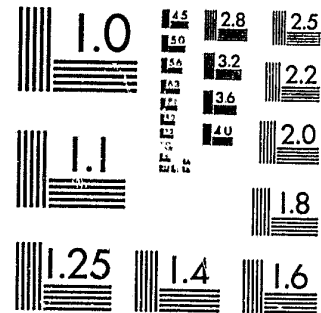


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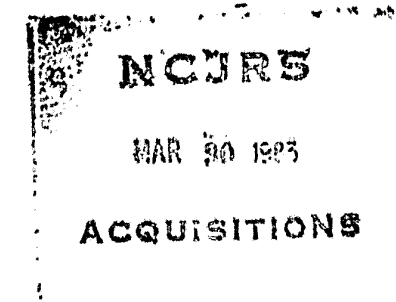
STATEMENT

OF

D. LOWELL JENSEN
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE



ACQUISITIONS

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 1280 AND RELATED BILLS TO
REFORM THE FEDERAL INSANITY DEFENSE

ON

MARCH 17, 1983

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Mr. Chairman and members of the Subcommittee, it is a pleasure to appear before you today to discuss the insanity defense and related procedural matters as they apply in the federal criminal justice system. The subject is an important one. Although the insanity defense is raised in comparatively few federal cases and is successful in even fewer, the defense raises fundamental issues of criminal responsibility which the Congress should address. Moreover, the insanity defense is often asserted in cases of considerable notoriety which influence, far beyond their numbers, the public's perception of the fairness and efficiency of the criminal justice process.

INTRODUCTION

My comments today will focus on H.R. 1280, a bill introduced by the Chairman to modify the insanity defense in federal courts. The bill also contains provisions concerning the determination of competence to stand trial and provisions dealing with the related issue of commitment to a mental institution of persons found not guilty by reason of insanity but who present a danger to themselves and other persons. As you know, the President has recently sent to the Congress a comprehensive draft crime control bill one title of which deals with the insanity defense and related procedural issues. I will be discussing this proposal, which in many respects is similar to H.R. 1280, in my statement, as well as portions of two other bills, H.R. 1329 and 1196, sponsored by members of the Subcommittee.

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As the Attorney General pointed out last July when he testified on the subject of the insanity defense, it is ironic, given the importance of the insanity defense, that neither the Congress nor the Supreme Court has yet played a major role in its development. Its evolution in England and in this country over several centuries has been haphazard and confusing. As the Committee knows from its work over the past decade or more on the criminal code revision bills, Congress has never enacted legislation defining the insanity defense. Likewise, the Supreme Court has generally left development of the defense to the various courts of appeals. As a result, the federal circuits do not even at present apply a wholly uniform standard. In recent years, however, all of the federal circuits have adopted, with some variations, the formulation proposed by the American Law Institute's Model Penal Code which provides that 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 to appreciate the [criminality][wrongfulness] of his conduct or to conform to the requirements of the law." In addition to the absence of any federal statute addressing the subject of the insanity defense, it is noteworthy that the Congress has created no procedures (outside the District of Columbia) under which a person acquitted by reason of insanity in federal court -- no matter how dangerous he may still be to

others -- can be committed to a mental health facility for treatment. Such persons may only be committed by a State if it chooses to do so.

We view these hearings as an opportunity for the Congress to enact what we regard as long overdue and necessary reforms in these areas.

THE INSANITY DEFENSE

Both H.R. 1280 and the Administration bill provide for a legislative limitation on the insanity defense and contain provisions on the commitment of insanity acquittees and other related procedural issues. With respect to the limitation of the insanity defense itself, the bills are quite similar and generally reflect the views of groups such as the American Bar Association and the American Psychiatric Association. Although we will suggest some modifications, we firmly endorse the thrust of sections one and two of H.R. 1280 and believe that their provisions represent the most viable approach at this time for

legislatively limiting the defense.^{1/} We have serious reservations, however, concerning some of the procedural provisions of H.R. 1280 which I will discuss subsequently.

Turning first to the issue of the insanity defense itself, H.R. 1280 provides that:

"It is a defense to a prosecution for an offense against the United States^{2/} that, at the time of the conduct alleged to constitute the offense, the defendant, as a result of mental disease or defect, did not understand the wrongfulness of that conduct."

The comparable language in the Administration bill provides:

^{1/} When the Department of Justice testified on the insanity defense before the Subcommittee in the last Congress we advocated an approach that would have eliminated the defense to the fullest extent permitted by the Constitution and would have made insanity a defense only where, as a result of mental disease or defect, the defendant lacked the state of mind, or mens rea, required as an element of the offense. That approach which is adopted in substance in sections one and two of H.R. 1196, remains in our view the preferable one. (See, also Norval Morris, The Criminal Responsibility of the Mental Ill, 33 Syracuse L. Rev. 477 (1982)). However, our review of the numerous bills that have been introduced and our recognition of the apparent consensus that has developed for the approach of H.R. 1280 -- which reflects the position of the ABA and APA -- have persuaded the Administration that there is also substantial merit in this approach, and accordingly to include this version of the insanity defense itself, in our draft bill.

^{2/} The term "offense against the United States" may be overly broad. Since the section is probably only intended to apply to prosecutions in United States District Courts, and not to prosecutions in the Superior Court for the District of Columbia or under the Uniform Code of Military Justice, we would recommend making this point explicit. Compare the proposed 18 U.S.C. 4247(k) in the Administration's draft bill.

"It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense."

Both of these limitations of the defense abolish the volitional portion of the two-pronged ALI-Model Penal Code test for insanity quoted earlier. We have concluded that elimination of the volitional portion of the test is appropriate since mental health professionals themselves have come to recognize that it is very difficult if not impossible to determine whether a particular individual lacked the ability to conform his conduct to the requirements of the law because he was suffering from a mental disease or defect. There is in short a much stronger agreement among psychiatrists about their ability to ascertain whether as a result of mental illness a defendant had an understanding of his acts than about whether he had the capacity to heed the law's strictures. For example, a December, 1982, statement by the American Psychiatric Association on the insanity defense noted that "[t]he line between an irresistible impulse, and an impulse not resisted is probably no sharper than that between twilight and dusk." Coupled with the elimination of the admissibility of expert opinion testimony on the ultimate issue of whether the defendant understood the wrongfulness of his acts -- a provision

contained in both H.R. 1280 and the Administration draft bill and which I will discuss in greater detail later -- this narrowing of the defense will help to eliminate the confusing and contradictory testimony of psychiatric experts which has brought the insanity defense as presently constituted into such disrepute. In many insanity defense trials prosecution and defense psychiatrists agree about the nature and extent of the defendant's mental disorder. They disagree over the probable relationship between his disorder and the defendant's ability to control his conduct or appreciate its wrongfulness. Elimination of the volitional portion of the ALI test and of expert opinion on whether the defendant's mental state is such that he cannot appreciate the wrongfulness of his conduct restrains the defense, and the psychiatric testimony to support or refute it, within reasonable boundaries. It will allow the relationship between any mental disorder of the defendant and his ability to appreciate the wrongfulness of acts to be treated as a question of fact to be presented to the jury for its decision.

Although we endorse the general way in which H.R. 1280 would limit the insanity defense, we believe the bill is seriously remiss in failing to provide explicitly that a mental disease or defect other than that which made the defendant unable to appreciate the nature and quality or wrongfulness of his acts does not constitute a defense. In our view a statement to this effect in the legislation itself is important to insure that the defense is not improperly resurrected in the guise of showing

that the defendant had a "diminished responsibility" or some similar asserted state of mind which would serve to excuse the offense and open the door anew to confusing psychiatric testimony.

Moreover, H.R. 1280 casts the defense in terms of the defendant's inability to "understand the wrongfulness" of his conduct whereas the Administration's draft bill states it in terms of the defendant's inability to "appreciate the nature and quality or wrongfulness" of his acts. The difference between "appreciation" and "understanding" in this context is important. "Appreciate" rather than "understand" was used by the drafters of the Model Penal Code (and recently adopted also by the American Bar Association) to take into account the emotional or affective aspects of a severe mental disorder. It is a broader term than understand and was intended to facilitate a full expert description of the defendant's mental state at the time of the offense and whether his mental state allowed him to comprehend the act's wrongfulness.

Turning next to the question of the burden of proof with respect to the insanity defense, both H.R. 1280 and the Administration's draft bill shift the burden of proof to the defendant. We point out initially that such a shift does not present a constitutional issue. The present rule followed in the federal courts which places the burden of proving sanity on the prosecution stems from the Nineteenth Century case of Davis v. United States, 160 U.S. 469. The rule has been held to establish

"no constitutional doctrine, but only the rule to be followed in federal courts." Leland v. Oregon, 343 U.S. 790, 797 (1952). Leland, which sustained the constitutionality of an Oregon statute shifting the burden of persuasion on insanity to the defendant beyond a reasonable doubt, was reaffirmed by the Supreme Court in Patterson v. New York, 432 U.S. 197 (1977), a case dealing with the constitutionality generally of the concept of affirmative defenses in which the burden of persuasion is placed on the defendant. Although Patterson did not deal with the insanity defense, it noted specifically that under Leland "once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence, including evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by the defendant by a preponderance of the evidence." Patterson, p. 206. As recently stated by the Sixth Circuit: "Patterson makes it clear that so long as a jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as ... insanity upon the defendant." Krzeminski v. Perini, 614 F.2d 121, 123 (6th Cir. 1980). A little over half of the states now place the burden of persuasion on the defendant.

We note, however, that H.R. 1280 only requires the defendant to prove insanity by a preponderance of the evidence whereas the Administration's draft bill would require such proof by clear and

convincing evidence. We think that the higher standard of proof in the Administration's bill (a standard also found in substance in H.R. 1329) is justified. In our view it is important to assure that only those defendants who clearly satisfy the elements of an insanity defense are exonerated from what otherwise would be culpable criminal behavior. It is therefore appropriate to require the defendant to demonstrate his insanity by something more than a bare preponderance of the evidence.

Both H.R. 1280 and the Administration's draft bill also put limits on the admissibility of opinion testimony by experts. H.R. 1280 would prohibit expert opinion testimony as to whether the defendant understood the wrongfulness of his conduct. The Administration's bill would prohibit such testimony on the broader range of issues involving whether the defendant did or did not have the mental state or condition constituting an element of the offense or a defense thereto. In our view, it is preferable to prohibit ultimate opinion evidence on any mental element of the offense as well as on a defense. For example, under H.R. 1280, a psychiatrist in an insanity defense murder trial could give an opinion on whether the defendant acted with malice aforethought. In our view, however -- a view supported by most psychiatrists themselves -- such allegedly "expert" testimony should be disallowed since there is no basis for believing that psychiatry is competent reliably to ascertain a person's

motivation, intent, or other mental state or condition on a previous occasion, as opposed to simply describing the person's mental disease or defect.

On the other hand, H.R. 1280 contains a limitation on the use of expert opinion testimony that may go too far and thereby deprive the defendant of his Sixth Amendment right to present evidence. The bill adds a new Rule 413 to the Federal Rules of Evidence providing that in an insanity defense case "opinion testimony as to the particular medical or psychiatric diagnosis of the defendant's alleged mental disorder or defect shall not be admissible." The apparent, and understandable, motivation behind this provision is a desire to avoid the introduction of psychiatric terms for mental illnesses, such as paranoid schizophrenia or dementia praecox, which are unduly prejudicial or confusing for a jury. However we believe that a preferable solution to this problem, and one which recognizes the proper role of the trial judge, would be to redraft proposed Rule 413 to provide that the judge has discretion to place reasonable restrictions on the use of psychiatric terms and require that their significance be referred to in laymen's language if their use is unduly prejudicial or confusing.

PROCEDURAL ISSUES

Section three of the bill deals with the procedures to determine mental competence to stand trial and with disposition of persons found to be incompetent. Section four of the bill adds a new chapter to title 18 that will, for the first time set

forth procedures to govern persons who have been found not guilty by reason of insanity. We believe that a close examination of the detailed provisions in these sections is necessary.

Turning first to section four dealing with insanity acquittees, it includes provisions to permit an examination and hearing to determine whether the person is presently insane and dangerous, and to permit the commitment for treatment of those who, if released, would present a substantial risk to public safety.

In providing for such procedures, section four of the bill sets the groundwork for distinctly improving current law. Absent any present statutory provisions to deal with the insanity acquittee, the authority of the courts and federal officials over such offenders essentially ceases once the jury has found the defendant not guilty by reason of insanity. If it appears that the defendant is still mentally ill and dangerous, the best that federal officials can do is to urge local authorities to commence civil commitment proceedings. Should these authorities be unwilling to take on the responsibility for commitment and treatment -- an understandable position where the person has maintained only minimal contacts with any particular state and the likely cost of his treatment is substantial -- there is now no alternative federal commitment procedure to provide both for the care and treatment of the person and the public safety.

Thus, the Department strongly endorses the creation of a federal commitment procedure for persons found not guilty only by reason of insanity, but such a procedure should not be viewed as

a substitute for the exercise of state responsibility for the commitment and treatment of the persons suffering from a dangerous mental disease, in cases where the state is willing to do so. In cases where the states fail to assume this responsibility federal commitment procedures should be invoked, and statutory amendment is necessary to provide this authority.

With respect to the disposition of mentally ill persons who are unlikely to regain competency to stand trial or who are reaching expiration of a sentence of imprisonment, section three of H.R. 1280 evidences a position that the states are not merely primarily responsible, but solely responsible for there is no provision for federal commitment where state commitment is not possible. As I will discuss shortly we view this sole reliance on the states as a serious shortcoming of the bill. But with respect to persons found not guilty only by reason of insanity, the bill evidences a contrary position. Only federal commitment procedures are described, and there is no requirement that they be reserved for instances in which the state has not acted. Such a limitation on federal commitment is appropriate in light of the dearth of federal facilities for the treatment of the mentally ill.^{3/} Accordingly, the Department recommends that section four of the bill be amended to provide for the federal commitment of persons

^{3/} Because of the lack of federal treatment facilities, it is essential that authority be given to contract for hospitalization of federally committed persons. No such authority is provided in H.R. 1280.

who are found to be presently mentally ill and dangerous only when attempts to have appropriate local authorities assume this responsibility have failed. This approach has been adopted in the analogous provisions of the Administration's bill.

Certain other aspects of H.R. 1280's provisions regarding insanity acquittees are of concern. Among the more significant of these are the following.

First, we believe that persons who have been found not guilty of a federal criminal charge solely by reason of insanity should generally be committed for an initial examination to determine whether they are presently suffering from a mental disease or defect that poses a serious risk to the safety of other persons and property. This is presently the approach of the statute enacted by Congress for the District of Columbia, and is incorporated in the Administration's bill. Under section four of H.R. 1280, however, an initial examination is required only with respect to persons who were charged with a violent offense, that is, an offense involving use of a dangerous weapon, or serious bodily injury or an attempt or threat to cause such injury. Thus, not only does the bill fail to require an examination for every insanity acquittee, it fails to require such an examination even for persons who had been charged with offenses involving substantial property damage, despite the fact that the bill itself recognizes that a substantial risk of future similar behavior is an appropriate basis for commitment. Furthermore, the bill makes it very difficult for the court to order the

commitment of the insanity acquittee for this initial examination. In essence, the court is required to make a "finding of fact" that the person presents a serious danger to the person or property of others.^{4/} Yet it is for the purpose of this very determination that the examination and subsequent hearing are conducted. This is an untenable Catch-22: it requires the court to find that the person is presently dangerously insane before he may be committed for an examination to determine if he is presently dangerously insane. In our view, the courts should be given broad authority to order commitment of insanity acquittees for the limited purpose of examination after trial. The person himself has already successfully asserted his insanity as an excuse for criminal conduct, and the stigmatization associated with commitment that is of concern in other contexts is not relevant, for the defendant asserted his own insanity in defense of criminal charges.

Second, the bill's standard for commitment should be improved. The bill permits commitment for treatment after an examination and hearing if the court determines that the "likelihood that the person will commit acts of serious bodily injury to any person or substantial damage to property of others is sufficiently substantial to justify commitment." A somewhat more meaningful and less subjective standard should be formulated. We

^{4/} Commitment for examination may also be ordered under the bill if the court makes a factual determination that commitment is necessary for the examination, the person has previously failed to report for similar examinations, or has not otherwise been released from pretrial confinement.

suggest adoption of a standard under which a finding of a "substantial risk" of the sort of danger described in the bill should be the basis for permitting commitment for treatment. Also, it is appropriate that the standard specify that the requisite risk of danger must be the result of a mental disease or defect, since other factors unrelated to mental illness which may render the person dangerous are of course not an adequate basis for commitment. The necessary relation between present mental illness and the finding of dangerousness may be implicit in the bill, but clarification of this point would be helpful.

Third, this portion of the bill provides that federal commitment for treatment of the insanity acquittee must cease after a period of time equivalent to the maximum sentence that could have been imposed if the person had been convicted of the offense with which he was charged. The argument that an insanity acquittee's commitment must terminate upon the expiration of a hypothetical maximum sentence was soundly rejected by the en banc District of Columbia Court of Appeals in Jones v. United States, 432 A.2d 364, 369-370 (1981), cert. granted, 102 S.Ct. 999 (1982). As stressed previously, we believe that such federal commitment should be available where hospitalization by state authorities is not possible. However, where federal commitment for treatment is necessary, there is no reason why its duration must or should be limited by the maximum sentence that could have been imposed upon conviction. As the bill elsewhere makes clear, the sole rationale for commitment is the fact that the insanity

acquittee is presently mentally ill and dangerous. This rationale, which is rooted in a legitimate and pressing concern for public safety, does not expire with the running of a maximum sentence. The maximum sentence that might have been imposed is irrelevant to the termination of the commitment of the person just as it is to his continued commitment at an earlier stage. This limitation on the duration of commitment also gives rise to the perception that such commitment is a form of alternative sentencing. To characterize commitment for treatment as an alternative sentence is entirely inappropriate. Such commitment is not punitive; its sole purpose is to provide for the hospitalization of a mentally ill person who poses too great a risk to the public safety to be treated on an outpatient basis.

PROCEDURES TO DETERMINE COMPETENCY

Turning next to section three of the bill which amends the present chapter 313 of title 18 which deals with the procedures to determine mental competence to stand trial and with the disposition of persons found incompetent, this portion of the bill includes a number of proposed changes in present law which we believe are unwise.

First, section 4243 provides for a hearing in appropriate cases on the issue of competence after a medical examination has been conducted or after the defendant has undergone a prescribed course of treatment. However, if the court determines by a preponderance of the evidence that the defendant is not competent, the bill then requires a further hearing to determine

whether the defendant can be restored to competence within 240 days, less any time already spent in a medical facility for treatment to determine or restore competence. In our view the need for two hearings is not clear and the procedure appears a cumbersome one.

Moreover, if the defendant does not request an opportunity to be restored to competence (a strange choice to give to an incompetent defendant) and the court determines that there is no substantial probability that he can be so restored, the court must release the defendant and dismiss any charges other than a "violent felony" -- defined as one in which he is alleged to have used a dangerous weapon or to have caused or threatened serious bodily injury -- or a felony punishable by five years' imprisonment or more. The defendant must also be released and the charges dismissed if the 240 day period for treatment has expired. If the defendant opposes treatment, the court has the option under section 4243(c)(2) of dismissing the charges if it finds that involuntary treatment would be "unduly oppressive" in light of several factors including the nature of the charges, any weaknesses in the government's case and the probable sentence if he was restored to competence, tried and convicted.

In our opinion, all of these provisions are objectionable. We know of no law or policy necessitating the setting of a 240 day period or any determinate, limited period for ascertaining whether the defendant is likely to be restored to competence. Jackson v. Indiana, 406 U.S. 715 (1972) merely indicates that the

period must be "reasonable." Such flexibility is particularly appropriate in the area of psychiatry, and should not be cabined by the establishment of a particular, arbitrary period.

Moreover, even if the defendant is found not likely to be restored to competence we see no reason why all charges (other than violent felonies and those where at least five years' imprisonment are authorized) must be dismissed. If, contrary to expectations, the defendant regains his competence the government should not lose the ability to try him because of the running of the statute of limitations. Thus, dismissal of charges should not be required or authorized on this basis without government approval.

Beyond these problems, the portion of this section which we find most objectionable is the power given to the court to determine that, as to a defendant who can be restored to competence through medically approved treatment, the charges nevertheless should be dismissed because the defendant simply refuses to undergo the treatment and the court believes that such things as weaknesses in the government's case and the likely sentence indicate that a dismissal is in the interests of justice. These are prosecutorial-type decisions that are inappropriate for the judiciary. One might as well purport to confer on federal judges the discretion to order charges dismissed if, after weighing the above factors against the likely strain on the defendant and his family from having to undergo trial, the court concluded that dismissal was in the interests of justice. Under our system,

prosecutors determine whether to bring charges and judges and juries then try the cases, subject only to the court determining whether the defendant is competent to stand trial. If found competent, or likely to be restored to competence through a course of medical treatment, it is the court's obligation to insist that all reasonable efforts be made to allow the government to try the charges. The power to order dismissal of charges under these circumstances because of the nature of the treatment required and the defendant's wishes in the matter is probably unconstitutional. In any event, it represents an intrusion by the judiciary into an area which should remain wholly outside the purview of the courts.

TREATMENT OF PERSONS FOUND INCOMPETENT

Section 4245 eliminates the possibility of federal commitment for a dangerous person found incompetent to stand trial, and for a person serving a sentence of imprisonment which is about to expire. This represents a departure from provisions of existing federal law, 18 U.S.C. 4246-4248, under which such persons can be federally committed if they are dangerous. These current statutes have been held by the Supreme Court to be constitutional, see Greenwood v. United States, 350 U.S. 366 (1956), and in our view are necessary to adequately safeguard the public interest. To be sure, present federal law provides for state commitment if a state will accept the defendant, but the law should recognize that this is not always possible. The states, too, have limited resources and may not be able to become

involved in what started as a matter of federal concern. In our opinion, it is extremely unwise to leave open the prospect that, if no state is willing to assume responsibility, a person judged incompetent to stand trial or about to be released from prison and who presents a danger to other persons by virtue of mental illness might be forced to be released into society.^{5/} Indeed, as I have discussed, H.R. 1280 makes a contrary judgment as to persons acquitted on the basis of an insanity defense by providing a federal commitment procedure. For the same basic reasons that underlie this proposed new procedure, the existing federal commitment procedures for incompetent persons should be retained.

UNREASONABLE LIMITS ON THE USE OF INFORMATION

DERIVED FROM A SANITY EXAMINATION

Section 4242(e)(4)(B) would place limits on the use of statements and conduct of the defendant made during the course of a competency examination or during commitment for treatment, or any evidence derived from such statement or conduct, on the issues of sanity or state of mind at the trial. We think the limits placed by these provisions are unreasonable because they would allow a defendant to have the court consider evidence favorable to an insanity claim resulting from a competency

^{5/} Compare proposed sections 4241 and 4246 in the Administration draft bill recently submitted by the President to Congress which allow for federal commitment of a person judge incompetent or of a federal prisoner due for release if he "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and ... suitable arrangements for State custody and care of the person are not available..."

examination but not consider such evidence that is unfavorable to such a claim. While present law, 18 U.S.C. 4244, correctly provides for the inadmissibility of statements (but not conduct) made during a competency examination on the issue of guilt, an aspect carried forward by 4242(e)(4)(A), it does not contain the further restriction in 4242(e)(4)(B) that even though the statement or conduct is relevant on the issue of sanity such evidence may not be considered unless the defendant "initiates" its introduction. If what is meant by "initiates" means that the defendant can preclude admissibility of the evidence by failing to call the expert examiner as a witness (as opposed to failing to call his sanity into question), this would be a remarkable provision which gives the defendant an unjustifiable ability to pick and choose whether relevant evidence on his sanity is admissible. If this is not the intent of the provision, then certainly we would suggest that clarification is in order. The present restriction in section 4244 on the use of evidence obtained during a competency examination exists in order to give broad protection (beyond the strictures of the Constitution) to the policy of the Fifth Amendment privilege against compulsory self-incrimination. See United States v. Malcolm, 475 F.2d 420 (9th Cir. 1975). The prohibition is arguably too broad already since it applies both to defendants who voluntarily submit to an examination as well as those who are compelled to do so. To extend it further, so that even though the evidence or conduct is sought to be used solely in determining the issue of sanity (and

not on the question of whether the defendant committed the act charged) the defendant may screen its admissibility by "initiating" favorable evidence and not "initiating" unfavorable evidence would distort the function of a criminal trial as a search for the truth.

It may be that section 4242(e)(4)(B) is intended to meet the due process requirements set out in the recent Supreme Court decision in Estelle v. Smith, 451 U.S. 454 (1981). That case held that the admission of a psychiatrist's testimony (based on an interview to determine competency which the court had ordered and the defendant had not sought) at the penalty stage of the trial -- which in that case involved the death penalty -- violated the defendant's Fifth Amendment rights because he was not warned that the substance of statements made by him could be used against him at the sentencing phase. Estelle also held that the defendant's Sixth Amendment rights to counsel were violated since his counsel was not informed of the examination and of the purpose for which the results would be used, namely a determination of future dangerousness of the defendant, a factor to be considered in capital cases.

Estelle presented an unusual fact situation in which a doctor was ordered to examine the defendant ostensibly to determine competency to stand trial. The Supreme Court noted that if the psychiatrist's findings had been used only for that purpose, no Fifth amendment issue would have arisen but in the "distinct circumstances," Estelle, p. 466, where the defendant

was surprised when the results of the examination were used against him at the crucial sentencing stage, the Fifth Amendment was implicated.

Proposed section 4242(e)(4)(B), however, in our opinion goes well beyond the requirements of Estelle and allows the defendant to be examined for competency and then to decide, depending on the results, if he wishes to admit or bar the evidence on the issue of sanity. Stretched this far, the ability to make such a choice in effect shifts the authority to rule on the admissibility of relevant and competent evidence from the trial judge to the defendant.

The foregoing are our most serious problems with section three of H.R. 1280. The section also contains other provisions common to it and to section four of the bill (pertaining to the disposition of insane offenders) which would require the Secretary of Health and Human Services to set out rules for the treatment of persons committed to mental health facilities. No doubt such provisions are intended to insure that mental patients give informed consent to certain psychiatric procedures such as electric shock treatments and the use of psychotropic drugs. While this is a reasonable objective, we are not sure whether federal rules in this area are wise, or if those mandated in H.R. 1280 are realistic. For example, H.R. 1280 seems to treat psychosurgery (lobotomies) which is now widely discredited, in the same manner as the protracted use of psychotropic drugs which, it is our understanding, much more commonly employed. In

general, we prefer the approach of the Administration's bill which sets out procedures and standards for hospitalizing and subsequently releasing persons in the criminal justice system who are suffering from a mental disease or defect which causes them to be dangerous, but does not attempt to detail their rights vis a vis the hospital in which they are confined or mandate how they will be treated.

Mr. Chairman, that concludes my prepared testimony and I would be happy to answer any questions the Subcommittee may have.

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