8.17
	LOW	30.67	28.67	13.33	12.33	11.33	10.33	9.50	8.50	7.67

Rounded to nearest year

CURRENT SENTENCING GUIDELINES IN MONTHS

CRIM. HISTORY CATEGORY		A 3+ PERSON FELONIES	B 2 PERSON FELONIES	C 1 PERSON 1 NONPERSON FELONIES	D 1 PERSON FELONY	E 3+ NONPERSON FELONIES	F 2 NONPERSON FELONIES	G 1 NONPERSON FELONY	H 2+ MISDEM.	I 1 MISDEM. NO RECORD
SEVERITY LEVEL										
1	HIGH	408	386	178	167	154	141	127	116	103
	MID	388	366	170	158	146	134	122	110	97
	LOW	370	346	161	150	138	127	115	104	92
2	HIGH	308	288	135	125	115	105	96	86	77
	MID	292	274	128	119	109	100	91	82	73
	LOW	276	260	121	113	103	95	86	77	68
3	HIGH	206	190	89	83	77	69	64	59	51
	MID	194	180	85	78	73	66	60	55	49
	LOW	184	172	80	74	68	62	57	51	46

CURRENT SENTENCING GUIDELINES IN YEARS

CRIM. HISTORY CATEGORY		A 3+ PERSON FELONIES	B 2 PERSON FELONIES	C 1 PERSON 1 NONPERSON FELONIES	D 1 PERSON FELONY	E 3+ NONPERSON FELONIES	F 2 NONPERSON FELONIES	G 1 NONPERSON FELONY	H 2+ MISDEM.	I 1 MISDEM. NO RECORD
SEVERITY LEVEL										
1	HIGH	34	32	15	14	13	12	11	10	9
	MID	32	31	14	13	12	11	10	9	8
	LOW	31	29	13	13	12	11	10	9	8
2	HIGH	26	24	11	10	10	9	8	7	6
	MID	24	23	11	10	9	8	8	7	6
	LOW	23	22	10	9	9	8	7	6	6
3	HIGH	17	16	7	7	6	6	5	5	4
	MID	16	15	7	7	6	6	5	5	4
	LOW	15	14	7	6	6	5	5	4	4

CURRENT SENTENCING GUIDELINES IN MONTHS

CRIM. HISTORY CATEGORY		A 3+ PERSON FELONIES	B 2 PERSON FELONIES	C 1 PERSON 1 NONPERSON FELONIES	D 1 PERSON FELONY	E 3+ NONPERSON FELONIES	F 2 NONPERSON FELONIES	G 1 NONPERSON FELONY	H 2+ MISDEM.	I 1 MISDEM. NO RECORD
SEVERITY LEVEL										
1	HIGH	408	386	178	167	154	141	127	116	103
	MID	388	366	170	158	146	134	122	110	97
	LOW	370	346	161	150	138	127	115	104	92
2	HIGH	308	288	135	125	115	105	96	86	77
	MID	292	274	128	119	109	100	91	82	73
	LOW	276	260	121	113	103	95	86	77	68
3	HIGH	206	190	89	83	77	69	64	59	51
	MID	194	180	85	78	73	66	60	55	49
	LOW	184	172	80	74	68	62	57	51	46

CURRENT SENTENCING GUIDELINES IN YEARS

CRIM. HISTORY CATEGORY		A 3+ PERSON FELONIES	B 2 PERSON FELONIES	C 1 PERSON 1 NONPERSON FELONIES	D 1 PERSON FELONY	E 3+ NONPERSON FELONIES	F 2 NONPERSON FELONIES	G 1 NONPERSON FELONY	H 2+ MISDEM.	I 1 MISDEM. NO RECORD
SEVERITY LEVEL										
1	HIGH	34.00	32.17	14.83	13.92	12.83	11.75	10.58	9.67	8.58
	MID	32.33	30.50	14.17	13.17	12.17	11.17	10.17	9.17	8.08
	LOW	30.83	28.83	13.42	12.50	11.50	10.58	9.58	8.67	7.67
2	HIGH	25.67	24.00	11.25	10.42	9.58	8.75	8.00	7.17	6.42
	MID	24.33	22.83	10.67	9.92	9.08	8.33	7.58	6.83	6.08
	LOW	23.00	21.67	10.08	9.42	8.58	7.92	7.17	6.42	5.67
3	HIGH	17.17	15.83	7.42	6.92	6.42	5.75	5.33	4.92	4.25
	MID	16.17	15.00	7.08	6.50	6.08	5.50	5.00	4.58	4.08
	LOW	15.33	14.33	6.67	6.17	5.67	5.17	4.75	4.25	3.83

Kansas County & District Attorneys Association

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EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of

HOUSE BILL NO. 2424

The Kansas County and District Attorneys Association supports HB 2424, which raises the severity level for a conviction of rape from a level 2 to level 1, person felony; and the penalty for criminal discharge of a firearm into an occupied building or vehicle which results in bodily harm from a level 5 to a level 3, person felony. The change is in recognition of the serious nature of both offenses. It adds 30 to 100 months for a rape conviction, depending on criminal history; and adds 24 to 90 months for a criminal discharge conviction, depending on history. Both increases are appropriate for the offenses.

On the other hand, we do not support wholesale increases in sentences due to doubling the sentence for levels I through III, such as in HB 2045. Most of us at KCDAA had to live so long with the prison overcrowding crisis: with the resultant dilution of sentences, federal court orders and the specter of wholesale release of inmates still such vivid memories that they outweigh any possible benefit of wholesale, indiscriminate doubling of sentences.

House Judiciary
2-15-95
Attachment 2

State of Kansas
KANSAS SENTENCING COMMISSION

HOUSE COMMITTEE ON JUDICIARY
House Bills 2424 and 2425
February 15, 1995
Testimony of Lisa Moots

The Kansas Sentencing Commission supports the approach taken by these two bills to increase the duration of sentences for certain felonies and crime severity levels in a manner consistent with the state's sentencing guidelines structure.

HB 2425 takes the straightforward approach of doubling the presumptive length of sentences for all crimes in the three most serious crime severity levels on the nondrug grid, regardless of the criminal history of the offender. These durational increases serve to address concerns that the sentences currently provided for offenders with little or no criminal history who are convicted of very serious crimes are inadequate.

The approach taken by HB 2425 is also a much cleaner way to adequately punish "persistent offenders" than either version of the "two strikes, you're out" legislation that has been introduced this session; while, as a matter of reality, the doubling of sentences in severity levels 1 through 3 may result in the incarceration of a number of offenders for the rest of their lives, there is no need to deal with the implications of imposition of a sentence of life without parole. Moreover, the challenge posed by the proposed "persistent offender " legislation to select those crimes to which it should or should not apply is avoided by HB 2425.

HB 2425 also addresses certain of the concerns about lengths of sentences for certain crimes which were expressed in the January, 1995, report entitled *Reviewing the Implementation of the Kansas Sentencing Guidelines Act* which was prepared by the Legislative Division of Post Audit. The report identified cases in which offenders convicted of the crimes of aggravated kidnapping and aggravated robbery might serve shorter terms under the guidelines than they would have served before guidelines were implemented. Aggravated kidnapping is a severity level 1 offense, and aggravated robbery is a severity level 3 offense, which means that both of these crimes would be covered by the increased sentences proposed in HB 2425.

In addition, among the other crimes included in the top three severity levels are rape (which HBs 2424 and 2425 would raise from level 3 to level 1), aggravated criminal sodomy, and aggravated indecent liberties with a child. These are all crimes committed by potential sex

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predators; however, if the prison sentences imposed on these offenders are doubled, the need to initiate "civil" commitment proceedings against them as predators in the future may be delayed or eliminated altogether. Instead, they can just stay in prison (which I think we all agree is where they really belong).

While the Sentencing Commission also has no disagreement with the idea of raising the severity level of rape, the Commission does feel that raising the severity level of criminal discharge at an occupied building from level 5 to level 3 is inappropriate and inconsistent with the severity levels assigned to the various forms of aggravated battery.

State of Kansas
Office of the Attorney General
2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

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February 15, 1995

Representative Mike O'Neal,
Chair, House Judiciary Committee
State Capitol, Room 170-W
Topeka, Kansas 66612

RE: House Bill 2424

Dear Representative O'Neal:

This letter is to let you know of my support of House Bills 2424 and 2425. I believe the changes in the sentencing grid in HB 2425 will allow for additional punishment of offenders and better protection of the public by keeping violent offenders out of our communities longer.

House Bill 2424 addresses increases in sentences for rapists and drive-by shooters. I have always stated that first-time convicted rapists and those who kill in a drive-by shooting should receive longer sentences than what the law currently allows. There is no logic for a convicted rapist or a person who kills to be released from prison after serving as little as four years and seven months which includes 20 percent good time. The people who commit these crimes should receive lengthy sentences for the vicious and heinous acts they have committed.

We must be committed to protecting the community and taking the violent criminal off the street for a longer period of time. I firmly believe this is an important change that the House Judiciary Committee should support. I ask for your passage of House Bills 2424 and 2425. Thank you.

Sincerely,

Carla J. Stovall

Carla J. Stovall
Attorney General

cc: Rep. Jill Grant

House Judiciary
2-15-95
Attachment 4

STATE OF KANSAS

DEENA HORST
REPRESENTATIVE, SIXTY-NINTH DISTRICT
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SALINA, KANSAS 67401
(913) 827-8540

STATE CAPITOL BUILDING—180-W
TOPEKA, KANSAS 66612-1504
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
EDUCATION
GOVERNMENTAL ORGANIZATION AND ELECTIONS
JOINT COMMITTEE: LEGISLATIVE EDUCATIONAL PLANNING

WRITTEN TESTIMONY HB 2424 & HB 2425

SENTENCING GUIDELINES REVISITED

February 15, 1995

Mr. Chairman; members of the committee, I appreciate the opportunity to share with you written testimony.

As I campaigned, I consistently heard from constituents that they wanted tougher sentences for criminal behavior. I am a co-sponsor of the "two-strikes-you-are-out" bill; however, given the knowledge that some crimes are rarely committed by older individuals, given the escalating costs of incarcerating individuals, and given the desire of the public to cut taxes, a better answer seems to be to adjust the sentencing guidelines to reflect the concerns of the public for certain criminal behavior.

I prefer HB 2425 because it is more inclusive and I feel will more completely address the concerns of my constituency. I would; however, support HB 2424 as an alternative. These bills seem preferable to having a geriatric prison and the expense which would surround that issue.

Thank you for time and your consideration.

Deena Horst

House Judiciary
2-15-95
Attachment 5

TO: RON SMITH
FROM: RAY SPRING
RE: ABOLITION OF THE INSANITY DEFENSE

Enclosed herewith are materials relating to the issue which has come up since the hearing on the bill to introduce "guilty but mentally ill". I've included copies of the relevant Utah, Montana and Idaho statutes, along with the Korell case from Montana and the relevant part of the Searcy case from Idaho. These cases best explain the constitutionality of the statutes in question. The Korell case is particularly well written, and also includes a dissent which presents the contrary view of constitutionality about as well, I think, as it can be presented.

For various reasons, none of the three state statutes seems to me to be the best possible approach to achieving the same result in Kansas with clarity and simplicity. I would propose an act which would read as follows:

Section 1. It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense.

Section 2. In any case in which the defense has offered substantial evidence of a mental disease or defect excluding the mental state required as an element of the offense charged, and the jury returns a verdict of "not guilty", the jury shall also answer a special question in the following form: "Do you find the defendant not guilty solely because he/she was, at the time of the alleged crime, suffering from a mental disease or defect which rendered him/her incapable of possessing the required criminal intent?"

It would also be necessary to amend K.S.A. 22-3219, 22-3428 and 22-3428a to eliminate the references to "not guilty because of insanity" and substitute therefor language referring to a finding of "mental disease or defect excluding criminal responsibility.

I think, on the rather quick review I've done in the relatively short time available, that this will get the job done if this is the direction the House Judiciary Committee wants to go.

Part 1
Relevance of Mental Disease or Defect

46-14-101. Mental disease or defect. As used in 46-14-204, 46-14-312, 46-14-313, and this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or other antisocial behavior.

History: En. 95-501 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 184, L. 1977; R.C.M. 1947, 95-501; amd. Sec. 1, Ch. 713, L. 1979; amd. Sec. 148, Ch. 800, L. 1991.

Cross-References

Voluntary act — material element of every offense, 45-2-202.

Criminal responsibility of person in intoxicated or drugged condition, 45-2-203.

Compulsion of threatened bodily injury, 45-2-212.

46-14-102. Evidence of mental disease or defect admissible to prove state of mind. Evidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense.

History: En. 95-502 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-502; amd. Sec. 150, Ch. 800, L. 1991.

46-14-103. Mental disease or defect excluding fitness to proceed. A person who, as a result of mental disease or defect, is unable to understand the proceedings against the person or to assist in the person's own defense

Montana Statute 6-2

may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.

History: En. 95-504 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-504; amd. Sec. 151, Ch. 800, L. 1991.

Part 2
Procedure When Mental Disease or Defect an Issue

46-14-201. Renumbered 46-14-214 by Code Commissioner, 1991.

46-14-202. Examination of defendant. (1) If the defendant or the defendant's counsel files a written motion requesting an examination or if the issue of the defendant's fitness to proceed is raised by the district court, prosecution, or defense counsel, the district court shall appoint at least one qualified psychiatrist or licensed clinical psychologist or shall request the superintendent of the Montana state hospital to designate at least one qualified psychiatrist or licensed clinical psychologist, which designation may be or include the superintendent, to examine and report upon the defendant's mental condition.

(2) The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding 60 days or a longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist or licensed clinical psychologist retained by the defendant be permitted to witness and participate in the examination.

(3) In the examination, any method may be employed that is accepted by the medical or psychological profession for the examination of those alleged to be suffering from mental disease or defect.

(4) If the defendant is indigent or the examination occurs at the request of the prosecution, the cost of the examination must be paid by the county or the state, or both, according to procedures established under 3-5-902(1).

History: En. 95-505 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 88, Ch. 120, L. 1974; R.C.M. 1947, 95-505(1), (2); amd. Sec. 3, Ch. 713, L. 1979; amd. Sec. 1, Ch. 616, L. 1981; amd. Sec. 2, Ch. 361, L. 1983; amd. Sec. 13, Ch. 680, L. 1985; amd. Sec. 1, Ch. 127, L. 1987; amd. Sec. 152, Ch. 800, L. 1991.

Cross-References

Consideration of mental disease or defect in sentencing, 46-14-311.

46-14-203. Renumbered 46-14-206 by Code Commissioner, 1991.

46-14-204. Prosecution's right to examination. (1) When the defense discloses the report of the examination to the prosecution or files a notice of the intention to rely on a defense of mental disease or defect, the prosecution is entitled to have the defendant examined by a qualified psychiatrist or licensed clinical psychologist.

(2) The report of the examination must be disclosed to the defense within 10 days of its receipt by the prosecution.

History: En. Sec. 153, Ch. 800, L. 1991.

46-14-205. Access to defendant for examination. If either the defendant or the prosecution wishes the defendant to be examined by a qualified psychiatrist or licensed clinical psychologist selected by the one proposing the

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examination in order to determine the defendant's fitness to proceed or whether the defendant had, at the time the offense was committed, a particular state of mind that is an essential element of the offense, the examiner shall be permitted to have reasonable access to the defendant for the purpose of the examination.

History: En. 95-507 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 90, Ch. 120, L. 1974; amd. Sec. 4, Ch. 184, L. 1977; R.C.M. 1947, 95-507(2); amd. Sec. 5, Ch. 713, L. 1979; amd. Sec. 2, Ch. 127, L. 1987; amd. Sec. 154, Ch. 800, L. 1991; Sec. 46-14-212, MCA 1989; redes. 46-14-205 by Code Commissioner, 1991.

46-14-206. Report of examination. (1) A report of the examination must include the following:

(a) a description of the nature of the examination;

(b) a diagnosis of the mental condition of the defendant, including an opinion as to whether the defendant is seriously mentally ill, as defined in 53-21-102, or is seriously developmentally disabled, as defined in 53-20-102;

(c) if the defendant suffers from a mental disease or defect, an opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense;

(d) when directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind that is an element of the offense charged; and

(e) when directed by the court, an opinion as to the capacity of the defendant, because of a mental disease or defect, to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirement of the law.

(2) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report must state that fact and must include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

History: En. 95-505 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 88, Ch. 120, L. 1974; R.C.M. 1947, 95-505(3) thru (5); amd. Sec. 4, Ch. 713, L. 1979; amd. Sec. 155, Ch. 800, L. 1991; Sec. 46-14-203, MCA 1989; redes. 46-14-206 by Code Commissioner, 1991; amd. Sec. 1, Ch. 397, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 397 in (1) substituted "must" for "may"; and at end of (1)(b) inserted "or is seriously developmentally disabled, as defined in 53-20-102". Amendment effective April 19, 1993.

46-14-207 through 46-14-210 reserved.

46-14-211. Repealed. Sec. 15, Ch. 713, L. 1979.

History: En. 95-507 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 90, Ch. 120, L. 1974; amd. Sec. 4, Ch. 184, L. 1977; R.C.M. 1947, 95-507(1).

46-14-212. Renumbered 46-14-205 by Code Commissioner, 1991.

46-14-213. Psychiatric or psychological testimony upon trial. (1) Upon trial, any psychiatrist or licensed clinical psychologist who reported under 46-14-202 or 46-14-206 may be called as a witness by the prosecutor or by the defense. Both the prosecution and the defense may summon any other qualified psychiatrist or licensed clinical psychologist to testify, but no one who has not examined the defendant is competent to testify to an expert opinion with respect to the mental condition of the defendant, as distinguished

6-4

from the validity of the procedure followed by or the general scientific propositions stated by another witness.

(2) When a psychiatrist or licensed clinical psychologist who has examined the defendant testifies concerning the defendant's mental condition, the psychiatrist or licensed clinical psychologist may make a statement as to the nature of the examination and the medical or psychological diagnosis of the mental condition of the defendant. The expert may make any explanation reasonably serving to clarify the expert's examination and diagnosis, and the expert may be cross-examined as to any matter bearing on the expert's competency or credibility or the validity of the expert's examination or medical or psychological diagnosis. A psychiatrist or licensed clinical psychologist may not offer an opinion to the jury on the ultimate issue of whether the defendant did or did not have a particular state of mind that is an element of the offense charged.

History: En. 95-507 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 90, Ch. 120, L. 1974; amd. Sec. 4, Ch. 184, L. 1977; R.C.M. 1947, 95-507(3), (4); amd. Sec. 6, Ch. 713, L. 1979; amd. Sec. 3, Ch. 361, L. 1983; amd. Sec. 3, Ch. 127, L. 1987; amd. Sec. 156, Ch. 800, L. 1991.

46-14-214. Form of verdict and judgment. When the defendant is found not guilty of the charged offense or offenses or any lesser included offense for the reason that due to a mental disease or defect the defendant did not have a particular state of mind that is an essential element of the offense charged, the verdict and the judgment must state that reason.

History: En. 95-503 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-503; amd. Sec. 2, Ch. 713, L. 1979; amd. Sec. 1, Ch. 593, L. 1981; amd. Sec. 157, Ch. 800, L. 1991; Sec. 46-14-201, MCA 1989; redes. 46-14-214 by Code Commissioner, 1991.

Cross-References

Notice of certain defenses, 46-15-323.

46-14-215 and 46-14-216 reserved.

46-14-217. Admissibility of statements made during examination or treatment. A statement made for the purposes of psychiatric or psychological examination or treatment provided for in this section by a person subjected to examination or treatment is not admissible in evidence against the person at trial on any issue other than that of the person's mental condition. It is admissible on the issue of the person's mental condition, whether or not it would otherwise be considered a privileged communication, only when and after the defendant presents evidence that due to a mental disease or defect the defendant did not have a particular state of mind that is an element of the offense charged.

History: En. 95-509 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 5, Ch. 184, L. 1977; R.C.M. 1947, 95-509; amd. Sec. 13, Ch. 713, L. 1979; amd. Sec. 158, Ch. 800, L. 1991; Sec. 46-14-401, MCA 1989; redes. 46-14-217 by Code Commissioner, 1991.

Cross-References

Doctor-patient privilege, 26-1-805.

Psychologist-client privilege, 26-1-807.

46-14-218 through 46-14-220 reserved.

46-14-221. Determination of fitness to proceed — effect of finding of unfitness — expenses. (1) The issue of the defendant's fitness to proceed may be raised by the court, the defendant or the defendant's counsel, or by the prosecutor. When the issue is raised, it must be determined by the court. If neither the prosecutor nor counsel for the defendant contests the finding of

the report filed under 46-14-206, the court may make the determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon the hearing, the parties have the right to subpoena and cross-examine the psychiatrists or licensed clinical psychologists who joined in the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant must be suspended, except as provided in subsection (4), and the court shall commit the defendant to the custody of the director of the department of corrections and human services to be placed in an appropriate institution of the department of corrections and human services for so long as the unfitness endures. The committing court shall, within 90 days of commitment, review the defendant's fitness to proceed. If the court finds that the defendant is still unfit to proceed and that it does not appear that the defendant will become fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed, except as provided in subsection (4), and the prosecutor shall petition the court in the manner provided in chapter 20 or 21 of Title 53, whichever is appropriate, to determine the disposition of the defendant pursuant to those provisions.

(3) If the court determines that the defendant lacks fitness to proceed because the defendant is developmentally disabled as provided in 53-20-102(4), the proceeding against the defendant must be dismissed and the prosecutor shall petition the court in the manner provided in chapter 20 of Title 53.

(4) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution that is susceptible to fair determination prior to trial and without the personal participation of the defendant.

(5) The expenses of sending the defendant to the custody of the director of the department of corrections and human services to be placed in an appropriate institution of the department of corrections and human services, of keeping the defendant there, and of bringing the defendant back are chargeable to the state and payable according to procedures established under 3-5-902(1).

History: En. 95-506 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 513, L. 1973; amd. Sec. 89, Ch. 120, L. 1974; amd. Sec. 6, Ch. 568, L. 1977; R.C.M. 1947, 95-506(part); amd. Sec. 7, Ch. 713, L. 1979; amd. Sec. 2, Ch. 616, L. 1981; amd. Sec. 1, Ch. 352, L. 1983; amd. Sec. 14, Ch. 680, L. 1985; amd. Sec. 4, Ch. 127, L. 1987; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 159, Ch. 800, L. 1991.

46-14-222. Proceedings if fitness regained. When the court, on its own motion or upon the application of the director of the department of corrections and human services, the prosecution, or the defendant or the defendant's legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding must be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from serious mental illness, order the

defendant committed to an appropriate institution of the department of corrections and human services.

History: En. 95-506 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 513, L. 1973; amd. Sec. 89, Ch. 120, L. 1974; amd. Sec. 6, Ch. 568, L. 1977; R.C.M. 1947, 95-506(part); amd. Sec. 8, Ch. 713, L. 1979; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 160, Ch. 800, L. 1991.

Part 3
Disposition of Defendant

46-14-301. Commitment upon finding of not guilty by reason of lack of mental state — hearing to determine release or discharge. (1) When a defendant is found not guilty for the reason that due to a mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged, the court shall order a predisposition investigation in accordance with 46-18-112 and 46-18-113, which must include an investigation of the present mental condition of the defendant. If the trial was by jury, the court shall hold a hearing to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. In either case, the testimony and evidence presented at the trial must be considered by the court in making its determination.

(2) The court shall evaluate the nature of the offense with which the defendant was charged. If the offense:

(a) involved a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage, the court may find that the defendant suffers from a mental disease or defect that renders the defendant a danger to the defendant or others. If the court finds that the defendant presents a danger to the defendant or others, the defendant may be committed to the custody of the director of the department of corrections and human services to be placed in an appropriate mental health facility for custody, care, and treatment. However, if the court finds that the defendant is seriously developmentally disabled, as defined in 53-20-102, the prosecutor shall petition the court in the manner provided in Title 53, chapter 20.

(b) charged did not involve a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage, the court shall release the defendant. The prosecutor may petition the court in the manner provided in Title 53, chapter 20 or 21.

(3) A person committed to the custody of the director of the department of corrections and human services must have a hearing within 180 days of confinement to determine the person's present mental condition and whether the person must be discharged or released or whether the commitment may be extended because the person continues to suffer from a mental disease or defect that renders the person a danger to the person or others. The hearing must be conducted by the court that ordered the commitment unless that court transfers jurisdiction to the district court in the district in which the person has been placed. The court shall cause notice of the hearing to be served upon the person, the person's counsel, the prosecutor, and the court that originally ordered the commitment. The hearing is a civil proceeding, and the burden is

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upon the state to prove by clear and convincing evidence that the person may not be safely released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of:

(a) serious bodily injury or death to the person or others;

(b) an imminent threat of physical injury to the person or others; or

(c) substantial property damage.

(4) According to the determination of the court upon the hearing, the person must be discharged or released on conditions the court determines to be necessary or must be committed to the custody of the director of the department of corrections and human services to be placed in an appropriate mental health facility for custody, care, and treatment.

(5) A professional person shall review the status of the person each year. At the time of the annual review, the director of the department of corrections and human services or the person or the representative of the person may petition for discharge or release of the person. Upon request for a hearing, a hearing must be held pursuant to the provisions of subsection (3).

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974; R.C.M. 1947, 95-508(1); amd. Sec. 9, Ch. 713, L. 1979; amd. Sec. 2, Ch. 593, L. 1981; amd. Sec. 4, Ch. 361, L. 1983; amd. Sec. 161, Ch. 800, L. 1991; amd. Sec. 2, Ch. 397, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 397 substituted (2) relating to types of offenses court shall evaluate for former (2) that read: "(2) The court, upon finding that the defendant may not be discharged or released without danger to others, shall order the defendant committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care, and treatment"; in (3), near beginning of first sentence, substituted "director of the department of corrections and human services" for "superintendent", before "be discharged" substituted "must" for "may", and after "released" substituted "or whether the commitment may be extended because the person continues to suffer from a mental disease or defect that renders the person a danger to the person or others" for "without danger to others", in second sentence substituted "district court in the district in which the person has been placed" for "third judicial district", at end of third sentence inserted "and the court that originally ordered the commitment", and in fourth sentence substituted "state" for "defendant", after "prove by" substituted "clear and convincing evidence that the person may not" for "a preponderance of the evidence that the defendant may", and after "released" inserted remainder of (3) outlining substantial risks; in (4) substituted "person" for "defendant", after "custody of the" substituted "director of the department of corrections and human services" for "superintendent of the Montana state hospital", and after "appropriate" substituted "mental health facility" for "institution"; inserted (5) relating to required annual review and petition for discharge; and made minor changes in style. Amendment effective April 19, 1993.

46-14-302. Discharge or release upon motion of director. (1) If the director of the department of corrections and human services believes that a person committed to the director's custody under 46-14-301 may be discharged or released on condition without danger to the person or others because the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, a substantial risk of an imminent threat of physical injury to the person or others, or a substantial risk of substantial property damage, the director shall make application for the discharge or release of the person in a report to the district court by which the person was committed unless that court transfers jurisdiction to the court in the district in which the

person has been placed and shall send a copy of the application and report to the prosecutor of the county from which the person was committed.

(2) Either the director of the department of corrections and human services or the person may also make application to the court for discharge or release as part of the person's annual treatment review.

(3) The court shall then appoint at least one person who is either a qualified psychiatrist or licensed clinical psychologist to examine the person and to report as to the person's mental condition within 60 days or a longer period that the court determines to be necessary for the purpose. To facilitate the examinations and the proceedings on the examinations, the court may have the person confined in any mental health facility located near the place where the court sits that may be designated by the director of the department of corrections and human services as suitable for the temporary detention of persons suffering from mental disease or defect.

(4) The committed person or the person's attorney may secure a professional person of the committed person's choice to examine the committed person and to testify at the hearing. If the person wishing to secure the testimony of a professional person is unable to do so because of financial reasons, the court shall appoint an additional professional person to perform the examination. Whenever possible, the court shall allow the committed person or the person's attorney a reasonable choice of an available professional person qualified to perform the requested examination. The professional person must be compensated by the department of corrections and human services.

(5) If the court is satisfied by the report filed under subsection (1) and the testimony of the reporting psychiatrist or licensed clinical psychologist that the committed person may be discharged or released on condition because the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, a substantial risk of an imminent threat of physical injury to the person or others, or a substantial risk of substantial property damage, the court shall order the person's discharge.

(6) (a) If the court is not satisfied, it shall promptly order a hearing to determine whether the person may safely be discharged or released on the grounds that the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of:

(i) serious bodily injury or death to the person or others;

(ii) an imminent threat of physical injury to the person or others; or

(iii) substantial property damage.

(b) A hearing is considered a civil proceeding, and the burden is upon the state to prove by clear and convincing evidence that the person may not be safely discharged or released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of:

(i) serious bodily injury or death to the person or others;

(ii) an imminent threat of physical injury to the person or others; or

(iii) substantial property damage.

(c) Accord
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(c) According to the determination of the court upon the hearing, the committed person must then be discharged or released on conditions that the court determines to be necessary or must be recommitted to the custody of the director of the department of corrections and human services, subject to discharge or release only in accordance with the procedures provided in this section and 46-14-303.

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974; R.C.M. 1947, 95-508(2), (3); amd. Sec. 15, Ch. 116, L. 1979; amd. Sec. 5, Ch. 361, L. 1983; amd. Sec. 5, Ch. 127, L. 1987; amd. Sec. 162, Ch. 800, L. 1991; amd. Sec. 3, Ch. 397, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 397 in (1), (3), and (6)(c) substituted "director of the department of corrections and human services" for "superintendent of the Montana state hospital"; in (1), near beginning before "custody", substituted "director's" for "superintendent's", near middle, after "others", inserted language relating to lack of substantial risks, before "shall" substituted "director" for "superintendent", before "court" inserted "district", after "committed" inserted "unless that court transfers jurisdiction to the court in the district in which the person has been placed", and at end substituted "person" for "defendant"; inserted (2) relating to application for discharge or release in annual treatment review; in first sentence of (3), after "least", reduced appointees from "two persons" to "one person" and in second sentence substituted "mental health facility" for "institution" and at end substituted "persons suffering from mental disease or defect" for "irresponsible persons"; inserted (4) relating to testimony of professional person at committed person's hearing; in (5), after "condition", substituted language relating to lack of substantial risks for "without danger to the person or others" and after "discharge" deleted "or release on conditions that the court determines to be necessary"; in (6)(a), after "released", inserted language outlining lack of substantial risks; in (6)(b), after "upon the", substituted "state to prove by clear and convincing evidence that the person may not be" for "committed person to prove by a preponderance of the evidence that the person may" and after "released" inserted remainder of subsection relating to substantial risks; and made minor changes in style. Amendment effective April 19, 1993.

46-14-303. Application for discharge or release by committed person. A committed person may make application for discharge or release to the district court by which the person was committed unless that court transfers jurisdiction to the court in the district in which the person has been placed, and the procedure to be followed upon the application is the same as that prescribed in 46-14-302 in the case of an application by the director of the department of corrections and human services. However, an application by a committed person need not be considered until the person has been confined for a period of not less than 6 months from the date of the order of commitment, and if the determination of the court is adverse to the application, the person may not be permitted to file a further application until 1 year has elapsed from the date of any preceding hearing on an application for the person's release or discharge.

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974; R.C.M. 1947, 95-508(5); amd. Sec. 6, Ch. 361, L. 1983; amd. Sec. 163, Ch. 800, L. 1991; amd. Sec. 4, Ch. 397, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 397 in first sentence, near beginning before "court", inserted "district", after "committed" inserted "unless that court transfers jurisdiction to the court in the district in which the person has been placed", and at end substituted "director of the department of corrections and human services" for "superintendent of the Montana state hospital". Amendment effective April 19, 1993.

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46-14-304. Revocation of conditional release. (1) The court may order revocation of a person's conditional release if the court determines after hearing evidence that:

(a) the conditions of release have not been fulfilled; and

(b) based on the violations of the conditions and the person's past mental health history, there is a substantial likelihood that the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of:

(i) serious bodily injury or death to the person or others;

(ii) an imminent threat of physical injury to the person or others; or

(iii) substantial property damage.

(2) The court may retain jurisdiction to revoke a conditional release for no longer than 5 years.

(3) If the court finds that the conditional release should be revoked, the court shall immediately order the person to be recommitted to the custody of the director of the department of corrections and human services, subject to discharge or release only in accordance with the procedures provided in 46-14-302 and 46-14-303.

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974; R.C.M. 1947, 95-508(4); amd. Sec. 16, Ch. 116, L. 1979; amd. Sec. 7, Ch. 361, L. 1983; amd. Sec. 164, Ch. 800, L. 1991; amd. Sec. 5, Ch. 397, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 397 at beginning of (1) substituted "The court may order revocation of a person's conditional release" for "If within 5 years after the conditional release of a committed person"; substituted (1)(b) relating to existence of substantial likelihood of mental disease or defect that causes substantial risk for "that for the safety of the person or for the safety of others the person's conditional release should be revoked"; at beginning of (3) inserted "If the court finds that the conditional release should be revoked" and in middle substituted "director of the department of corrections and human services" for "superintendent of the Montana state hospital"; and made minor changes in style. Amendment effective April 19, 1993.

46-14-305 through 46-14-310 reserved.

46-14-311. Consideration of mental disease or defect in sentencing. Whenever a defendant is convicted on a verdict or a plea of guilty and claims that at the time of the commission of the offense of which convicted the defendant was suffering from a mental disease or defect that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law, the sentencing court shall consider any relevant evidence presented at the trial and shall require additional evidence as it considers necessary for the determination of the issue, including examination of the defendant and a report of the examination as provided in 46-14-202 and 46-14-206.

History: En. Sec. 10, Ch. 713, L. 1979; amd. Sec. 165, Ch. 800, L. 1991.

Cross-References

Admissibility of statements made during examination or treatment, 46-14-217.

46-14-312. Sentence to be imposed. (1) If the court finds that the defendant at the time of the commission of the offense of which the defendant was convicted did not suffer from a mental disease or defect as described in

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46-14-311, the court shall sentence the defendant as provided in Title 46, chapter 18.

(2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect as described in 46-14-311, any mandatory minimum sentence prescribed by law for the offense need not apply and the court shall sentence the defendant to be committed to the custody of the director of the department of corrections and human services to be placed in an appropriate institution for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

(3) Either the director or a defendant whose sentence has been imposed under subsection (2) may petition the sentencing court for review of the sentence if the professional person certifies that:

(a) the defendant no longer suffers from a mental disease or defect;

(b) the defendant's mental disease or defect no longer renders the defendant unable to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law;

(c) the defendant suffers from a mental disease or defect but is not a danger to the defendant or others; or

(d) the defendant suffers from a mental disease or defect that makes the defendant a danger to the defendant or others, but:

(i) there is no treatment available for the mental disease or defect;

(ii) the defendant refuses to cooperate with treatment; or

(iii) the defendant will no longer benefit from active inpatient treatment for the mental disease or defect.

(4) The sentencing court may make any order not inconsistent with its original sentencing authority except that the length of confinement or supervision must be equal to that of the original sentence. The professional person shall review the defendant's status each year.

History: En. Sec. 11, Ch. 713, L. 1979; amd. Sec. 1, Ch. 267, L. 1987; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 166, Ch. 800, L. 1991; amd. Sec. 28, Ch. 262, L. 1993; amd. Sec. 6, Ch. 397, L. 1993.

Compiler's Comments

1993 Amendments: Chapter 262 made minor changes in style.

Chapter 397 inserted (3)(c) that read: "(c) the defendant suffers from a mental disease or defect but is not a danger to the defendant or others"; inserted (3)(d)(iii) that read: "(iii) the defendant will no longer benefit from active inpatient treatment for the mental disease or defect"; and made minor changes in style. Amendment effective April 19, 1993.

46-14-313. Discharge of defendant from supervision. At the expiration of the period of commitment or period of treatment specified by the court under 46-14-312, the defendant must be discharged from custody and further supervision, subject only to the law regarding the civil commitment of persons suffering from serious mental illness.

History: En. Sec. 12, Ch. 713, L. 1979; amd. Sec. 167, Ch. 800, L. 1991.

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Compiler's notes. A former section, which comprised Cr. & P. 1864, § 11; R.S., R.C., & C.L., § 6344; C.S., § 8095; I.C.A., § 17-206, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-206, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Sentences.

In an appeal from convictions of grand theft under § 18-2403(4) and acting as an accessory to grand theft pursuant to § 18-2403(4), the trial court's imposition of a four-year indeterminate sentence for the first count, under § 18-2408, and a concurrent two-year indeterminate sentence for the second count, pursuant to this section, was not unduly harsh where, although the defendant was only 18 years old, he had a record consisting of minor traffic violations and a possession of marijuana charge, and where the presentence report showed that the defendant was involved with marijuana and cocaine, that the defendant had sought to obtain $500 from the rightful owners of stolen snowmobile for information leading to its return, had offered to sell a stolen snowmobile to a neighbor, and had engaged in a number of other criminal activities. State v. Mason, 107 Idaho 706, 692 P.2d 350 (1984).

18-207. Mental condition not a defense — Provision for treatment during incarceration — Reception of evidence. — (a) Mental condition shall not be a defense to any charge of criminal conduct.

(b) If by the provisions of section 19-2523, Idaho Code, the court finds that one convicted of crime suffers from any mental condition requiring treatment, such person shall be committed to the board of correction or such city or county official as provided by law for placement in an appropriate facility for treatment, having regard for such conditions of security as the case may require. In the event a sentence of incarceration has been imposed, the defendant shall receive treatment in a facility which provides for incarceration or less restrictive confinement. In the event that a course of treatment thus commenced shall be concluded prior to the expiration of the sentence imposed, the offender shall remain liable for the remainder of such sentence, but shall have credit for time incarcerated for treatment.

(c) Nothing herein is intended to prevent the admission of expert evidence on the issues of mens rea or any state of mind which is an element of the offense, subject to the rules of evidence. [I.C., § 18-207, as added by 1982, ch. 368, § 2, p. 919.]

Idaho Statute

Compiler's notes. Former § 18-207 (I.C., § 18-207, as added by 1972, ch. 336, § 1, p. 844) was repealed by S.L. 1982, ch. 368, § 1, effective July 1, 1982.

Section 1 of S.L. 1982, ch. 368 contained repeals; section 3 is compiled as § 18-211.

Cross ref. Consideration of mental illness in sentencing, § 19-2523.

Examination of defendant for evidence of mental condition, § 19-2522.

Cited in: State v. Gratiot, 104 Idaho 782, 663 P.2d 1084 (1983); State v. Dryden, 105 Idaho 848, 673 P.2d 809 (Ct. App. 1983); Barrows v. State, 106 Idaho 901, 684 P.2d 303 (1984).

ANALYSIS

Burden of proving intent.
Instructions.
Mental condition as evidentiary question.
Sentence.

Burden of Proving Intent.

This section does not relieve the state of the burden of proving every fact necessary to constitute the crime charged beyond a reasonable doubt; it does not operate as a presumption that no defendant can possess such lack of mental capacity as to be unable to formulate criminal intent. State v. Beam, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, — U.S. —, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

Instructions.

Where jury instructions clearly set out the specific intent required for the crime of robbery, and the jury was instructed that they could find that at the time the alleged crime

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was committed the defendant was suffering from a mental condition which prevented him from forming the specific intent, the court's instructions fairly and accurately presented the issue of intent and stated the applicable law correctly. State v. Potter, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

Mental Condition as Evidentiary Question.

Sections 18-114 and 18-115 and this section are not in conflict, since §§ 18-114 and 18-115 do not mandate the existence of a defense based upon insanity, but rather, this section reduces the question of mental condition from the status of a formal defense to that of an evidentiary question. Subsection (c) of this section continues to recognize the basic common law premise that only responsible defendants may be convicted. State v. Beam, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied. — U.S. —, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

Sentence.

Under this section, a judge can select either a probation program or a sentence of incarceration for a mentally ill convicted defendant; therefore, where the defendant, who, was mentally ill, pled guilty to a charge of lewd conduct with a minor under the age of 16 years, custody in the Department of Health and Welfare was not an option and the judge did not err in sentencing the defendant to the custody of the board of correction. State v. Desjarlais, 110 Idaho 100, 714 P.2d 69 (Ct. App. 1986).

Decisions Under Prior Law

Analysis

Acquittal Denied.

Where the examining psychiatrist's report stated that defendant could appreciate the wrongfulness of his conduct but that it was very difficult to judge whether defendant could conform his conduct to the requirements of the law at the time of the murder, the report was insufficient for a finding of insanity and therefore the court's denial of defendant's motion for acquittal was proper. State v. Powers, 96 Idaho 833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 881, 47 L. Ed. 2d 99 (1976).

Appeal as Proper Method of Challenge.

The district court did not err when it dismissed the declaratory judgment action brought by criminal defendants, who were attacking their automatic commitment to mental institutions following their acquittal of criminal charges by reason of mental disease or defect, since the proper method of contesting the judicial decisions was by appeal. Carter v. State, Dep't of Health & Welfare, 103 Idaho 701, 652 P.2d 649 (1982).

Authority of Department.

Once a commitment to the department of health and welfare is made by the court, the department has the power to determine the method and type of treatment and the location of the treatment, and the department can transfer the patient from one treatment facility to another without judicial authorization where the transfer is consistent with the mental health needs of the patient, but the department cannot release the patient without a hearing before the committing court. Flores v. Lodge, 101 Idaho 533, 617 P.2d 837 (1980).

Automatic Commitment to Institution.

Under former statute requiring automatic commitment of defendant acquitted on ground of mental disease or defect, an accused who asserted the defense of mental disease or defect, and was acquitted on that basis, could be automatically committed to a mental institution without further hearing and such automatic commitment did not violate the acquittee's rights to due process or equal protection because his dangerous mental condition was established by his own admission. The committed acquittee thereafter bore the burden of establishing his right to release by showing, pursuant to authorized procedures, that he was no longer dangerously insane. Penny v. State, Dep't of Health & Welfare, 103 Idaho 689, 652 P.2d 193 (1982).

Since the differences between the release procedures under §§ 66-327, 66-337 and 66-343 regarding persons involuntarily committed under § 66-329, and the procedures under former statute requiring automatic commitment of defendants acquitted on ground of mental disease or defect, were minor, and since the state is reasonably entitled to take greater precaution in releasing persons judicially determined to have already endangered the public safety than may be appropriate for persons committed under

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§ 66-329, defendants committed under the automatic commitment statute were not denied equal protection of the law. Penny v. State, Dep't of Health & Welfare, 103 Idaho 689, 652 P.2d 193 (1982).

An accused who successfully asserted the defense of mental disease or defect and was automatically committed to mental institution was not denied his right to a hearing and judicial determination on the question of his mental condition in that those rights were accorded him at the time his defense of mental disease or defect was tendered and accepted. The fact that two separate statutes governed the recognition of those rights, i.e., former statute requiring automatic commitment of defendant acquitted on ground of mental disease or defect and § 66-329 governing involuntary civil commitments did not deny equal protection, but rather simply reflected differing factual settings under which those rights were equally recognized. Penny v. State, Dep't of Health & Welfare, 103 Idaho 689, 652 P.2d 193 (1982).

It was within the province of the legislature to establish reasonable time limits for release of defendants under former statute requiring automatic commitment of defendant acquitted on ground of mental disease or defect in order to ensure that a patient could be released without endangering himself or others. Penny v. State, Dep't of Health & Welfare, 103 Idaho 689, 652 P.2d 193 (1982).

Availability of Habeas Corpus Writ.

Where fundamental constitutional errors occurred which would render the commitment proceedings and the order of commitment oid, then custody in mental institutions could still properly be challenged in an application for a writ of habeas corpus, even though no appeal was filed. Carter v. State, Dep't of Health & Welfare, 103 Idaho 701, 652 P.2d 649 (1982).

Challenge to Confinement.

The appropriate method of challenging the confinement of a person who claimed that he was not receiving care and treatment as required by application to the committing court and not by petition for writ of habeas corpus. Flores v. Lodge, 101 Idaho 533, 617 P.2d 837 (1980).

Equal Protection.

A commitment pursuant to former law that provided for commitment of acquitted defendant did not violate an acquittee's right to equal protection of the laws in failing to provide a hearing as to the acquittee's present mental illness or dangerousness at the initial state of commitment, or at the expiration of the acquittee's hypothetical criminal sentence. Stoneberg v. State, 106 Idaho 519, 681 P.2d 994 (1984).

It did not violate equal protection principles to hold a person acquitted on grounds of mental disease or defect in confinement for a period longer than one may be criminally incarcerated for the commission of the same offense. Stoneberg v. State, 106 Idaho 519, 681 P.2d 994 (1984).

Substantial Capacity.

This section provides that mental illness is an affirmative defense which justifies acquittal; the accused must lack substantial capacity, not total capacity. State v. Scroggie, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986).

Where the trial court misinterpreted this section to require that the accused lack total capacity, the jury was precluded from considering the affirmative defense of mental illness, and the defendant was prejudiced by the misinterpretation of this section and the subsequent withdrawal of the proposed jury instruction; therefore, the conviction was reversed. State v. Scroggie, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986).

Time Allowed for Examination.

Where a defendant was given only two days to prepare an examination, the amount of time allowed was insufficient and the defendant's substantial rights were prejudiced by the court's denial of a motion for a continuance. State v. Cook, 98 Idaho 686, 571 P.2d 332 (1977).

Transfer of Inmates.

Where an inmate had been committed to a mental health facility after being acquitted of a first degree murder charge by reason of mental disease or defect, the department of health and welfare had authority to transfer the inmate from one mental health institution to another without prior approval of the district court that had committed him but did not have authority to discharge or conditionally release him without first obtaining approval from the court. State v. Nielson, 97 Idaho 330, 543 P.2d 1170 (1975).

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crime.

rning of the incident involving the kidnap-
ng and assault of a nine-year-old girl with
e intent of committing a lewd and lascivi-
s act. State v. Soto, 121 Idaho 53, 822 P.2d
2 (Ct. App. 1991).

tructions to Jury.

lthough the trial court gave an instruc-
essentially stating the content of this
ion, and defendant argued that the
thier instructions approved in State v.
111 Idaho 827, 727 P.2d 1255 (Ct. App.
), should have been given, the intoxica-
instruction given adequately stated the
State v. Enno, 119 Idaho 392, 807 P.2d
1991).

crimes.

he crime. State v. Stiffler, 114 Idaho
3 P.2d 308 (Ct. App. 1988), aff'd, 117
05, 788 P.2d 220 (1990).

or Menace.

eat" is a declaration of an intention
another by the commission of an
act; a "menace" is synonymous with
State v. Eastman, — Idaho —, 831
(1992).

defendant was arrested for DUI and
without privileges where she at-
o move a vehicle involved in an ac-
d in which she had been a passen-
the intersection, there was no evi-
upport an instruction on "threats or
an assertion of justification or evi-
ustification does not support a re-
struction of "threat or menace."
astman, — Idaho —, 831 P.2d 555

ed persons liable to pun-

hts, occurred in Idaho, under this
ss 19-301 and 19-302, the state
tion over the crime. State v.
daho 911, 828 P.2d 1316 (1992).
e withholding of the child from
parent in violation of a court
fferent than the withholding of
a family in violation of a court
ping or withholding occurs, for
risdiction, where the defendant

is required to return the child to the custodial parent. State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992).

Prosecutable Act.

Although the term "prosecutable act" contained in § 19-301 has not been defined by the legislature or by the Idaho Supreme Court, it would appear that, to be consistent with this section, "prosecutable act" means any essential element of the crime. State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992).

Result of Crime.

Given the language in this section and § 19-301 requiring that the crime must occur "in whole or in part" within the state, or that some "prosecutable act" must have been committed within the state, the language in § 19-302 must be interpreted to mean that the result of the crime must be an essential element of the offense before the result can be construed to have been "consummated" within Idaho. State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992).

Subject Matter Jurisdiction.

An Idaho court will have subject matter jurisdiction over a crime if any essential element of the crime, including the result, occurs within Idaho. State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992).

18-204. Principals defined.

Cited in: State v. Hoffman, 116 Idaho 480, 776 P.2d 1199 (Ct. App. 1989); State v. Weinmann, 122 Idaho 631, 836 P.2d 1052 (Ct. App. 1992).

Aid and Abet.

Aiding and abetting requires some proof that the accused either participated in or assisted, encouraged, solicited, or counseled the crime; mere knowledge of a crime and assent to or acquiescence in its commission does not give rise to accomplice liability and failure to disclose the occurrence of a crime to authorities is not sufficient to constitute aiding and abetting. State v. Randles, 117 Idaho 344, 787 P.2d 1152 (1990).

18-205. Accessories defined.

Cited in: State v. Randles, 117 Idaho 344, 787 P.2d 1152 (1990); State v. Barnes, 121 Idaho 634, 826 P.2d 1346 (Ct. App. 1992).

18-207. Mental condition not a defense — Provision for treatment during incarceration — Reception of evidence.

Cited in: State v. Searcy, 120 Idaho 882, 820 P.2d 1239 (Ct. App. 1991).

ANALYSIS

Burden of proving intent.
Constitutionality.
Expert evidence.
Lacking capacity.
No justiciable controversy in record.

Burden of Proving Intent.

Although eliminating affirmative defenses based upon the defendant's mental condition, this section does not relieve the state of its burden of proving beyond a reasonable doubt every fact necessary to constitute the crime charged; in every crime or public offense there still must exist either a union of act and intent, or criminal negligence. State v. McDougall, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988).

This section does not remove the element of criminal responsibility for the crime. The prosecution is still required to prove beyond a reasonable doubt that a defendant had the mental capacity to form the necessary intent. State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

Constitutionality.

This section which has eliminated mental condition as a defense but which does not prevent a defendant from presenting relevant evidence "on the issues of mens rea or any state of mind which is an element of the offense ..." did not deprive the defendant of his federal constitutional rights under the eighth and fourteenth amendments where the defendant did not establish either that he was denied an opportunity to present evidence of mental condition in an attempt to negate criminal intent or that he offered such evidence and had it ruled inadmissible by the trial court. Potter v. State, 114 Idaho 612, 759 P.2d 903 (Ct. App. 1988).

Due process as expressed in the Constitu-

tions of the United States and of Idaho does not mandate an insanity defense and this section does not deprive a defendant of his due process rights under the state or federal Constitution. State v. Searcy, 118 Idaho 632, 798 P.2d 914 (1990).

A statement by defense counsel asserting the impossibility of a psychiatrist offering an opinion as to defendant's insanity without a legal standard to work with, did not suffice to create a justiciable issue as to whether the abolition of the insanity defense deprived the defendant's due process rights; therefore, the trial court properly refused to render a declaratory judgment on the issue. State v. Rhoades, 119 Idaho 594, 809 P.2d 455 (1991).

Defendant sought a pre-trial ruling from the trial court as to the constitutionality of this section, but did not present any evidence or make any representation sufficient to create a justiciable controversy on the issue of the insanity defense; therefore, the record did not create a judiciable controversy sufficient to support a ruling on the issue of the repeal of the insanity defense. State v. Winn, 121 Idaho 850, 828 P.2d 879 (1992).

Expert Evidence.

This section merely disallows mental condition from providing a complete defense to the crime and may allow the conviction of persons who may be insane by some former insanity test or medical standard, but who nevertheless have the ability to form intent and to control their actions. The statute expressly allows admission of expert evidence on the issues of mens rea or any state of mind which is an element of the crime. State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

Lacking Capacity.

An individual must be found competent to stand trial. In addition, those individuals who are incapable of forming the necessary intent needed for the crime are protected by the mens rea requirements of this section and §§ 18-114 and 18-115. Finally, those "profoundly or severely retarded" individuals who do not fall under the first two protections and are convicted and who are "wholly lacking capacity to appreciate the wrongfulness of their actions" are protected by the sentencing provisions of § 19-2523. State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

No Justiciable Controversy in Record.

The Supreme Court upheld the trial court's finding that the record did not create a justiciable controversy to support a ruling on the issue of the repeal of the insanity defense where there was nothing before the court to indicate an insanity defense had been raised, as a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists. State v. Rhoades, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, — U.S. —, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where the record before the trial court contained nothing more than the statement of counsel that he desired to inquire into the viability of the insanity defense, and that although defendant had been examined by a psychiatrist, no opinion in any form as to defendant's mental state could be forthcoming unless the court provided an operative legal definition of insanity, counsel's unsworn statement and the testimony of a law enforcement officer did not provide a factual showing sufficient to create a justiciable issue before the court. State v. Rhoades, 121 Idaho 63, 822 P.2d 960 (1991).

18-210. Lack of capacity to understand proceedings — Delay of trial.

Sec. to sec. ref. This section is referred to in § 18-3302.

Cited in: State v. King, 120 Idaho 955, 821 P.2d 1010 (Ct. App. 1991).

18-211. Examination of defendant — Appointment of psychiatrists and licensed psychologists — Hospitalization — Report.

Cited in: State v. Beebe, 113 Idaho 977, 751 P.2d 673 (Ct. App. 1988); State v. King, 120 Idaho 955, 821 P.2d 1010 (Ct. App. 1991).

Ineffective Assistance of Counsel.

Where the record indicates that counsel was aware of the value of doctor's observation in his report under this section that defendant was having trouble communicating with his attorneys and counsel alerted the court to these problems and argued for further assistance, any assertion that counsel was ineffective in this regard is without merit, and failure to subpoena the doctor for the hearing was not prejudicial. State v. Soto, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991).

(b) His ignorance or mistake resulted from the actor's reasonable reliance upon:

(i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

(ii) A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.

(3) Although an actor's ignorance or mistake of fact or law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the fact or law were as he believed.

History: C. 1953, 76-2-304, enacted by L. 1973, ch. 196, § 76-2-304; 1974, ch. 32, § 5.

COLLATERAL REFERENCES

Utah Law Review. — Ignorance or Mistake of Law Revisited, 1980 Utah L. Rev. 473.

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 141, 142.

C.J.S. — 22 C.J.S. Criminal Law §§ 93 to 95.

Key Numbers. — Criminal law ⇐ 32, 33.

76-2-304.5. Mistake as to victim's age not a defense.

(1) It is not a defense to the crime of child kidnaping, a violation of Section 76-5-301.1; rape of a child, a violation of Section 76-5-402.1; object rape of a child, a violation of Section 76-5-402.3; sodomy upon a child, a violation of Section 76-5-403.1; or sexual abuse of a child, a violation of Section 76-5-404.1; or an attempt to commit any of those offenses, that the actor mistakenly believed the victim to be 14 years of age or older at the time of the alleged offense or was unaware of the victim's true age.

(2) It is not a defense to the crime of unlawful sexual intercourse, a violation of Section 76-5-401, or an attempt to commit that crime, that the actor mistakenly believed the victim to be 16 years of age or older at the time of the alleged offense or was unaware of the victim's true age.

History: C. 1953, 76-2-304.5, enacted by L. 1983, ch. 88, § 2.

76-2-305. Mental illness — Use as a defense — Influence of alcohol or other substance voluntarily consumed — Definition.

(1) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense.

(2) The defense defined in this section includes the defenses known as "insanity" and "diminished mental capacity."

(3) A person who is under the influence of voluntarily consumed or injected alcohol, controlled substances, or volatile substances at the time of the alleged

Original Utah Statute

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offense is not excused from criminal responsibility on the basis of mental illness.

(4) "Mental illness" means a mental disease or defect. A mental defect may be a congenital condition or one the result of injury or a residual effect of a physical or mental disease. Mental illness does not mean a personality or character disorder or abnormality manifested only by repeated criminal conduct.

History: C. 1953, 76-2-305, enacted by L. 1983, ch. 49, § 1; 1986, ch. 120, § 1.

Repeals and Reenactments. — Laws 1983, ch. 49, § 1 repealed former § 76-2-305 (L. 1973, ch. 196, § 76-2-305), relating to mental disease or defect, and enacted present § 76-2-305.

Amendment Notes. — The 1986 amendment, rewrote the second sentence of Subsection (1), added present Subsection (2) and redesignated former Subsections (2) and (3) as present Subsections (3) and (4), added the third sentence in present Subsection (4), and made stylistic changes in present Subsections (3) and (4).

Cross-References. — Inquiry into insanity of defendant, Rule 21.5, R.Crim.P.

Mental examination, § 77-14-4.

Notice of defense, § 77-14-3.

NOTES TO DECISIONS

Analysis

Arrest of judgment.
Determination of sanity of accused.
Diminished capacity defense.
Fact question.
Instructions.
Lay witness.
Mens rea.
Presumption and burden of proof.
Proof required.
Raising issue.
Relatives, insanity of.
Responsibility.
Cited.

Arrest of judgment.

Where an alienist specifically found defendant competent to proceed to sentencing, trial court did not err in refusing to arrest judgment despite the fact that defendant may have suffered from an undetermined "mental illness." State v. Cantu, 750 P.2d 591 (Utah 1988).

Determination of sanity of accused.

The sanity of a person charged with a crime could be determined at any stage of the proceeding in the manner provided by law, and defendant under judgment of death with execution of sentence suspended and with no day fixed for execution of sentence was "charged with a crime." State v. Green, 88 Utah 491, 55 P.2d 1324 (1936).

Diminished capacity defense.

This section's test of insanity has, in effect, displaced diminished mental capacity as a defense in general intent crimes to whatever extent such defense may have been applicable; however, defendant has the right to adduce evidence of diminished mental capacity to negate the existence of a specific intent. State v. Sessions, 645 P.2d 643 (Utah 1982).

Fact question.

Question of sanity or insanity of anyone accused of commission of crime is a question of fact primarily for jury determination. State v. Hadley, 65 Utah 109, 234 P. 940 (1925).

Instructions.

Instructions on insane delusions or hallucinations would not be given in absence of supporting evidence. State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

In murder prosecution, instructions charging jury that defendant should be acquitted if they had reasonable doubt as to defendant's sanity were proper. State v. Green, 86 Utah 192, 40 P.2d 961 (1935).

Where trial court gave insanity instruction similar to that approved in State v. Green, 78 Utah 580, 587, 6 P.2d 177, 184 (1931), based on a combination of the M'Naghten and "irresistible impulse" rules, but stated in the course of the instruction that insanity may be present where the defendant is "irresponsible or partly irresponsible," there was substantial compliance with the requirements of this section, and giving of instruction was not reversible error. State v. Dominguez, 564 P.2d 768 (Utah 1977).

Lay witness.

Court did not commit error in excluding lay witness testimony of defendant's insanity where defendant did not manifest any obvious symptoms of insanity from which the lay witness could reliably form a judgment. State v. Mellen, 583 P.2d 46 (Utah 1978).

Mens rea.

A defendant can be found mentally ill even

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though his mental illness does not entirely negate the mens rea of the crime charged. A defendant who suffers from a mental disease or defect and, therefore is mentally ill as defined by this section but is found to possess the state of mind necessary to commit the crime charged, despite his illness, should be found guilty and mentally ill. State v. DePlonty, 749 P.2d 621 (Utah 1987).

Presumption and burden of proof.

Anyone charged with an offense was presumed to be sane, and it was incumbent upon defendant to rebut that presumption before defense of insanity could be submitted to jury. State v. Hadley, 65 Utah 109, 234 P. 940 (1925).

When testimony had been introduced to overcome presumption of sanity, burden of proof shifted and it was incumbent upon state to prove beyond reasonable doubt that defendant was sane at time of commission of offense. State v. Hadley, 65 Utah 109, 234 P. 940 (1925).

Under former § 76-1-41, sanity was presumed, thus casting on defendant duty of going forward with evidence; when evidence tending to show that accused was insane was presented, the presumption of sanity disappeared and jury was no longer concerned with presumption, but had to determine fact of sanity or insanity solely from evidence. State v. Hadley, 65 Utah 109, 234 P. 940 (1925); State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

Proof required.

The defense of "mental disease or defect" statutorily requires the same quantum and quality of proof to successfully obtain an acquittal as is required when one tries to defend on the ground of "insanity." State v. Baer, 638 P.2d 517 (Utah 1981).

Reasonable doubt in minds of jury as to sanity of accused entitled him to acquittal. State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

Raising issue.

It was duty of judge, not jury, to determine sufficiency of evidence to raise issue of sanity of accused; judge should have submitted issue to jury if he thought there was some evidence tending to show accused's insanity at time of alleged offense. State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

Relatives, insanity of.

Insanity of collateral blood relatives of person being investigated for insanity was proper matter of inquiry. State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

Responsibility.

For cases discussing insanity as negating criminal responsibility under former law, see People v. Calton, 5 Utah 451, 16 P. 902 (1888), rev'd on another point, 130 U.S. 83, 9 S. Ct. 435, 32 L. Ed. 2d 870 (1889); State v. Mewhinney, 43 Utah 135, 134 P. 632, 1916D L.R.A. 590 1916C Ann. Cas. 537 (1913); State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

Cited in State v. Standiford, 769 P.2d 254 (Utah 1988); State v. Smith, 777 P.2d 464 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

Brigham Young Law Review. — Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees, 1983 B.Y.U. L. Rev. 499.

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 40, 46.

C.J.S. — 22 C.J.S. Criminal Law § 99 et seq.

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

Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 A.L.R.3d 714.

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

Comment note—Mental or emotional condition as diminishing responsibility for crime, 22 A.L.R.3d 1228.

Admissiblity on issue of sanity of expert opinion based partly on medical, psychological, or hospital reports, 55 A.L.R.3d 551.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

Probation revocation: insanity as defense, 56 A.L.R.4th 1178.

Pathological gambling as basis of defense of insanity in federal criminal case, 76 A.L.R. Fed. 749.

Key Numbers. — Criminal Law ⇐ 47.

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As amended, 1990

State v. Richardson, 201 Utah Adv. Rep. 40 (Ct. App. 1992).

76-2-305. Mental illness — Use as a defense — Influence of alcohol or other substance voluntarily consumed — Definition.

(1) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense.

(2) The defense defined in this section includes the defenses known as "insanity" and "diminished mental capacity."

(3) A person who is under the influence of voluntarily consumed or injected alcohol, controlled substances, or volatile substances at the time of the alleged offense is not excused from criminal responsibility on the basis of mental illness.

(4) "Mental illness" means a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of injury, or a residual effect of a physical or mental disease and includes, but is not limited to, mental retardation. Mental illness does not mean a personality or character disorder or abnormality manifested only by repeated criminal conduct.

(5) "Mental retardation" means a significant subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested during the developmental period as defined by the current Diagnostic and Statistical Manual of the American Psychiatric Association.

History: C. 1953, 76-2-305, enacted by L. 1983, ch. 49, § 1; 1986, ch. 120, § 1; 1990, ch. 306, § 3.

Amendment Notes. — The 1990 amendment, effective March 13, 1990, in Subsection (4) added the clause beginning "that" to the first sentence and the clause beginning "and includes" to the second sentence; and added Subsection (5).

NOTES TO DECISIONS

Cited in State v. Anderson, 789 P.2d 27 (Utah 1990).

76-2-306. Voluntary intoxication.

NOTES TO DECISIONS

ANALYSIS

Evidence.
—Sufficiency for instruction.
Second degree murder.

Evidence.

—Sufficiency for instruction.

There was no rational basis for a verdict acquitting the defendant of manslaughter and convicting him of negligent homicide, when the only issue relevant to the choice was defendant's awareness of the risk of death, and any absence of awareness could only have been due to voluntary intoxication, making unawareness immaterial under this section. State v. Day, 815 P.2d 1345 (Utah Ct. App. 1991).

Second degree murder.

In developing a defense strategy around defendant's voluntary intoxication on the night of the murder, defense counsel was statutorily limited to showing that the alcohol deprived defendant of the capacity to form the mental state necessary for second-degree murder. Un-

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[2] We hold that defendant's challenge to the final judgment cannot be reviewed on appeal in the absence of a transcript.

II

[3] Rule 56(b), M.R.Civ.P. permits a defendant to move for a summary judgment in his favor at any time with or without supporting affidavits. Rule 56(c), M.R. Civ.P. provides in pertinent part:

"... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...."

Summary judgments serve the purpose of judicial economy where there is no genuine issue of material fact. As this Court stated in *Cereck v. Albertson's Inc.* (1981), 195 Mont. 409, 411, 637 P.2d 509, 510-11:

"The purpose of the summary judgment procedure is to encourage judicial economy by eliminating unnecessary trials, and it is proper under Rule 56(c), M.R. Civ.P., only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law....

"It is well established that a party moving for summary judgment has the burden of showing a complete absence of any genuine issue as to all facts deemed material in light of the substantive principles that entitle that party to a judgment as a matter of law.... All reasonable inferences that may be drawn from the offered proof are to be drawn in favor of the party opposing the summary judgment." (citations omitted)

Here, the District Court concluded there were issues of material fact. A hearing was held on March 8, 1983, approximately 10 months prior to the motion for summary judgment. The court's minute entry from that date states:

"This was the time set for hearing on the defendant's motion to dismiss.... Present in Court were plaintiffs and their counsel, Lawrence Murphy, Dick Holzworth, acting pro se. Mr. Holzworth offered argument favoring dismissal of the case. Mr. Lawrence Murphy replied. The parties agreed the mineral interest in the property is owned by both plaintiffs Lutzenhiser and Russell, *the only issue left to be decided is the question of damages plaintiffs claim defendant inflicted on property....*" *(emphasis added)*

The District Court there concluded that the issue that remained for determination was the amount of property damage caused by the defendant. In addition, prior to entry of the order denying summary judgment, the defendant submitted a proposed pre-trial order in which he identified three specific issues of fact for trial. At that point, the voluminous court file, with its numerous pre-trial motions and papers on extraneous matters, did identify specific issues of fact for determination.

We hold that the defendant has failed to show an absence of genuine issues of material fact and that he was entitled to judgment as a matter of law. The District Court's denial of the motion for summary judgment is affirmed.

SHEEHY, SHEA, MORRISON and GUL BRANDSON, JJ., concur.

STATE of Montana, Plaintiff and Respondent,

v.

Jerry T. KORELL, Defendant and Appellant.

No. 83-410.

Supreme Court of Montana.

Submitted Oct. 2, 1984.

Decided Nov. 16, 1984.

Defendant was convicted in the Fourth Judicial District Court, Ravalli County,

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Robert M. Holter, J., of attempted deliberate homicide and aggravated assault. Defendant appealed. The Supreme Court, Haswell, C.J., held that: (1) Montana's abolition of insanity defense neither deprives defendant of his Fourteenth Amendment right to due process nor violates Eighth Amendment proscription against cruel and unusual punishment; (2) failure of county attorney to give court and defendant notice of new rebuttal witness constituted harmless error; (3) defendant was not entitled to instruction that "material element of every crime is a voluntary act"; but (4) trial court's refusal to independently evaluate defendant's mental condition compelled vacation of sentence and remand for resentencing.

Remanded for resentencing.

Morrison, J., filed opinion concurring in part and dissenting in part.

Sheehy, J., filed dissenting opinion in which Shea, J., joined.

Shea, J., will file dissenting opinion.

1. Criminal Law ⇐568

When defendant raises issue of mental disease or defect, it is sufficient that state prove beyond a reasonable doubt that requisite mental state, e.g., purposely or knowingly, that is element of offense charged. MCA 46-14-102, 46-14-103, 46-14-201(2), 46-14-221.

2. Constitutional Law ⇐252.5

Due process clause of the Fourteenth Amendment was intended in part to protect certain fundamental rights long recognized under the common law. U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⇐257
Criminal Law ⇐46

Insanity defense is not a fundamental right under due process clause of the Fourteenth Amendment; however, one who lacks requisite criminal state of mind may not be convicted or punished. U.S.C.A. Const.Amend. 14; MCA 46-14-102, 46-14-103, 46-14-201(2), 46-14-221.

4. Criminal Law ⇐13(3)

Amendments to Criminal Code which abolish the insanity defense do not unconstitutionally shift state's burden of proof of necessary elements of the offense; state retains its traditional burden of proving all elements beyond a reasonable doubt. U.S. C.A. Const.Amend. 14; MCA 46-14-102, 46-14-103, 46-14-201(2), 46-14-221.

5. Constitutional Law ⇐257
Criminal Law ⇐13(3)

Amendments to Criminal Code which abolish the insanity defense do not compromise due process rights of insane individuals who suffer from delusions but who are capable of forming requisite intent to commit a crime in light of heavy burden prosecutor who seeks conviction of such defendant must face and mitigating factors which must be considered by sentencing judge. MCA 46-14-102, 46-14-103, 46-14-201(2), 46-14-221, 46-14-311, 46-14-312(1); U.S. C.A. Const.Amend. 14.

6. Constitutional Law ⇐257
Criminal Law ⇐13(3)

Amendments to Criminal Code which abolish the insanity defense do not impair due process rights of defendants who lack ability to conform their conduct to the law in light of provisions which require consideration by sentencing judge of defendant's ability to conform his conduct to law and requirement that any criminal offense include a voluntary act and companion mental state. MCA 45-2-101(31), 45-2-202, 46-14-102, 46-14-103, 46-14-201(2), 46-14-221; U.S.C.A. Const.Amend. 14.

7. Criminal Law ⇐1213.2(1)

Montana's abolition of affirmative defense of insanity does not violate Eighth Amendment prohibition of cruel and unusual punishment in light of requirement that sentencing court consider convicted defendant's mental condition at time offense was committed. MCA 46-14-102, 46-14-103, 46-14-201(2), 46-14-221, 46-14-311, 46-14-312(2); U.S.C.A. Const.Amend. 8.

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8. **Constitutional Law** ⇐257
Criminal Law ⇐13(3), 1213.2(1)

Montana's abolition of insanity defense neither deprives defendant of his Fourteenth Amendment right to due process nor violates Eighth Amendment proscription against cruel and unusual punishment. U.S.C.A. Const.Amends. 8, 14.

9. **Criminal Law** ⇐286

There is no independent constitutional right to plead insanity as defense to criminal charges.

10. **Criminal Law** ⇐1166(11)

Failure of county attorney to give court and defendant notice of new rebuttal witness constituted harmless error where defense counsel was given opportunity to prepare for cross-examination but refused offer of continuance. MCA 46-15-301(3).

11. **Criminal Law** ⇐772(5)

Defendant was not entitled to instruction that "material element of every crime is a voluntary act" in support of his theory that he did not act voluntarily due to his mental condition, as voluntary acts instruction was not intended to address psychological impairment. MCA 45-2-101(31), 45-2-202.

12. **Criminal Law** ⇐1181.5(8)

Sentencing court's refusal to independently evaluate defendant's mental condition compelled vacation of defendant's sentence and remand for resentencing. MCA 46-14-311, 46-14-312.

13. **Criminal Law** ⇐625

Fact that jury has found existence of requisite mental state does not conclusively establish defendant's sanity or fitness for penal punishment; that determination must be independently made by sentencing judge and record must reflect deliberative process. MCA 46-14-311, 46-14-312.

14. **Costs** ⇐308

Award of $12,000 in attorney fees to defendant's court-appointed attorney was not abuse of discretion in attempted deliberate homicide and aggravated assault prosecution in which defendant raised defense of lack of requisite criminal mental state.

Robinson, Doyle & Bell; John C. Doyle argued, Hamilton, for defendant and appellant.

Mike Greely, Atty. Gen., Helena, Kimberly A. Kradolfer argued, Asst. Atty. Gen., Robert B. Brown, County Atty., Hamilton, Larry Johnson argued, Deputy County Atty., Hamilton, for plaintiff and respondent.

HASWELL, Chief Justice.

Jerry Korell appeals the judgment of the Ravalli County District Court finding him guilty of attempted deliberate homicide and aggravated assault. Korell was sentenced to concurrent sentences of thirty-five and fifteen years at the Montana State Prison. Korell's defense at trial was that he lacked the requisite criminal mental state by reason of his insanity. On appeal his primary contention is that the Montana statutory scheme deprived him of a constitutional right to raise insanity as an independent defense.

Jerry Korell is a Viet Nam veteran who had several disturbing experiences during his tour of duty. The exact nature of the trauma was never fully documented. Friends and family agree that he was a different person when he returned from the service. Between Korell's honorable discharge in 1970 and the present events, he was twice admitted to VA hospitals for psychological problems and treated with anti-psychotic drugs. In 1976 he was jailed briefly in Boise, Idaho, for harassing and threatening the late Senator Frank Church.

The basic nature of Korell's problems was that he would periodically slip into paranoid phases during which he had trouble relating to male authority figures. His mental health varied dramatically. In the poorer times his family entertained thoughts about having him civilly committed. His VA hospitalizations were voluntary and neither of the stays were of such

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length that he was fully evaluated or treated.

In 1980 Korell entered a community college program for echocardiology in Spokane, Washington. Echocardiology is the skill associated with recording and interpreting sonograms of the heart for diagnostic purposes. In March 1982 he was sent to Missoula to serve a clinical externship at St. Patrick's Hospital. Korell's supervisor at the hospital was Greg Lockwood, the eventual victim of this crime.

Korell's relationship with Lockwood deteriorated for a variety of work-related reasons. Foremost was Korell's belief that he was worked excessively by Lockwood. At this time Korell was subjected to what expert testimony labeled psychological stressors: a divorce by his wife, financial problems and the pressures of graduation requirements.

In April 1982 Korell wrote a letter to the hospital administrator complaining about his supervisor, Lockwood. Korell was transferred to an externship in Spokane, and Lockwood was placed on probation. Both men retained very bitter feelings about the incident. Lockwood stated to friends he would see to it that Korell was never hired anywhere in echocardiology. Korell may have learned of Lockwood's statements.

Korell's actions in the next two months indicate a great deal of confusion. He set fire to a laundromat because he lost nine quarters in a machine and was tired of being ripped off. He set fire to a former home of his wife because she had bad feelings about it.

Released on bail from these incidents, he returned to Missoula in June 1982. Psychiatric testimony introduced at trial indicates that Korell felt he had to kill Lockwood before Lockwood killed him. He removed a handgun from a friend's home, had another acquaintance purchase ammunition, and on the evening of June 25, 1982, drove to the Lockwood home in the Eagle Watch area of the Bitterroot Valley. Shirley Lockwood, Greg's wife, saw the unfamiliar vehicle approach the house. Greg Lockwood was lying on the living room floor at the time watching television. Korell entered the house through a side door and began firing. Although wounded, Greg Lockwood managed to engage the defendant in a struggle. A shot was fired in the direction of Lockwood's wife. Korell grabbed a kitchen knife and both men were further injured before Lockwood was able to subdue Korell.

Korell was charged with attempted deliberate homicide and aggravated assault. The defendant gave notice of his intent to rely on a mental disease or defect to prove that he did not have the particular state of mind which is an essential element of the offense charged. Prior to trial he sought a writ of supervisory control declaring that he had a right to rely on the defense that he was suffering from a mental disease or defect at the time he committed the acts charged. The writ was denied by this Court on December 20, 1982, and the case proceeded to trial.

Several psychologists and psychiatrists testified on Korell's mental condition. The defense sought to establish by its expert witnesses and numerous character witnesses that Korell was a disturbed man who was psychotic at the time the crimes were committed. It was argued that his actions when he entered the Lockwood home were not voluntary acts. The State produced its own expert witnesses who testified on Korell's mental condition. Four doctors testified in all, two for the prosecution and two for the defense. Three of the four stated Korell had the capacity to act knowingly or purposely, the requisite mental state for the offenses, when he entered the Lockwood home.

Without giving prior notice, the State produced Cedric Hames as a rebuttal witness who testified that he purchased ammunition for the defendant several days before the shooting. A motion for mistrial was made by the defense. The court denied the motion but offered the defense a continuance. The offer was refused by defendant's counsel.

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In keeping with Montana's current law on mental disease or defect, the jury was instructed that they could consider mental disease or defect only insofar as it negated the defendant's requisite state of mind. The jury returned guilty verdicts for the attempted deliberate homicide and aggravated assault.

On appeal the defendant presents the following issues:

1. Is there a constitutional right to raise insanity as an independent defense to criminal charges?

2. Was the State's rebuttal testimony of Cedric Hames properly admitted?

3. Was the jury properly instructed on the issue of voluntariness?

4. Did the District Court fail to consider defendant's mental condition at sentencing?

5. Did the District Court act within its discretion in awarding fees to defendant's court-appointed attorney?

I. CONSTITUTIONAL CHALLENGE

A. *Background*

In 1979 the Forty-Sixth Session of the Montana Legislature enacted House Bill 877. This Bill abolished use of the traditional insanity defense in Montana and substituted alternative procedures for considering a criminal defendant's mental condition. Evidence of mental disease or defect is now considered at three phases of a criminal proceeding.

Before trial, evidence may be presented to show that the defendant is not fit to proceed to trial. Section 46-14-221, MCA. Anyone who is unable to understand the proceedings against him or assist in his defense may not be prosecuted. Section 46-14-103, MCA.

During trial, evidence of mental disease or defect is admissible when relevant to prove that, at the time of the offense charged, the defendant did not have the state of mind that is an element of the crime charged, e.g., that the defendant did not act purposely or knowingly. Section 46-14-102, MCA. The State retains the burden of proving each element of the offense beyond a reasonable doubt. Defendant may, of course, present evidence to contradict the State's proof that he committed the offense and that he had the requisite state of mind at that time.

Whenever the jury finds that the State has failed to prove beyond a reasonable doubt that the defendant had the requisite state of mind at the time he committed the offense, it is instructed to return a special verdict of not guilty "for the reason that due to a mental disease or defect he could not have a particular state of mind that is an essential element of the offense charged...." Section 46-14-201(2), MCA.

Finally at the dispositional stage following the trial and conviction, the sentencing judge must consider any relevant evidence presented at the trial, plus any additional evidence presented at the sentencing hearing, to determine whether the defendant was able to appreciate the criminality of his acts or to conform his conduct to the law at the time he committed the offense for which he was convicted. Section 46-14-311, MCA.

The sentencing judge's consideration of the evidence is not the same as that of the jury. The jury determines whether the defendant committed the offense with the requisite state of mind, e.g., whether he acted purposely or knowingly. The sentencing judge determines whether, at the time the defendant committed the offense, he was able to appreciate its criminality or conform his conduct to the law.

If the court concludes the defendant was not suffering from a mental disease or defect that rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, normal criminal sentencing procedures are invoked. Section 46-14-312(1), MCA.

Whenever the sentencing court finds the defendant was suffering from mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the require-

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ments of law, mandatory minimum sentences are waived. The defendant is committed to the custody of the director of institutions and placed in an appropriate institution for custody, care and treatment not to exceed the maximum possible sentence. Section 46-14-312(2), MCA. As a practical matter, this means the defendant may be placed in the Warm Springs State Hospital under the alternative sentencing procedures. The institutionalized defendant may later petition the District Court for release from the hospital upon a showing that the individual has been cured of the mental disease or defect. If the petition is granted, the court must transfer the defendant to the state prison or place the defendant under alternative confinement or supervision. The length of this confinement or supervision must equal the original sentence. Section 46-14-312(3), MCA.

In summary, while Montana has abolished the traditional use of insanity as a defense, alternative procedures have been enacted to deal with insane individuals who commit criminal acts.

Much has been written concerning criminal responsibility and insanity. Professor Norval Morris commented that "[r]ivers of ink, mountains of printer's lead, forests of paper have been expended on this issue...." Morris, *Psychiatry and the Dangerous Criminal*, 41 S.Cal.L.R. 514, 516 (1968). Yet there is a paucity of judicial opinions construing the constitutional parameters of the traditional insanity defense or the various reform proposals. This case is the first direct constitutional challenge to Montana's abolition of the affirmative insanity defense and adoption of alternative procedures in its place.

Four opinions of this Court have addressed the post-1979 law on mental disease or defect: *State v. Mercer* (Mont. 1981), 625 P.2d 44, 38 St.Rep. 312; *State v. Doney* (Mont.1981), 636 P.2d 1377, 38 St. Rep. 1707; *State v. Zampich* (Mont.1983), 667 P.2d 955, 40 St.Rep. 1235; and *State v. Watson* (Mont.1984), 686 P.2d 879, 41 St. Rep. 1452.

In *Mercer*, supra, we affirmed the aggravated assault conviction of a man found guilty of attacking a school teacher. The defendant, Bryan Mercer, suffered episodic mental illness. While broad questions concerning the mental disease defense were raised, we did not reach these issues. Mercer argued that sentencing to prison a man suffering from severe mental illness violates the constitutional ban against cruel and unusual punishment. We found no authority holding that imprisonment rather than medical treatment of a person who claims to be insane, but has not been adjudicated insane, constitutes cruel and unusual punishment. We held that the jury verdict convicting the defendant was supported by substantial evidence and that the defendant had failed to show any statutory or constitutional violation by the sentencing judge.

Following *Mercer*, this Court heard the appeal of another aggravated assault conviction in *Doney*, supra. The defendant Doney stabbed the night clerk of a Havre hotel and relied on expert testimony during trial to show he was incapable of forming the requisite mental state of purposely or knowingly. On appeal he argued that the State was required to overcome his "preponderance of evidence" by proving his sanity beyond a reasonable doubt, as well as the fact that he had acted purposely and knowingly. We rejected that notion:

> "... It is sufficient that the State prove beyond a reasonable doubt the existence of the mental state that is an essential element of each of the offenses charged. Implicit in the jury's conviction is its conclusion that the defendant possessed the requisite mental state, and therefore had the capacity to form that mental state. The State has met the requirements of Montana law." 636 P.2d at 1382.

Our holding in *Doney* clarified prior language in *Mercer*, where the majority had noted:

> "... Therefore, the jury knew that the State had the burden of proving beyond a reasonable doubt that the defendant

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was sane and capable of acting purposely or knowingly at the time of the crime." 625 P.2d at 49.

[1] While some jurisdictions, most notably the federal courts, have given the prosecution the burden of proving the defendant's sanity beyond a reasonable doubt, such practice is not the rule in Montana. Prior to 1979, insanity was treated as an affirmative defense that had to be established by the accused by a preponderance of the evidence. *State v. Caryl* (1975), 168 Mont. 414, 425, 543 P.2d 389, 395. As the above discussion and our holding in *Doney* states, it is sufficient that the State prove beyond a reasonable doubt the requisite mental state, e.g., purposely or knowingly, that is an element of the offense charged.

The third decision of this Court to address the 1979 changes in the law on mental disease or defect was *Zampich*, supra. The defendant Zampich was charged with mitigated deliberate homicide for a tavern shooting in Carter, Montana. Zampich's psychologist testified that while the defendant may have been able to act purposely or knowingly, he may not have been acting voluntarily. We upheld the conviction on the ground that a jury instruction was given stating that a voluntary act is a material element of every offense and that the instructions read as a whole properly gave the jury notice of the defendant's theory of the case.

Finally in *Watson*, supra, the defendant argued that, because the primary symptoms of his mental disease were his repeated criminal or antisocial behavior and because the jury was instructed that mental disease does not include an abnormality manifested only by repeated criminal or other antisocial conduct, the jury was misled to presume that he had the requisite state of mind at the time he committed the offenses. See section 46-14-101, MCA.

Watson had entered two Missoula apartments, stabbed a sleeping woman thirty-five times and also stabbed a man who came to her rescue. Both victims survived the attacks. The defendant claimed a demon spirit possessed his body during the acts. The jury convicted Watson of attempted deliberate homicide, aggravated assault and burglary. In accordance with our prior decisions, this Court concluded that the jury was properly informed of the State's burden of establishing beyond a reasonable doubt that Watson acted purposely or knowingly. The conviction was affirmed.

The sentencing judge found that Watson was suffering from a serious mental disorder, but also found that Watson was capable of appreciating the criminality of his conduct or conforming his conduct to the law but chose not to do so. See section 46-14-311, MCA. The court designated Watson a dangerous and persistent felony offender and sentenced him to 300 years imprisonment. Watson contended that his punishment was cruel and unusual in light of the fact that he suffered from a mental disorder. Relying on our prior decisions in *Mercer* and *Doney*, we upheld Watson's sentence, which was within the statutory maximum.

Review of our case law reveals that the constitutionality of the legislature's abolition of the affirmative defense of insanity has not previously been decided. Korell's present challenge is based on the Fourteenth Amendment guarantee of due process of law and the Eighth Amendment prohibition against cruel and unusual punishment.

B. *Due Process Considerations*

1. Fundamental Rights

[2, 3] The due process clause of the Fourteenth Amendment was intended in part to protect certain fundamental rights long recognized under the common law. *Powell v. Alabama* (1932), 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158. Appellant contends that the insanity defense is so embedded in our legal history that it should be afforded status as a fundamental right. He argues that the defense was firmly established as a part of the common law long before our federal constitution was adopted and is es-

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sential to our present system of ordered liberty.

The United States Supreme Court has never held that there is a constitutional right to plead an insanity defense. Moreover, the Court has noted that the significance of the defense is properly left to the states:

"We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas* (1968), 392 U.S. 514, 535-536, 88 S.Ct. 2145, 2156, 20 L.Ed.2d 1254, 1269.

An examination of the common law in a search for fundamental rights can be misleading. When looking at concepts of insanity and criminal responsibility, one discovers a continuum of changing societal values and views. Commentators and courts have reached differing conclusions on the role of the insanity defense in the history of jurisprudence.

The English jurist Stephen observed:

"... in very ancient times proof of madness appears not to have entitled a man to be acquitted, at least in case of murder, but to a special verdict that he committed the offense when mad. This gave him a right to a pardon. The same course was taken when the defence was killing by misadventure or in self-defence." 2 Stephen, *A History of the Criminal Law of England* 151 (1883).

This early thirteenth century practice of pardoning the insane was acknowledged in our *Watson* decision and the historical discussion therein. Pardons were liberally granted and the practice represented a humane departure from earlier times of absolute liability for criminal acts.

Development of the *mens rea* concept preceded recognition of the insanity defense. The Latin phrase *mens rea* literally translates as "evil mind." It has also been interpreted as guilty mind, evil intent or criminal intent. Enlightened medieval jurists developed the *mens rea* doctrine: without criminal intent, there can be no moral blameworthiness, crime or punishment. In the words of Henrici Bracton (d.1268): "For a crime is not committed unless the will to harm be present." This principle has played a central role in all subsequent considerations of capacity, insanity, and moral and legal culpability.

For centuries evidence of mental illness was admitted to show the accused was incapable of forming criminal intent. Insanity did not come to be generally recognized as an affirmative defense and an independent ground for acquittal until the nineteenth century. Morris, *The Criminal Responsibility of the Mentally Ill,* 33 Syracuse L.R. 477, 500 (1982); American Medical Association, *The Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony,* Report of the Board of Trustees, at 27 (1983). The defense grew out of the earlier notions of *mens rea.*

We reject appellant's contention that from the earliest period of the common law, insanity has been recognized as a defense. What we recognize is that one who lacks the requisite criminal state of mind may not be convicted or punished.

Three older state court decisions have found state statutes abolishing the insanity defense to be unconstitutional. *State v. Lange* (1929), 168 La. 958, 123 So. 639; *Sinclair v. State* (1931), 161 Miss. 142, 132 So. 581; *State v. Strasburg* (1910), 60 Wash. 106, 110 P. 1020. These decisions are distinguishable in that they interpret statutes that precluded *any* trial testimony of mental condition, including that which would cast doubt on the defendant's state of mind at the time he committed the charged offense. The Montana statutes in

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question expressly allow evidence of mental disease or defect to be introduced to rebut proof of defendant's state of mind. Section 46-14-102, MCA.

The United States Supreme Court refused in 1952 to accept the argument that the Due Process Clause required the use of a particular insanity test or allocation of burden of proof. *Leland v. Oregon* (1952), 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302. The Oregon statute upheld in *Leland* required the defendant to prove insanity beyond a reasonable doubt. This allocation of proof was found constitutionally sound because the State retained the burden to prove the requisite state of mind and other essential criminal elements. The State's due process burden of proof was further emphasized in *In Re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. *Winship* established that the prosecution must prove beyond a reasonable doubt every element constituting the crime charged.

[4] The Montana statutory scheme is consistent with the dictates of *Leland* and *Winship*. The 1979 amendments to the criminal code do not unconstitutionally shift the State's burden of proof of the necessary elements of the offense. The State retains its traditional burden of proving all elements beyond a reasonable doubt.

2. The Delusional Defendant

[5] In addition to asserting that the insanity defense is a fundamental constitutional right, the appellant contends that insanity is a broader concept than *mens rea*. Korell argues that individuals may be clearly insane yet also be capable of forming the requisite intent to commit a crime. For example, an accused may form intent to harm under a completely delusional perception of reality or act without volitional control. It is defendant's position that the due process of these defendants is compromised by state law which permits conviction of delusional defendants and those who act without volitional control.

Addressing the delusional defendant first, we note that planning, deliberation and a studied intent are often found in cases where the defendant lacks the capacity to understand the wrongfulness of his acts. Fink & Larene, *In Defense of the Insanity Defense*, 62 Mich.B.J. 199 (1983). Illustrations include the assassin acting under instructions of God, the mother drowning her demonically-possessed child, and the man charging up Montana Avenue on a shooting spree believing he is Teddy Roosevelt on San Juan Hill. Defendant contends that these people could properly be found guilty by a jury under current Montana law.

As some commentators have noted, the 1979 amendments to the law on mental disease or defect may actually have lowered the hurdle mentally disturbed defendants must clear to be exculpated. In order to be acquitted, the defendant need only cast a reasonable doubt in the minds of the jurors that he had the requisite mental state. See, Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 Mont.L.R. 133, 141 (1984). As a practical matter, the prosecutor who seeks a conviction of a delusional and psychotic defendant will be faced with a heavy burden of proof.

Assuming the delusional defendant is found guilty by a jury, factors of mitigation must be considered by the sentencing judge in accordance with section 46-14-311, MCA. The fact that the proven criminal state of mind was formed by a deranged mind would certainly be considered. In addition, a defendant can be sentenced to imprisonment only after the sentencing judge specifically finds that the defendant was *not* suffering, at the time he committed the offense, from a mental disease that rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Section 46-14-312(1), MCA.

3. The Volitionally-Impaired Defendant

[6] The test of mental disease or defect that was afforded defendants prior to 1979 read as follows:

"A person is not responsible for criminal conduct if at the time of such conduct as

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a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Section 46-14-101, MCA (1978).

It is the second prong of this standard, the volitional aspect of mental disease or defect, that appellant claims has been eliminated. He argues that there are those who lack the ability to conform their conduct to the law and that elimination of the involuntariness defense is unconstitutional.

The volitional aspect of mental disease or defect has not been eliminated from our criminal law. Consideration of a defendant's ability to conform his conduct to the law has been moved from the jury to the sentencing judge. The United States Supreme Court found in *Leland*, 343 U.S. at 801, 72 S.Ct. at 1008, that the "irresistible impulse" test of insanity was not implicit in the concept of ordered liberty. Additionally, the minimum requirements of any criminal offense are still a voluntary act and companion mental state. Section 45-2-202, MCA, provides that "[a] material element of every offense is a voluntary act...."

This Court has not judicially recognized the automatism defense. Applications of the defense may exist where a defendant acts during convulsions, sleep, unconsciousness, hypnosis or seizures. See, *People v. Grant* (1978), 71 Ill.2d 551, 17 Ill.Dec. 814, 377 N.E.2d 4. Our criminal code's provisions requiring a voluntary act and defining involuntary conduct adequately provide for such defenses. See sections 45-2-202 and 45-2-101(31), MCA.

To the extent that the 1979 criminal code revisions allegedly eliminated the defense of insanity-induced volitional impairment, we find no abrogation of a constitutional right.

C. *Eighth Amendment Considerations*

[7] Appellant next contends that abolition of the affirmative defense of insanity violates the Eighth Amendment's prohibition of cruel and unusual punishment. In *Robinson v. California* (1962), 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758, the Supreme Court held that punishment for the status crime of drug addiction violated the Eighth Amendment prohibition. The Court declared that any law which created a criminal offense of being mentally ill would also constitute cruel and unusual punishment. The Court noted that had the California statute under which Robinson was convicted required proof of the actual use of narcotics, it would have been valid. In *Powell v. Texas*, 392 U.S. at 532, 88 S.Ct. at 2154, a statute imposing a fine for public intoxication was found to not violate the Eighth Amendment. There the Court reasoned that although alcoholism might be a disease, the statute was valid because it punished an act, not the status of being an alcoholic.

The Montana Criminal Code does not permit punishment of a mentally ill person who has not committed a criminal act. As such, the statutes avoid the constitutional infirmities discussed in *Robinson v. California*, supra, and *Powell v. Texas*, supra.

Prior to sentencing, the court is required to consider the convicted defendant's mental condition at the time the offense was committed. This review is mandatory whenever a claim of mental disease or defect is raised. The plain language of the statute reads: "... the sentencing court *shall* consider any relevant evidence...." Section 46-14-311, MCA (emphasis added). Whenever the sentencing court finds the defendant suffered from a mental disease or defect, as described in section 46-14-311, MCA, the defendant must be placed in an "... appropriate institution for custody, care and treatment...." Section 46-14-312(2), MCA.

These requirements place a heavy burden on the courts and the department of institutions. They serve to prevent imposition of cruel and unusual punishment upon the insane. Since the jury is properly preoccupied with proof of state of mind, it is imperative that the sentencing court discharge its responsibility to independently review the defendant's mental condition.

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It is further argued that subjecting the insane to the stigma of a criminal conviction violates fundamental principles of justice. We cannot agree. The legislature has made a conscious decision to hold individuals who act with a proven criminal state of mind accountable for their acts, regardless of motivation or mental condition. Arguably, this policy does not further criminal justice goals of deterrence and prevention in cases where an accused suffers from a mental disease that renders him incapable of appreciating the criminality of his conduct. However, the policy does further goals of protection of society and education. One State Supreme Court Justice who wrestled with this dilemma observed: "In a very real sense, the confinement of the insane is the punishment of the innocent; the release of the insane is the punishment of society." *State v. Stacy* (Tenn.1980), 601 S.W.2d 696, 704 (Henry, J., dissenting).

Our legislature has acted to assure that the attendant stigma of a criminal conviction is mitigated by the sentencing judge's personal consideration of the defendant's mental condition and provision for commitment to an appropriate institution for treatment, as an alternative to a sentence of imprisonment.

[8, 9] For the foregoing reasons we hold that Montana's abolition of the insanity defense neither deprives a defendant of his Fourteenth Amendment right to due process nor violates the Eighth Amendment proscription against cruel and unusual punishment. There is no independent constitutional right to plead insanity.

II. REBUTTAL TESTIMONY

[10] The evening before the final day of trial, the Ravalli County Attorney's office received word that Cedric Hames could testify he purchased ammunition for Korell a couple days before the shooting. Hames was told to report to the courthouse the next morning where a subpoena would await him.

Hames was the owner of a bar that the defendant frequented in the weeks preceding the shooting. The prosecution briefly interviewed Hames in the morning and decided to put him on the stand. Since Korell had twice requested Hames to buy ammunition for him in the days before the shooting, Hames' testimony would tend to rebut defendant's claim that he did not act purposely or knowingly.

Hames was put on the stand without any prior notice to the defendant or the court. Our discovery statutes specifically provide that the defendant and the court must be given such notice:

> "For the purpose of notice only and to prevent surprise, the prosecution shall furnish to the defendant and file with the clerk of the court no later than 5 days before trial or at such later time as the court may for good cause permit a list of witnesses the prosecution intends to call as rebuttal witnesses to the defenses of justifiable use of force, entrapment, compulsion, alibi, or the defense that the defendant did not have a particular state of mind that is an essential element of the offense charged." Section 46-15-301(3), MCA.

Hames' testimony was short and to the point. Defense counsel did not object to the direct examination of the witness. However, after counsel learned on cross-examination that the witness had contacted the prosecution the day before, defense moved for a mistrial.

Outside the presence of the jury, the court heard arguments of counsel and interviewed the witness. Convinced that there was no designed surprise by the prosecution, the court denied the motion for a mistrial. Defense counsel was offered a continuance to prepare cross-examination. Defense refused this offer and chose not to examine the witness further.

Failure of the county attorney to give the court and defendant notice of the new rebuttal witness constituted clear error.

This issue concerning the failure of the prosecution to give notice of a rebuttal witness arose in *State v. Madera* (Mont. 1983), 670 P.2d 552, 40 St.Rep. 1558. In

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Madera a witness not previously announced was used by the prosecution on the last day of trial to rebut an alibi witness. This Court announced that when unanticipated exigencies arise at trial the court may waive the time limitations for giving notice when good cause is shown. Additionally, this Court said that if surprise is claimed by the other party, the proper procedure is to ask for a continuance so that preparation may be made.

While *Madera* established that the time limitations of section 46-15-301(3), MCA, may be waived, it did not suggest that notice may also be waived. There was no reason the deputy county attorney could not have notified the court and defendant that Hames had come forward the morning he testified. Had such notice been given, the court could have ruled whether there was good cause to waive the time limitations.

The recognized error in this case does not rise to the level of reversible error. Defense counsel was given an opportunity to prepare for cross-examination. The continuance offer was refused. Counsel claims prejudicial surprise on appeal yet did not avail himself of the opportunity to alleviate such prejudice at trial.

While the prejudicial surprise of this particular testimony is found harmless error, future prosecutorial disregard of these discovery notice provisions will not be condoned.

III. VOLUNTARY INSTRUCTION

[11] The trial court refused an instruction offered by the defendant that: "A material element of every crime is a voluntary act." The court did include four instructions that specifically mentioned the requirement of voluntariness:

"[Instruction No. 17] A person commits the offense of attempt when with purpose to commit a specific offense he voluntarily does any act toward the commission of such offense."

"[Instruction No. 24] ... the State must prove that each element of the offense was done purposely or knowingly and voluntarily...."

"[Instruction No. 38] ... You may consider such evidence because the defendant asserts that due to mental disease or defect he could not have had a particular state of mind which is an element of the offense, i.e., that he did not purposely or knowingly and voluntarily commit the acts constituting the offense...."

"[Instruction No. 40] ... a person, to be guilty of any of the offenses charged, must have committed the act or acts voluntarily, while having, with regard to each element contained in the law defining the offenses, one of the mental states contained in said definition..."

The refused instruction is based on section 45-2-202, MCA, which states: "A material element of every offense is a voluntary act...." This code provision expresses the common law principle previously discussed that every crime must consist of an act and a criminal intent.

One of defendant's theories in this case was that he did not act voluntarily due to his mental condition. Although this Court permitted section 45-2-202, MCA, to be used for such a theory in *Zampich*, supra, the statute was not intended to address psychological impairment. The voluntary act requirement properly reflects physiological considerations; those who act by reflex, while sleepwalking, etc., should not be held criminally responsible. See, section 45-2-101(31), MCA; Bender, supra, at 144-145; W. LaFave & A. Scott, *Criminal Law* § 25, at 179-181 (1972).

Defendant's theory of his case was not prejudiced by the trial court's refusal to give the instruction. Arguably, the instruction would not have hurt the prosecution as it correctly states the law of Montana. However, we sense that defense counsel was offering the instruction for a context to which it was not designed. The four instructions set forth above properly instructed the jury on the requirement of a voluntary act.

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IV. SENTENCING

[12] Four doctors testified before the jury concerning Korell's mental condition. The State produced Dr. Herman Walters, Ph.D., a clinical psychologist, and Dr. Verne Cressey, M.D., a psychiatrist. The defendant called Dr. William Stratford, M.D., a forensic psychiatrist, and Dr. Michael Marks, Ph.D., a clinical psychologist. Additionally, a psychiatrist, Dr. Noel Howell, M.D., was retained by the defense and filed an evaluation with the court although he did not testify.

These expert witnesses were allowed to express their opinions concerning Korell's medical diagnosis, whether he suffered from mental disease or defect at the time of the shooting, his capacity to form the requisite intent and his ability to control his behavior. Additionally, Dr. Stratford was called to testify at the sentencing hearing on his recommendations for treatment of Korell. All the doctors filed written evaluations with the court.

Immediately after announcing sentence, the trial judge stated:

> "I'm going to address myself in regard to your mental condition. Let me say that the jury heard the evidence by all of the various doctors in regard to your mental condition. The jury reached their conclusion after some twenty-four to twenty-six hours, and in that conclusion they found that you were responsible and that you did have the mental state required by the statute. For me to indulge otherwise would amount to nothing but nullification of the jury's effort, and I will not do so."

This pronouncement flies in the face of the court's basic duty to independently evaluate the defendant's mental condition. The trial judge's refusal to act compels this Court to vacate the defendant's sentence and remand for resentencing.

As Part I of this opinion established, whenever mental disease or defect is put in issue, the trial judge must review the defendant's mental condition prior to sentencing. Deferring to a jury verdict indicates a misunderstanding of the distinct roles of the jury and court.

[13] The jury has a narrow duty under the statutes: to consider mental disease or defect insofar as it relates to criminal state of mind. The fact that a jury has found the existence of a requisite mental state does not conclusively establish the defendant's sanity or fitness for penal punishment. That determination must be independently made by the sentencing judge and the record must reflect the deliberative process.

If problems of cruel and unusual punishment of the insane are to be avoided, the sentencing judge must faithfully discharge the review duties of sections 46-14-311 and 46-14-312, MCA. The sentence is vacated.

V. ATTORNEY FEES

[14] As a final matter, defense counsel appeals the order affixing his attorney fees. The court determined that reasonable fees for Korell's defense were $12,000 and awarded the appointed attorney this amount. Counsel contends that the amount is unfair in light of the defense presented.

This Court has adopted guidelines to be followed when awarding a court-appointed attorney compensation. Those guidelines are set forth in *State v. Boyken* (1981), 196 Mont. 122, 637 P.2d 1193, and the District Court order at issue. That order reflects that the District Court properly considered the *Boyken* factors of time expended, nature of the defense, fees paid for similar services elsewhere, public funds available, the responsibility of the legal profession, and needs of the accused. Having so reached its decision, we will not disturb the trial court's award of fees.

We remand this cause to the District Court for resentencing consistent with this opinion.

WEBER, HARRISON and GULBRANDSON, JJ., concur.

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MORRISON, Justice, concurring in part and dissenting in part.

I concur with the result reached by majority on all issues except the admission of certain testimony. This dissent specifically relates to the admission of rebuttal testimony received from one Cedric Hames. The majority opinion finds that the failure to notice this witness and the subsequent admission of the witness's testimony, constituted error but was harmless. The basis of the majority's determination that reception of the evidence constituted harmless error was that defense counsel was given an opportunity, through being afforded a continuance, for cross-examination of the witness. Such opportunity did not cure the error.

The thrust of Hames' testimony was to counter defendant's evidence with respect to "state of mind." This was the pivotal issue in the case.

The unquestionable prejudice to defendant in not knowing of Hames' testimony, was that defendant was denied opportunity to counter the testimony with psychiatric testimony offered on behalf of defendant. To effectively answer the State's position that the defendant planned this act defendant must be allowed the opportunity to explain the meaning of the actions portrayed by Hames. Defendant's psychiatrist was denied this opportunity because the reality of the proof was unknown. Defendant was further denied the right to deal with this damaging evidence either in voir dire or at any other stage of the trial. I cannot conceive of a majority of this Court holding that cross-examination of an unnoticed witness satisfies the legal requirement that defendant be entitled to know the State's case and be given the opportunity to prepare a defense.

Sometimes I feel we may as well abolish the defendant's procedural safeguards for we routinely hold that the State's failure to comply constitutes harmless error. At least we would all be saved the expense of lengthy appeals.

SHEEHY, Justice, dissenting:

It is a matter of coincidence that I dictate this dissent on Sunday, November 11, 1984. This used to be called Armistice Day, and the television news is full of reports of a reunion of Viet Nam war veterans in Washington, D.C. Coincident with their reunion, is the dedication of a memorial statuary to Viet Nam war veterans, the seven-foot tall representation of three Viet Nam war servicemen who seem to be peering intently at an earlier Viet Nam war memorial on which is inscribed the names of more than 58,000 servicemen who lost their lives in that war.

It was a war in which nothing was won and much was lost. A part of that loss, not recognized or admitted by the authorities at first, was the damaging effect to the cognitive abilities of some that served in the war. Only recently has there been positive acceptance that there does exist in some ex-servicemen a post-Viet Nam war traumatic syndrome.

Jerry Korell, the evidence is clear, is a victim of that syndrome. Before his term of service, he was a mentally functional citizen. After his return from service, he is mentally dysfunctional. We can measure our maturity about how we meet such problems by the fact that Jerry Korell now will inevitably spend a great part of his life in jail for his actions arising out of that dysfunction.

Jerry Korell's dysfunction can be traced almost directly to the Viet Nam war. There are thousands of others whose mental aberrations have no such distinct origins. From genes, from force of environment, from physical trauma, or from countless other causes, their actions do not meet the norm. You know them well—the strange, the different, the weird ones.

Sometimes (not really often it should be said) these mentally aberrant persons commit a criminal act. If the criminal act is the product of mental aberration, and not of a straight-thinking cognitive direction, it would seem plausible that society should offer treatment, but if not treatment, at

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least not punishment. The State of Montana is not such a society.

I would hold that Montana's treatment of the insanity defense is unconstitutional for at least two reasons: One, it deprives the insane defendant of due process by depriving him of a trial by jury for each element of the crime for which he is charged; and two, it invades the insane defendant's right against self-incrimination.

In this dissent I use the terms "insanity" and "insane" in their universal sense. They include the broad spectrum of mental aberration from the maniacal to those deprived of their reasoning processes by such vague forces as prolonged melancholia, depression, paranoia and the like. I use the terms in the sense of those persons who meet the American Law Institute formulation of insanity for criminal purposes:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Model Penal Code, section 4.01(1), proposed official draft (1962).

Before 1979, it was clear in Montana that persons suffering from a mental disease or defect were not responsible for their criminal conduct. Former section 95-501, R.C.M. 1947, provided:

> "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct with the requirements of law."
>
> "(2) As used in this chapter, the term 'mental disease or defect' does not include an abnormality manifested only by repeated criminal or other antisocial conduct."

The provisions of former section 95-501, R.C.M. 1947, reflected the American Law Institute position with respect to the insanity defense. The language found in subsection (2) of section 95-501, R.C.M. 1947, was a caveat formed by the ALI to restrict the definition of mental disease or defect.

In 1979, the legislature acted to repeal and eliminate what was subdivision (1) of section 95-501, R.C.M. 1947. What remains are only the provisions of present section 46-14-101, MCA, which defines mental disease or defect in the same manner as subdivision (2) of former section 95-501, supra.

Thus, the 1979 legislature removed any statutory direction that a person is not responsible for criminal conduct if at the time of the conduct, as a result of mental disease or defect, he was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The 1979 legislature went further. While one may not use the defense of mental disease or defect unless within ten days of entering plea one files a written notice of a purpose to rely on such mental disease or defect to prove that one did not have a particular state of mind which is the essential element of the offense charged (section 46-14-201, MCA), once one has filed such a notice, the court thereupon appoints a psychiatrist or requests the superintendent of the Montana State Hospital to designate a qualified psychiatrist to examine and report upon the mental condition of the defendant. Section 46-14-202, MCA.

Under section 46-14-202(3), in the examination of the defendant any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect. Under section 46-14-212, the psychiatrist is to be permitted to have reasonable access to the defendant for the purpose of the examination. Chemical injection, if accepted by the medical profession, is one of the methods that may be used in such an examination. There can be no question that, regardless of the method of the examination, the insane defendant's right against self-incrimination is at once imperiled.

I would not, however, on the grounds of self-incrimination alone, hold the process

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unconstitutional. I recognize the necessity, in cases where insanity is pleaded as a defense, that the State have equal right to psychiatric testimony to the same extent that is enjoyed by the defendant. What is more serious constitutionally, however, is what our statutes provide with respect to the testimony at trial from the examining psychiatrist.

Section 46-14-213, MCA, provides that when the psychiatrist who has examined the defendant testifies, his testimony may include his *opinion* "as to the ability of the defendant *to have a particular state of mind* which is an element of the offense charged." The statute takes away from the psychiatrist, and from the jury, the previous test of whether the defendant lacked the capacity to appreciate the criminality of his conduct or his ability to conform his conduct to the requirements of the law. The statute instead places in the power of the psychiatrist, and takes from the jury, the determination of *whether the defendant had the particular state of mind* which is an element of the offense charged. Thus is the defendant deprived of his right of trial by jury as to every element of the crime charged against him. See, *In Re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

The elements of the crime of deliberate homicide in Montana are a voluntary act (section 45-2-202, MCA), coupled with either purpose or knowledge (section 45-5-102, MCA). Thus the jury must be instructed, even where the insanity is an issue, that if the defendant acted purposely, or with knowledge, he is guilty of the offense. The jury is then instructed that a person acts knowingly if, with respect to the conduct, he is aware of his conduct. Section 45-2-101(33), MCA.

The jury is also instructed that the defendant acts purposely if it is his conscious object to engage in that conduct or to cause that result. Section 45-2-101(58), MCA. No consideration is given by the jury as to whether the defendant lacks substantial capacity to appreciate the criminality of his conduct, or whether he is unable to conform his conduct to the requirements of the law. If the psychiatrist has testified that the defendant had the state of mind required as an element of the crime, that is, in the case of deliberate homicide, purpose or knowledge, the defendant is criminally guilty. The jury never gets to determine if the defendant acted by force of mental aberration.

In a case under present Montana law, therefore, when the defendant relies on insanity to explain the crime of deliberate homicide, the jury is led to the inevitable conclusion by *managed testimony* that he is indeed guilty of the crime.

Montana's statutory scheme seeks to ameliorate the managed conviction of the insane defendant by providing that at his *sentencing*, he having been convicted of a criminal act, the sentencing judge may take into consideration his insanity! At the sentencing, the judge, and not the jury, shall for the first time consider whether the defendant was suffering from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Section 46-14-311, -312, MCA.

For the reasons foregoing, I would hold the statutory scheme pertaining to insane defendants in Montana unconstitutional. I do not hold with the majority that there is no independent constitutional right to plead insanity. I consider that position the ultimate insanity. I would hold that he has an independent constitutional right to trial by jury of the fact of his ability to commit a crime by mental aberration.

For like reasons, I do not agree with the majority with respect to the rebuttal testimony offered by Cedric Hames. I would hold that reversible error occurred in that instance. Principally I would so hold because the State learned that Korell had twice requested Hames to buy ammunition for him in the days before the shooting from his examination by the psychiatrists. The State used his psychiatric examination to help convict him.

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I also emphatically disagree with the majority with respect to the necessity of the voluntary instruction.

Section 45–2–202, MCA, states that "a material element of every offense is a voluntary act ..." The majority opinion seems to limit this statutory provision by determining that the statute reflects only physiological considerations, stating that those who act by reflex, or while sleepwalking, should not be held criminally responsible. That is too narrow an interpretation of "voluntary." The word has its root in the Latin word for will, and any interpretation of it should include acts done through one's will, choice or consent. A jury should be specifically instructed that a criminal act requires one's will, choice or consent.

Unfortunately, our criminal code does not define a "voluntary act." It does define an "involuntary act" to include reflexes or convulsions, unconscious sleep movements, hypnosis and such. Section 45–2–101(31), MCA. The majority has changed the definition of an involuntary act to limit the scope of a voluntary act which, to me, is not the intent of the criminal code and is improperly restrictive.

I would reverse and remand for a new trial, and direct the District Court to instruct the jury on the ALI formulations respecting insanity as applied to criminal acts.

I suggest a retrial on the basis of the ALI formulations not because I consider those formulations the last word on the subject, but because we do have remaining in our statutes some recognition of the ALI formulations with respect to the insanity defense. Under present law the District Court must look to the ALI formulations to determine the extent of the sentence to be imposed, section 46–14–311, MCA. The real problem facing this Court is that the abolition by the legislature in 1979 of mental disease or defect as an exculpatory defense leaves a cavity in our criminal law that is the obligation of the legislature to fill. Unless we now recognize the ALI formulations on the basis that there is legislative recognition of their validity in the sentencing process, we have no legislative direction in the statutes for the insanity defense.

It is curious that Montana abolished the insanity defense in 1979, before the onset of the Hinckley trial. Hinckley's attack on President Reagan, and the subsequent acquittal of Hinckley in June 1982, prompted a rash of enactments and proposals for enactments with respect to the insanity defense. The Standing Committee on Association Standards for Criminal Justice of the American Bar Association at the time of the Hinckley verdict had been considering mental health law and criminal justice issues for close to a year and a half. The Hinckley verdict triggered the Committee's consideration of key issues in order to advise Congress, state legislatures and the public in the aftermath of the concern arising from the Hinckley verdict. At least part of the credit must be given to that Standing Committee for the fact that Congress has refused so far to abolish the insanity defense.

The Standing Committee on Association Standards has since promulgated its proposed criminal justice mental health standards for consideration by the Bar and by legislatures. It proposes that the insanity defense be considered as "the defense of mental nonresponsibility," and further proposes that such a condition be exculpatory to a criminal charge. The Committee examined enactments such as Montana's and in comment had this to say:

"This approach, which would permit evidence of mental condition on the requisite mental element of the crime but eliminate mental nonresponsibility as an independent, exculpatory doctrine, has been proposed in several bills in Congress, and adopted in Montana, Idaho and Utah. The ABA has rejected it out of hand. Such a jarring reversal of hundreds of years of moral and legal history would constitute an unfortunate and unwarranted overreaction to the Hinckley verdict.

"...

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"Yet the issue of criminal blameworthiness should require a deeper inquiry. Implicit in this concept is a certain *quality* of knowledge and intent, going beyond a minimal awareness and purposefulness. Otherwise, for example, a defendant who knowingly and intentionally kills his son under the psychotic delusion that he is the biblical Abraham and his son, the biblical Isaac, could be held criminally responsible. The Montana, Idaho and Utah enactments, on their face, would deny a defense to such a defendant." American Bar Association, Standing Committee on Association Standards for Criminal Justice, Report to the House of Delegates, August, 1984, Standard 7-6.1, Commentary P. 327.

Thus has Montana's abolition of the insanity defense in 1979 been held up for criticism and disrespect by national authorities and scholars. It behooves our legislature, which will be meeting in a few months, to reexamine its mental health laws as they pertain to criminal justice and to revamp the same. It could do nothing finer than to adopt the standard of exculpatory definition proposed by the Standing Committee on Association Standards of the American Bar Association which follows:

"Standard 7-6.1. The defense of mental nonresponsibility [insanity].

"(a) A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct.

"(b) When used as a legal term in this standard 'mental disease or defect' refers to:

"(i) impairments of mind, whether enduring or transitory; or, (ii) mental retardation either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense."

There are accompanying standards proposed by the Standing Committee which the legislature should also adopt, which would soften the aspects of self-incrimination which I have described above, and especially a proposed standard which would prevent the experts from invading the province of the jury. Particularly applicable, in my opinion, would be Standard 7-6.6:

"Standard 7-6.6. Limitation on opinion testimony concerning mental condition.

"Expert opinion testimony as to how the development, adaptation and functioning of the defendant's mental processes may have influenced defendant's conduct at the time of the offense charged should be admissible. Opinion testimony, whether expert or lay, as to whether or not the defendant was criminally responsible at the time of the offense charged should not be admissible."

It is clear that the Standing Committee, by proposing Standard 7-6.6, recognized the impropriety of handing to medical or other persons the ultimate question to be determined by the jury, whether the defendant is entitled to be exculpated because of his mental processes at the time of the crime charged. The Report of the Standing Committee points out that the issue is jurisprudential, and not medical, and for that reason we should provide an exception to section 704 of the Montana Rules of Evidence, which allows opinion testimony on the ultimate question in the ordinary case.

In the meantime, I would reverse the conviction of Jerry Korell, and return this cause for a trial on his insanity defense.

SHEA, Justice, dissenting:

I join in the dissent of Justice Sheehy and I also will be filing my own dissent setting forth in more detail my own reasons.

118 Idaho 632

STATE of Idaho, Plaintiff-Respondent,

v.

Barryngton Eugene SEARCY, Defendant-Appellant.

No. 17835.

Supreme Court of Idaho.

Sept. 5, 1990.

Defendant was convicted of first-degree murder and robbery after jury trial in the Seventh Judicial District Court, Fremont County, H. Reynold George, J., and sentenced to determinate life sentence on first-degree murder charge, indeterminate life sentence on robbery charge and enhancement of ten years for use of firearm. Defendant appealed. The Supreme Court, Bakes, C.J., held that: (1) due process as expressed in Federal and State Constitutions did not constitutionally mandate insanity defense, and thus, statute providing that mental condition shall not be defense to criminal charge did not deprive defendant of his due process rights; (2) trial court properly considered victim impact statement when imposing fixed life term for murder; (3) trial court could not correct invalid sentence without defendant being present; and (4) sentences, which were within maximum sentences for each crime, were not unreasonable or unduly severe.

Affirmed in part; vacated in part and remanded.

Johnson, J., filed opinion concurring in part and dissenting in part, in which McDevitt, J., concurred.

McDevitt, J., dissented and filed opinion in which Johnson, J., concurred in part.

1. Constitutional Law ⇐268.2(2)
Homicide ⇐8

Due process as expressed in Federal and State Constitutions did not unconstitutionally mandate insanity defense, and thus, statute, which stated that mental condition shall not be defense to any charge of criminal conduct but permitted admission of expert evidence as to defendant's mental condition on issues of mens rea or any state of mind which was element of offense pursuant to rules of evidence, did not unconstitutionally deny defendant due process under State or Federal Constitutions by preventing defendant from pleading insanity defense to charge of first-degree murder. U.S.C.A. Const.Amends. 5, 14; I.C. § 18-207; Const. Art. 1, § 13.

2. Homicide ⇐325

Defense, by presenting testimony from psychiatric expert concerning alleged facts which may have had some bearing on defendant's claim that he was not mentally responsible for killing, raised issue of whether statute eliminating mental condition as defense to criminal charge unconstitutionally denied defendant due process of law by preventing him from pleading insanity as defense before trial court and, thus, preserved issue for appeal. U.S.C.A. Const.Amends. 5, 14; I.C. § 18-207; Const. Art. 1, § 13.

3. Homicide ⇐358(1)

Sentencing court properly considered victim impact statement by victim's husband in sentencing defendant to fixed life sentence without possibility of parole for first-degree murder; cases requiring sentencing court to ignore victim impact statements were applicable only to death penalty cases. I.C. § 19-5306; Criminal Rule 32(b)(1).

4. Criminal Law ⇐987

Trial court could not correct original sentence, which was invalid because it provided for double enhancement penalty contrary to statute, without defendant being present. Criminal Rule 43(a); I.C. § 19-2520E.

5. Criminal Law ⇐1208.6(2)

Single ten-year enhancement based on use of deadly weapon was justified for defendant who was convicted of robbery as well as first-degree murder, regardless of whether enhancement of defendant's fixed life sentence without possibility of parole for first-degree murder was authorized by statute. I.C. §§ 19-2520, 19-2520E.

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6. Homicide ⇐354(2)
Robbery ⇐30

Sentences of fixed life term for first-degree murder and indeterminate life term for robbery enhanced by ten years for use of firearm in commission of robbery, which fell within maximum sentence range for each crime, were not unreasonable or unduly severe considering cold-blooded nature of murder, despite defendant's alleged addiction to cocaine and troubled childhood. I.C. § 19-2520.

William R. Forsberg, St. Anthony, for defendant-appellant.

Jim Jones, Atty. Gen., Lynn E. Thomas, Sol. Gen. (argued), Boise, for plaintiff-respondent.

BAKES, Chief Justice.

Barryngton Eugene Searcy appeals from convictions for first degree murder, robbery and an enhancement for the use of a firearm in the commission of a felony and from the following sentence:

1. First degree murder—determinate life sentence without possibility of parole;
2. Robbery—indeterminate life sentence to be served consecutively to the sentence pronounced for murder, with a minimum of ten years to be served;
3. Use of a firearm in the commission of murder and robbery—an enhancement of ten years;

Searcy raised several issues on appeal, including the argument that I.C. § 18-207 [1] unconstitutionally deprived him of his right to due process by forbidding him to plead an independent defense of insanity (mental nonresponsibility).

I

Barry Searcy was convicted of killing Teresa Rice while robbing Jack's Grocery Store in Ashton, Idaho, July 15, 1987. Rice, the mother of two children, owned and operated the store with her husband Michael. Searcy robbed the store in order to get money to buy cocaine. Searcy had staked out the store during its operating hours and hid on top of some coolers in the back room where he waited to either burglarize or rob as the situation dictated. From this hiding spot Searcy could see Rice enter the back room and count out money for storage in the store's safe. Rice then left the back room. As Searcy was leaving his hiding spot Rice returned to the back room and discovered Searcy. A confrontation ensued and Rice was shot in the stomach by Searcy, apparently during a struggle. Searcy testified that he then told Rice that if she opened the safe he would call an ambulance. She did so. Searcy then removed the money from the safe and placed it into his backpack. Searcy did not call an ambulance. Rather, he put his rifle to Rice's head and shot her, killing her instantly.

After leaving the store, Searcy testified that he hid the rifle and money under a rock at a target shooting location near Rexburg, Idaho. The next day Searcy took some of the money and bought a used car with it in order to drive to Salt Lake City, Utah, to purchase more cocaine. On September 13, 1987, some boys discovered the

1. I.C. § 18-207 reads as follows:

18-207. Mental condition not a defense—Provision for treatment during incarceration—Reception of evidence.—(a) Mental condition shall not be a defense to any charge of criminal conduct.

(b) If by the provisions of section 19-2523, Idaho Code, the court finds that one convicted of crime suffers from any mental condition requiring treatment, such person shall be committed to the board of correction or such city or county official as provided by law for placement in an appropriate facility for treatment, having regard for such conditions of security as the case may require. In the event a sentence of incarceration has been imposed, the defendant shall receive treatment in a facility which provides for incarceration or less restrictive confinement. In the event that a course of treatment thus commenced shall be concluded prior to the expiration of the sentence imposed, the offender shall remain liable for the remainder of such sentence, but shall have credit for time incarcerated for treatment.

(c) Nothing herein is intended to prevent the admission of expert evidence on the issues of mens rea or any state of mind which is an element of the offense, subject to the rules of evidence.

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gun, money and Searcy's gloves. The boys showed the items to their fathers who were target shooting nearby. Discovery of these items lead to the arrest of Searcy.

Searcy was 20 years old at the time he killed Rice. He apparently is chemically dependant on alcohol and cocaine. Searcy's parents were divorced when he was eight. Searcy suffers from a physical condition known as delayed growth syndrome. This condition stunted Searcy's growth, allegedly making him the target of harassment from children in grade school. By the time he reached 15 years of age Searcy had the physical development of a 9 year old. Searcy began hormone treatments, but his growth was limited to 5 feet, 6 inches. Allegedly, the hormone treatments had a bad side effect and Searcy became mean and abusive. This ill effect was worsened by Searcy's introduction and addiction to chemicals: alcohol, marijuana and cocaine.

Searcy increasingly got into trouble as his chemical dependency continued while repeated efforts to treat it were not successful. Searcy committed burglaries, armed robberies, and sold illegal drugs in order to support his addiction to cocaine. Searcy had ambitions of becoming a major drug dealer but he personally used most of the cocaine he purchased. After using up a significant portion of the cocaine he bought from the money he stole from Jack's Grocery, Searcy began to contemplate robbing a bigger store in order to get more money. Instead of committing another robbery, Searcy entered treatment once again. While in treatment, Searcy confessed to a counselor that he had killed Rice.

At trial a jury found Searcy guilty of murder in the first degree by finding both premeditation and by finding that Searcy killed while committing a robbery. Searcy was also found guilty of robbery and of using a firearm while committing a felony.

Over objection, the trial judge at sentencing admitted a victim impact statement from Rice's family. Michael Rice, the victim's husband, indicated in the statement that he favored imposition of the death penalty for Searcy and that he felt it should be swiftly carried out. Nevertheless, the trial judge did not impose the death penalty on Searcy. Instead, the trial judge entered the following sentences on the various counts:

1. First degree murder—determinate life sentence without possibility of parole;
2. Robbery—indeterminate life sentence to be served consecutively to the sentence pronounced for murder, with a minimum of ten years to be served;
3. Use of a firearm in the commission of murder and robbery—an enhancement of ten years;

Searcy appeals from the conviction and sentences raising the following issues.

II

[1, 2] First Searcy argues that I.C. § 18-207 unconstitutionally denies him due process of law because it prevented him from pleading insanity as a defense.[2] Neither the federal nor the state Constitutions contains any language setting forth any such right. Searcy argues, nevertheless, that the disallowance of the insanity defense deprived him of one of the "fundamental principles of liberty and justice which lie at the base of our civil and political institutions," *Herbert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926), and thus denied him due process of law. Searcy argues the insanity defense is so deeply rooted in our legal traditions as to be considered fundamental and thus embedded in due process.

2. The State argues that Searcy did not raise the issue before the trial court, and therefore it was waived. We observe, however, that the defense presented testimony from a psychiatric expert, Dr. Kenneth Ash, concerning alleged facts which may have some bearing on Searcy's claim that he was mentally nonresponsible for the killing of Rice. We conclude that Searcy arguably raised this issue before the trial court and thus it is preserved. However, we reject Searcy's claim. As discussed hereafter, there is no due process right under either the United States or Idaho Constitution to present such a defense. Rather, it is the prerogative of the legislature to decide (1) whether such a defense is available and (2) what form such a defense will take

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The insanity defense has had a long and varied history during its development in the common law. As the understanding of the mental processes changed over the centuries, the implications of a criminal defendant's insanity have changed. In more recent times legislatures have enacted statutes regulating and defining the effect of a defendant's claim of mental nonresponsibility. Not surprisingly, there has resulted a wide disparity in the positions taken on this issue both by legislatures and courts in the various states.[3]

Three states, Idaho, Montana and Utah, have legislatively chosen to reject mental condition as a separate specific defense to a criminal charge. The statutes in these three states, however, expressly permit evidence of mental illness or disability to be presented at trial, not in support of an independent insanity defense, but rather in order to permit the accused to rebut the state's evidence offered to prove that the defendant had the requisite criminal intent or *mens rea* required by I.C. §§ 18-114 and 18-115 to commit the crime charged. I.C. § 18-207;[4] M.C.A. § 46-14-102; U.C. § 76-2-305. In *State v. Beam*, 109 Idaho 616, 621, 710 P.2d 526, 531 (1985) we upheld I.C. § 18-207 against a related challenge, stating:

> We hold that the three statutes are not in conflict since I.C. §§ 18-114 and 18-115 do not mandate the existence of a defense based upon insanity, but rather I.C. § 18-207 reduces the question of mental condition from the status of a formal defense to that of an evidentiary question. Section 18-207(c), Idaho Code, continues to recognize the basic common law premise that only responsible defendants may be convicted.

It is Beam's second argument that I.C. § 18-207 violates the doctrine established by *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), which held that due process of law requires that the prosecution prove every fact necessary to constitute the crime charged beyond a reasonable doubt. It is asserted that I.C. § 18-207 impermissibly relieves the State of that burden,

3. One of the earliest formulations of the insanity defense and one still in use in as many as sixteen states is the *M'Naghten* rule. This rule is stated as follows:

> [T]o establish a defense on the ground of insanity, it must be clearly proven that, at the time of the committing of the act, the party accused was labouring under such a defective reason, from disease of the mind, as not to 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.

M'Naghten's Case, 8 Eng.Rep. 718, 722 (1843).

Another test broadens the scope of the *M'Naghten* rule to include those who knew that their actions were wrong but who, as a result of a "disease of the mind," were unable to exercise control over their actions. This "irresistible impulse" test is used to supplement the *M'Naghten* rule in approximately five states.

Many states follow a variation of the American Law Institute (ALI) test which is a combination of the M'Naghten Rule and the "irresistible impulse" test. The ALI standard reads:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.
>
> 2. As used in this article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

American Law Institute, Model Penal Code (Proposed Official Draft, 1962), § 4.01, at p. 74. Among those states which follow the ALI test, some favor the word "wrongfulness" instead of "criminality." Still others remove the word "substantial."

New Hampshire is the only state which follows the *Durham* rule or "product" test. As set forth in *Durham v. United States*, 214 F.2d 862, 874-875 (D.C.1954), "a defendant is not criminally responsible if his unlawful act was a product of mental disease or defect."

Three other states have adopted unique standards drawing in part from the cognitive right-wrong language of the *M'Naghten* rule and the "irresistible impulse" test while adding other considerations, such as "prevailing community standards" and "legal and moral aspects of responsibility."

See, generally, I. Keilitz & J.P. Fulton, *The Insanity Defense and its Alternatives: A Guide for Policymakers*, Institute on Mental Disability and the Law, National Center for State Courts (October 1983).

4. I.C. § 18-207(c) provides: "Nothing herein is intended to prevent the admission of expert evidence on the issues of mens rea or any state of mind which is an element of the offense, subject to the rules of evidence."

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since it operates as a presumption that no defendant can possess such lack of mental capacity as to be unable to formulate the criminal intent. We disagree. I.C. § 18-207(c) specifically provides that a defendant is not prohibited from presenting evidence of mental disease or defect which would negate intent.

While the issue facing us today has never been directly decided by the United States Supreme Court, the language from several opinions of that Court suggests rather convincingly that that Court would conclude that the due process of the fifth amendment does not require the states to provide a criminal defendant with an independent defense of insanity. First, in *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), the United States Supreme Court rejected an argument that due process required the use of any particular insanity test and upheld an Oregon statute which placed on the criminal defendant the burden of proving his insanity defense, and then by proof beyond a reasonable doubt. In *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), the Supreme Court stated:

> [T]his court has never articulated a general constitutional doctrine of *mens rea*. We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. *This process of adjustment has always been thought to be the province of the States.*[5]

392 U.S. at 535-536, 88 S.Ct. at 2156, 20 L.Ed.2d at 1269 (emphasis added). Justice Marshall, in his *Powell* opinion, stated that "nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." 392 U.S. at 536, 88 S.Ct. at 2156. Justice Rehnquist recently reaffirmed this view in his dissenting opinion in *Ake v. Oklahoma*, 470 U.S. 68, 91, 105 S.Ct. 1087, 1100, 84 L.Ed.2d 53, 71 (1985), in which he wrote:

> [I]t is highly doubtful that due process requires a state to make available an insanity defense to a criminal defendant, but in any event if such a defense is afforded the burden of proving insanity can be placed on the defendant.

In a similar vein, the Ninth Circuit Court of Appeals has very recently rejected the argument that the eighth amendment to the United States Constitution contains any implicit command that mental illness be considered a mitigating circumstance. *Harris v. Pulley*, 885 F.2d 1354 (9th Cir.1989).

The Supreme Court of Montana has upheld a similar Montana statute abolishing the independent defense of insanity, concluding that "Montana's abolition of the insanity defense neither deprives a defendant of his fourth amendment right to due process nor violates the eighth amendment proscription against cruel and unusual punishment. There is no independent constitutional right to plead insanity." *State v. Korell*, 690 P.2d 992 (1984).

In conclusion, on this issue, while there is little authority directly on the question which we must decide today, the only court which has expressly ruled upon this issue has upheld the constitutionality of a state statute abolishing the insanity defense. *State v. Korell, supra.* The only justice of the United States Supreme Court, Chief Justice Rehnquist, who has addressed this specific issue has stated, "It is highly doubtful that due process requires the state to make available an insanity defense to a criminal defendant...." Finally, from the statement of the United States Supreme Court in *Powell v. Texas*, that "noth-

5. Although the Court in *Powell* stated that "this court has never articulated a general constitutional doctrine of *mens rea*," the Idaho state statutory scheme retains on the prosecution the burden of proving the requisite state of mind *i.e., mens rea*, and the other essential elements of the crime beyond a reasonable doubt, *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985).

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ing could be less fruitful than for this court to be impelled into defining some sort of insanity test in constitutional terms," it is difficult to understand how there could be an insanity defense guaranteed by the United States Constitution which, nevertheless, has no constitutional definition and is subject to differing definitions by the various states, *Powell v. Texas, supra*, and may be subject to differing burdens of proof by the states. *Leland v. Oregon, supra*. Accordingly, we conclude, based upon the foregoing authorities, that due process as expressed in the Constitutions of the United States and of Idaho does not constitutionally mandate an insanity defense and that I.C. § 18-207 does not deprive the defendant Searcy of his due process rights under the state or federal Constitution. *Leland v. Oregon, supra; State v. Korell*, 213 Mont. 316, 690 P.2d 992 (1984); *Leland v. Oregon, supra; Powell v. Texas, supra; State v. Beam, supra.*[6]

III

[3] We now consider Searcy's objection that the trial court erred by denying his motion to strike a victim impact statement which was allegedly used as a basis for arriving at the sentence. Searcy asserts that the sentencing court improperly considered prejudicial remarks contained in the victim impact statement when imposing on Searcy a fixed life prison term. Searcy argues that the victim impact statement was irrelevant to sentencing considerations even though he acknowledges that its use by the sentencing court is mandated by I.C. § 19-5306[7] and I.C.R. 32(b)(1).[8] Searcy argues, however, that the sentencing court was obliged to ignore the victim impact statements based upon the holdings in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989). However, those two cases were death penalty cases and the decisions are based on the unique requirements of the eighth amendment of the United States Constitution as it applies to death penalty cases. In the present case where the defendant was not sentenced to death but, rather to a fixed life prison term, the *Booth* and *Charboneau* cases are inapplicable. The sentencing court did not err by denying defendant's motion to strike the victim impact statement.

IV

A.

[4] Searcy argues that the trial court imposed an invalid sentence when it gave a ten-year enhancement both to the determinate life sentence without possibility of parole for the premeditated first degree murder, and a ten-year enhancement to the consecutive indeterminate life sentence imposed for the crime of robbery. As a result, Searcy argues that he should have

6. Three early state court decisions holding that statutes which abolish the insanity defense are unconstitutional are distinguishable because those decisions had involved state statutes which precluded any trial testimony of mental condition, including trial testimony which would have rebutted the state's evidence of the defendant's state of mind, *i.e., mens rea*, at the time he committed the offense. Those cases are *State v. Lange*, 168 La. 958, 123 So. 639 (1929); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); and *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910).

7. I.C. § 19-5306 provides in pertinent part:

"(1) Upon request, each victim of a felony offense shall be:

. . . .

"(b) Consulted by the presentence investigator in the preparation of the presentence report and have included in that report a statement of the impact which the defendant's criminal conduct has upon the victim;

"(c) Afforded the opportunity to address under oath, the court at sentencing;

. . . .

8. I.C.R. 32 provides in pertinent part:

. . . . . .

(b) Contents of presentence report. . . . [W]henever a full presentence report is ordered, it shall contain the following elements:

(1) The description of the situation surrounding the criminal activity with which the defendant has been charged, including the defendant's version of the criminal act and his explanation for the act, the arresting officers's version or report of the offense, where available, *and the victim's version where relevant to the sentencing decision.*

. . . .

(Emphasis added.)

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