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AB 156

Ben G

CRIMINAL RESPONSIBILITY

MENS REA "GUILTY MIND" *ACTUS REAS* "CRIMINAL ACT"

WE DO NOT GET INTO TROUBLE WITH OUR FELLOW MAN WITH EVIL THOUGHTS ALONE. GENERALLY THE "GUILTY MIND", MUST BE COUPLED WITH THE "GUILTY ACT", RESULTING IN A HARM OR INJURY. THERE ARE A COUPLE OF EXCEPTIONS WHERE THE ACT CONSTITUTES THE CRIME. THIS IS THE CONCEPT OF "STRICT LIABILITY" ELIMINATING THE ELEMENT OF INTENT.

OUR LAWS HAVE DEVELOPED PUNISHING HARM OR INJURY OCCASIONED BY A PERSON WITH A GUILTY MIND.

THERE ARE CIRCUMSTANCES WHERE AN INDIVIDUAL HAS CAUSED A HARM OR INJURY BUT NO PROSECUTION WAS WARRANTED BECAUSE OF THE MISSING "EVIL INTENT/GUILTY MIND" ELEMENT. UNDER CERTAIN FACT PATTERNS KILLING IN SELF DEFENSE IS NOT CRIMINAL. A YOUNG CHILD CAUSES A HARM OR INJURY THAT, IF AN ADULT, WOULD WARRANT CRIMINAL CONSEQUENCES. THE DEFENSE OF INFANCY PRECLUDES CRIMINAL PUNISHMENT BECAUSE OF THE LACK OF CRIMINAL INTENT IN THE CHILD.

THE ISSUE OF INSANITY HAS BEEN STUDIED FOR A NUMBER OF YEARS. SHOULD AN INSANE PERSON BE PUNISHED FOR ACTS THAT RESULT IN INJURY OR EVEN DEATH? THE ISSUE BECOMES, WHAT IS WHAT DEFECT OF THE MIND WOULD BE A VALID DEFENSE? NOT ALL STATES HAVE THE INSANITY DEFENSE. THERE ARE OTHER STATES THAT DEAL WITH DIMINISHED CAPACITY, THERE WAS A SUCCESSFUL DEFENSE A NUMBER OF YEARS AGO WHERE THE HOMICIDE WAS REDUCED IN DEGREE BY A DEFENDANT THAT CLAIMED DIMINISHED CAPACITY BECAUSE HE HAD CONSUMED LARGE QUANTITIES OF COCA COLA AND TWINKIES. THAT DEFENSE IS NO LONGER AVAILABLE IN CALIFORNIA.

ASSEMBLY JUDICIARY
DATE: 3/31/03 ROOM: 3138 EXHIBIT N
SUBMITTED BY: BEN GRAHAM

OF THE STATES THAT DO HAVE THE INSANITY DEFENSE THE MAJORITY FOLLOW A STANDARD THAT NEVADA FOLLOWED FOR A NUMBER OF YEARS. THE STANDARD AROSE OUT OF REX v M'NAGHTEN, 10CL. &F.200, 8 ENG. REP. 718, AN 1843 ENGLISH CASE. THE LAW EVOLVED INTO THE CONCEPT THAT IT WAS INAPPROPRIATE TO PUNISH A PERSON FOR ACTS THAT RESULTED IN HARM OR INJURY IF HE SUFFERED FROM SUCH A DEFECT OF THE MIND THAT HE DID NOT "KNOW RIGHT FROM WRONG". UNDER THESE CIRCUMSTANCES THE ELEMENT OF INTENT/GUILTY MIND WAS MISSING. NEVADA CHANGED FROM THIS STANDARD PRIMARILY AS A RESULT OF A NEVADA SUPREME COURT CASE THAT REQUIRED AN INSANITY INSTRUCTION ON NO OTHER EVIDENCE THAN A FORMER SISTER-IN-LAW OF A HOMICIDE DEFENDANT TESTIFYING THAT THE DEFENDANT "HAD BEEN ACTING CRAZY" A FEW DAYS BEFORE HE COMMITTED MURDER. THE RESULTING REVERSAL AND NECESSITY OF A NEW TRIAL WITH THE SAME JURY FINDING GAVE SOME INCENTIVE TO SUPPORT ANOTHER APPROACH. THE CHANGE ADOPTED WAS A PLEA OF "GUILTY BUT MENTALLY ILL. THIS APPROACH WAS FOUND WANTING, OUR COURT HAS MANDATED THE NEVADA MUST OFFER THE OPTION OF AN INSANITY DEFENSE.

THE NEVADA DISTRICT ATTORNEYS ASSOCIATION SUPPORTS RETURNING TO THE BASIC "RIGHT AND WRONG" TEST, THE M'NAGHTEN TEST, FOLLOWED BY THE MAJORITY OF THE STATES THAT RETAIN INSANITY AS A DEFENSE. WE ARE PROPOSING AMENDING THE CURRENT LANGUAGE IN AB 156 TO REFLECT M'NAGHTEN AS IT HAS DEVELOPED AND TO ADOPT PROCEDURAL STANDARDS TO EFFECTUATE THE DEFENSE.

THANK YOU.....

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 169.195 is hereby amended to read as follows:

169.195 1. "Trial" means that portion of a criminal action which:

(a) If a jury is used, begins with the impaneling of the jury and ends with the return of the verdict, both inclusive.

(b) If no jury is used, begins with the opening statement, or if there is no opening statement, when the first witness is sworn, and ends with the closing argument or upon submission of the cause to the court without argument, both inclusive.

2. "Trial" does not include any proceeding had upon a plea of guilty ~~[or guilty but mentally ill]~~ to determine the degree of guilt or to fix the punishment.

Sec. 2. NRS 173.035 is hereby amended to read as follows:

173.035 1. An information may be filed against any person for any offense when the person:

(a) Has had a preliminary examination as provided by law before a justice of the peace, or other examining officer or magistrate, and has been bound over to appear at the court having jurisdiction; or

(b) Has waived his right to a preliminary examination.

2. If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the Attorney General when acting pursuant to a specific statute or the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process must forthwith be issued thereon. The affidavit need not be filed in cases where the defendant has waived a preliminary examination, or upon a preliminary examination has been bound over to appear at the court having jurisdiction.

3. The information must be filed within 15 days after the holding or waiver of the preliminary examination. Each information must set forth the crime committed according to the facts.

4. If, with the consent of the prosecuting attorney, a defendant waives his right to a preliminary examination in accordance with an agreement by the defendant to plead guilty ~~[, guilty but mentally ill]~~ or nolo contendere to a lesser charge or at least one but not all, of the initial charges, the information filed against the defendant pursuant to this section may contain only the offense or offenses to which the defendant has agreed to enter a plea of guilty ~~[, guilty but mentally ill]~~ or nolo contendere. If, for any reason, the agreement is rejected by the district court or withdrawn by the defendant, the prosecuting attorney may file an amended information charging all

of the offenses which were in the criminal complaint upon which the preliminary examination was waived. The defendant must then be arraigned in accordance with the amended information.

Sec. 3. NRS 173.125 is hereby amended to read as follows:

173.125 The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, and a plea of guilty ~~[or guilty but mentally ill]~~ to one or more offenses charged in the indictment or information does not preclude prosecution for the other offenses.

Sec. 4. NRS 174.035 is hereby amended to read as follows:

174.035 1. A defendant may plead not guilty, guilty~~[, guilty but mentally ill]~~ or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty. ~~[or guilty but mentally ill.]~~

2. If a plea of guilty is made in a written plea agreement, the agreement must be in substantially the form prescribed in NRS 174.063. If a plea of guilty ~~[or guilty but mentally ill]~~ is made orally, the court shall not accept such a plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea. ~~[In addition, the court shall not accept a plea of guilty but mentally ill without complying with the provisions of NRS 174.041.]~~

3. With the consent of the court and the district attorney, a defendant may enter a conditional plea of guilty~~[, guilty but mentally ill]~~ or nolo contendere, reserving in writing the right, on appeal from the judgment, to a review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal must be allowed to withdraw the plea.

4. ~~[A plea of guilty but mentally ill is not a defense to the alleged offense. A defendant who enters such a plea is subject to the same penalties as a defendant who pleads guilty.]~~ ***The defendant may, in the alternative or in addition to any one of the pleas permitted by subsection 1, plead not guilty by reason of insanity.***

(a) A plea of not guilty by reason of insanity must be entered no less than 21 days prior to trial.

(b) The defendant bears the burden of proving his insanity by (a preponderance of the evidence, clear and convincing evidence, proof beyond a reasonable doubt)

Burden of Proof

5. If a defendant refuses to plead~~[,]~~ *or* if the court refuses to accept a plea of guilty ~~[or guilty but mentally ill]~~ or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

6. A defendant may not enter a plea of guilty ~~[or guilty but mentally ill]~~ pursuant to a plea bargain for an offense punishable as a felony for which:

(a) Probation is not allowed; or

(b) The maximum prison sentence is more than 10 years,

unless the plea bargain is set forth in writing and signed by the defendant, the defendant's attorney, if he is represented by counsel,

and the prosecuting attorney.

Sec. 5. NRS 174.055 is hereby amended to read as follows:

174.055 In the justice's court, if the defendant pleads guilty, ~~[or guilty but mentally ill,]~~ the court may, before entering such a plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed. If it appears to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail~~[,]~~ *or* to answer any indictment that may be found against him or any information which may be filed by the district attorney.

Sec. 6. NRS 174.061 is hereby amended to read as follows:

174.061 1. If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty~~[, guilty but mentally ill]~~ or nolo contendere to a lesser charge or for a recommendation of a reduced sentence, the agreement:

(a) Is void if the defendant's testimony is false.

(b) Must be in writing and include a statement that the agreement is void if the defendant's testimony is false.

2. A prosecuting attorney shall not enter into an agreement with a defendant which:

(a) Limits the testimony of the defendant to a predetermined formula.

(b) Is contingent on the testimony of the defendant contributing to a specified conclusion.

Sec. 7. NRS 174.065 is hereby amended to read as follows:

174.065 Except as otherwise provided in NRS 174.061:

1. On a plea of guilty ~~[or guilty but mentally ill]~~ to an information or indictment accusing a defendant of a crime divided into degrees, when consented to by the prosecuting attorney in open court and approved by the court, the plea may specify the degree, and in such event the defendant shall not be punished for a higher degree than that specified in the plea.

2. On a plea of guilty ~~[or guilty but mentally ill]~~ to an indictment or information for murder of the first degree, when consented to by the prosecuting attorney in open court and approved by the court, the plea may specify a punishment less than death. The specified punishment, or any lesser punishment, may be imposed by a single judge.

Sec. 8. NRS 174.075 is hereby amended to read as follows:

174.075 1. Pleadings in criminal proceedings are the indictment, the information and, in justice's court, the complaint, and the pleas of guilty, ~~[guilty but mentally ill,]~~ not guilty and nolo contendere.

2. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which could have been raised by one or more of them may be raised only by motion to dismiss or to grant appropriate relief, as provided in this title.

Sec. 9. Chapter 175 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Where on a trial a defense of insanity is interposed by the defendant and he is acquitted by reason of that defense, the finding of the jury pending the judicial determination pursuant to subsection 2 has the same effect as if he were regularly adjudged insane, and the judge must:

(a) Order a peace officer to take the person into protective custody and transport him to a mental health facility or hospital for detention pending a hearing to determine his mental health;

(b) Appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the person; and

(c) At a hearing in open court, receive the report of the examining advisers and allow counsel for the State and for the person to examine the advisers, introduce other evidence and cross-examine witnesses.

2. If the court finds, after the hearing:

(a) That there is not clear and convincing evidence that the person is a mentally ill person, the court must order his discharge; or

(b) That there is clear and convincing evidence that the person is a mentally ill person, the court must order that he be committed to the custody of the Administrator of the Division of Mental Health and Developmental Services of the Department of Human Resources until he is regularly discharged therefrom in accordance with law.

The court shall issue its finding within 90 days after the defendant is acquitted.

3. The Administrator shall make the same reports and the court shall proceed in the same manner in the case of a person committed to the custody of the Division of Mental Health and Developmental Services pursuant to this section as of a person committed because he is incompetent to stand trial pursuant to NRS 178.400 to 178.460, inclusive, except that the determination to be made by the Administrator and the district judge on the question of release is whether the person has recovered from his mental illness or has improved to such an extent that he is no longer a mentally ill person.

4. As used in this section, unless the context otherwise requires, "mentally ill person" has the meaning ascribed to it in NRS 433A.115.

Sec. 10. NRS 175.282 is hereby amended to read as follows:

175.282 If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty~~[, guilty but mentally ill]~~

OFFICE OF THE DISTRICT ATTORNEY
CLARK COUNTY, NEVADA

DAVID ROGER
District Attorney

J. CHARLES THOMPSON
Assistant District Attorney

MICHAEL D. DAVIDSON
Assistant District Attorney

MARY-ANNE MILLER
County Counsel

CHRISTOPHER LAURENT
Chief Deputy District Attorney

MEMORANDUM

TO Ben Graham

FROM Christopher Laurent, David Barker, Chris Owens

DATE March 7, 2003

SUBJECT A.B. 156

After reviewing discussing the bill draft for A.B. 156 on insanity, the Clark County District Attorney's Office proposes the following amendments.

FIRST - NRS 174.035

To NRS 174.035 which A.B. 156 proposes as follows:

4. ~~[A plea of guilty but mentally ill is not a defense to the alleged offense. A defendant who enters such a plea is subject to the same penalties as a defendant who pleads guilty.]~~ *The defendant may, in the alternative or in addition to any one of the pleas permitted by subsection 1, plead not guilty by reason of insanity. A defendant who has not so pleaded may offer the defense of insanity during trial upon good cause shown. Under such a plea or defense, the burden of proof is upon the defendant to establish his insanity by a preponderance of the evidence.*

The District Attorneys Office is of the opinion that the proposed amendments are not need and in fact if included would have unintended consequences. Under the above amended statute a dangerous person who has been duly convicted and sentenced, who becomes "incompetent" while incarcerated would have to be released because his incarceration is punishment. This language is not required by the US Supreme Court decision in *Atkins.* Such persons already have available the remedy of executive clemency--A remedy, which is evaluated on a case by case basis.

THIRD - NRS 194.010

To NRS 194.010 which A.B. 156 proposes as follows:

Sec. 37. NRS 194.010 is hereby amended to read as follows:
194.010 All persons are liable to punishment except those belonging to the following classes:
1. Children under the age of 8 years.
2. Children between the ages of 8 years and 14 years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.
3. Persons who committed the act charged or made the omission charged in a state of insanity.
4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense.
~~[4.]~~ *5.* Persons who committed the act charged without being conscious thereof.
~~[5.]~~ *6.* Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.
~~[6.]~~ *7.* Persons, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

The District Attorneys Office recommends the following amendment beginning at line 30-43:

7. Persons, unless ~~the crime is punishable with death~~ charged with the crime of murder or attempt murder, who committed the act or made the omission charged under *immediate* threats or menaces *to themselves or others* sufficient to show that they had reasonable cause to believe, and did believe, that their lives *or the life of another* would be endangered if they refused, or that they *the other person* would suffer great bodily harm.

The amendment proposed by the District Attorneys Office brings this section up to date with current law. NRS 194.010 was initially passed in 1911. At that time there were many crimes that were punishable by death. Now not even every murder is punishable by death. It is clear that this defense should not be available where the in circumstances where one placed in a position of trading someone else's life for their own.

Furthermore, the statute as written would not protect a mother from committing a crime to protect her child.

Analysis of the "Finger" decision

The intent of the Nevada Supreme Court in *Finger* toward the legislature is as follows:

> [7][8] **The Legislature is free to decide what method to use in presenting the issue of legal insanity to a trier of fact, i.e., as an affirmative defense or rebuttal presumption of sanity. It may also determine that legal insanity be proven by the defendant by any one of the established standards**. But it cannot abolish legal insanity or define it in such a way that it undermines a fundamental principle of our system of justice. (Emphasis added)

J. Leavitt, in his concurring opinion recommended that the original statutory scheme be reinstated:

> The legislative scheme as set forth in S.B. 314 [FN10] must be set aside, and the law as it existed prior to its enactment be reinstated.
> FN10. S.B. 314, 67th Leg. (Nev.1995), amending NRS 174.035, 193.220 and 194.010 and repealing 175.521.

The established standards or burden of proof are delineated in the opinion as follows:

> Under M'Naghten, insanity is considered an affirmative defense, which must be proven by the defendant. **The burden of proof can be either: (1) by a preponderance of the evidence, (2) by clear and convincing evidence or (3) beyond a reasonable doubt.** See Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). In contrast, other jurisdictions have determined that insanity is not an affirmative defense, but an issue of presumptions. A person is presumed to be sane. This presumption can be rebutted by the introduction of evidence tending to show that the defendant is legally insane. Once such evidence is presented, the prosecution has the burden of proving the defendant's sanity beyond a reasonable doubt. See Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895). (Emphasis added)

Conclusion

Based upon the reasons stated, we support the re-adoption on the old M'Nagthen definition of insanity. So long as the proposed procedural changes are also adopted.

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DATE March 7, 2003

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The District Attorneys Office would amend to be:

4. *The defendant may, in the alternative or in addition to any one of the pleas permitted by subsection 1, plead not guilty by reason of insanity.*

(a) plea of not guilty by reason of insanity must be entered into ***no less than 21 days prior to trial.***

This change would bring this statute inline with NRS 174.234, which requires the parties to a criminal action to provide 21 day notice of expert witnesses. This amendment is intended to prevent trial by ambush and will prevent unnecessary delays and expenditures that would arise if a defendant were allowed to raise this issue untimely or perhaps in the middle of trial.

Utah code of criminal procedure 77-14-4 (1) directs written notice as soon after arraignment a practicable but not fewer that 30 days before trial.

(b) *The defendant bears the burden of proving his insanity by* ***clear and convincing evidence.***

This change would bring this statue in line our sister state of Arizona. As stated in Arizona Revised Statutes ARS 13-502 (C) "The defendant shall prove the defendant's insanity by **clear and convincing evidence**.

Our sister state of Tennessee under TRS 39-11-501
Our sister state of Alaska under ARS 12.47.090.
Our sister state of Alabama under ARS 13-A-3-1.
Our sister state of Illinois under IRS 38.3-2; 38.6-2
Our sister state of South Dakota under SDRS 22-5-10

The proposed standard is not as high a burden as the state must prove in order for a jury to find the defendant guilty

California, New Mexico, Utah have codified different definitions of insanity other that our M'Naghten language.

Montana and Idaho passed laws that abolish the insanity defense just as Nevada did in 1995.

SECOND – NRS 178.400

NRS 178.400 which A.B. 156 proposes is as follows:

Sec. 25. NRS 178.400 is hereby amended to read as follows:
178.400 1. A person may not be tried , [or] adjudged to punishment *or punished* for a public offense while he is incompetent.
2. For the purposes of this section, "incompetent" means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.

The District Attorneys Office is of the opinion that the proposed amendments are not need and in fact if included would have unintended consequences. Under the above amended statute a dangerous person who has been duly convicted and sentenced, who becomes "incompetent" while incarcerated would have to be released because his incarceration is punishment. This language is not required by the US Supreme Court decision in *Atkins.* Such persons already have available the remedy of executive clemency--A remedy, which is evaluated on a case by case basis.

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Conclusion

Based upon the reasons stated, we support the re-adoption on the old M'Nagthen definition of insanity. So long as the proposed procedural changes are also adopted.