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Comment

MENTAL RESPONSIBILITY AND THE CRIMINAL LAW IN MISSOURI

The purpose of this comment is two-fold: first, to discuss generally the criminal law concept of mental disease or defect; and second, to provide an analysis of important Missouri case law arising under the 1963 mental responsibility act.¹ Prior to the passage of the act, Missouri followed the traditional test for criminal insanity known as the M'Naghten Rule. The new codification includes some of the various modifications of the M'Naghten Rule that have been made in both the recent and more distant past. In order to better understand the application of the Missouri statute, a discussion of the various approaches for determining "insanity" will be helpful.

I. THE DEFENSE OF INSANITY—AN OVERVIEW

The dividing line between "sanity" and "insanity" is practically indistinguishable.² While legal and medical authorities recognize the existence of different kinds and degrees of insanity,³ they do not use the same system of classification. The law looks at insanity in the context of the specific legal questions involved, while the medical approach defines and classifies the various types of insanity according to physical, mental, or emotional abnormalities. One Missouri case cites an early distinction between legal insanity and medical insanity—also called moral insanity—terming the former a disorder of the intellect and the latter a disorder of the feelings and propensities.⁴

In the criminal law field we are faced with a multiplicity of definitions as to what constitutes "insanity" in determining the issue of criminal responsibility. We start with the basic judicial test of insanity, the M'Naghten Rule, and then go on to subsequent court and legislative attempts to improve upon this test. To defend on the ground of insanity under the M'Naghten Rule, the defense must prove that at the time of the alleged criminal act, the party accused was suffering from such a defect of reason, resulting from disease of the mind, that (1) he did not know the nature and quality of the act; or that (2) if he was aware of this much, he did not know that what he was doing was wrong.⁵ In practice, the test is basically a "right-

1. Ch. 552, RSMo 1969.

2. *St. George v. Biddeford*, 76 Me. 593, 596 (1885).

3. *United States v. Kiles*, 70 F.2d 880, 883 (8th Cir. 1934).

4. *Bensberg v. Washington University*, 251 Mo. 641, 660, 158 S.W. 330, 336 (1913) (determining testamentary capacity).

5. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (H.L. 1843).

An ardent supporter of this rule praises the simplicity and accuracy with which the M'Naghten judges described both the elements necessary for a crime, the *actus reus* and the *mens rea*, and how they are negated by the mental disease or defect. See Mueller, *M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity*, 50 GEO. L. J. 105, 106 (1961). Were the rule interpreted by

wrong" test; for if the accused did not know what he was doing, he was in no position to distinguish between right and wrong as to the act.

An early departure from the M'Naghten Rule was the test promulgated by the New Hampshire Supreme Court in an 1871 case.⁶ The court stated that no single fact or set of facts shall automatically determine the existence of a mental disease which constitutes a defense to the crime charged. Rather, all facts relevant to the defendant's mental state, of whatever nature and from whatever source, are admissible. The jury is thus left free to weigh them as it chooses in deciding whether defendant suffered from a mental disease or defect, and whether the crime committed was a product of that disease.⁷ Under this rule the jury receives little guidance from the court, and extraordinary leeway is given to the expert witness whose expert testimony is likely to be considered controlling by the jury. No other state has adopted this approach—apparently feeling that it leaves too much latitude to the jury and to expert witnesses in determining the insanity question.

In 1954, the United States Court of Appeals for the District of Columbia Circuit adopted a slightly modified version of the New Hampshire Rule.⁸ The standard adopted, called the Durham Rule,⁹ takes as its measuring device, for purposes of determining both admissibility and relevancy, that portion of the New Hampshire rule which refers to the unlawful act as a product of mental disease. Although this gives the fact-finder a standard by which to weigh the evidence bearing on the issue of mental responsibility, the standard is less restrictive regarding what evidence can be considered on this issue than the M'Naghten Rule. It also provides a broader standard for admissibility of evidence pertaining to the mental responsibility of the defendant at the time of the crime. The Durham Rule reflects the opinion that the traditional defense of insanity under the M'Naghten Rule should be extended to cover not only persons hopelessly insane, but also those who suffer from a lesser degree of mental disturbance. If the fact-finder determines that the criminal act was caused by the mental disease or defect and was not the result of a person acting with the required *mens rea*, then the act goes unpunished. However, this test, like the New Hampshire rule, has met a cool response in other courts. Only one state¹⁰ and one federal court of appeals have adopted this approach.

the courts as it is presented by this author, the furor for change raised by legal scholars and those members of the medical profession involved with mental disease or defect as a defense in criminal cases would no doubt be of much smaller volume.

6. *State v. Jones*, 50 N.H. 369 (1871).

7. Neither delusion, nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. *Id.* at 370.

8. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

9. "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874.

10. M.E. REV. STAT. ANN. ch. 310, § 38 (1961). The pertinent portion is as follows:

Sec. 38-A. *Responsibility*. An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. The

Other recent modifications of the M'Naghten Rule include the Currens Rule¹¹ and the Model Penal Code Rule.¹² The authors of these rules have used the term "substantial capacity" to define the degree of sanity required to hold a man responsible for his acts in an attempt to give more latitude to expert witnesses testifying on the question of insanity while still retaining a framework upon which the court can build its instructions to the jury. These and other modifications of the M'Naghten Rule have been heralded by commentators, legal scholars, and psychiatrists as the first faltering steps of a journey that will take the defense of insanity in criminal cases out of the dark ages and place it in proper perspective with the present state of medical knowledge.¹³

II. MENTAL RESPONSIBILITY IN MISSOURI SINCE 1963

Since 1963, the effect of mental disease or defect on the outcome of a criminal prosecution under the laws of Missouri has been governed by the Mental Responsibility Act. Contained in Chapter 552 of the Revised Statutes of Missouri, the Act represents the combined efforts of legislators and legal scholars to reshape Missouri's mental responsibility law to reflect advances made by medical science while still retaining the sound legal principles of the earlier rules.

An examination of Missouri cases dealing with mental responsibility since 1963 reveals that the Missouri Supreme Court has taken a conservative approach in interpreting the new law. In *State v. Garrett*,¹⁴ the defendant was charged with and convicted of first degree robbery by means of a dangerous and deadly weapon. He pleaded not guilty by reason of mental disease or defect. The victim supplied the police with a description of the defendant that led to his arrest. Defendant confessed to substantially all of the details of the crime, both orally and in a signed confession. The issues appealed to the Missouri Supreme Court included several which dealt with the instructions given the jury regarding mental responsibility. The defendant's first argument was that the instructions, by referring to "a" mental disease or defect, limited the jury to a finding that only one, not a combination, of the defendant's symptoms could be the mental disease or defect

terms 'mental disease' or 'mental defect' do not include an abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol.

11. The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated. *United States v. Currens*, 290 F.2d 751, 774 (3d Cir. 1961).

12. 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 of his conduct or to conform his conduct to the requirements of law. MODEL PENAL CODE § .401(1) (Proposed Official Draft 1962).

13. See comments collected in 19 J. MO. BAR 645, 650-676 (1963); H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 176-79, 182-85 (1954); Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L.J. 959, 972 (1947).

14. 391 S.W.2d 235 (Mo. 1965).

that would bring him under the new statutory exemption from criminal responsibility. The court held this to be a hypertechnical objection and stated that section 552.030 "uses the term 'mental disease or defect' in a generalized sense which, as we understand, merely means a mind sufficiently disordered to cause the results indicated (with the specific exceptions noted)."¹⁵

The next argument in *Garrett* dealt with the court's refusal to give an instruction to the jury concerning the section 552.040¹⁶ requirement of automatic commitment to a mental institution of all defendants found not guilty by reason of mental disease or defect. In support of his contention that such an instruction was necessary to fully inform the jury, the defendant relied on authority from the District of Columbia Court of Appeals, birthplace of the Durham Rule. The court closely examined the cases cited and concluded that the issue was not resolved by the D. C. of Appeals.¹⁷ Defendant had drawn the substance of his proposed instruction from an extensive discussion and analysis of the new mental responsibility law found in the *Journal of the Missouri Bar*.¹⁸ While commending this article generally, the court chose not to follow its suggestions in this particular matter. The court instead looked to decisions from the 5th Circuit Court of Appeals¹⁹ and the Maine Supreme Court.²⁰ Some significance may be attached to this choice of authority since the 5th Circuit is the source of the Currens Rule and Maine is the only state that has adopted the Durham Rule by statute. The Missouri Supreme Court emphasized portions of these two decisions which describe the detrimental effect an instruction on automatic committal, by injecting the issue of punishment, could have in drawing the jury's attention away from their primary duty as fact-finders on the issue of guilt.²¹ The court does not, however, note any similarity between the Missouri statute and the rules developed by these two jurisdictions. This seems to indicate that the interpretation these two jurisdictions have applied to their rule will not be given special weight when our court is interpreting the Missouri mental responsibility statute.

Garrett sheds only a glimmer of light on the approach the Missouri Supreme Court will adopt in interpreting the new law. One can, however,

15. *Id.* at 239. Quoted with approval in *State v. Duisen*, 428 S.W.2d 169, 175 (Mo. En Banc 1967).

16. § 552.040, RSMo 1969. The pertinent portion is as follows:

1. When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order such person to be committed to the director of the division of mental diseases for custody, care and treatment in a state mental hospital. No person shall be released from such commitment until it is determined through the procedures provided in this section that he does not have and in the reasonable future is not likely to have a mental disease or defect rendering him dangerous to the safety of himself or others or unable to conform his conduct to the requirements of law.

17. *State v. Garrett*, 391 S.W.2d 235, 240-41 (Mo. 1965).

18. Richardson, Reardon and Simeone, *An Analysis of The Law*, 19 J. Mo. BAR 677, 733 (1963).

19. *Pope v. United States*, 298 F.2d 507 (5th Cir. 1962).

20. *State v. Park*, 159 Me. 328, 193 A.2d 1 (1963).

21. *State v. Garrett*, 391 S.W.2d 235, 241-42 (Mo. 1965).

discern some indication of the court's tendency to view the new law as a departure from the former position taken in Missouri. Until 1963, Missouri professed to follow the M'Naghten Rule, but a close examination of the cases indicates that, in fact, only the second half of the M'Naghten Rule was used as the test of insanity.²² At the same time, the court has shown that it is not ready to use the new statute to reform every aspect of the law on mental responsibility so as to reflect the modern views advocated by most scholars and commentators. This conservative attitude is manifested in the manner in which the court disposes of the issue of partial responsibility raised in Garrett's appeal. Defendant argued that an instruction should have been given which would have allowed the jury to find that, at the time of the crime, he was suffering from a degree of mental disease or defect quantitatively sufficient to deprive him of the ability to act "willfully or feloniously," even though this degree of mental disease or defect would not require a verdict of "not guilty by reason of mental disease or defect." Thus, under defendant's "partial responsibility" theory, the jury could have found him "not guilty" without adding the qualification "by reason of mental disease or defect." Such a verdict would have spared the defendant from automatic committal in a state mental hospital—the result required by the statute upon a verdict of "not guilty by reason of mental disease or defect excluding responsibility."²³ The court felt that defendant was attempting to play "fast and loose" with the terms of the statute.²⁴ Relying on Missouri cases decided before 1963, the court stated that Missouri had refused to adopt the "partial responsibility" theory and saw no basis for change in the Mental Responsibility Law. This dictum seems to ignore section 552.030 (3),²⁵ but may be explained in part by the court's finding that the words "willfully" and "feloniously" refer only to the general criminal intent which is an element of every crime. Since the instruction on insanity given to the jury covered the issue of *general* criminal intent, the court felt that there could be no error in failing to give an instruction in this case concerning a mental disease or defect negating *specific* criminal intent. Yet after the court discussed Missouri's position prior to 1963, found in *State v. Holloway*,²⁶ that insanity is an all or nothing defense, the stated conclusion was that Missouri will continue to reject the defense of "partial responsibility" negating specific intent. In *Holloway*, the defendant was charged with first degree murder and his defense was insanity. The court held that "defendant, if sane, 'could coolly deliberate said murder'; if insane, he could neither deliberate nor premeditate, and consequently was guiltless

22. *State v. Barton*, 361 Mo. 780, 782, 236 S.W.2d 596, 597 (En Banc 1951); *State v. Pinski*, 163 S.W.2d 785, 787 (Mo. 1942); *State v. Holloway*, 156 Mo. 222, 56 S.W. 734 (1900), and cases cited therein.

23. § 552.040(1), RSMo 1969.

24. *State v. Garrett*, 391 S.W.2d 235, 242 (Mo. 1965).

25. 3. Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible (1) To prove that the defendant did or did not have a state of mind which is an element of the offense; (2) For the purpose of determining whether or not the defendant, if found guilty of a capital offense, shall be sentenced to death or life imprisonment. § 552.030(3), RSMo (1969).

26. 156 Mo. 222, 56 S.W. 734 (1900). See also *Fisher v. United States*, 328 U.S. 463 (1946); *State v. Barbata*, 336 Mo. 362, 80 S.W.2d 865 (1935).

of the crime charged, and of any degree of that crime. . . ."²⁷ This language clearly indicates that, under Missouri law prior to 1963, the mental disease or defect of the defendant could only affect the outcome of the trial if it was of such magnitude as to completely negate the state of mind necessary for conviction of the crime charged or any degree thereof. Thus, on a charge of first degree murder, the mental disease or defect must be such as to negate not only the mental elements required for that crime, *i.e.*, "willful, deliberate, and premeditated,"²⁸ specific intent elements, but must also negate the mental state required for second degree murder, a general intent.

In light of the provision on state of mind as affected by mental disease or defect contained in the mental responsibility statute²⁹ it is difficult to understand how the court reached the conclusion that the law in Missouri was not changed by the statute. It would seem apparent that the law now allows evidence on mental disease or defect to be admitted at least to prove that the defendant did not have the *specific* intent required for conviction of certain crimes requiring more than general intent, even though the evidence is not of sufficient weight to meet the burden of proof required for a finding that defendant was not guilty by reason of mental disease or defect. Section 552.030 (3) states this proposition quite clearly.³⁰ Thus evidence of defendant's mental state is to be admitted to negate a finding that defendant had a specific mental intent, even though it would be inadmissible to defeat a finding that defendant had the general intent to commit a crime. In a first degree murder case the jury should be able to find that the evidence of mental disease or defect was sufficient to negate the mental state required for a conviction of first degree murder, but was not sufficient to support a finding of not guilty by reason of mental disease or defect. The court in *Garrett* avoids reaching this result by reasoning that an instruction to this effect would defeat the real intent and purpose of sections 552.030 and 552.040 by permitting the acquittal of the defendant (without commitment to a mental institution) on a finding of a lesser degree of "mental disease or defect" than contemplated in the act.³¹

The court does not discuss the rationale of this finding, in *Garrett* nor does it give a basis for the reference to the "degree of 'mental disease or defect' . . . contemplated in the act."³² The statute makes no reference to a degree of mental disease or defect that will allow defendant to be acquitted without commitment to a mental institution. Section 552.030 (1)³³ defines the mental disease or defect needed to exclude responsibility. Paragraph two of that section³⁴ provides that the court shall automatically order the

27. *State v. Holloway*, 156 Mo. 222, 221, 56 S.W. 734, 737 (1900).

28. § 559.010, RSMo 1969.

29. § 552.030(3), RSMo 1969, note 25 *supra*.

30. See note 25 *supra*.

31. 391 S.W.2d 235, 243 (Mo. 1965).

32. *Id.*

33. 1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law § 552.030(1), RSMo 1969.

34. 2. Evidence of mental disease or defect excluding responsibility shall not be admissible at trial of the defendant unless the defendant at the time

committal of a defendant who is found not guilty by reason of mental disease or defect.³⁵ Paragraph three of section 552.030 provides that evidence of defendant's mental state is admissible to prove that he did not have the requisite state of mind for the crime charged and, in a capital offense, to aid the jury in determining whether the sentence should be death or life imprisonment.³⁶ This section at least manifests legislative intent to recognize varying degrees of mental responsibility where the penal statutes recognize varying degrees of culpability based on specific mental states.³⁷ The authors of an article on the new statute point out the origin of section 552.030 (Model Penal Code, section 4.02 (1)) and explain that its purpose is not to allow the defendant to be found partially guilty of any crime but rather allow evidence of mental disease or defect to be admitted to negate the specific mental state required for crimes having different degrees of culpability based upon varying degrees of intent.³⁸ The dictum in *Garrett* ignores this purpose and the plain meaning of section 552.030 (3). If followed in future decisions, the effect of this dictum will be to thwart legislative intent by keeping the defense of mental responsibility an all or nothing proposition.

The next case to be examined is *State v. Brizendine*.³⁹ Defendant was convicted of first degree murder and given a life sentence by a jury. The sole

of entering his plea to the charge pleads not guilty by reason of mental disease or defect excluding responsibility, or unless within ten days after a plea of not guilty or at such later date as the court may for good cause permit, he files a written notice of his purpose to rely on such defense. Such a plea or notice shall not deprive the defendant of other defenses. The state may accept a defense of mental disease or defect excluding responsibility, whether raised by plea or written notice, if the defendant has no other defense and files a written notice to that effect. Upon the state's acceptance of the defense of mental disease or defect excluding responsibility, the court shall proceed to order the commitment of the defendant as provided in section 552.040 in cases of persons acquitted on the ground of mental disease or defect excluding responsibility, and further proceedings shall be had regarding the confinement and release of the defendant as provided in that section. § 552.030(2), RSMo 1969.

35. Section 552.040, RSMo 1969 sets forth the procedures to be followed after one is found not guilty because he suffered from mental disease or defect excluding responsibility. The section also sets forth the requirements that must be met and the procedures to be followed in obtaining the release of the person so committed.

36. See note 25 *supra*.

37. Murder is a prime example of a crime in Missouri with such a gradation of culpability. §§ 559.010, .020, RSMo 1969. Thus a man suffering from a mental disorder may be capable of appreciating the "nature, quality or wrongfulness" of his conduct but incapable of "deliberation," a crucial mental element of first degree murder.

38. Richardson, Reardon and Simeone, *supra* note 18, at 712. It should be noted that the wording of § 552.030(3)(1) could be interpreted to cover any crime for which the state must establish a *specific* intent, "a state of mind which is an element of the offense."

39. 391 S.W.2d 898 (Mo. 1965). The defendant subsequently made a 27.26 motion, one part being that defendant lacked counsel at the arraignment and was thereby precluded from asserting the defense of mental disease or defect excluding responsibility. The court held that while the new statute had added significance to the arraignment step in the criminal procedure, it was not per se a

issue on appeal was whether defendant was entitled to a jury instruction on the defense of insanity at the time of the murder. On his own motion defendant was given a pre-trial mental examination to determine his general mental state and ability to aid counsel in the preparation of his defense. The examination report, which stated that although defendant showed a mild degree of mental deficiency, he was competent to stand trial and aid in his defense, was read to the jury. The Supreme Court pointed out that although homicide was committed before the new mental responsibility law was operative, the arraignment took place after it became effective. The court found it immaterial whether the trial court adhered to the new statutory test of insanity or merely followed the "knowing right from wrong" test,⁴⁰ since both require an instruction on insanity to be given only if there is substantial evidence of insanity or mental irresponsibility.⁴¹

In disposing of defendant's contention that a pre-trial motion for a competency examination was sufficient compliance with the statutory requirements of written notice of intent to rely on the insanity defense,⁴² the court made two points. First the pre-trial motion for a competency examination was not sufficient written notice under section 552.030 (2), because it related only to defendant's mental condition *at the time the motion was made*. Second, while the court was not then deciding whether the notice requirement is mandatory, the court indicated that if it is mandatory, the state "undoubtedly" waived the requirement by not objecting to the admission of the pre-trial examination report as claimed evidence of mental irresponsibility.⁴³

The balance of the opinion is devoted to an examination of the evidence in determining whether it contained sufficient proof of defendant's mental state at the time of the crime to constitute substantial evidence of insanity or mental irresponsibility. The testimony given did not sufficiently support defendant's allegations; thus the court held that the instruction on the defense of mental disease or defect was properly refused.⁴⁴ The court indicated that, in its interpretation, the new mental responsibility law requires the same quantum of proof as the prior rule, *i.e.*, "substantial evidence of defendant's insanity or mental irresponsibility at the time of the homicide" to put the insanity issue before the jury.⁴⁵ Once again, as in *Garrett*,⁴⁶ the court treated the new statute as consistent with prior Missouri law, rather than a departure from the former practice.

violation of the Sixth Amendment for defendant to appear for arraignment without counsel. The reason for this holding was that under the statute "the defense of not guilty by reason of mental disease or defect may be raised beyond the ten-day period following arraignment 'at such later date as the court may for good cause permit'" (*State v. Brizendine* 433 S.W.2d 321, 333 (Mo. 1968).

40. See note 22 *supra*.

41. *State v. Brizendine*, 391 S.W.2d 898, 901 (Mo. 1965). Thus it was not necessary to decide which test of insanity should be applied to an act committed before the new law apparently became operative.

42. § 552.030(2), RSMo 1969.

43. *State v. Brizendine*, 391 S.W.2d 898, 901 (Mo. 1965). Also, the state failed to object to testimony about defendant's actions before, during, and after the homicide which were also claimed to be evidence of mental irresponsibility. *Id.*

44. *Id.* at 903.

45. *Id.* at 901. See *State v. Pinski*, 163 S.W.2d 785 (Mo. 1942).

46. *State v. Garrett*, 391 S.W.2d 235, 241 (Mo. 1965).

This is unfortunate, for by apparently treating the statute as being merely a restatement of prior law, the court is retarding the growth of Missouri's law by continuing to cling to nineteenth century mental responsibility concepts. It is not advocated that the law be changed, either by legislative action or judicial construction, to reflect each passing whim or theory propounded by scholars, but once a medical theory is sufficiently established to warrant legislative action it would seem that the courts should accept the change and respect the legislature's determination. Only when the legislature has acted in an unconstitutional manner should the courts refuse to accept a statute and, even then, their function is to declare the law unconstitutional—not to prevent it from having the effect intended by the legislature by a restrictive and, sometimes, unrealistic interpretation.⁴⁷

Another case dealing with the notice provisions of the statute⁴⁸ is *State v. Lowe*.⁴⁹ Lowe was convicted of burglary in the second degree and stealing during the commission of a burglary. On appeal, Lowe contended that the trial court erred in overruling his oral motion, made after the jury was selected, for leave to enter "a plea of not guilty by reason of mental disease or defect excluding responsibility and amounting to unfitness to stand trial."⁵⁰ This motion contained requests for application of two separate provisions of the new statute. The first request was aimed at invoking the defense of insanity granted by section 552.030(1). The court held that this request was properly denied because it was not presented when Lowe entered his plea, nor by written notice within ten (10) days thereafter. While the court may for good cause extend the time period for filing the defense, no evidence of such good cause appeared in the record, so this part of the statute was not applicable.⁵¹ After stating that the penalty for failing to comply with the notice requirement of the statute is the inadmissibility of any evidence relating to defendant's mental condition, the court clouds the water by saying "however, in this case appellant offered no such evidence, and neither the state nor appellant attempted to present evidence on that issue."⁵² This fact is used, apparently, to bolster the decision of the court that Lowe was not improperly deprived of any right under section 552.030. How the fact that neither the state nor Lowe attempted to present evidence which the statute specifically declares inadmissible under the conditions present during this trial supports the trial ruling on the motion made just prior to trial is not explained by the court. This statement not only fails to accomplish the purpose of supporting the trial court ruling, but it casts doubt upon the effectiveness of the ban on admitting evidence on mental disease or defect after failure to comply with the notice requirements. Is this prohibition a mere sham to be disregarded? Is it possible to persuade the trial court to reverse itself and allow the defense of insanity by attempting to introduce evidence on the prohibited subject? The opinion provides no answers to the questions raised

47. *Addison v. Holly Hill Co.*, 322 U.S. 607 (1944).

48. § 552.030(2), RSMo 1969.

49. 442 S.W.2d 525 (Mo. 1969).

50. *Id.* at 528.

51. *Id.*

52. *Id.* at 529.

by this statement. It is therefore imperative that the Missouri Supreme Court answer them at the first opportunity.

The second request in the motion was that the court send Lowe to a mental hospital to determine whether he was competent to stand trial. This request was denied by the trial court and affirmed by the instant decision because there was no "good cause" to believe the defendant had a mental disease or defect excluding fitness to proceed. The court found that Section 552.020(2) does not have any specific notice provisions relating to the time within which a request for an examination must be made. Thus, this provision, when read in conjunction with the preceding paragraph,⁵³ allows a motion for examination to be made anytime prior to sentencing.⁵⁴ With this holding, the court fills in the void left by the statute's silence as to time requirements.

The issue of when there is sufficient evidence presented at trial to submit the defense of mental irresponsibility to the jury is dealt with in *State v. Olinger*.⁵⁵ Olinger was found guilty of stealing property worth more than fifty dollars and given a five year prison sentence. Along with other issues raised on appeal, defendant claimed that his case should have been tried and submitted to the jury under the new mental responsibility law although the alleged burglary and stealing took place before the effective date of the law. First the court found that the testimony of a psychiatrist offered by the defendant was so "speculative, vague, and contradictory that it lacked the certainty necessary for probative value with respect to the issue on which it was offered."⁵⁶ Because this was the only testimony offered by the defendant on the issue of mental responsibility, the court held under the new statutory test that there was insufficient evidence to present this issue to the jury. The evidence was also considered as bearing on the defense under the old standard, but in the court's view was not so substantial as to require submission. This certainly indicates a great similarity in the two approaches, but leaves unarticulated specific criteria that must be met before the issue of mental responsibility will be placed before the jury.

Thus, contrary to early predictions,⁵⁷ it appears that the psychiatrist who testifies in a case where the defendant is relying upon the new statute may be required to present his testimony in essentially the same manner as would have been required prior to passage of the statute. While, in answering the question of whether defendant was mentally responsible—as defined by the statute—at the time of the crime, the psychiatrist is not required to confine his answer to a yes or no, the expert witness must refrain from basing his opinion on such nebulous factors as "suggestions of tendencies to deviate from normal behavioral patterns." Instead, the

53. 1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures. § 552.020(1), RSMo 1969.

54. *State v. Lowe*, 442 S.W.2d 525, 529 (Mo. 1969).

55. 396 S.W.2d 617 (Mo. 1965).

56. *Id.* at 620. See also *Adelsberger v. Sheehy*, 332 Mo. 954, 957, 59 S.W.2d 644, 647 (1933), cited by the *Olinger* court in support of this proposition.

57. *Richardson, Reardon and Simeone, supra* note 18, at 705, 711.

psychiatrist will be required to give concrete examples of facts and occurrences which constitute such deviations so that the jury may make a proper determination as to the issue of insanity.

Another aspect of the statute was involved in *State v. Nickens*.⁵⁸ Here, the defendant, charged with murder in the first degree, pleaded not guilty by reason of mental disease or defect under section 552.030. The jury found that defendant held up a store with a pistol and in attempting to effect his escape, shot a policeman to death. Nickens was found guilty of first degree murder and sentenced to death. On appeal, defendant claimed that the trial court erred in allowing the state to introduce the testimony of a psychiatrist to the effect that defendant was so mentally deranged that he would commit crimes in the future if not restrained. Another ground for reversal raised by defendant was the state's closing argument. In that argument the expert testimony as to the need to confine defendant so as to prevent his further commission of crime was used as the basis for the statement that

if unrestrained, further anti-social acts by this man will undoubtedly recur in the same way as in the past and we—are we to say now the same type of boogie man he (attorney for defendant) throws up; are we to say after he hits the street again 'My God, what have I done?' Who do we say that to—the next widow?⁵⁹

The court found the psychiatrist's statement on dangerousness inadmissible, the state's resulting argument impermissible, reversed and remanded the case for a new trial.⁶⁰ The opinion expressed by the psychiatrist was inadmissible because it exceeded the admissibility standard set forth in the statute, whether a defendant did or did not suffer from a mental disease or defect at the time of the alleged crime.⁶¹ Testimony as to defendant's probable future conduct was regarded as prejudicial to defendant's right to be tried only for the instant offense, and the suggestion of restraint invaded the province of the jury to determine guilt and punishment.

The court in *Nickens* also discussed a small but highly significant portion of the new mental responsibility statute which provides that any information as to past crimes given to the examining psychiatrist by defendant may be considered only in connection with the issue of mental disease or defect and is not to be considered when the jury decides defendant's guilt or innocence.⁶² The psychiatrists who examined Nickens related his prior convictions to the jury and the prosecutor made reference to them in closing argument, terming the defendant a "repeater." The

58. 403 S.W.2d 582 (Mo. 1966).

59. *Id.* at 585.

60. *Id.* at 589.

61. § 552.030(3)(2), RSMo 1969.

62. § 552.030(4), RSMo 1969. Although this paragraph limits the admissibility of evidence obtained from such examinations to the issue of insanity, the fact remains that should the examiner make reference to any prior crimes of defendant in his report, the jury would then be exposed to that information. It is debatable whether the restrictions placed on the uses to which such information is to be put would be effective. In this manner the defendant, if he chose to invoke the protection of the statute, could suffer the disadvantages inherent in having his history of past crimes laid before the jury.

prosecutor's use of this information was held reversible error as it infringed upon defendant's right to have this evidence considered solely in the determination of his mental condition.⁶³ This statement of the law is based on several cases dealing with substantially the same issue which were decided before the new law was enacted.⁶⁴

The case of *State v. Crawford*⁶⁵ presented the court with yet another opportunity to interpret a portion of the new statute. In this case the defendant was charged with and found guilty of first degree murder. His defenses were "not guilty" and "not guilty by reason of mental disease or defect." On appeal one of the assignments of error dealt with the admission of testimony by a psychiatrist as to defendant's mental condition both at the time of the trial and at the time he committed the criminal act. Defendant claimed that the psychiatrist's examination was for the sole purpose of determining whether defendant was mentally competent to stand trial—an examination required by the new statute when reasonable cause for such examination is shown.⁶⁶ The written report ordering the examination stated that it was to be made pursuant to section 552.020, but the court said this was not controlling and that the designation of section 552.020 could have been a typographical error.⁶⁷ After reviewing the psychiatrist's report, the court found that the trial court correctly accepted is as an all-inclusive examination of defendant's mental condition both at the time of trial and at the time of the crime.⁶⁸ This ruling indicates that if the defendant desires to limit a mental examination to the narrow issue of his capacity to stand trial, extreme care should be taken in instructing the psychiatrist as to the proper scope of his inquiry into defendant's mental condition.

III. CONCLUSION

After scrutinizing the Missouri Supreme Court's handling of the cases falling under the new mental responsibility statute, there is but one inescapable conclusion. Unless the court reverses the trend it is now setting, Missouri will continue to be beset with and beleaguered by the outmoded, outdated mental responsibility concepts of the nineteenth century. The new mental responsibility statute, heralded as a shining new vehicle of enlightened thought in the area of mental responsibility, will be converted into a second-hand truck upon which the discredited concepts of the past will be transported into the future.

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63. Defendant did not testify, so the reference to prior convictions was not justifiable on impeachment grounds.

64. *State v. Mobley*, 369 S.W.2d 576 (Mo. 1963); *State v. Baber*, 297 S.W.2d 439 (Mo. 1956); *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524 (1947); *State v. Jackson*, 336 Mo. 1069, 83 S.W.2d 87 (1935).

65. 416 S.W.2d 178 (Mo. 1967).

66. § 552.020(2), RSMo 1969. Had the court accepted defendant's contention, the psychiatrist's report in question could not have been introduced as evidence of defendant's mental state at the time the crime was committed. Paragraph Nine of § 552.020 specifically provides that evidence obtained during or as a result of an examination to determine competency to stand trial is inadmissible to prove defendant's guilt or his mental state when the crime occurred.

67. *State v. Crawford*, 416 S.W.2d 178, 188 (Mo. 1967).

68. *Id.*