TESTIMONY OF PROFESSOR PAUL G. CASSELL
REGARDING INSANITY DEFENSE AMENDMENTS
Judiciary Interim Committee – August 21, 2019

As someone who teaches Criminal Law at the S.J. Quinney College of Law at the University of Utah,[1] I have been closely following Representative Moss' proposed amendments to Utah's insanity defense with interest. The issues that she raises deserve careful attention. In my view, however, today is not a good time for addressing these issues. The United States Supreme Court currently has pending before it a case challenging the constitutionality of Kansas' insanity law – which is quite similar to Utah's. It would make sense to wait until that challenge is resolved (probably in late 2019 or early 2020) before making any final decision about whether to consider modifications to Utah's long-existing law on the subject.

If this Committee decides to address this issue now, I recommend that the Committee consider how crime victims' interests will be protected in any situation where a case moves from the criminal justice system into another setting.

I. Background on the *M'Naghten* Test and the Mens Rea Approach.

I know that this Interim Committee has already received much useful information about the history of the insanity defense in this country. In brief, current Utah law addresses issues related to insanity through the mens rea requirement for criminal law ability. Representative Moss' bill would essentially have Utah adopt the so-called "*M'Naghten* test" for insanity.

It is not clear that changing Utah law in this way would be desirable.[2] In this country, during the Nineteenth Century, earlier references to knowledge of good and evil morphed into the right-and-wrong test recognized in *M'Naghten's Case*.[3] But this test was hotly debated in this country and never became entrenched as a fundamental principle of American law. For example, a century ago Professor John Henry Wigmore, then-president of the American Institute of Criminal Law and Criminology, appointed a committee of law professors, judges, and physicians to try to reach some agreement so "that the difficult problem of determining the relation of insanity to criminal

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[1] Since 1992, I have been a professor law at the S.J. Quinney College of Law at the University of Utah, with additional service as a U.S. District Court Judge for the District of Utah (2002-07).

[2] The following discussion draws heavily on the Brief for Kansas in Kahler v. Kansas at pp. 26-30, No. 18-6135 (currently pending before the Supreme Court).

[3] 8 Eng. Rep. 718 (1843).

responsibility might be thereby to some extent solved."[4] In 1916, the committee reached unanimous agreement and recommended a *mens rea* approach to insanity – an approach that looks very much like the Utah approach today.[5]

The *mens rea* approach found in Utah, or some close derivation thereof, has been advocated by many scholars since then.[6] As Professor Norval Morris argued in his influential book on the subject, "[t]he English and American judges went wrong in the nineteenth century; it is time we returned to older and truer principles."[7] As someone who clerked for Chief Justice Burger, I find then-Judge Warren Burger's 1964 analysis of the issue powerful. Then-Judge Burger explained that "we should consider abolishing what is called the 'insanity defense'; the jury would decide within the traditional framework of drawing inferences as to intent from the accused's conduct only whether he committed the overt acts charged."[8] Judge Burger then went on to describe the mens rea approach that Utah would adopt some years later.[9]

Building on suggestions like those advanced by Judge Burger, in 1974 the U.S. Department of Justice recommended that Congress adopt a *mens rea* approach to the insanity defense. The Department of Justice supported S. 1400, which—in language nearly identical to Utah's current law—provided: "It is a defense to a prosecution under any federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense."[10]

In 1982, when John Hinckley was found not guilty by reason of insanity for shooting President Ronald Reagan and Press Secretary James Brady, public outrage prompted Congress and some states to reexamine their respective insanity defense laws. At that time, the Department of Justice reiterated its support for the *mens rea* approach

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[4] Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 536 (1917).

[5] *Id.* at 536.

[6] *See* Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 544-47 & n.13 (1968) (discussing advocates of the approach); Joseph Goldstein & Jay Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L. J. 853 (1963).

[7] Morris, *Madness and the Criminal Law* 56 (1982).

[8] Warren E. Burger, *Psychiatrists, Lawyers, and the Courts*, 28 FED. PROBATION 3, 9 (June 1964)

[9] *Id.*

[10] Department of Justice Memorandum on Section 502 of the Criminal Code Reform Act (the Insanity Defense), *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 6813 (1974) ("*1974 Senate Hearings*").

before ultimately acceding to a legislative compromise.[11] At the time of the 1982 hearings, psychiatrists were so divided about the role of the insanity defense (and psychiatrists' role in proving and disproving it), the American Psychiatric Association was unwilling to take a position.[12] But Dr. Abraham L. Halpern, then president-elect of the American Academy of Psychiatry in the Law, testified in favor of the "total elimination of the exculpatory insanity rule" and its replacement with the *mens rea* approach.[13] And in 1983, the American Medical Association adopted a policy calling for the replacement of the affirmative defense of insanity with the *mens rea* approach.[14]

II. Utah's Adoption of the Mens Rea Approach.

Against that backdrop, in 1983 Utah abolished the traditional insanity defense in favor of a new statutory scheme that essentially tracked the U.S. Justice Department's mens rea proposal.[15] The Utah approach provided that: "It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense."[16]

In 1995, the Utah Supreme Court upheld Utah's mens rea approach against constitutional attack in a case known as *State v. Herrera*.[17] The Utah Supreme Court explained that "[i]n formulating an insanity defense, government must carry out the demands of punishment and at the same time assure that those without guilty minds are not unjustly condemned."[18] The Utah Supreme Court found no federal constitutional defect in Utah's approach to insanity issues, noting that Utah's approach, while a minority one, "has been endorsed by credible branches in the scientific and medical

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[11] *See* Testimony of Hon. William French Smith, Attorney General of the United States, *1982 Senate Hearings* at 26-29.

[12] *See* Statement by the American Psychiatric Association on the Issues Arising from the Hinckley Trial, *Insanity Defense in Federal Courts: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 97th Cong., 2d. Sess. 58, 77 (1982).

[13] *1982 Senate Hearings* at 283.

[14] Committee Report, *Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony*, 251 J. AM. MED. ASS'N 2967, 2967 (1984).

[15] *See* State v. Young, 853 P.2d 327, 383 (Utah 1993); Utah Legislative Survey, 1984 Utah L. Rev. 115, 151.

[16] Utah Code § 76-2-305(1).

[17] 895 P.2d 359 (Utah 1995).

[18] *Id.* at 362.

fields."[19] And the Court also rejected state constitutional challenges to the law, noting that Utah had historically adopted varying positions on how to treat the issue.[20]

The Court also pointed to Utah's statute providing a defense of "guilty with mental illness,"[21] explaining that "[t]he guilty and mentally ill verdict buffers some of the harsher consequences of eliminating an independent insanity defense. "[22] In addition, it is worth noting that Utah law also contains a provision providing for "special mitigation" reducing the level of a criminal homicide offense.[23] Among other things, the special mitigation provision provides a defense where an actor "acts under a delusion attributable to a mental illness ...."[24]

III. The Current Constitutional Challenge to the Kansas Mens Rea Approach.

Currently the Utah approach "mens rea" to insanity issues is paralleled by about four other states. In addition to Utah, three other states -- Montana, Idaho, and Kansas -- have adopted laws channeling insanity issues into mens rea requirements.[25] The state supreme courts of all four states have upheld the constitutionality of this approach.[26] In addition, Alaska has adopted a very similar approach. While insanity remains an affirmative defense in Alaska, only the cognitive prong of *M'Naghten* remains; a requirement that the defendant know his actions were
wrong has been abolished.[27]

The U.S. Supreme Court has recently agreed to review the constitutionality of the Kansas law. On March 18, 2019, the Court granted certiorari to review the Kansas Supreme Court's decision upholding the Kansas law.[28] Briefing was completed recently, and the case will be orally argued during the Court's very first argument day – the first Monday in October, i.e., October 7, 2019.

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[19] *Id.* at 364.

[20] *Id.* at 366.

[21] *See* Utah Code § 77-16a-101 et seq.

[22] 895 P.2d at 367 (*citing* Utah Legislative Survey - 1983, 1984 Utah L. Rev. at 156-57).

[23] Utah Code § 76-5-205.5.

[24] Utah Code § 76-5-205.5(1)(a).

[25] Mont. Code Ann. § 46-14-102; Idaho Code § 18-207; Kansas stat. Ann. § 22-3220.

[26] In addition to the decision of the Utah Supreme Court in *Herrara* discussed above, *see State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Korell*, 690 P.2d 992 (Mont. 1984); *State v. Kahler*, 410 P.3d 105 (Kansas 2018), *cert granted*, No. 18-6135 (U.S. 2019).

[27] Alaska Stat. § 12.47.010(a).

[28] Kahler v. Kansas, No. 18-6135.

In the interests of full disclosure, I am an attorney in that case. Joining with Allyson Ho and other co-counsel, I recently filed a brief for Lynn Denton, Arizona Voice for Crime Victims, and the Utah Crime Victims Legal Clinic in support of the constitutionality of the Kansas law.[29] So that the Committee may have the benefit of our position, I set out the key part of the argument here:

> The Constitution does not deny States the flexibility to channel mental issues into the *mens rea* requirement of a crime, as Kansas has done. Resp. Br. 18–55. See *Clark*, 548 U.S. at 752 n.20 ("We have never held that the Constitution mandates an insanity defense."). As Justice O'Connor explained in her *Foucha* concurrence, the majority "places no new restriction on the States' freedom to determine whether, and to what extent, mental illness should excuse criminal behavior. The Court does not indicate that States must make the insanity defense available." 504 U.S. at 88–89 (O'Connor., J., concurring). Similarly, Justice Kennedy emphasized that "the States are free to recognize and define the insanity defense as they see fit." *Id.* at 91, 96 (Kennedy, J., joined by Rehnquist, C.J., dissenting) ("Mental illness may bear upon criminal responsibility * * * in *either of two ways*: First, it may preclude the formation of *mens rea* * * *; second, it may support an affirmative plea of legal insanity") (first emphasis added).[30]

I helped to file this brief because of concerns about how a broad insanity defense can harm the interests of crime victims. As we explained in our brief:

> Flexibility [in addressing insanity issues] is particularly important so that the interests and concerns of victims can be taken into account. Broadly speaking, victims have an interest in holding perpetrators accountable for their crimes. If a defendant is found not guilty by reason of insanity, subsequent proceedings to determine whether to release him from a treatment facility will take place outside the criminal justice system—reducing transparency and the opportunity for victim involvement (e.g., victim impact statements that can be provided to sentencing judges and parole boards). See generally Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 Ohio St. J. Crim. L. 611, 615 (2009) (noting widespread adoption of victim impact statements in criminal sentencings).[31]

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[29] Brief for Lynn Denton et al., Kahler v. Kansas, No. 18-6135 (filed Aug. 9, 2019).

[30] *Id.* at 9-11.

[31] *Id.* at 11-12.

Given that the U.S. Supreme Court will be holding oral argument in the *Kahler* case on October 7, it seems likely that the Court will render a decision in late 2019 or perhaps early 2020.

Conclusion: The Legislature Should Wait to Revisit Insanity Issues

Insanity issues are difficult and raise many complexities. But if one thing seems clear, it is that this Interim Committee – and perhaps ultimately the Legislature – should now wait until the United States Supreme Court has ruled in the *Kahler* case. If the Court were to, for some reason, strike down the Kansas law as unconstitutional, then the Legislature would need to act and would have the benefit of the Court's decision as to how to craft a replacement law.

But at the risk of entering into the realm of prognostication, I believe it is likely that the Supreme Court will uphold Kansas' law. If it does so, the Court's opinion may shed valuable light on how Kansas' law is useful and what considerations led the Court to reach this conclusion.

It is well known that insanity issues are very infrequently raised in America's courts. There does not seem to be any pressing urgency to address the insanity issue immediately. Waiting may be particularly important, because any changes in Utah's current statute will certainly lead to litigation in future cases. I recommend that the Legislature wait for the Supreme Court's opinion on the Kansas statute and then, at that time, consider how best proceed.

If the Interim Committee – or the Legislature – determines to revisit this issue, I would also add one note of caution. If criminal defendants are removed from the criminal justice system into a mental health system, then it is important that the interests of crime victims not be overlooked. Because of Utah's state constitutional victims' rights amendment – and associated state statutes – crime victims have a voice in the criminal justice process. In other settings, how crime victims' voices are to be heard is not immediately clear. The Legislature should consider this issue if it determines to make any changes in this area.