Law and Justice Interim Committee

67th Montana Legislature

Memorandum

To: Law and Justice Interim Committee
From Julianne Burkhardt, Staff Attorney
Date: January 2, 2022
Re: HJ 4 Interim Study -- Legal Overview of the Criminal Commitment Process

I. Background

In 1979 the Montana Legislature abolished the insanity defense[1] and adopted what was then a new approach to addressing criminal defendants who are mentally ill and commit crimes.[2] House Bill 877 arose from a growing distrust of mental health professionals and concern regarding false insanity claims. The bill was an effort to get psychiatrists out of criminal trials.[3] The sponsor of HB 877 testified that psychiatrists were making "arbitrary and God-like determinations" that were "unscientific" and together with social workers "should be removed from the criminal justice process".[4] As is apparent today, this effort was unsuccessful.

Montana was the first state to abolish the insanity defense. Unlike consideration of this issue in other states, Montana's statutory change was not motivated by the acquittal of John Hinckley by reason of insanity in the attempted assassination of President Reagan in 1982.[5]

Currently, four states have abolished the insanity defense.[6] Along with Montana, Idaho, Utah, and Kansas have abolished the insanity defense. Alaska's system includes aspects of both

[1] The "insanity defense" in general terms is an affirmative defense used to provide a legal excuse for a criminal act, arguing that the defendant is not responsible for their actions due to a mental disease or disorder present at the time of the criminal act.
[2] *See* House Bill 877(1979).
[3] Jeanne Matthews Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 Mont. Law Rev. 133, 137, n. 30 (1984).
[4] *Id*; Andrew King-Ries, *Arbitrary and Godlike Determinations: Insanity, Neuroscience, and Social Control in Montana*, 76 Mont. Law Rev. 281, (2015) (citing n. 1, Mont. H. Jud. Comm., *Hearing on HB 877*, 46th Legis. Reg. Sess. (Feb. 20, 1979)).
[5] *See generally* King-Ries *Supra*. 283-288, Bender *Supra.* n. 30.
[6] Jacqueline S. Landess, MD, JD, Brian J. Holoyda, MD, MPH, MBA, *Kahler v. Kansas and the Constitutionality of the Mens Rea Approach to Insanity*, 49 J. Am. Acad. Psychiatry Law 23-235 (2021).

approaches. The remaining 45 states, the federal criminal justice system and the District of Columbia have retained the insanity defense.[7]

In 1899 the M'Naghten and irresistible impulse tests were adopted in Montana.[8] Over the years the test utilized for insanity in Montana evolved as happened throughout much of the United States.[9] In 1979, the test for insanity utilized in Montana was the American Law Institute (ALI) test, which stated:

> 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 law.[10]

The ALI test was adopted in Montana in 1967. The Montana version differed from the ALI test in that the phrase "is unable" was substituted for "lacks substantial capacity".[11]

In 1979 when the Legislature abolished the insanity defense it was replaced with a mental state or "*mens rea*" approach that primarily considers whether the defendant was able to form the requisite mental state required as an element of the crime charged.[12] In addition, the statutory approach adopted in 1979 provides a procedural structure for the handling of these cases throughout the criminal process.

A. Constitutionality of Montana's Statutory Scheme Following Abolition of the Insanity Defense

Several cases have challenged Montana's statutory scheme after the abolition of the traditional insanity defense.[13] One of the first of these cases was *State v. Korell*.[14] Defendant Korell was a Vietnam veteran who suffered some disturbing experiences while in Vietnam.[15] He received treatment from the VA and at times was prescribed antipsychotic medications. He continued to have run-ins with the police and other difficulties. His primary problem was that sometimes he would become paranoid and, during this time, would have difficulty relating to male authority figures.[16] He went to a community college and received training in echocardiography and was sent to Missoula for an externship. Over time his relationship with his supervisor deteriorated. Eventually he was placed at a different hospital. He continued to

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[7] *Kahler v. Kansas*, 140 S. Ct. 1021, fn 3, (2020); Andrew Chung, Lawrence Hurley, *US Supreme Court lets states bar insanity defense*, Reuters, March 23, 2020.
[8] *State v. Peel*, 23 Mont. 358, 59 P.2d 169 (1899).
[9] *See generally* Bender, *Supra*. 134-137.
[10] American Law Institute test (citing Model Penal Code §4.01(1); Bender, *Supra*. 135, n. 19.
[11] *Id.,*136.
[12] The two primary mental states in Montana's criminal code are "purposely" or "knowingly" which are defined in 45-2-101(65) and (35), respectively.
[13] *See generally* Stephanie Stimpson, *State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense*, 55 Mont. Law Rev. 503 (1994).
[14] *State v. Korell*, 213 Mont. 316, 690 P.2d 992 (1984).
[15] *Korell*, at 319, 994
[16] *Id*.

struggle with law enforcement. About two months after leaving Missoula, Korell returned convinced he had to kill his supervisor before the supervisor killed him. He went into the supervisor's home and started firing his gun. The supervisor was wounded but fought back and ultimately was able to subdue Korell.[17]

Ahead of trial, Korell filed a writ of supervisory control asking the Montana Supreme Court to intervene and arguing that he had a right to rely on the traditional affirmative defense of insanity when his crimes were committed. The writ was denied and the case proceeded to trial where the defendant was convicted. On appeal Korell argued that he had a constitutional right, grounded in the 14th Amendment Due Process Clause and the Eighth Amendment protection from cruel and unusual punishment, to the affirmative defense of insanity.[18] After a discussion of the history of the insanity defense and the concept of *mens rea*, the Court held that the insanity defense is not a fundamental right and the Montana statutory scheme following the 1979 amendments, does not unconstitutionally shift the burden of proof.[19]

Specifically, the Court in *Korell* stated:

> 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.
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> 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*. (Emphasis added).[20]

In *State v. Byers*, the Court upheld this determination noting "[W]e have carefully considered this argument before and have stated that no constitutional right to plead insanity exists in the law"[21] and reiterating "[I]t is unconstitutional for the State to be relieved of the burden of proof of an element of a criminal offense."[22] The Court further determined, with reference to *Korell*, that a defendant is able to present evidence of "mental disease or disorder" at three separate stages in the criminal process: (1) before trial with a fitness to proceed determination; (2) during trial when a defendant may argue that their mental disease or disorder prevented them from forming the requisite mental state; or (3) at sentencing in arguing that the

[17] *Korell*, at 320, 995.
[18] *Korell*, at 326, 327, 332, 998, 1001.
[19] *Korell,* at 331, 1000 (the United States Supreme Court did not take up the issue of whether the traditional insanity defense is required until *Kahler v. Kansas*, 140 S.Ct. 1021, 1026-27 (2020), discussed later in this report).
[20] *Korell,* at 333-334, 1002.
[21] *State v. Byers*, 261 Mont. 17, 27-28, 861 P.2d 860, 866 (1993) reversed on other grounds.
[22] *Byers,* at, 25, 865 (citing *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368).

defendant is suffering from a mental disease or defect that prevented them from appreciating the criminality of their behavior or conforming their behavior to the requirements of the law.[23]

The next principle case was *State v. Cowan*.[24] In *Cowan* the defendant made similar arguments and the Montana Supreme Court again did not agree.[25] The defendant went further and filed a petition for a writ of certiorari to the United States Supreme Court arguing that Montana's statutory scheme violated his rights to due process under the 14th Amendment and unconstitutionally shifted the burden of proof on mental state.[26] The United States Supreme Court denied the writ of certiorari without explanation and did not take up this issue until the recent decision of *Kahler v. Kansas*. [27]

B. United States Supreme Court Jurisprudence

The United States Supreme Court indicated its reluctance to interfere in how states administer the insanity defense in *Leland v Oregon*. In *Leland* the Court noted that a prime consideration in determining whether a defendant received due process was whether the state law "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"[28]

This reasoning was extended in *Clark v. Arizona* in which the Court held:

> With this varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. . . There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity.[29]

In 2020 the United States Supreme Court revisited these issues in *Kahler v. Kansas*.[30] In 1996 Kansas abolished its insanity defense and adopted a *mens rea* system similar to Montana. Like Montana, at trial, the only relevant determination is whether due to a "mental disease or defect" the defendant lacked the culpable mental state for the crime charged.[31]

The *Kahler* decision involved a defendant who became increasingly distressed after his wife filed for divorce and moved out of the family home in early 2009. Over Thanksgiving

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[23] *Korell,* at 28, 866.
[24] *State v. Cowan*, 260 Mont. 510, 861 P.2d 884 (1993)
[25] *Cowan*, at 516-518, 888-889.
[26] Stimpson, *Supra*. 513, 520.
[27] *Cowan v. Montana*, 511 U.S. 1005 (1994); *See generally Kahler v. Kansas*, 140 S. Ct. 1021, fn 3, (2020).
[28] *Leland v Oregon*, 343 U.S. 790, 798 (1952) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).
[29] *Clark v. Arizona*, 548 U.S. 735, 752, 753 (2006); *See also Powell v. Texas*, 392 U.S. 514, 536-537 (1968).
[30] *Kahler v. Kansas*, 140 S. Ct. 1021 (2020).
[31] Kan. Stat. Ann. sec. 21-5209 (2019).

weekend he drove over to Ms. Kahler's grandmother's home where Ms. Kahler and his three children were visiting and shot and killed Ms. Kahler, her grandmother, and his two daughters, while allowing his 9-year-old son to escape.[32]

Before trial Kahler filed a motion arguing that the *mens rea* approach under Kansas law violates the Due Process Clause of the 14th Amendment, arguing that Kansas had:

> unconstitutionally abolished the insanity defense by allowing the conviction of a mentally ill person who cannot tell the difference between right and wrong.[33]

The trial court denied the motion, and Kahler was convicted by a jury of capital murder. While he was able to offer additional evidence regarding mental illness and make arguments regarding mitigation during the sentencing phase, the jury nonetheless imposed the death penalty.[34] Kahler filed an appeal again challenging the constitutionality of Kansas's approach to insanity claims. The Kansas Supreme Court denied the appeal and held that "[d]ue process does not mandate that a State adopt a particular insanity test."[35]

Kahler's appeal to the United States Supreme Court asked the Court to decide:

> whether the Due Process Clause requires States to provide an insanity defense that acquits a defendant who could not "distinguish right from wrong" when committing his crime—or, otherwise put, whether that Clause requires States to adopt the moral-incapacity test from M'Naghten.[36]

The Court further noted:

> Kahler can prevail here only if he can show (again, contra Clark) that due process demands a specific test of legal insanity—namely, whether mental illness prevented a defendant from understanding his act as immoral. Kansas, as we have explained, does not use that type of insanity rule. If a mentally ill defendant had enough cognitive function to form the intent to kill, Kansas law directs a conviction even if he believed the murder morally justified. In Kansas's judgment, that delusion does not make an intentional killer entirely blameless.[37]

In affirming the decision of the Kansas Supreme Court, the Court held:

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[32] *Kahler v. Kansas*, 140 S.Ct. 1021, 1026-27 (2020).
[33] *Kahler*, at 1027 (citing Appellant's brief, pp 11-12).
[34] *Id*.
[35] *Id* (citing *State v. Kahler*, 307 Kan. 374, 400-401, 410 P.3d 105 124-125 (2018).
[36] *Id.*
[37] *Kahler,* at 1031.

> We therefore decline to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong. Contrary to Kahler's view, Kansas takes account of mental health at both trial and sentencing. It has just not adopted the particular insanity defense Kahler would like. That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later.[38]

In other words Kansas's *mens rea* approach does not violate due process and due process does not mandate the acquittal of a defendant who could not tell right from wrong when the crime was committed.[39] Since Montana's approach is similar to that of Kansas, and the Court clearly states its intention for this to remain up to the states to determine, it is almost certain that the Montana statutory approach to defendants with a claim of mental disease or disorder, would be upheld.

II. Montana's Statutory Scheme

Montana's current statutory scheme for mental competency of the accused is found in Title 46, chapter 14. Part 1 of Title 46, chapter 14 describes the relevance of mental disease or disorder, part 2 provides the procedure when mental disease or disorder is an issue, and part 3 contains the statutes governing the disposition of the defendant.

These statutes come into play when a person is alleged to have committed a crime and the person's mental health or mental state is recognized or raised as an issue. Section 46-14-101, MCA, provides:

> 46-14-101. Mental disease or disorder — purpose — definition. (1) The purpose of this section is to provide *a legal standard of mental disease or disorder* under which the information gained from examination of the defendant, pursuant to part 2 of this chapter, regarding a defendant's mental condition is applied. *The court shall apply this standard:*
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> *(a) in any determination regarding:*
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> *(i) a defendant's fitness to proceed and stand trial;*
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> *(ii) whether the defendant had, at the time that the offense was committed, a particular state of mind that is an essential element of the offense; and*
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> *(b) at sentencing when a defendant has been convicted on a verdict of guilty or a plea of guilty or nolo contendere and claims that at the time of commission of the offense for which the defendant was convicted, the defendant was unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law.*

[38] *Kahler,* at 1037.
[39] *See generally, Kahler v. Kansas*, 140 S.Ct. 1021 (2020).

> (**2) (a) As used in this chapter, "mental disease or disorder" means an organic, mental, or emotional disorder that is manifested by a substantial disturbance in behavior, feeling, thinking, or judgment to such an extent that the person requires care, treatment, and rehabilitation.**
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> (b) The term "mental disease or disorder" does not include but may co-occur with one or more of the following:
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> (i) an abnormality manifested only by repeated criminal or other antisocial behavior;
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> (ii) a developmental disability, as defined in 53-20-102;
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> (iii) drug or alcohol intoxication; or
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> (iv) drug or alcohol addiction. (Emphasis added.)

As set forth in 46-14-101, MCA, there are three circumstances in which the issue of mental disease or disorder may arise. The first circumstance is a court-ordered evaluation (COE) regarding fitness to proceed and generally is an issue before the trial or plea of the defendant, though COEs can be requested and/or ordered at any point during the pendency of the criminal case and address the issue of competency.[40] The second circumstance is not guilty but mentally ill (NGMI). This category addresses defendants who, based upon evidence at trial, did not have the requisite intent or mental state required as an element of the criminal offense charged.[41] The third circumstance of guilty but mentally ill encompasses a defendant who is evaluated during the sentencing phase of the case when the defendant argues that at the time the offense was committed, "the defendant was unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law."[42]

A. Legal Definition of "Mental Disease or Disorder"

The legal definition of "mental disease or disorder" is found in 46-14-101(2)(a), MCA, as shown in the block quotation above in bold type. The legal definition did not exist until the Montana Supreme Court adopted a legal definition in *State v. Wooster*.[43] In doing so the Court noted that: "a district court's definition of mental disease or defect need not be identical with medical definitions of mental disease or defect".[44] The Court further stated that:

> Not only do "psychiatrists disagree widely and frequently on what constitutes mental illness," but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement. . . .Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession.[45]

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[40] 46-14-101(a)(i), MCA.
[41] 46-14-101(a)(ii), MCA.
[42] 46-14-101(b); This statute was adopted from the Model Penal Code drafted by the ALI as was the case of the pre-1979 insanity test; *See* Bender, *Supra*. 135, n. 19, 136.
[43] *State v. Wooster*, 1999 MT 22, ¶ 36-44, 293 Mont. 195, 209, 974 P.2d 640, 649-650.
[44] *State v. Wooster*, 1999 MT 22, ¶ 36.
[45] *Id*.

In making this determination, the Court considered that the absence of an affirmative definition of mental disease or defect[46] in the face of several opinions from psychiatrists and other appropriate mental health professionals to be confusing and determined that an affirmative definition was necessary.[47] This definition was codified in 46-14-101(2)(a), MCA, by the Montana Legislature during the 2003 legislative session.[48]

B. Fitness to Proceed – Court-Ordered Evaluations (COE)

Fitness to proceed evaluations take place before trial and the primary goal is to determine whether the defendant is competent to stand trial.

Competency is a threshold issue in every criminal case. If a defendant is deemed incompetent, they cannot stand trial. The United States Supreme Court in *Dusky v. United States* held that for a defendant to be found competent to stand trial, they must have a "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding – and . . .[have] a rational as well as factual understanding of the proceedings against [them]".[49] The *Dusky* standard was specifically adopted in Montana in 1982 in *State v. Austad*.[50]

The authority for fitness to proceed evaluations or COEs is found in 46-14-101(1)(a)(i), MCA. The process for raising the issue of fitness to proceed is found in 46-14-221, MCA. In general terms, after the issue of fitness to proceed has been raised, the court must determine the issue.[51] The defendant must be examined by a "qualified psychiatrist, licensed clinical psychologist, or advanced practice registered nurse,"[52] and the examiner must prepare a report of examination containing a description, a diagnosis, and an opinion whether "the defendant, because of a mental disease or disorder or developmental disability, to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirement of the law."[53] Of course, to the extent the issue of competency, as discussed above, requires an additional or slightly different opinion than expressly required in 46-14-206(e), MCA, competency, as originally determined in *Dusky*, remains a threshold issue for a fitness to proceed determination.[54]

If a defendant is deemed unfit to stand trial, the court must "within 90 days of commitment, review the defendant's fitness to proceed".[55] If a defendant remains unfit "and. . . 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".[56] At this point, assuming the

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[46] Now "mental disease or disorder" *See* House Bill No. 382 (2015).
[47] *Wooster*, ¶ 35-36.
[48] Senate Bill No. 57 (2003).
[49] *Dusky v. United States*, 362 U.S. 402 (1960).
[50] *State v. Garner*, 2001 MT 222, ¶ 21, 306 Mont. 462, 36 P.3d 346 (noting that the *Dusky* standard was specifically adopted in *State v. Austad*, 197 Mont. 70, 78, 641 P.2d 1373, 1378 (1982)).
[51] 46-14-221(1), MCA.
[52] 46-14-205, MCA.
[53] 46-14-206(e), MCA.
[54] *See* n. 46 and 47.
[55] 46-14-221(3)(a), MCA; *See generally Jackson v. Indiana*, 406 U.S. 715 (1972).
[56] *Id*.

defendant has a mental disorder, the prosecutor is required to prepare a civil petition for commitment under Title 53, chapter 21, and move forward with the petition.[57] The same procedure is followed for a defendant with a developmental disability.[58]

Section 46-14-222, MCA, addresses the procedure if the defendant's fitness is regained.

> **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 public health 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 facility of the department of public health and human services.

The situation where a defendant receives treatment following a determination of unfitness and regains fitness within 90 days, or within a fairly short period of time, is fairly straightforward based on 46-14-221, MCA, and 46-14-222, MCA. However, the case where a defendant who is determined unfit for trial, whose criminal case is dismissed and who is then civilly committed, as provided in 46-14-222, MCA, and after a period of years regains fitness is much more complex.

A very recent case from the Montana Supreme Court illustrates the complexities of these situations.[59] Mosby was 24 years of age at the time of his arrest and had spent most of his life in foster care, group homes, or the Montana Developmental Center (MDC). At the time the incident took place he was under 24-hour supervision and residing in a group home in Missoula.[60] The residents of the group home were on an outing to a gym where there was an incident in the showers resulting in Mosby being charged with felony sexual assault and indecent exposure.[61]

Mosby was charged in 2005 and following an evaluation of his fitness to proceed under 46-14-221, MCA, was determined unfit to stand trial and unlikely to significantly improve. Mosby was then evaluated by a second expert who made similar findings. As provided under 46-14-221(3)(a), MCA, the district court dismissed the criminal case and the prosecutor filed for civil commitment. The Court found that Mosby met the criteria for civil commitment and Mosby was committed to MDC in May 2006.[62] Mosby continued to be recommitted each Spring with no

[57] 46-14-221(3)(b), MCA.
[58] 46-14-221(3)(c), MCA.
[59] *State v. Mosby*, 2022 MT 5.
[60] *Mosby* ¶4-5.
[61] *Mosby* ¶4.
[62] *Mosby* ¶5-6.

objection from Mosby. In 2013 he began requesting hearings on his continued recommitment and in 2017 requested a hearing and a new psychological evaluation.[63]

At this point the issue, addressed in 46-14-222, MCA, of whether "so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings" came to the forefront.[64] The Court discussed the United States Supreme Court case of *Jackson v. Indiana*, where the United States Supreme Court held:

> [A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.[65]

Thus, the United States Supreme Court, like the Montana Supreme Court, is concerned that at some point the ability to renew the criminal case must end. Ultimately the Montana Supreme Court held that "the passage of over 12 years in Mosby's circumstances also renders the District Court's decision to renew the criminal process an abuse of discretion."[66]

C. Not Guilty But Mentally Ill (NGMI)

After a defendant is determined to be competent or fit to stand trial or if competence or fitness was not an issue, the case proceeds to trial. At trial the defendant is limited to arguing "that due to a mental disease or disorder the defendant could not have a particular state of mind that is an essential element of the offense charged."[67] In other words, when considering the potential criminal mental states of purposely, knowingly, or negligently,[68] the defendant, due to their mental disease or disorder, was unable to form the requisite mental state when the crime was committed. The defendant typically admits to the criminal act but argues they could not form the mental state required as an element of the crime.

It is very difficult for defendants to be able to successfully argue to a jury that due to their mental disease or disorder they were unable to form the requisite mental state for the crime they were charged with. An example is the case of *State v. Cowan.*[69] Cowan broke into a forest service cabin while the resident of the cabin was away. When the resident came home, she could tell someone had been in her cabin, eating her food and watching television. She locked all the windows and doors and called 911. At this point, Cowan broke in again and severely beat her

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[63] *Mosby* ¶7.
[64] 46-14-222, MCA.
[65] *Jackson v. Indiana, 406 U.S. 715, 738 (1972); Mosby*, ¶18.
[66] *Mosby* ¶30.
[67] 46-14-301(1), MCA.
[68] 45-2-101(35), (43), or (65), MCA.
[69] *See State v. Cowan Supra.*, n. 25.

with a tree planting tool called a hodag.[70] The victim survived despite being gravely injured and Cowan was charged with attempted deliberate homicide and aggravated burglary.[71] Cowan elected to waive his right to a jury trial. During the bench trial he argued:

> that he did not act deliberately in committing these offenses . . .[and] that he was in an acute psychotic episode at the time of the attack and that he was under the delusion that the victim was a robot, not a human being.[72]

Despite arguing that he was in an acute psychotic episode at the time of the crime and that he suffered from paranoid schizophrenia, which was bolstered by the testimony of expert witnesses, the Court found Cowan had possessed the requisite mental state and pronounced him guilty.[73]

On appeal, Cowan conceded the conduct elements of attempted deliberate homicide and aggravated burglary. He argued that he was unable to form the mental states of purposely or knowingly. The definitions of "knowingly" and "purposely" at the time of the *Cowan* decision were:

> (33) "Knowingly" -- a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.
> . . .
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> (58) "Purposely" -- a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.[74]

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[70] *Cowan* at 512, 885.
[71] *Cowan*, at 512-513, 886.
[72] *Cowan*, 512, 885.
[73] *Id*.
[74] 45-2-101(33), (58) (1993), MCA.

At trial Cowan presented evidence that he had suffered for years with paranoid schizophrenia and presented testimony that there was "reasonable scientific evidence" that he was experiencing an acute psychotic episode when the crimes were committed. Even the psychologist who testified on behalf of the state stated "the presence of his disorder . . . plus that kind of behavior certainly raised the possibility of psychosis at that time."[75] While there was certainly conflicting evidence offered by the prosecution, a criminal defendant is only required to raise reasonable doubt.

However, the issue at trial was not simply whether Cowan was in a psychotic state at the time of the trial. The issue at trial was whether Cowan acted purposely or knowingly. The Montana Supreme Court found that the district court could have found beyond a reasonable doubt that Cowan possessed the required mental state for conviction and upheld the conviction.[76] The Cowan case illustrates the hurdles to successfully arguing a defendant with a documented serious mental illness characterized by periods of acute psychosis could not form the requisite mental state required for conviction.[77] It is also important to understand the standard of review that applies when challenging the decision of the trier of fact was "whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found Cowan guilty beyond a reasonable doubt of the crimes with which he was charged."[78]

When a defendant is successful in arguing that they are not guilty but mentally ill (NGMI), 46-14-301, MCA, provides the procedure for how their case and placement are handled. For serious crimes they are generally committed to the Department of Public Health and Human Services (DPHHS). However, the period of commitment may not exceed the maximum sentence for the longest potential sentence of the charged offenses.[79] After an NGMI finding, the following occurs:

> Commitment upon finding of not guilty by reason of lack of mental state — hearing to determine release or discharge — limitation on confinement. (1) When a defendant is found not guilty for the reason that due to a mental disease or disorder 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

[75] *Cowan*, 513, 886.
[76] *Cowan*, 514, 887.
[77] Cowan also challenged his sentence to the department of institutions (now department of corrections) "for placement in a facility deemed appropriate to [his] need for treatment and society's need for protection from [him]". He did not prevail on this issue either is currently housed at the Montana state prison; *Cowan*, 512, 885; Correctional Offender Network, Montana Department of Corrections, entry for Joe Junior Cowan, Jan. 14, 2022.
[78] *Cowan*, 512, 885-886 (citing *State v. Bower*, 254 Mont. 1, 6, 833 P.2d 1106, 1110 (1992)).
[79] 46-14-301(4), MCA; 46-14-214(2), MCA.

> 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.[80]

The court is further required to evaluate the nature and seriousness of the offense. If the offense caused a "substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage" the court must make a determination with regard to dangerousness. If the court finds that the person is a danger to themselves or others, then the person is committed to the DPHHS.[81] If the charge "did not involve a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage, the court shall release the person." However, the prosecutor may pursue a civil commitment under Title 53, chapter 20 or 21.[82]

When a person is committed to the custody of the DPHHS the following must occur:

> (3) A person committed to the custody of the director of the department of public health 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 disorder 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 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 disorder 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 damag*e. (Emphasis added.)[83]

The hearing at this stage is a civil hearing. Assuming the prosecution meets the burden emphasized above, and the judge determines the person presents a substantial risk of harm, they are again committed to the DPHHS for a period of time that cannot exceed the maximum penalty for the most serious of the crimes charged. When the maximum sentence expires, "involuntary civil commitment proceedings may be instituted in the manner provided in Title 53, chapter

[80] 46-14-301(1), MCA.
[81] 46-14-301(2)(a), MCA.
[82] 46-14-301(2)(b), MCA.
[83] 46-14-301(3), MCA.

21."[84] If the court rules that the person does not pose a substantial risk of harm or pose a safety risk, the person may be released on appropriate conditions. A person who is committed to the DPHHS under 46-14-301, MCA, must have their status reviewed by a professional person once a year.[85] The potential discharge or release may also be done on motion of the director of the DPHHS.[86]

D. Guilty But Mentally Ill (GBMI)

When a defendant who alleges that they suffer from a mental disease or disorder is later convicted at trial, they may argue at sentencing that when they committed their crimes they were "unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law."[87] In essence, this standard takes us back to volitional aspect of the pre-1979 abolition of the traditional insanity defense without the "substantial capacity" aspect adopted in Montana in 1967.[88]

If a defendant alleging GBMI is successful, "the sentencing court shall consider any relevant evidence presented at the trial and may also consider the results of the presentence investigation (PSI)."[89] At this point the sentencing judge may order a "presentence investigation and a report on the investigation."[90] The PSI ordered in these circumstances must:

> [I]nclude a mental evaluation by a person appointed by the director of the department of public health and human services or the director's designee. The evaluation must include an opinion as to whether the defendant suffered from a mental disease or disorder or developmental disability with the effect as described in subsection (1). If the opinion concludes that the defendant did suffer from a mental disease or disorder or developmental disability with the effect as described in subsection (1), the evaluation must also include a recommendation as to the care, custody, and treatment needs of the defendant.[91]

Thus, if the sentencing judge finds the defendant was "unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law," then any mandatory minimums no longer apply. More importantly,

> [t]he court shall sentence the defendant to be committed to the custody of the director of the department of public health and human services to be placed, after consideration of the recommendations of the professionals providing treatment to the

[84] 46-14-301(4), MCA.
[85] 46-14-301(5), MCA.
[86] 46-14-302, MCA.
[87] 46-14-311(1), MCA.
[88] American Law Institute test (citing Model Penal Code §4.01(1); Bender, *Supra*. 135, n. 19.
[89] 46-14-311(1), MCA.
[90] 46-14-311(2), MCA.
[91] 46-14-311(2), MCA.

> defendant and recommendations of the professionals who have evaluated the defendant, in an appropriate correctional facility, mental health facility, as defined in 53-21-102, residential facility, as defined in 53-20-102, or developmental disabilities facility, as defined in 53-20-202, 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).[92]

Finally, if the sentencing judge finds the defendant did not suffer from a mental disease or defect, the defendant is sentenced under the typical process found in Title 46, chapter 18.[93]

III. Conclusion

The criminal commitment process that is the subject of the House Joint Resolution 4 study is a very complex and detailed process. The difficulty in writing this report is first simply the breadth of information necessary to explain the process, and also stems from the fact that the cases interpreting the statutes in Title 46, chapter 14, tend to involve the most heinous of crimes. The focus on serious criminal offenses obscures the reality that issues related to mental disease or defect also occur in cases involving relatively minor crimes. The panel discussion is intended in part to fill in the blanks beyond the recitation of statutes and caselaw and provide the Law and Justice Interim Committee with an understanding of how this process works on a day to day basis for the practitioners who have various roles in this process in all types of criminal cases.

[92] 46-14-312(2), MCA.
[93] 46-14-312(1), MCA.