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The Definition and Determination of Insanity in Colorado

by H. Patrick Furman

On a London street in early 1843, a young Scotsman named Daniel M'Naghten shot Edward Drummond, the personal secretary of British Prime Minister Sir Robert Peel. The shot, fired in broad daylight and within the view and hearing of a constable, proved fatal. M'Naghten, who thought that he was shooting the Prime Minister himself, was laboring under a delusional belief that the Prime Minister was a devil in human form who was tormenting him and seeking his life.

M'Naghten was found not guilty by reason of insanity. He was committed to an insane asylum, where he spent the rest of his unhappy days. Queen Victoria, displeased by this verdict, asked the common law judges of England to examine the defense of insanity. The results of their deliberations came to be known as the M'Naghten test.[1]

The M'Naghten test is the starting point for any consideration of the insanity defense. This article reviews the current Colorado test and procedures used to define and determine insanity.

Definition of Insanity

The current test for insanity in Colorado, at CRS § 16-8-101(1), reads as follows:

> A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable. But care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred or other motives, and kindred evil conditions, for when the act is induced by any of these causes the person is accountable to the law.

The Colorado definition has been narrowed significantly over the last decade. Ten years ago, the definition of insanity in Colorado included an "irresistible impulse" component. Under the irresistible impulse test at CRS § 16-8-101, a person also was considered insane if—even though able to distinguish right from wrong—he or she was incapable, due to a mental disease or defect, of choosing the right and refraining from doing the wrong. The irresistible impulse portion of the definition was deleted in 1983.[2]

The Colorado Supreme Court recently reviewed the definition of insanity in *People v. Serravo*.[3] This decision affirmed a Court of Appeals decision,[4] although on different grounds from those the lower court employed. A jury found the defendant not guilty by reason of insanity in connection with the stabbing of his wife. The defendant was delusional about having a mission from God to establish a sports complex in Denver. He believed that this "deific decree" required him to sever his relationship with his wife, who opposed his efforts to establish this sports complex. He severed the relationship by stabbing her in the back. The prosecution appealed the acquittal on a question of law,[5] arguing that the trial court improperly instructed the jury on the definition of insanity. At issue was the meaning of the phrase "right from wrong."

Five psychiatrists and one psychologist testified about the defendant's sanity. These experts disagreed on the precise diagnosis. Nevertheless, they all agreed that the defendant believed his actions were morally justified—that he was morally "right." There was disagreement as to whether he knew his actions were illegal and were seen as "wrong" by society.

The court had to determine from whose viewpoint "right" and "wrong" would be considered: that of the individual, of society generally or of society as expressed by positive law. The defendant argued that right and wrong should be defined by his own personal understanding of those terms. The prosecution argued that they should be defined by reference to legal right and wrong. The court rejected both approaches and held that

> the phrase . . . refers to a cognitive inability to distinguish right from

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> wrong under existing societal standards of morality rather than . . . under a purely subjective and personal standard of morality.[6]

The court noted that use of the prosecution's proposed definition—knowledge that the act was illegal, rather than knowledge that it was immoral—would result in the acquittal of a person who knew that his or her actions were profoundly immoral but did not know that they were prohibited by law. In the court's view, this person should be considered sane and liable for criminal acts. Conversely, the court noted that the prosecution's proposed definition would result in the conviction of a person who knew that his or her actions were prohibited by law but did not have any comprehension of the profoundly immoral nature of the acts. This person, the court said, should not be held accountable under the criminal law.

Under the test established by the court,

> a person may be considered legally sane as long as the person commits an act contrary to law and knows the act is morally wrong without regard to the person's actual knowledge of its legality under positive law.[7]

However, the court stated, it is unclear how frequently this distinction actually will make a difference because

> knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals.[8]

The trial court instructed the jury that the definition of insanity encompasses someone "who appreciates that his conduct is criminal, but, because of a mental disease or defect, believes it to be morally right."[9] The Court of Appeals held that this instruction did not substitute a subjective standard of morality into the right-wrong test.[10] The Supreme Court disagreed with this conclusion and held that the jury should receive a clarifying instruction stating that right and wrong should be measured by a societal standard of morality.[11] Despite the fact that the trial court improperly instructed the *Serravo* jury, the Supreme Court held that principles of double jeopardy barred a retrial of the defendant on the issue of sanity.

The Supreme Court also held that the "deific decree" delusion—the belief that God was ordering the commission of the act—is not an exception to the right-wrong test for legal insanity. However, it is evidence that a defendant's

> cognitive ability to distinguish right from wrong with respect to an act charged as a crime has been destroyed as a result of a psychotic delusion that God has ordered him to commit the act.[12]

"The court had to determine from whose viewpoint 'right' and 'wrong' would be considered: the individual's, society's or the law's."

One justice dissented from all three holdings of the court, arguing that the statutory language compelled the conclusion that a defendant need only be conscious that his or her conduct was forbidden by law. The dissent also argued that the deific decree exception is an improper subjective test which should not be recognized either as an exception or in the form adopted by the majority. Finally, the dissenting justice would have held that a retrial was not barred on double jeopardy grounds because the defendant was not put in jeopardy by a sanity trial. He reasoned that such a trial is not a final determination of guilt or innocence.[13]

"Temporary" and "Settled" Insanity

Two variations of the traditional notion of insanity are "temporary insanity" and "settled insanity." The notion of temporary insanity seems to have taken root in the public discourse about insanity but has no independent application in Colorado. The notion of settled insanity is far less well-known but is, for the moment at least, part of Colorado law.

The defendant in *People v. Low*[14] did not enter a plea of not guilty by reason of insanity. However, at trial, the defendant offered evidence that he had ingested a quantity of cold medication sufficient to render him temporarily incapable of distinguishing right from wrong. The trial court accepted this evidence, held that this evidence established the defendant was temporarily insane and acquitted the defendant.

The Court of Appeals disapproved the acquittal, holding that "temporary insanity is not part of the Colorado statutory framework for resolving a criminal defendant's nonresponsibility for a criminal act. . . ."[15] The court held that the defendant should have been required to plead and prove insanity the same as other defendants who seek to excuse their conduct by reason of insanity caused by an ongoing mental disease or defect.

The settled insanity doctrine is based on the premise that

> an inability to distinguish between right and wrong because of a mental infirmity derived from excessive substance abuse should be recognized as a form of legal insanity when the mental infirmity persists after the effects of the substance itself have dissipated.[16]

While intoxication does not, by itself, constitute a mental disease or defect, the settled insanity doctrine holds that permanent (or, at least, long term) mental infirmity caused by intoxication may constitute a mental disease or defect justifying a finding of insanity.

The Court of Appeals addressed the viability of the settled insanity doctrine in the recent case of *People v. Bieber*.[17] The defendant suffered from an atypical psychotic disorder, the root of which may have been long-term amphetamine use. The trial court gave the jury the standard definition of insanity and instructed them that intoxication does not, in itself, constitute a mental disease or defect. The trial court refused to give the jury an instruction on settled insanity which was proffered by the defendant.

The Court of Appeals affirmed the conviction. However, the three judges on the *Bieber* panel issued three separate opinions. The lead opinion held that the settled insanity doctrine is not applicable in Colorado because the mental disorder is based on the voluntary ingestion of substances which, as a matter of common knowledge, people know are harmful. Thus, in the court's view, moral blame can be assigned to the long-term effects of illegal drug use which cannot be assigned to a traditional mental disease or defect. The concurring opinion was of the view that settled insanity can be a "disease or defect" within the meaning of the Colorado statutory framework, but that the instructions, as given, allowed the defendant to argue this view fairly to the jury. The dissenting opinion agreed with the concurrence that settled insanity is part of Colorado's statutory framework, but would reverse the conviction on the grounds that the jury in-

structions did not explain the doctrine to the jury adequately.

The net result is that two of the three *Bieber* judges consider settled insanity a legitimate part of Colorado's statutory framework, but only one believes that a specific jury instruction on settled insanity is required. At the time of this writing, a petition for rehearing is pending in the Court of Appeals.

Overview of Procedure

The general procedure employed in cases involving the insanity defense is as follows. The defendant enters a plea of not guilty by reason of insanity and is examined by experts on the issue. A sanity trial is then held. If the defendant is found insane, he or she is committed indefinitely and is held until found eligible for release. If the defendant is found sane, a trial on the merits of the charge is held. Acquittal or conviction at the trial on the merits operates just like any other acquittal or conviction.

Entering the Plea

A defendant raises the insanity defense by pleading not guilty by reason of insanity. This plea should be raised at arraignment, although the trial court, for good cause shown, may allow the plea to be entered at any time prior to trial.[18] Such a plea is in the nature of confession and avoidance. In other words, the plea confesses the commission of the prohibited act but seeks to avoid legal responsibility on the ground of insanity.[19] However, an insanity plea also is a plea on the merits because, in essence, it attacks the *mens rea* element of the charge.[20]

A problem arises when counsel and client disagree about whether an insanity plea is appropriate. If counsel wishes to enter the plea but the defendant does not, counsel should inform the court of the situation. The court then conducts an investigation, including a psychiatric examination, to determine whether entering a plea of not guilty by reason of insanity is necessary for a just determination of the charge. If the court determines that such a plea is necessary, it enters the plea on behalf of the defendant. The plea is treated as if it were entered voluntarily by the defendant.[21] When counsel and client agree that a plea of not guilty by reason of insanity should not be entered, it is improper for the trial court to enter that plea over their objections.[22]

Under CRS § 16-8-103(4), before accepting a plea of not guilty by reason of insanity, the trial court must advise the defendant of the consequences of the plea.

Pre-Trial Procedure

Once the plea has been entered, the trial court orders a sanity examination pursuant to CRS § 16-8-105(1). Most examinations take place at the Colorado State Hospital in Pueblo, although the statute is silent on the location of this examination.

An issue arising with frequency in recent years concerns the use of statements made by the defendant during the course of the sanity examination. A typical examination includes questions not only about the medical, family and social history of the defendant, but also about the crime for which the defendant is charged. Such questions are necessary because the issue is the sanity of the defendant at the time the offense was committed.

Of course, statements the defendant makes during the examination can be used at the sanity trial because they are an integral part of the examination itself. CRS § 16-8-106(2) recognizes the danger of self-incrimination and provides that a defendant has a privilege against self-incrimination during the course of a sanity examination. However, the statute also provides that the fact a defendant exercised this privilege is admissible at the sanity trial.[23]

It is a different issue when using such statements at the trial on the merits of the charge in order to establish the guilt of the defendant. CRS § 16-8-107(1) provides that any evidence acquired from the defendant's mental processes during the examination is inadmissible at the trial on the merits. That statute makes an exception for evidence which is offered at the trial on the merits to rebut evidence of mental state or to impeach or rebut the defendant's testimony. Thus, statements made during the course of a sanity examination are treated like statements made during a suppression hearing:[24] they cannot be used in the prosecution's case in chief, but can be used for certain types of rebuttal.

Precisely which statements are protected by these rules has been the subject of litigation. Clearly, statements made to the examining psychiatrist or

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psychologist are protected by the statute.[25] A recent ruling of the Colorado Court of Appeals concerned statements made by a defendant to, and in the presence of, a psychiatric social worker while the defendant was at the State Hospital undergoing a court-ordered sanity examination. The court ruled that the statements should not have been admitted at the trial on the merits.[26] This holding was based partly on the social worker's testimony that it was part of his job to interact with the patients and to report back to the doctors any statements made by the patients. The court held that the privilege codified at CRS § 16-8-107(1) should be interpreted broadly to protect against unconstitutional self-incrimination.

Trial Procedure

Under CRS § 16-8-106(4), when the sanity examination results are received, they are given to the court and counsel. Then, the matter is set for a trial at which the issue is whether the defendant was sane at the time the offense was committed. Every defendant is presumed sane. The defendant carries the burden of introducing evidence of insanity. Once such evidence is introduced, the burden is on the prosecution to prove sanity beyond a reasonable doubt.[27]

The statute allows defendants to waive the right to a jury trial in all cases except those involving Class 1, 2 or 3 felonies. In those more serious cases, a waiver of a jury requires the consent of both the court and the prosecutor.[28] This restriction on the right to waive a jury has been upheld on the ground that, while a defendant has a constitutional right to a jury trial, a defendant does not have a constitutional right to a court trial. Thus, it is permissible for the legislature to place conditions on obtaining a court trial.[29]

Expert opinions on sanity almost always are adduced by one or both parties at a sanity trial. The normal rules for expert testimony apply. First, the expert must be qualified. Then, the expert can give an opinion on the facts in issue, including the ultimate fact—the sanity of the defendant. Finally, the facts on which the expert bases the opinion need not be admissible but must be revealed on cross-examination.[30]

Despite their general use by both parties, experts are not the only witnesses who can give opinions on the issue of sanity. Expert opinions are not conclusive and should be weighed with any other evidence presented.[31] Pursuant to CRS § 16-8-109, a layperson also may give an opinion on sanity. The courts have read this section, in conjunction with general evidentiary principles, to require that a foundation be laid for such testimony.

The evidentiary foundation necessary to elicit a lay opinion is fairly straightforward. The witness must have had sufficient opportunity to observe the person whose sanity is at issue, so that the witness's opinion about that person's mental state is reliable. This foundation has been described as evidence that the witness had an adequate means of becoming acquainted with the person and had contacts with the person proximate in time to the alleged offense.[32] For example, it has been held that a defendant's mother should be allowed to offer an opinion as to the sanity of her son when it was established that he had lived with her until about three months before the commission of the offense.[33]

As is usually the case with evidentiary rulings, the trial court has broad discretion in determining whether the foundation has been laid.[34] However, a failure to lay the proper foundation renders a lay opinion inadmissible.[35] Even with a proper foundation, a lay witness cannot answer hypothetical questions about sanity.[36]

The defendant is entitled to a jury instruction informing the jury of the commitment procedures which will be used if the verdict is insanity.[37] This instruction is for information only and should not directly bear on the verdict.[38] As a practical matter, this instruction helps guard against the possibility that a jury may believe that a defendant who is acquitted by reason of insanity simply will be released and that the jury will find the defendant sane to avoid that possibility.

If the defendant is found sane, the case proceeds to a trial on the merits or other disposition. Defense counsel still may introduce evidence—at the trial on the merits—that the defendant, because of a mental disease or defect, did not act with the requisite degree of culpability.[39] Such evidence also may be used in mitigation of any sentence imposed following a conviction on the merits.[40]

Under CRS § 16-8-105(4), if the defendant is found not guilty by reason of insanity, the defendant is committed to the custody of the executive director of the Department of Institutions until he or she is deemed eligible for release. This commitment is for the purpose of treatment, not punishment.[41] CRS § 16-8-105 (4) also gives the executive director the authority to place the defendant in the appropriate institution.

The trial court which commits a defendant following such a verdict retains some jurisdiction over the defendant. For example, the Colorado Supreme Court has held that the trial court retains jurisdiction to hear a motion to authorize the administration of anti-psychotic medication without the defendant's consent.[42]

Release Procedure

Just as the definition of insanity has changed over the years, the definition of who is eligible for release from commitment following an adjudication of insanity has changed. The current test for release, found in CRS § 16-8-120(3), is

> [t]hat the defendant has no abnormal mental condition which would be likely to cause him to be dangerous either to himself or others or to the community in the reasonably foreseeable future, and is capable of distinguishing right from wrong and has substantial capacity to conform his conduct to requirements of law.

Persons committed for crimes occurring before July 1, 1983, are subject to a different, broader release standard at CRS § 16-8-120(1)(2).

This issue is determined at the release hearing. The court, the prosecutor or the defendant may seek a release hearing. With some exceptions, the defendant is entitled to only one release hearing per year.[43] With the exception of the first request for a hearing, a defendant requesting a release hearing must offer proof of eligibility by obtaining expert testimony in support of release.[44]

If the request for a release hearing is granted, the defendant may have the issue determined by a jury of six or by the court. Once any evidence of insanity is introduced at the hearing, the defendant has the burden of proving a restoration to sanity by a preponderance of the evidence.[45]

Pursuant to CRS § 16-8-115(3)(a), if the jury or court finds the defendant eligible for release, the trial court has the power to place conditions on the release. The defendant is entitled to present to the jury evidence about what conditions might be placed on the release, even though the jury does not determine those conditions.[46] In this way, the jury is better informed about the supervision which still would be maintained following the release of the defendant.[47]

When a defendant is released conditionally, the DOI retains jurisdiction to monitor compliance with the conditions and is required to report periodically to the district attorney concerning the defendant's status. Under CRS § 16-8-115 (3), the trial court also must review the status of a conditionally released defendant at least every twelve months.

The procedure for revoking a conditional release also is governed by statute. Anyone who has reason to believe the defendant has violated a conditional release may report it to an appropriate authority and set the revocation process in motion. Whenever the state has probable cause to believe that a conditional release should be revoked, the prosecutor may apply for a warrant to take the defendant into custody or proceed by way of a summons. Once the defendant is in custody, a petition for revocation of the conditional release must be filed within seventy-two hours, unless good cause is shown for an extension.[48]

The defendant is entitled to a preliminary hearing within seventy-two hours of arrest or first appearance pursuant to summons. However, this hearing may be continued for up to five days on a showing of good cause. A finding that no probable cause for revocation exists mandates release. Conversely, a finding that probable cause does exist requires a temporary revocation and recommitment, pending the final hearing. The final hearing on revocation must be held within thirty days of the preliminary hearing. While the rules of evidence are relaxed significantly in this procedure, the defendant does have the right to call, confront and cross-examine witnesses.[49]

CRS § 16-8-115.5(8) places the burden at the final hearing on the prosecution to prove, by a preponderance of the evidence, that the defendant has become ineligible to remain on conditional release. This does not mean the court has to find that the defendant is dangerous. The court need only find that there has been a violation of the terms and conditions of the conditional release.[50] If the defendant is found ineligible to remain on conditional release, the court recommits the defendant. A finding that the burden on this issue has not been met requires release on the same or modified conditions.[51]

Conclusion

The question of who should be excused from responsibility for criminal conduct by reason of insanity is a reminder that there are no easy answers to some of the fundamental questions of criminal law. Nearly 150 years after the common law judges of England addressed the issue of insanity in the M'Naghten case, practitioners still struggle to find an appropriate definition of insanity and to apply that definition to the difficult problems posed by persons with mental health problems who run afoul of the criminal justice system.

Even the best test and the most fair procedure have a significant limitation: they can determine only criminal culpability. The real solutions to mental health problems must come from a concerted effort by those in both the criminal justice and mental health arenas. Still, some behavior, like that revealed in the recent trial of Jeffrey Dahmer, will remain beyond society's capacity to understand and explain.

NOTES

1. *M'Naghten's Case*, 8 Eng. Rpt. 718 (1843). This description of the M'Naghten case is taken from Wilson and Herrnstein, *Crime and Human Nature* (NY: Simon & Schuster, 1985).
2. 1983 Colo. Sess. Laws, Chapter 188 at 672. This amendment also added subsection (2).
3. *People v. Serravo*, 21 Colo.Law. 592 (March 1992) (No. 90SC322, *annc'd* 1/13/92).
4. *People v. Serravo*, 797 P.2d 782 (Colo. App. 1990).
5. CRS § 16-12-102(1).
6. *Serravo, supra*, note 3.
7. *Id.* at 594.
8. *Id.* at 596, *quoting People v. Schmidt*, 110 N.E. 945, 949 (N.Y. 1915).
9. *Serravo, supra*, note 3 at 593.
10. *Id.* at 592.
11. *Id.* at 596.
12. *Id.*
13. *Id.* at 597 (Vollack, J., dissenting).
14. *People v. Low*, 732 P.2d 622 (Colo.App. 1987).
15. *Id.* at 632.
16. *People v. Bieber*, 21 Colo.Law. 542 (March 1992) (App.No. 87CA1863, *annc'd* 1/30/92).
17. *Id.*
18. CRS § 16-8-103(1).
19. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).
20. *Parks v. District Court*, 503 P.2d 1029 (Colo. 1972).
21. CRS § 16-8-103(2).
22. *Labor v. Gibson*, 578 P.2d 1059 (Colo. 1978).
23. A defendant who exercises his right to silence at the time of arrest is protected against having that silence used against him. *People v. Galimanis*, 765 P.2d 644 (Colo. 1988).
24. *See, Harris v. New York*, 401 U.S. 222 (1981); *Oregon v. Haas*, 420 U.S. 714 (1985).
25. *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980).
26. *People v. Kruse*, 819 P.2d 548 (Colo. App. 1991).
27. CRS § 16-8-105(2).
28. *Id.*
29. *People v. District Court*, 731 P.2d 720 (Colo. 1987).
30. C.R.C. 702-705.
31. *Palmer v. People*, 424 P.2d 766 (Colo. 1967).
32. *People v. Medina*, 521 P.2d 1257 (Colo. 1974).
33. *Galimanis, supra*, note 23.
34. *People v. Giles*, 557 P.2d 408 (Colo. 1976).
35. *Medina, supra*, note 32.
36. *Rupert v. People*, 429 P.2d 276 (Colo. 1967).
37. *People v. Thomson*, 591 P.2d 1031 (Colo. 1979).
38. *People v. Roark*, 643 P.2d 756 (Colo. 1982).
39. *Rupert, supra*, note 36.
40. *Ingles v. People*, 22 P.2d 1109 (Colo. 1933).
41. *Chavez, supra*, note 19.
42. *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).
43. CRS § 16-8-115(1).
44. CRS § 16-8-115(2). In the past, the offer of proof did not have to be based on expert testimony; an offer from a lay witness would suffice to require a hearing. *People v. Howell*, 701 P.2d 131 (Colo.App. 1985). The statute was amended in 1986. 1986 Colo. Sess. Laws., § 1 at 736.
45. CRS § 16-8-115 *et seq.*
46. *Giles, supra*, note 34.
47. *Vialpando v. People*, 727 P.2d 1090 (Colo. 1986); CRS § 16-8-115(3)(a).
48. CRS § 16-8-115.5.
49. *Id.*
50. *People v. McCoy*, 821 P.2d 873 (Colo. App. 1991).
51. CRS § 16-18-115.5(8).