

To: Assemblyman William Horne and the Interim Study Committee on Sentencing and Pardons, and Parole and Probation

From: Richard Siegel, President
American Civil Liberties Union of Nevada

Date: January 3, 2006

Re: Insanity Defense and "Guilty but Mentally Ill" verdict

The National Board of Directors of the American Civil Liberties Union (ACLU) articulates policies after extensive study by leading experts.

The following policy positions are relevant to the hearing held by your committee on November 9, 2005. We hope that this memo is not sent too late to help the committee. The ACLU of Nevada's leadership carefully reviewed the committee issues, and is dealing with the subject matter in several forums. We will soon file an amicus curiae brief in a current case (re: Jane Woerner) in the Nevada Supreme Court that challenges forced medication given on and off for thirteen years, of a mentally incompetent 70 year old criminal defendant.

Our basic views are as follows:

1. "Guilty but Mentally Ill" Verdict:

The ACLU of Nevada opposes on constitutional grounds any attempt to introduce 'guilty but mentally ill' as either a replacement or an additional sentencing option to the traditional insanity defense.

Criminal defendants have a right to present evidence of their mental state at the time the crime charged was committed, and to be found not guilty of the crime if they are legally insane. If an individual is determined to be insane at the time the crime was committed he cannot be held blameworthy for his actions. All attempts to replace the traditional 'not guilty by reasons of insanity' criminalizes conduct beyond the proper reach of the law.

The 'guilty but mentally ill' verdict recognizes the existence of mental illness at the time of the crime while also finding that the defendant is not legally insane. Yet the 'guilty but mentally ill' verdict holds defendants whose mental illness contributed to the commission of a crime to be fully culpable for his actions.

'Guilty but mentally ill' statutes do not preclude an insanity defense, but they may be used to discourage judges and juries from finding a severely mentally ill defendant 'not guilty by reasons of insanity.' Juries want to punish a person for committing a crime and often do not understand the nuanced

EXHIBIT H Pardons

Document consists of 4 pages

☒ Entire document provided.

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psychological and legal implications of an individual's mental state on their blameworthiness for the crime committed. With a 'guilty but mentally ill' verdict, a jury can simultaneously acknowledge an individual's mental illness while still holding him completely accountable for the crime committed. A jury can impose criminal responsibility on individuals who, due to their mental state, are not responsible of their actions.

Although many 'guilty but mentally ill' statutes promise treatment, this is not necessarily required once the prisoner is incarcerated. Thus the 'guilty but mentally ill' verdict prevents mentally ill prisoners from receiving necessary help to treat their mental illness.

Criminal conviction, like incarceration or any other restriction on civil liberties, must be fully justified. Criminal conviction of the insane is not justifiable by the traditional objectives of punishment. Retribution, or vengeance, is inappropriate because insane persons lack the qualities conducive to deterrence or blameworthiness. It is fundamentally unfair to hold an individual responsible for actions which she is not blameworthy.

2. M'Naughten standard to determine legal insanity

Nevada currently uses the *M'Naughten* standard to determine insanity, which focuses on the cognitive abilities of the defendant. Under the *M'Naughten* test, a criminal defendant cannot be convicted if, as a result of mental illness at the time of the crime, he did not know what he was doing or that it was wrong. This is an extremely high standard as it must be demonstrated that the defendant was completely unable to tell the difference between right and wrong at the time of the crime.

The M'Naughten test does not consider the situation of individuals who cannot control their behavior because of mental impairment. It requires total impairment of cognitive ability and clearly fails to account for new psychiatric information on human behavior.

The ACLU recommends to the legislature the American Law Institute's Model Penal Code as a replacement for the *M'Naughten* standard. The Model Penal Code, already adopted by 22 states to replace the 1943 *M'Naughten* Rule, provides that:

§4.01 (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 (or she) lacks substantial capacity to either appreciate the criminality/wrongfulness of his (or her) conduct or to conform his (or her) conduct to the requirements of the law.

The Model Penal Code addresses the problems noted in the *M'Naughten* test. First, it considers both cognitive and volitional disability qualities. Second, it does not require total impairment. If an individual "lacks substantial capacity" he or she may be determined insane. A copy of the relevant Model Penal Code sections is attached.

3. Forced Drugs to try to make "incompetent" defendants stand trial

This practice, though not wholly forbidden, has been substantially limited in the past year by the 9th Circuit Court of Appeals in a ruling binding on Nevada.

United States v. Rivera-Guerrero (9th Circuit, October 19, 2005) states that involuntary medication of incompetent defendants should be "rare." The 10th Circuit in United States v. Morrison [415f.3d 1180 (2005)] found that the courts should inquire into whether medication was medically appropriate or in the inmate's best interest before inquiring into whether medication should be involuntarily administered to render the defendant competent to stand trial.

Taken together, these discussions speak to the fact that the federal and state governments should address insanity and mental incompetence seriously and not seek to ignore or mask its very real impacts on reasoning and judgment. This applies then adjudicating mental state at the time of a violent act or when the state seeks to place a mentally incompetent person on trial.

Model Penal Code

Section 4.01. Mental Disease or Defect Excluding Responsibility

(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 (or she) lacks substantial capacity to either appreciate the criminality/wrongfulness of his (or her) conduct or to conform his (or her) 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 antisocial behavior.

Section 4.02. Evidence of Mental Disease or Defect Admissible When Relevant to Element of the Offense; Mental Disease or Defect Impairing Capacity as Ground for Mitigation of Punishment in Capital Cases.

(1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the defense.

(2) Whenever the jury or the Court is authorized to determine or to recommend whether or not the defendant shall be sentenced to death or imprisonment upon conviction, evidence that the capacity of the defendant to appreciate the criminality/wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect is admissible in favor of a sentence of imprisonment.

Opinion on graduated removal of custody for those found competent after being determined to be NGRI.

Limits to holding people or forcing medication on people found incompetent to stand trial. In Sell v. United States, 539 U.S. 166 (2003), the United States Supreme Court held that a state can forcibly medicate a defendant in order to make him competent to stand trial. The individual must meet one of two conditions. The individual must be a danger to himself or others (Washington v. Harper). Or, alternatively, "if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-related interests." *Id.*, 2184.