MEMORANDUM

TO: Interim Committee on the Study of the Treatment of Persons with Mental Illness in the Criminal Justice System

FROM: Julie Pelegrin, Office of Legislative Legal Services

DATE: August 3, 1999

SUBJECT: Summary of existing statutes concerning competence to stand trial and the defense of not guilty by reason of insanity[(1)]

To convict a person of a crime, the prosecution must prove, beyond a reasonable doubt, that the defendant committed each element of the crime with the required degree of mental culpability (e.g., willfully, intentionally, knowingly, or recklessly). If the defendant's mental condition prevented the defendant from forming the required degree of culpability, the prosecution cannot prove the element of mental culpability beyond a reasonable doubt, and thus, the defendant cannot be convicted of the offense. The defendant is held not guilty because of insanity or impaired mental condition. Also, if a person who is charged with committing a crime exhibits mental illness to the extent that he or she cannot understand the nature and course of the proceedings against him or her or cannot participate or assist in his or her own defense, under the statutes, the person must be found incompetent to stand trial until he or she can understand the proceedings or participate in his or her defense.

However, the law provides that any person found not guilty by reason of insanity ("NGRI") or incompetent to stand trial shall be held for treatment in a mental institution until a court determines that the person who has been tried and acquitted may be released without posing a danger to himself or herself or society or the person who has not yet been tried can assist in his or her defense. Following is a summary of the statutory procedures for any person who raises a defense based on mental condition and for the treatment of any person who is incompetent to stand trial.

I. Competency to stand trial: §§16-8-110 to 16-8-114.5, C.R.S.:

A. Raising the question of and determining competency to proceed

Under section 16-8-110, C.R.S., no person may be tried, sentenced, or executed if the person is incompetent to proceed at that stage of the proceedings against the person.[(2)] A defendant is considered incompetent to proceed if he or she is suffering from a mental disease or defect that renders the person incapable of understanding the nature and course of the proceedings against him or her or of participating or assisting in his or her defense or cooperating with the person's defense counsel. (§16-8-102 (3), C.R.S.). The judge at any time during the trial or the prosecution or the defense attorney, prior to trial or on a showing of good cause during trial, may raise the question of the defendant's competency to proceed.

When the question of competency is raised, the judge makes a preliminary finding that the defendant either is or is not competent to proceed. Either the prosecution or the defense attorney may challenge the preliminary finding by requesting a competency hearing at which both sides would have the opportunity to present evidence pertaining to the defendant's competency. If neither side requests a hearing, the preliminary finding becomes the final determination.

Prior to making the preliminary finding or prior to the competency hearing, the judge may order a competency examination if adequate psychiatric information is not already available. At the competency hearing, the burden of proof by a preponderance of the evidence rests with the party asserting the incompetency of the defendant If the question of the defendant's competency was raised after the jury was impaneled, and the judge either determines the defendant is incompetent to proceed or orders a competency hearing, the judge may declare a mistrial. Such an order would not prevent the defendant from being tried or sentenced for the same offense after he or she has been found restored to competency.

Any defendant who raises the issue of competency to proceed waives any claim of confidentiality or privilege with regard to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for the mental condition that causes incompetency. The Colorado supreme court has recently held, however, that this waiver does not extend to any items of attorney work product that may be included in the defendant's medical file. *People v. Ullery*, No. 98SC92 (Colo. June 21, 1999).

If the judge finds that the defendant is competent to proceed, the trial or sentencing shall continue. If the judge declared a mistrial when the issue of competency was raised, the judge shall reset the case for trial at the earliest possible date.

B. After the defendant is found incompetent to proceed

Generally, after a defendant is found incompetent to proceed, the court commits the defendant to the department of human services. The executive director of the department designates the state facility at which the defendant will be held for care and psychiatric treatment until the defendant is declared competent to proceed. In cases where the defendant is not charged with a crime involving violent behavior and the defendant's psychiatric examination suggests he or she may be treated on an outpatient basis, the court may order the defendant to undergo treatment at or under the supervision of a private mental health facility designated by the department. The court may release an incompetent defendant on bail, so long as the defendant meets the statutory conditions for bail. In addition, the court must take into consideration whether the defendant's incompetence may affect the defendant's ability to insure his or her presence for trial.

C. Restoration to competency

The judge, on his or her own motion or on the prosecution's or defense attorney's motion, may order a restoration hearing for the defendant to determine whether the defendant has been restored to competency. The court must order the hearing if the head of an institution to which the defendant is committed or the physician treating the defendant files a report that the defendant is mentally competent to proceed. At the hearing, if the issue of competency is contested, the side that asserts the defendant's competence bears the burden of proving the defendant's competence by a preponderance of the evidence.

If the judge determines at the hearing that the defendant has been restored to competency, the judge shall resume or recommence the trial or sentencing proceeding. The defendant receives credit for any time spent in confinement while committed against any term of imprisonment that may be imposed after the defendant's restoration to competency. Evidence of the defendant's competency or incompetency is not admissible on the issues raised by a plea of not guilty or not guilty by reason of insanity.

D. Finding of continued incompetence to proceed

If at the hearing the judge determines that the defendant remains incompetent to proceed, the judge may continue or modify any orders entered when the defendant was first found incompetent and may commit or recommit the defendant. A defendant who is committed to the department of human services or otherwise confined due to a finding of incompetency cannot remain confined for a longer period of time than the maximum sentence that could have been imposed had the defendant been tried and found guilty, minus any earned time to which the defendant would be entitled under the earned time statutes.

At least once every six months, the judge must review the case of any defendant who is committed or confined as incompetent. The judge reviews the case to consider the probability that the defendant will eventually be restored to competency and to consider the justification of continuing the defendant's commitment or confinement. Prior to each review, the institution treating the defendant provides a report of the defendant's competency to the judge. On the basis of this evidence, if the judge determines there is a substantial probability that the defendant will not be restored to competency in the foreseeable future, the judge may terminate the criminal proceeding, upon the prosecution's motion, and terminate the commitment or treatment order. After terminating the order, the judge may either order release of the defendant or commencement of civil commitment proceedings. In each such case, the judge must enter a written decision explaining why he or she either did or did not terminate the criminal proceeding.

II. Raising mental condition as a defense (§§16-8-101 to 16-8-109 and 16-8-115 to 16-8-122):

A. Definitions

Under Colorado law, a person may be found NGRI if:
a. The person is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to the act; or
b. The person suffers from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged.[(3)]

Section 16-8-102 (4.7), C.R.S., defines "mental disease or defect" as severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and are not attributable to the voluntary ingestion of alcohol or drugs. However, the term does not include an abnormality manifested only be repeated criminal or otherwise antisocial conduct. Section 16-8-101.5, C.R.S., in defining "insanity" cautions that mental disease or defect should not be confused with "moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions...". Any person who commits an action motivated by any of these causes is accountable to the law for his or her actions.

B. Pleading insanity as a defense

A defendant may raise the defense of NGRI or any other defense that raises the defendant's mental condition by making a specific plea at arraignment, but the judge, on a showing of good cause by the defendant, may allow entry of the plea at any time prior to trial. Before accepting a plea of NGRI, the judge must advise the defendant of the effect and consequences of the plea.

If the defense attorney believes the defendant should plead NGRI, but the defendant refuses to do so, the defense attorney may inform the judge. The judge shall conduct such investigation as may be necessary, including ordering a psychological examination, and in a hearing determine whether a plea of NGRI should be entered. If the judge determines the plea is necessary for a just determination of the charge against the defendant, he or she shall enter the plea on the defendant's behalf and it will have the same effect as if the plea were entered by the defendant.

If the judge holds the preliminary hearing after entry of a plea of NGRI and determines that probable cause is not established, the case must be dismissed, but the judge may order the prosecution to institute civil commitment proceedings against the defendant if necessary for the protection of the defendant or the community.

Any defendant who places his or her mental condition at issue by raising a defense based on mental condition, such as NGRI, waives any claim of confidentiality or privilege with regard to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for the mental condition that causes incompetency. The Colorado supreme court has recently held, however, that this waiver does not extend to any items of attorney work product that may be included in the defendant's medical file. *People v. Ullery*, No. 98SC92 (Colo. June 21, 1999).

C. Procedures following entry of plea that raises mental condition as a defense

Pre-trial: For offenses committed on or after July 1, 1995, the judge conducts a single trial on both the issues of insanity and guilt, treating the NGRI plea as an affirmative defense. For offenses committed prior to July 1, 1995, judge conducts separate trials with separate juries on the issues of insanity and guilt. This memo will focus solely on the procedure for offenses committed on or after July 1, 1995.

Following entry of the plea, the judge must commit the defendant for a sanity examination, specifying both the place and period of commitment. In determining the place of the exam, the judge gives priority to the place in which the defendant is confined, unless the nature and circumstances of the exam require a different facility. In any event, the exam is conducted at a state institution.

To aid in forming an opinion, the physician may use the defendant's confessions and admissions and any other evidence of the circumstances surrounding commission of the offense. The physician may also use the defendant's medical and social history. If the defendant refuses to cooperate in the examination, the physician may use this information as the basis of his or her opinion. In the course of the examination, the physician may also conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and subject the defendant to a polygraph test. At trial, the physician may testify as to the results of any of these procedures and the defendant's statements and reactions to the extent the physician used these results, statements, and reactions in forming his or her opinion of the defendant's mental condition. Upon completion of the exam, the physician must submit a written report to the judge, the prosecution, and the defense attorney that includes the names of the persons who examined the defendant, a description of the examination and any tests conducted, a diagnosis and prognosis of the defendant's physical and mental condition and an opinion as to whether the defendant meets the legal definition of NGRI and, if so, separate opinions as to whether the defendant is insane.

The defendant retains the privilege against self-incrimination during the course of the examination, but the fact of defendant's noncooperation may be admissible at trial. Evidence acquired directly or indirectly for the first time as a result of the examination is only admissible at trial to rebut the defendant's evidence of his or her mental condition. The jury may not use the evidence in determining the issues raised by the defendant's not guilty plea.

In addition to the court-ordered examination, the defendant has the right to an examination by physicians of his or her own choosing. At the defendant's request, the judge shall order that the examiner selected by the defendant be given reasonable opportunity to conduct the examination. The defendant must provide to the prosecution a copy of any report of the examination. For any indigent defendant, the court must appoint appropriate physicians and psychologists, in addition to a defense attorney.

At trial: Once the judge receives the report of the sanity examination, he or she must set the case for trial as soon as possible. At trial, every defendant is presumed to be sane, but once the defendant introduces any evidence of insanity, the prosecution has the burden of proving beyond a reasonable doubt that the defendant is sane. Witnesses who are not trained in psychiatry or psychology may also testify as to their observation of the defendant's actions and conduct, including any conversations they have had with the defendant bearing on the defendant's mental condition, and give their opinions as to the defendant's mental condition.

Where the defendant has raised NGRI as an affirmative defense, the jury receives special verdict forms that include special interrogatories to provide specific findings pertaining to the NGRI affirmative defense. If the jury finds beyond a reasonable doubt that the defendant is guilty, they do not answer the special interrogatories. If the jury finds the defendant NGRI, the judge must commit the defendant to the department of human services. The executive director of the department designates the state facility at which the defendant will be held for care and psychiatric treatment until such time as the defendant is found to be eligible for release.

The executive director may transfer the defendant from one facility to another if he or she determines it is necessary to ensure the defendant's proper care, custody, and treatment or for the protection of the public or the personnel of the facilities in question. If the chief officer of the institution in which the defendant has been committed authorizes treatment and rehabilitation activities involving temporary physical removal of the defendant from the institution, he or she must first notify the court and the district attorney for the committing jurisdiction. The district attorney or the defense attorney may file objections with the committing court and the committing court shall conduct a hearing on said objections. The defendant cannot be removed from the institution unless the court approves such removal following the hearing.

D. Release from commitment after verdict of not guilty by reason of insanity

Six months after entry of the commitment order, the defendant may file with the court a request for a release hearing. After that first hearing, the defendant is only entitled to one release hearing per year, unless he or she can present good cause for a more frequent hearing. At any time after entry of the commitment order, the court may order a release hearing either on its own motion or on motion of the prosecution or the defense attorney. The court shall order a release hearing upon receipt of a report from the chief officer of the institution to which the defendant is committed

that the defendant no longer requires hospitalization because he or she no longer suffers from a mental disease or defect that is likely to cause the defendant to be dangerous to self, others, or the community in the reasonably foreseeable future. The court must notify the victim or the victim's family prior to any release hearing, so long as the victim or the victim's family can reasonably be located.

Prior to the release hearing, the court shall order a release examination when the results of a current examination are not available or when either the prosecution or defense requests an examination of the defendant at a different institution or by different experts. If none of the examination reports indicate the defendant is eligible for release, the court shall summarily deny the request for release, unless the defendant can produce any evidence by a medical expert in mental disorders that would indicate the defendant is eligible for release.

The judge makes the determination at the release hearing, unless the defendant requests a jury. If any evidence that defendant is not eligible for release is introduced at the release hearing, the defendant has the burden of proving by a preponderance of the evidence that the defendant has no abnormal mental condition that would be likely to cause him or her to be dangerous either to himself or herself or to others or to the community in the reasonably foreseeable future. Both the defendant and the prosecution are entitled to present evidence and make opening and closing statements and arguments. In addition, the court may examine or cross-examine any witness and may summon and examine witnesses on its own motion.

If the judge finds that the defendant is eligible for release, the judge may impose such conditions on the release as he or she determines are in the best interests of the defendant and the community. If the judge finds the defendant is ineligible for release, the defendant is recommitted.

Upon granting of conditional release, the chief officer of the institution in which the defendant was committed must give written notice of the conditions of release to the executive director of the department of human services and the director of the community mental health center that may be charged with the defendant's continued treatment. Every three months, the community mental health center director must submit a report of the defendant's treatment and status to the executive director of the department of human services, the district attorney for the judicial district where the defendant was committed and the district attorney for the judicial district in which the defendant is receiving treatment. The report must include all known violations of the conditions of release and any changes in the defendant's mental status that would indicate that the defendant has become ineligible to remain on conditional release.

The defendant who is conditionally released remains under the supervision of the department of human services until the court enters an order of unconditional release. If the defendant violates any condition of release requiring him or her to reside at a specific address and his or her whereabouts become unknown to the supervising authorities or when the defendant leaves the state, the defendant's absence from supervision constitutes the crime of escape.

The court must review the conditions of the defendant's release at least every twelve months. So long as the defendant is on conditional release, all information concerning the defendant, including clinical information, must be freely shared among the department of human services and appropriate community mental health centers, district attorneys, law enforcement, and court personnel.

E. Revocation of conditional release

Whenever the superintendent of the Colorado mental health institute at Pueblo ("CMHI") has probable cause to believe that the defendant has become ineligible to remain on conditional release, the superintendent shall notify the district attorney for the judicial district where the defendant was committed. Either the superintendent or the district attorney shall obtain a warrant instructing the sheriff or chief of police for the jurisdiction in which the defendant resides to take the defendant into custody and deliver the defendant immediately to CMHI.

Experts at CMHI must examine the defendant and evaluate his or her ability to remain on conditional release. If the defendant refuses to submit to or cooperate in the examination, the committing court shall revoke the conditional release. The examination must be completed within twenty days and a copy of the examination report mailed to the district attorney and the court for the committing jurisdiction.

The district attorney may file a petition for the revocation of the defendant's conditional release. If the district attorney does not file such a petition within ten days after the defendant is delivered to CMHI, the defendant must be immediately released from custody, unless the district attorney shows evidence of good cause for delay in filing the petition. The court must hold a hearing on the petition for revocation of conditional release within thirty days after the defendant is delivered to CMHI. If the judge finds by a preponderance of the evidence that the defendant has become ineligible for conditional release, the judge shall revoke the conditional release order and recommit the defendant. Following recommitment, the defendant may receive a release hearing as described above. If the judge does not find that the defendant has become ineligible for conditional release, he or she shall dismiss the petition and reinstate or modify the conditional release order.

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1. This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties. Consistent with the OLLS' position as a staff agency of the General Assembly, OLLS legal memoranda generally resolve doubts about whether the General Assembly has authority to enact a particular piece of legislation in favor of the General Assembly's plenary power.

2. Although this statutory section includes situations where execution is postponed due to questions of the offender's mental competence, this memo will address only situations in which the question of competence arises at the pretrial or sentencing stage of the proceedings.

3. Prior to July 1, 1995, a defendant could either plead not guilty by reason of insanity or the defendant could plead the affirmative defense of impaired mental condition that prevented the defendant from forming the culpable mental state that is an essential element of the crime. For offenses committed on or after July 1, 1995, HB95-1120 incorporated the affirmative defense of impaired mental condition into the definition of insanity.