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MEMORANDUM

To: **All Members, Assembly Judiciary Committee**

From: **Howard Brooks** HWB

Date: **February 20, 2003**

Re: **Competency-Insanity-Mental Retardation (AB 15, 156)**

When discussing competency, insanity, and mental retardation, lawyers often confuse key words and descriptions, blurring the distinctions among these different legal terms. This document is intended to clarify the meaning of these concepts as they are used in Nevada's criminal courts.

Competency

A criminal defendant lacks competency to stand trial if he or she cannot understand the nature of the court proceedings, cannot consult with counsel, or cannot assist counsel in preparing his or her defense. Drope v. Missouri, 420 U.S. 162 (1975). Federal and state due process guarantees are violated when the government prosecutes a defendant who is legally incompetent to stand trial.

The issue of competency is separate from the issue of guilt, and involves the defendant's ability to consult with his lawyer and to understand the proceedings against him. Dusky v. U.S., 362 U.S. 402 (1960).

The issue of competency can arise at any time during the prosecution of a criminal case. If a Nevada court finds that there is "doubt" about the competency of a criminal defendant, "the court shall suspend the trial or the pronouncing of the judgment [and all court proceedings]...until the question of competence is determined." NRS 178.405.

When a competency issue arises, NRS 178.415 establishes a procedure for how to determine competence. In Clark County, the procedure established by statute is rarely, if ever, followed. Instead, an informal procedure exists whereby a court will send a defendant to Lakes Crossing Center for the Criminally Disordered Offender if the defense provides two reports from two psychiatrists stating the defendant is not competent.

Most defendants who are not competent suffer from mental illness. They are usually psychotic or acutely paranoid. When a defendant goes to Lakes Crossing (in Sparks), the staff medicates the defendant until the defendant is competent. Defendants usually stay at Lakes Crossing from two to six months. If the defendant never regains competence, the criminal charges must be dismissed, but this rarely happens.

ASSEMBLY JUDICIARY
DATE: 2/12/03 ROOM 3138 EXHIBIT K
SUBMITTED BY: Howard Brooks

Insanity

Insanity describes a mental condition, suffered by a criminal defendant, that is so severe that the condition negates the individual's legal responsibility for his or her criminal actions. In other words, insanity is a legal defense to criminal accountability.

The test for insanity is whether the defendant, at the specific time of the alleged crime, understood the nature and quality of his actions, or understood the wrongfulness of his actions. If the defendant did not understand his actions, or did not understand that his actions were wrong, then the defendant is not guilty by reason of insanity.

An excellent history of the insanity defense and an overview of how different jurisdictions in this country define insanity can be found in the Nevada Supreme Court decision of Finger v. State, 117 Nev. Adv. Op. 48, 27 P.3d 66 (2002).

Attached to this memorandum is my article from the Clark County Bar Association's *Communique* describing the impact of Finger v. State upon Nevada law.

Mental Retardation

Mental retardation is not a defense to a criminal charge. The mental retardation of a defendant, in and of itself, does not stop criminal proceedings. Mental retardation is not about whether a defendant understood the nature and quality of his actions, or knew right from wrong.

Mental retardation becomes an issue in murder cases where the State seeks a death sentence against a person convicted of first degree murder. The United States Supreme Court has ruled that executing a mentally retarded person convicted of first degree murder is cruel and unusual punishment, and is therefore prohibited by the United States Constitution. Atkins v. Virginia, 537 U.S. 304 (2002).

Mental retardation differs from mental illness because the limitations in intellectual functioning occurs prior to the age of 18 with mental retardation. Nevada law currently defines mental retardation to mean subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. NRS 433.174.

The 2003 Legislature must define the procedure for how a court or jury will determine if a defendant is mentally retarded.

Questions ?

If any legislator finds this memorandum confusing, feel free to call me at 702-455-5731 (work) or 702-434-6071 (home) any time, and I will be happy to attempt a clarification of this information. Questions can also be e-mailed to me at salebabu@lvcm.com.

Does Nevada Really Have an Insanity Defense?

By Howard Brooks

On July 24, 2001, the Nevada Supreme Court resurrected an insanity defense for persons facing criminal liability under Nevada law. In *Finger v. State*, 117 Nev. Adv. Op. 48, 27 P.3d 66 (2002), the Court ruled that federal and state due process guarantees are violated when persons are convicted and punished for acts committed when the person did not understand the nature and quality of his or her actions, or did not know the actions were wrong.

While the *Finger* decision attracted much attention by bringing our jurisprudence back in line with all the states except Utah, Idaho and Montana, doubts exist whether a criminal defendant can litigate an insanity defense with any hope of success. I believe the insanity defense exists as a theoretical proposition, but a criminal defendant will rarely be able to present a viable insanity defense at trial.

Nevada's Old Insanity Defense

Prior to October 1, 1995, the Nevada Revised Statutes provided a defendant the right to plead not guilty by reason of insanity. Under such a plea, the defendant had the burden to establish his insanity by a preponderance of the evidence. See former NRS 194.035(3) (1967, repealed 1995) (defined plea and burden of proof); former NRS 175.521 (1967, repealed 1995) (defined procedure when insanity found by jury); former NRS 194.010(4) (1967, repealed 1995) (provided that lunatics and insane persons not culpable for crimes). The test for insanity was the *M'Naghten* standard: does a defendant understand the nature and quality of his actions, or does he know his actions were wrong. *In M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843); *State v. Lewis*, 20 Nev. 333, 22 P. 241 (1889); *Clark v. State*, 95 Nev. 24, 588 P.2d 1027 (1979). Expert testimony was not necessary to support an insanity verdict. A defendant could argue for insanity if any evidence supported such a defense. *Aldana v. State*, 102 Nev. 245, 720 P.2d 1217 (1986); *Criswell v. State*, 84 Nev. 459, 443 P.2d 552 (1968).

Nevada's insanity defense disappeared in 1995 after prosecutors told the Legislature insanity defenses were being argued in inappropriate cases. Prosecutors' concerns were largely imaginary. Verdicts of not guilty by reason of insanity are extremely rare in Nevada, and I am aware of only two such verdicts in the 34-year history of the Clark County Public Defender Office. Nevertheless, the Legislature heeded the prosecutors' pleadings and abolished the defense. See S.B. 314 (Nev. 1995).

What was substituted for the insanity defense was a statutory scheme that promised mental health treatment in prison for people who plead "guilty but mentally ill," but promised no such help to people who went to trial since juries did not have the discretion to find defendants "guilty but mentally ill." See NRS 174.035, 174.127, 174.041, 176.127.

The *Finger* Decision

The *Finger* decision abolished the "guilty but mentally ill" plea, and restored the insanity statutes as they existed prior to the passage of Senate Bill 314 in 1995. *Finger* at 84. However, *Finger* also limited the ability of a defendant to present an insanity defense. Overruling *Aldana v. State*, 102 Nev. 245, 720 P.2d 1217 (1986), the Court ruled that laypersons may not express an opinion that a defendant is insane. Lay witnesses may describe bizarre or unusual behavior, but only an expert can say a person is insane. The Court also said a defendant qualifies as insane if he suffers a delusion that renders him incapable of understanding the nature or quality of actions or being unable to tell right from wrong, and the delusion, if true, constitutes a legal defense to the charge.

The Ramifications

With *Finger* on the books, can we say that Nevada has a legally viable insanity defense? Anyone presenting an insanity defense must understand that juries hate the idea of a defendant "getting away" with the crime. We have had insanity cases in Nevada where expert testimony established a defendant's insanity, and the State offered no testimony rebutting the expert's view; but the juries rejected the insanity defense and found the defendant guilty. See *Hudson v. State*, 108 Nev. 716, 837 P.2d 1361 (1992).

But even if a defendant can get beyond a jury's prejudice, the nature of evidence in cases where a mentally ill defendant has committed a crime and the requirement in *Finger* that the defendant's delusion constitute a defense to the charge are almost impossible hurdles to conquer. Most insane criminal defendants do not remember the delusion they experienced when they did the alleged crime. And when mental health experts state an opinion that a person did not understand what he or she was doing when the crime occurred, that conclusion is generally based on the defendant's mental health history and how the defendant is acting days or weeks after the event. Obtaining

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a statement from a mentally ill person which accurately describes a past delusion is rare.

Plus, defining insanity is more complicated than the test articulated in *Finger*. For example, a deific decree occurs where a defendant believes his act was compelled by the will of God. The knowledge that man's law prohibits certain acts yields to God's alleged decree that an act is not wrong. Persons acting under the delusion of a deific decree are legally insane. *See, e.g., State v. Potter*, 842 P.2d 481 (Wash. Ct. App. 1992), *People v. Skinner*, 704 P.2d 752 (Cal. 1985). They do not understand their actions are wrong. But the last prong of *Finger* will be argued as an impediment to the validity of deific decrees, when in fact the last prong of *Finger* is simply not relevant in cases of deific decrees.

So while the restoration of the insanity defense makes a good news story, the *Finger* decision does not make the insanity defense a viable trial option for the overwhelming majority of mentally ill criminal defendants. I do predict, however, that this area of the law will remain interesting as a subject of litigation, and I believe the requirement that the facts of a delusion constitute a valid defense will ultimately be superseded by a more sophisticated and complex analysis. C

Howard Brooks, a deputy public defender for Clark County, specializes in litigating murder cases. He also serves as the President of the Nevada Attorneys for Criminal Justice.

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