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I. INTRODUCTION

A. The New Law

On March 8, 1982, the Governor signed Senate Bill No. 99 into law.[1] The new law, which became effective in May 1982, provides for a plea and verdict of "guilty but mentally ill" ("GBMI") in New Mexico. The statute states that a person who was not insane but was suffering from a

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1. N.M. Stat. Ann. § 31-9-3 (Cum. Supp. 1982). Section 31-9-3 provides:
   A. A person who at the time of the commission of a criminal offense was not insane but was suffering from a mental illness is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill. As used in this section, "mentally ill" means a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he did not know what he was doing or understand the consequences of his act or did not know that his act was wrong or could not prevent himself from committing the act.
   B. A plea or finding of guilty but mentally ill is not an affirmative defense but an alternative plea or finding that may be accepted or made pursuant to appropriate evidence when the affirmative defense of insanity is raised or the plea of guilty but mentally ill is made.
   C. A plea of guilty but mentally ill shall not be accepted until the defendant has undergone examination by a clinical psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition and is satisfied that there is a factual basis that the defendant was mentally ill at the time of the offense to which the plea is entered.
   D. When a defendant has asserted a defense of insanity, the court may find the defendant guilty but mentally ill if after hearing all of the evidence the court finds beyond a reasonable doubt that the defendant:
      (1) is guilty of the offense charged;
      (2) was mentally ill at the time of the commission of the offense; and
      (3) was not legally insane at the time of the commission of the offense.
   E. When a defendant has asserted a defense of insanity, the court, where warranted by the evidence, shall provide the jury with a special verdict form of guilty but mentally ill and shall separately instruct the jury that a verdict of guilty but mentally ill may be returned instead of a verdict of guilty or not guilty, and that such a verdict requires a finding by the jury beyond a reasonable doubt that the defendant committed the offense charged and that the defendant was not legally insane at the time of the commission of the offense but that he was mentally ill at that time.

"mental illness" at the time of the commission of the crime charged may be found GBMI. The statute defines mental illness as:

> a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he did not know what he was doing or understand the consequences of his act or did not know that his act was wrong or could not prevent himself from committing the act.[2]

The statute provides that the trier of fact may enter the new verdict under two circumstances: 1) when the defendant raises the insanity defense and the trier of fact finds beyond a reasonable doubt that the defendant (a) is guilty of the offense charged; (b) was mentally ill at the time of the commission of the offense; and (c) was not legally insane at the time of the commission of the offense; or 2) when the defendant pleads guilty but mentally ill, a psychologist or psychiatrist examines the defendant, and the court holds a hearing and determines that there is a factual basis to the plea.[3]

The statute provides that upon a finding of GBMI, the court may impose any sentence appropriate for the offense. However, if the defendant is sentenced to the custody of the Department of Corrections, that entity shall examine the defendant and provide such psychiatric treatment "as it deems necessary."[4] Evidently, a verdict of GBMI does not in any way limit the sentencing options of the trial judge. The judge may, for instance, still place a defendant on probation. In that case, the provisions regarding treatment would be inapplicable because they only apply when a defendant is committed to the Department of Corrections. Presumably, a judge could, nevertheless, condition probation on arrangements for psychiatric treatment, including commitment to an appropriate facility.[5]

There is a potentially significant loophole in the new GBMI statute. The trier of fact can enter a GBMI verdict only when the defendant raises

2. N.M. Stat. Ann. § 31-9-3(A) (Cum. Supp. 1982).

3. N.M. Stat. Ann. § 31-9-3(C), (D) (Cum. Supp. 1982).

4. N.M. Stat. Ann. § 31-9-4 (Cum. Supp. 1982). Section 31-9-4 provides:

> The court may impose any sentence upon a defendant which could be imposed pursuant to law upon a defendant who has been convicted of the same offense without a finding of mental illness; provided that if a defendant is sentenced to the custody of the corrections department, the department shall examine the nature, extent, continuance and treatment of the defendant's mental illness and shall provide psychiatric, psychological and other counseling and treatment for the defendant as it deems necessary.

5. *See* Mich. Comp. Laws Ann. § 768.36(4) (1982), which provides, "If a defendant who is found guilty but mentally ill is placed on probation under the jurisdiction of the sentencing court pursuant to law, the trial judge, upon recommendation of the center for forensic psychiatry, shall make treatment a condition of probation."

the insanity defense. Because the defendant ultimately controls when GBMI will be raised, a mentally ill defendant might seek to avoid the GBMI option by not pleading the insanity defense. Instead, he might claim that his mental illness precluded formation of the requisite mens rea. A claim that mental illness had negated an essential mens rea would involve substantially different proof problems than the insanity defense. Indeed, the burden would be on the state to prove the existence of the requisite mens rea beyond a reasonable doubt once the defendant came forward with some evidence of mental illness. Every serious offense includes a mental state element, and in certain circumstances mental illness can negate a requisite mental state.[6]

There are at least two ways in which the GBMI plea and verdict may arise in a criminal prosecution. First, the defendant may plead GBMI. This would most likely arise out of a plea bargain in which a mentally ill defendant was doubtful about the likelihood of a successful insanity defense and felt that the plea might make mental care more likely. Such a plea bargain would probably include an agreement on sentencing. In such a case, the statute requires that the court receive psychological or psychiatric reports on the defendant, hold a hearing and satisfy itself that "there is a factual basis that the defendant was mentally ill at the time of the offense. . . ."[7]

Second, the state may raise the GBMI verdict in a requested instruction when the defendant pleads the insanity defense and the court finds that giving a GBMI instruction would be "warranted by the evidence." It is difficult to imagine the situation in which a court would give an insanity defense instruction and not instruct on GBMI. It is less likely, but nevertheless possible, that the prosecution may oppose giving a GBMI instruction because it is confident that it can defeat the insanity defense.

B. Scope of this Article

This article will explore the impact of the new GBMI plea and verdict in New Mexico. It will discuss the new statute's potential impact on the insanity defense, on jury deliberations, and its probable effect on the treatment of mentally and emotionally disturbed prison inmates. This exploration will be based on informed impressions of the New Mexico scene, and will draw extensively from the experience of the courts in Michigan, the first state to adopt a plea and verdict of GBMI.[8] The Michigan experience is useful for at least three reasons. First, it exem-

6. N.M. U.J.I. Crim. 41.11 (Repl. Pamp. 1982).
7. N.M. Stat. Ann. § 31-9-3(C) (Cum. Supp. 1982).
8. Mich. Comp. Laws Ann. § 768.36 (1982).

plifies the recent history of the insanity defense and the related development of the GBMI plea and verdict. Second, the courts in Michigan have more fully interpreted Michigan's GBMI statute than have the courts of any other jurisdiction. Third, the language of the Michigan statute and the decisions interpreting it reveal basic similarities as well as critical distinctions between the Michigan and New Mexico versions. The similarities and distinctions illustrate the purposes, problems, and implications of New Mexico's GBMI statute.

The GBMI plea and verdict may have at least two possible groups of beneficiaries. The statute may provide a proper disposition for those who are not mentally ill in the legal sense required under the insanity defense, or the new plea and verdict may seek to provide appropriate treatment for those who are truly mentally ill for purposes of the insanity defense. This view of the function of the statute, however, assumes one basic purpose: that the plea and verdict will provide mental health care to needy convicts while serving society's need to protect itself and society's right to punish criminals. The difficulty with this view is that an honest appraisal of New Mexico's GBMI statute strongly suggests that as a practical matter, the new statute may only further limit the already infrequent success of insanity defenses in New Mexico. The principal thrust of this article is to explore the likely purpose and practical impact of this new plea and verdict.

II. THE HISTORY AND DEVELOPMENT OF GBMI— OPPONENTS OF THE INSANITY DEFENSE PROPOUNDED THE GBMI VERDICT

Although GBMI provisions are a rather recent innovation in the criminal law, they are an inextricable part of the much more ancient insanity defense. The defense of "not guilty by reason of insanity" ("NGRI") has deep roots in the history of the common law. The M'Naghten case does not represent the genesis, but only a reformulation of the test for criminal insanity.[9] The defense itself was well established in 1843 and can be traced back as far as the 12th Century.[10] This longstanding recognition of the insanity defense was grounded in society's fundamental

9. Daniel M'Naghten's Case, 10 CL. & F.200, 8 Eng. Rep. 718 (H.L. 1843). *M'Naghten* is the first reported case setting out the insanity defense in its modern formulation:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

10. Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 Am. Crim. L. Rev. 559, 559 (1972) [hereinafter cited as Gray].

unwillingness to punish one who is not responsible for his conduct.[11] The requirement of responsibility is one of the philosophical underpinnings of the criminal law inherited from England and developed in the United States.[12]

In recent years, there has been increased opposition to the insanity defense. This opposition has tended to take two forms. Some abolitionists "[r]ecommend that all evidence regarding defendant's mental abnormality be excluded from the 'guilty stage' of the criminal proceeding and that such evidence be taken into account only at the sentencing."[13] Other opponents urge the less sweeping approach of excluding evidence of mental disease or defect unless it is relevant to the mens rea of the offense charged.[14] Montana adopted this approach[15] and it was also the essence of President Nixon's unsuccessful 1972 proposal to abolish the insanity defense.[16]

In 1976, Michigan was the first state to enact a plea and verdict of GBMI. This enactment was apparently triggered by the public's reaction to developments which were related to the insanity defense. The Michigan

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11. P. Low, J. Jeffries & R. Bonnie, Criminal Law Cases and Materials (1982) [hereinafter cited as Low, Jeffries & Bonnie].

> Before the 12th century, mental disease, as such, apparently had no legal significance. However, as criminal liability came to be predicated upon general notions of moral blameworthiness, "madness" was recognized as an excusing condition. At first, insanity (like self-defense) was not a bar to criminal liability but only a recognized ground for granting a royal pardon; while the records are fragmentary, it appears that the king would remand the person to some form of indefinite custody in lieu of execution. The first recorded case of outright acquittal by reason of insanity occurred in 1505.

Id. at 643.

12. Fletcher, *The Theory of Criminal Negligence*, 119 U. Pa. L. Rev. 401, 410–15 (1971).

13. Low, Jeffries & Bonnie, *supra* note 11, at 759. The state of Washington enacted this approach in 1909 and the Washington Supreme Court declared it unconstitutional in 1910. *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910).

14. *See, e.g.*, G. Fletcher, Rethinking Criminal Law 843 (1978); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?* 72 Yale L.J. 853 (1963); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. Cal. L. Rev. 514 (1968).

15. See Mont. Code Ann. § 46-14-201 (1981), which provides in part:

> (1) Evidence of mental disease or defect is not admissible in a trial on the merits unless the defendant . . . files a written notice of his purpose to rely on a mental disease or defect to prove that he did not have a particular state of mind which is an essential element of the offense charged. . . .
>
> (2) When the defendant is found not guilty of the charged offense or offenses or any lesser included offense for the reason that due to a mental disease or defect he could not have a particular state of mind that is an essential element of the offense charged, the verdict and judgment shall so state.

This approach would likely preclude some claims which would be successful today under predominant approaches to the insanity defense. However, some commentators suggest that nothing much would change. *See, e.g.*, Dershowitz, *Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay*, 9 Crim. L. Bull. 434, 438–39 (1973).

16. Appelbaum, *The Insanity Defense: New Calls for Reform*, 33 Hospital and Community Psychiatry 13, 14 (1982) [hereinafter cited as Appelbaum].

experience tends to support the conclusion that GBMI provisions were a third form of opposition to the insanity defense and were designed to undercut that defense.

As the human rights reforms of the 1960's and 1970's spread, they touched upon the rights of those involuntarily committed for mental or emotional disturbance. Gradually, the courts began to exercise more control over these commitments, requiring periodic evaluations of progress and release of persons improperly committed or not requiring further commitment.[17] In *People v. McQuillan*,[18] the Michigan Supreme Court decided that due process and equal protection requirements of the United States Constitution demanded that prior to civil commitment, a hearing must be held to determine the present sanity of a defendant found NGRI. Within a year of the decision, 64 inmates in Michigan hospitals were released following hearings in which they were found presently sane.[19]

In addition, in Michigan, a person found not guilty of a violent crime by reason of insanity could be released sixty days after acquittal. In a five-year period, 223 defendants were found NGRI; 124 of these defendants were released as noncommittable according to civil standards following a sixty-day assessment period. Almost half of the remaining acquittees were released within five years of acquittal after an average of nine-and-one-half months of postevaluation hospitalization. Before another year ended, two of those released had committed additional homicides which were highly publicized.[20]

These developments confronted the public with a new factor in the insanity defense equation. Previously,

> the outcome for the defendant acquitted by reason of insanity was almost always the same: indefinite confinement in a maximum security facility. Thus the public could have its moral cake and eat it, too. Public reluctance to punish those who were not in the same abstract sense "responsible" for their acts was satisfied, and at the same time the offenders themselves were locked securely away for decades in hospitals for the criminally insane.[21]

The public could no longer be confident of the indefinite confinement of those found NGRI and became concerned about the implication of insanity verdicts. In response to the public outcry denouncing the release of dangerous mental patients, the Michigan Legislature passed the GBMI pro-

17. *See* Jackson v. Indiana, 406 U.S. 715 (1972); Specht v. Patterson, 386 U.S. 605 (1967); Baxtrom v. Herold, 383 U.S. 107 (1966); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).

18. 392 Mich. 511, 221 N.W.2d 569 (1974).

19. Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. Urb. L. 471, 471–72 (1976) [hereinafter cited as Comment].

20. Appelbaum, *supra* note 16, at 13–14; Comment, *supra* note 19, at 472.

21. Appelbaum, *supra* note 16, at 13.

vision.[22] The Michigan experience suggests, then, that GBMI provisions are reactions to the incidence of successful insanity defenses and the likelihood of early release for those found criminally insane.

III. EXPLANATION FOR THE GBMI PROVISIONS: A TOOL TO ABOLISH THE INSANITY DEFENSE

The new plea and verdict of GBMI can be viewed in at least two ways. On the one hand, it may be seen, as the experience in Michigan suggests, as an attempt to undermine the insanity defense. On the other hand, it may represent an effort by the legislature of the State of New Mexico to reestablish a constructive balance between society's interest in protecting itself from the dangerously mentally ill and society's longstanding reluctance to punish the mentally ill, while also providing appropriate mental health treatment to those who need it.[23] Of course, the present composition of the insanity defense and the manner in which those found NGRI are disposed of reflect the striking of that balance traditionally accepted in Anglo-American criminal law.[24]

The public perception, however, of the proper balance between societal self-protection and the individual rights of mentally ill persons who commit crimes appears to be shifting. This changing perception, the virtually parallel developments of opposition to the insanity defense, adoption of the GBMI statute, and the likelihood that no additional mental health care will be made available, suggest that GBMI is nothing more than an effort to undercut the insanity defense and not an attempt to reestablish the traditional balance.

Therefore, the new plea and verdict may be the product of two quite different tendencies which seek to eliminate the insanity defense. First, the public, which lacks confidence in the disposition of those found NGRI, would like to see the insanity defense abolished.[25] Second, as noted earlier, there is a school of thought that issues of mental illness should generally be raised only at disposition, except where the mental condition is alleged to preclude a requisite element of the offense.[26]

Certainly, on its face, New Mexico's GBMI provision does not purport to abolish the insanity defense. The new provision makes clear that only

22. Mich. Comp. Laws Ann. § 768.36 (1982).

23. *See* People v. Philpot, 98 Mich. App. 257, 296 N.W.2d 229 (1980). In *Philpot*, the court stated that the purpose of the guilty but mentally ill statute is to "provide help to those who have committed a criminal offense while suffering from mental illness even when that mental illness cannot be said to have totally relieved defendant from all criminal responsibility." *Id.* at ___, 296 N.W.2d at 230.

24. H.L.A. Hart, Punishment and Responsibility 31 (1968).

25. Appelbaum, *supra* note 16, at 13.

26. *See supra* notes 14–15 and accompanying text.

on a finding that a defendant is guilty, mentally ill, *and not insane* can he or she be found GBMI.[27] Several reasons underlie the belief, however, that either or both the motive and/or the effect of the new provision will be to undercut the insanity defense: 1) the potential for juror confusion between the NGRI verdict and the GBMI alternative; 2) the potentially attractive compromise which the new verdict offers jurors; and 3) the absence of any plausible reason for enacting the new provision other than its impact on the insanity defense.

A. Potential for Juror Confusion

The potential for confusing jurors arises from two features of the GBMI provision. First, its application in a given case is closely tied to the insanity defense and its terms, although vague, are similar and yet arguably different from those used to delineate the insanity defense. Second, the provision will add to the often large number of full or partial mens rea defenses on which jurors must be instructed, especially in homicide cases.

1) Similarities Between the GBMI and the NGRI Verdicts

The close tie between the insanity defense and GBMI arises primarily from the fact that trial consideration of the GBMI verdict is tied to and triggered by defendant's invocation of the insanity plea.[28] The definition of the new verdict requires a jury determination that defendant was not legally insane. Thus, under the New Mexico statute, the jury will always be required to consider defendant's sanity when it considers a verdict of GBMI. The only role played by the new verdict as described in the statute itself is that of an alternative to the defense of insanity.

The jury's meaningful choice between the two verdicts might be difficult due to the jury's confusion over the similarities and differences in the definitions of the two alternatives. Both verdicts require two showings—a mental condition and a consequence caused by that condition. The conditions may be similar; the requisite results quite different.

The insanity defense requires a "disease of the mind" which has been defined as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls," normally extending over a considerable period of time rather large in extent or degree as distinguished from a sort of momentary insanity arising from the presence of circumstances.[29] The GBMI statute expressly

27. N.M. Stat. Ann. § 31-9-3(A) (Cum. Supp. 1982). *See supra* note 1.

28. N.M. Stat. Ann. § 31-9-3(B) (Cum. Supp. 1982). *See supra* note 1.

29. *See* State v. Nagel, 87 N.M. 434, 437, 535 P.2d 641, 644 (Ct. App. 1975), *cert. denied*, 87 N.M. 450, 535 P.2d 657 (1975); *see also* State v. Valenzuela, 90 N.M. 25, 559 P.2d 402 (1976).

defines its requisite "mental illness" as "a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense. . . ."[30]

In either case, the condition must be substantial and apparently may encompass mental, emotional, or behavioral disorders. However, there are differences. The definition of "diseases of the mind" appears to require both impairment of behavior controls *and* impact on either mental or emotional processes. On the other hand, mental illness permits a finding of any one of the three types of disorders—mental [thought], emotional [mood], or behavioral. In addition, while a mental disease must be long-standing in nature for purposes of the insanity defense,[31] the GBMI provision does not include such a requirement.

Although the court makes a threshold determination, the court does not instruct the jury considering an insanity plea on the definition of "disease of the mind."[32] It is not clear under the new GBMI provision whether the legislature intended that the jury be instructed on the statutory definition of mental illness.[33] If, as appears likely, no such definitional instruction is to be given to the jury, the jury will never understand the relationship between the concepts with regard to their respective requisite mental conditions and will be applying rules without fully understanding them. Yet, in deciding whether to give the GBMI instruction, the judge must distinguish between these concepts. It is not clear what will guide the courts in this task.

If the differences and similarities in the requisite mental conditions are unclear, no such vagueness exists with regard to the respective results that must arise from these mental conditions. In this regard, the two verdicts vary substantially.

With respect to insanity, New Mexico law requires that one of three consequences arise from the required disease of the mind: 1) that defendant did not know what he was doing, or understand the consequences of his act, 2) that he did not know that his act was wrong, or 3) that he was unable to prevent himself from committing the act. On the other

30. N.M. Stat. Ann. § 31-9-3(A) (Cum. Supp. 1982). *See supra* note 1.

31. State v. White, 58 N.M. 324, 330, 270 P.2d 727, 730 (1954).

32. N.M. U.J.I. Crim. 41.00 (Repl. Pamp. 1982).

33. Presumably, there was no such legislative intent. It would be most confusing for a jury to be instructed on the definition of mental illness, but not on that of mental disease. Most likely, such an absurd instruction would lead the jury to apply the GBMI definition of mental illness to the insanity plea concept of mental disease. As noted above, that might yield an inaccurate definition of mental disease. If there are no instructions to the jury on these definitions, the vagaries of the two related but different concepts will fall to the trial court's threshold decision on whether an instruction should be given on the insanity defense, on the GBMI verdict, or on both. The apparent differences, similarities, and resultant confusion over the distinctions between the definitions will not make the judge's decision any easier. *See* Low, Jeffries & Bonnie, *supra* note 11, at 652.

hand, under the GBMI provision, the defendant must be both guilty and mentally ill, but his mental illness need have nothing to do with his guilt. The new plea and verdict only requires that the defendant's mental illness exist at the time of the offense and that it have impaired the defendant's judgment in some otherwise undefined manner. Beyond the vague reference to impairment of judgment, and the requirement that defendant be mentally ill at the time of the commission of the crime, there is seemingly no other requirement of connection between the mental illness and the criminal conduct under the GBMI provision.

There is an apparent overlap between the mental conditions required for both the insanity and the GBMI verdict which blurs the distinctions which exist between these conditions. This potential confusion coupled with the substantially lesser showing of consequence required for GBMI, suggests that jurors will often opt for GBMI without full understanding of the choices. Ultimately, the jury will be left with the rather broad mission of deciding whether a defendant who pleads NGRI was mentally ill at the time of the offense and, therefore, should be relieved of responsibility for the offense or, despite having essentially the same mental illness, is responsible and thus GBMI.

Defendants in Michigan have recognized this potential for confusion and have challenged their convictions on the ground that the plea and verdict confuses jurors or is too vague to enforce. The courts in Michigan have consistently rejected such challenges to that state's GBMI statute. The Michigan challenges have included claims that the jury would be unable to distinguish between the two verdicts because their definitions are so vague and overlapping,[34] and that the definitions of each are based upon substantially similar behavioral characteristics and thus essentially indistinguishable.[35] The courts in Michigan have rejected both contentions.

2) Additional Mens Rea Options

The second feature of the GBMI provision, the additional mens rea options available to a jury, increase the possibility of confusion in choosing between the two verdicts. Insanity and GBMI verdicts are only two of the substantial array of mens rea options available to a jury. The

34. In People v. Ramsey, 89 Mich. App. 468, 280 N.W. 2d 565 (1979), the Michigan Court of Appeals held that the definitions were not "so vague and overlapping as to confer upon the trier of fact unstructured and unlimited discretion. . . ." *Id.* at ___, 280 N.W.2d at 566.

35. In People v. Sorna, 88 Mich. App. 351, 276 N.W.2d 892 (1979), the Michigan Court of Appeals rejected this claim, conceding that the instructions might not be clearcut but observing: "The legislature in formulating [the GBMI statute] has established an intermediate category to deal with situations where a defendant's mental illness does not deprive him of substantial capacity sufficient to satisfy the insanity test but does warrant treatment in addition to incarceration." *Id.* at ___, 276 N.W.2d at 896.

potential for confusion is exemplified by the possibilities that may come before a jury in a first degree murder case. The jury could be asked to decide: 1) whether the defendant by virtue of his mental condition was able to formulate the requisite mens rea of premeditation and deliberation; 2) whether the defendant could even form an intent to kill or the reckless state of mind required for second degree murder;[36] 3) whether the defendant was NGRI;[37] 4) whether the defendant was, because of mental illness, adequately provoked into killing so as to be guilty only of voluntary manslaughter;[38] 5) whether diminished capacity arising from mental disease would apply to defendant's case reducing the charge to second degree murder;[39] and 6) whether defendant by virtue of his mental illness was GBMI.[40]

Each of the foregoing decisions requires two steps for resolution. They all require the same threshold determination that the defendant suffer from some kind of mental illness. Each differs in the second step—identification of a consequence of that mental illness. These consequences are generally related to culpability for the crime. The same mental illness might serve as the basis for the jury's decision about which of the foregoing possibilities to choose. The only difference among them being the often subtle distinctions among the various consequences of the mental illness.

Thus, the hypothetical jury (after determining that the defendant was mentally ill) would have to decide whether: 1) the defendant's mental illness prevented formation of a requisite mens rea; 2) the defendant did not know what he was doing or understand the consequences of his act, or did not know that his act was wrong or could not prevent himself from committing the act; 3) the defendant was reasonably provoked into the killing on account of his mental illness; 4) because of the mental illness the defendant was unable to form a "deliberate intent to take away the life of another"; and 5) the defendant's mental illness impaired his judgment.

This myriad of decisions and minimum of guidance is likely to lead juries in their confusion down one of two paths—either to greater dependence on expert testimony or to increased tendency to reach compromise verdicts because of their inability to apply the law to the conflicting and overlapping evidence in a given case.[41] There is already concern

36. *See* N.M. Stat. Ann. § 30-2-1 (Cum. Supp. 1982); N.M. U.J.I. Crim. 2.00 (Repl. Pamp. 1982); N.M. U.J.I. Crim. 2.10 (Repl. Pamp. 1982).

37. *See* N.M. U.J.I. Crim. 41.00 (Repl. Pamp. 1982).

38. *See* N.M. Stat. Ann. § 30-2-3 (1978); N.M. U.J.I. 2.20 (Repl. Pamp. 1982).

39. *See* N.M. U.J.I. Crim. 41.10 (Repl. Pamp. 1982).

40. *See* N.M. Stat. Ann. § 31-9-3 (Cum. Supp. 1982).

41. *See* Hosch, *A Comparison of the Influence of Expert Testimony on Jurors*, 4 L. Hum. Behav. 297–302 (1980); H. Kalven & H. Zeisel, The American Jury 301–317 (1966) [hereinafter cited as Kalven and Zeisel]; Low, Jeffries & Bonnie, *supra* note 11, at 652; Comment, *supra* note 20, at 471.

among commentators about juror dependence on the expert testimony of psychiatrists and psychologists in criminal cases involving mental illness. The concern is that experts will usurp the function of the jury. Jurors, in their confusion over the multitude of subtle distinctions that must be made as to the existence and consequences of mental illness, may simply defer to the expertise of psychologists and psychiatrists.[42] The confusion added by the new plea and verdict of GBMI will simply compound the problem and accelerate the trend.

B. The Likelihood of Jury Compromise

The GBMI plea and verdict seem designed to permit jurors a "compromise" between acquittal on grounds of insanity and a simple guilty verdict. The likelihood of such compromise will arise most emphatically in cases where the jury is convinced that a defendant is mentally ill, but fears the possibility of the defendant's release if he is found NGRI.[43] "Observations of experimental juries have revealed that a Guilty But Mentally Ill option is exactly the type of 'middle ground' between the verdicts of 'guilty' and NGRI that many jurors would prefer."[44]

Studies show that despite judicial admonitions to the contrary, juries commonly discuss the consequences of their verdicts.[45] Such discussion would increase the likelihood of jury compromise to a verdict of GBMI. Ostensibly, the GBMI verdict suggests by its terms, "guilty *but* mentally ill," that the finding of mental illness somehow mitigates the consequences of a finding of guilt.

In *People v. Long*,[46] the Michigan Court of Appeals suggested that the plea and verdict of GBMI would deceive jurors into believing that their compromise is meaningful:

> Indeed, upon close inspection it appears that the label of the plea (or verdict, or finding) is somewhat of a misnomer. To a layperson, "guilty *but* mentally ill" may suggest that the culpability, and hence the punishment, attending the finding of "guilty" is mitigated by the finding of "mentally ill". However, the statute explicitly provides that, "If a defendant is found guilty but mentally ill or enters a plea to that effect which is accepted by the court, the court shall impose any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense." . . . The statute

42. *See* Low, Jeffries & Bonnie, *supra* note 11, at 652.

43. *See* Gray, *supra* note 10, at 579.

44. Kalven & Zeisel, *supra* note 41, at 197; R. Simon, The Jury and the Defense of Insanity 178 (1967); *Cf.* Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. Personality and Soc. Psychology 211, 215–17 (1972).

45. Kalven & Zeisel, *supra* note 41, at 197.

46. 86 Mich. App. 676, 273 N.W.2d 519 (1978).

> further provides that a defendant found "guilty but mentally ill" may have continued treatment at a mental institution made a condition of parole or probation. . . . In sum, the finding of "mentally ill" can only serve to aggravate rather than mitigate the restraints on a convicted defendant's liberty. The plea, verdict or finding would more aptly be "guilty and mentally ill". In its substance, and in its penal consequences, a plea of guilty but mentally ill is a guilty plea."[47]

The impression that the defendant's sentence will be mitigated by the verdict is even more illusory in New Mexico than in Michigan. The New Mexico statute not only provides no mitigation of sentence, it leaves entirely to the judgment of the Department of Corrections the decision whether and how much treatment or counseling will be provided to one found GBMI.[48] Michigan's statute on the other hand, mandates evaluation and treatment.[49] Thus, in New Mexico, there is not even an assurance of treatment. The invariable linkage between the GBMI verdict and the insanity defense suggests a legislative intent to give juries in New Mexico a compromise alternative to the insanity verdict. The new plea and verdict can only be raised when a plea of insanity is entered. Although the court is not mandated to instruct on GBMI in every case where insanity is an issue, it seems clear that given the similarities between the prerequisite mental conditions,[50] in the vast majority of insanity plea cases the jury will be given the GBMI alternative.

Defendants in Michigan have raised the charge that GBMI results in a compromise verdict and that given a choice between a verdict of GBMI and NGRI, juries will choose GBMI even though the defendant is truly insane. The Michigan courts rejected those charges. In *People v. Sorna*,[51] the jury found the defendant guilty on a charge of armed robbery. The defendant appealed his conviction stating as one ground that the jury was misled by the court's instruction and returned a "compromise verdict" of GBMI rather than a verdict of NGRI.[52] The defendant argued that the wording of the court's jury instructions prompted the compromise verdict. The Michigan Court of Appeals rejected the argument and affirmed the conviction because, "[t]he fact that [the distinctions between insanity and mental illness] may not appear clear-cut does not warrant a finding of no rational basis to make them."[53]

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47. *Id.* at ___, 273 N.W.2d at 523.
48. N.M. Stat. Ann. § 31-9-4 (Cum. Supp. 1982).
49. People v. Philpot, 98 Mich. App. 257, 296 N.W.2d 229 (1980); Mich. Comp. Laws Ann. § 768.36 (1982).
50. *See supra* notes 36–42 and accompanying text.
51. 88 Mich. App. 351, 276 N.W.2d 892 (1979).
52. *Id.* at ___, 276 N.W.2d at 896.
53. *Id.*

The most convincing argument that Michigan's GBMI verdict is a compromise between a guilty and a NGRI verdict arises from the fact that juries in Michigan are instructed on the respective consequences of those verdicts. Knowledge that a defendant will be incarcerated and receive treatment under a GBMI verdict, but may be released after sixty days if found NGRI, may lead juries to a GBMI verdict rather than a NGRI verdict.

Traditionally, juries were not to consider the consequences of their NGRI verdicts because it was considered an irrelevant issue.[54] However, the Michigan courts have followed the reasoning in *Lyles v. United States*,[55] in which a federal appellate court concluded that there is no general understanding of what happens if a NGRI verdict is returned as opposed to general knowledge as to the consequences of a guilty verdict.[56] The federal court thought it was important for the jury to be instructed that NGRI means neither freedom nor punishment but, in most states, automatic commitment. In *People v. Tenbrink*,[57] the Michigan Court of Appeals applied the *Lyles* reasoning to the GBMI verdict. The *Tenbrink* court decided that juries are equally uninformed as to the disposition of the defendant found GBMI. The court held that not only could an instruction on the disposition of a GBMI verdict be given but that the judge, *sua sponte*, could so inform the jury, even over the objection of the defense.[58]

Present New Mexico law does not permit an instruction on the disposition of a defendant found NGRI.[59] Two years ago, in *State v. Lujan*,[60] the New Mexico Supreme Court said, "[t]hey [the jury] are to patiently and dispassionately weigh the evidence and arrive at a verdict in accordance with the law as given to them by the court. To instruct them on the consequences of the verdict would add an element to their deliberations that is not proper."[61] Because New Mexico has not adopted the policy of instructing on the consequences of the NGRI verdict (the basis for the

54. People v. Samuelson, 75 Mich. App. 228, 254 N.W.2d 849 (1977).

55. 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958).

56. In People v. Cole, 382 Mich. 695, 172 N.W.2d 354 (1969), the court stated that it would follow the reasoning of *Lyles* and instruct juries on disposition of the defendant if defendant is found NGRI.

57. 93 Mich. App. 326, 287 N.W.2d 223 (1980).

58. In People v. Rone, 101 Mich. App. 811, 300 N.W.2d 705 (1981) *vacated* and *remanded*, ___ Mich. ___, 311 N.W.2d 702 (1981), the court confirmed the holding that a judge may *sua sponte* inform the jury of the consequnces of a GBMI verdict. Although *People v. Rone* is presently on remand, the Michigan Court of Appeals reiterated its position that a trial judge has independent authority to instruct the jury on the consequences of a GBMI verdict over an objection by defense counsel in People v. Goad, 109 Mich. App. 726, 311 N.W.2d 457, 458 (1981).

59. State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980); State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972).

60. 94 N.M. 232, 608 P.2d 1114 (1980).

61. *Id.* at 234, 608 P.2d at 1116.

Michigan decision to allow an instruction on the GBMI verdict), it is unlikely that New Mexico will allow an instruction on the consequences of a GBMI verdict.

Therefore, in New Mexico, the likelihood of GBMI as a compromise verdict is heightened when compared with Michigan. The tendency of juries to discuss the consequences of their verdicts, no matter what instructions they receive, could create essentially the same situation in New Mexico with the added disadvantage that the court would not accurately and officially inform the jurors of the consequences of their verdict.

C. The Need for the GBMI Verdict in New Mexico

1) Few Defendants Successfully Raise NGRI Defense

New Mexico's GBMI statute is virtually identical to the Michigan provision.[62] Our state's experience with the insanity defense is, however, quite different. Michigan had substantial numbers of successful insanity pleas prior to passage of their GBMI statute. Although hard data is currently unavailable in New Mexico, professionals in the mental health, corrections, and criminal justice fields agree that few defendants in New Mexico have successfully raised the NGRI defense. Most defendants who have raised mens rea defenses are found guilty. If mental treatment is necessary, the Department of Corrections may supervise provision of such treatment. One experienced New Mexico forensic psychologist, Dr. Elliot Rappaport, stated that in his eight years of interviewing and testifying on behalf of defendants seeking NGRI verdicts, he had not seen one successful insanity defense.[63] Presently, there are no patients at the New Mexico State Hospital in Las Vegas, New Mexico, who were civilly committed after being found NGRI.[64]

Dr. Richard Fink, another psychologist with extensive experience in New Mexico, found that defendants who exhibited signs of insanity were sent to the Forensic Hospital to determine their competency to stand trial. The charges against those who were never deemed competent usually were dropped and such patients were then civilly committed. If the charges against the patient committed for determination of competence were not serious, they were usually dropped soon after admission, and then civil

62. The major difference is that Michigan's enactment provides in detail for the disposition of one found or pleading GBMI. New Mexico's statute is very sketchy and leaves virtually total discretion to the Department of Corrections.

63. Interview with Dr. Elliot Rappaport, Clinical Psychologist, former Director of the Forensic Hospital, Las Vegas, New Mexico (1966–1969), former Director (1979–1981), and present consultant to the Forensic Evaluation Team, Santa Fe, New Mexico (Feb. 17, 1982).

64. Interview with Dr. Richard Fink, Chief Psychologist, Forensic Hospital, Las Vegas, New Mexico (March 24, 1982).

commitment took place. Dr. Fink knew of no cases in which a defendant was found competent, stood trial, was found NGRI at the time of the offense, and was then civilly committed. His belief is that most are convicted and then sentenced. Indeed, the Forensic Hospital presently holds many patients admitted after conviction.[65] Based on Dr. Fink's experience, it might be concluded that one reason for the already low rate of success of NGRI pleas in New Mexico may be that many of the colorable insanity claims are effectively eliminated at the competency determination stage. In the case of serious offenses, defendants may be held at the Forensic Hospital for diagnosis until they can be tried, or they are simply civilly committed. Lesser offenders are moved more expeditiously out of the criminal process and into civil commitment.

In any event, the mentally ill are dealt with at two levels in the criminal justice system. Pretrial defendants, many of those who would subsequently plead NGRI, are either held at the Forensic Hospital or civilly committed after some level of competency proceeding. After conviction, and at the discretion of the Department of Corrections, some of the mentally ill are admitted to the Forensic Hospital on referral from the Department of Corrections. It does seem clear, however, that very few insanity pleas are successful in New Mexico.

2) *Potential for Early Release of Dangerous Persons Civilly Committed*

In another regard, however, the New Mexico scene is quite similar to that in Michigan where early release of the mentally ill is also a substantial possibility. New Mexico law provides that following a NGRI verdict the prosecutor must instigate civil, involuntary commitment proceedings against the acquitted defendant.[66] The defendant may first be committed on any emergency basis[67] or for a thirty-day period.[68] Within twenty-one days of commitment under the thirty-day statute, a petition may be filed to extend the commitment for six months. "[W]hen the client has been committed for two consecutive periods of commitment, any commitment commencing thereafter shall not exceed one year."[69] Thus, in New Mexico it is possible for a defendant acquitted of a violent crime by reason of insanity to be released after thirty days or six months of commitment. With successive hearings he may end up with an indefinite commitment, but not without periodic reviews of present sanity.

The standard for emergency civil commitment is different than the standard for legal insanity. Emergency civil commitment requires a person

65. *Id.*
66. N.M.R. Crim. P. 35(a)(2) (Cum. Supp. 1982).
67. N.M. Stat. Ann. §43-1-10 (Repl. Pamp. 1979).
68. N.M. Stat. Ann. §43-1-11 (Repl. Pamp. 1979).
69. N.M. Stat. Ann. §43-1-12(C) (Repl. Pamp. 1979).

to have "a mental disorder [which] presents a likelihood of serious harm to himself or others."[70] Similarly, commitment for thirty days requires "a description of the specific behavior or symptoms of the client which evidence a likelihood of serious harm to the client or others. . . ."[71] The six-month commitment statute requires a hearing at which it is determined "by clear and convincing evidence that the client presents a likelihood of harm to himself or others, that extended treatment is likely to improve the client's condition and that the proposed extended commitment is consistent with the least drastic means principle. . . ."[72]

As discussed above, much of the public concern over the insanity defense has arisen from the potential for early and perhaps improper release of dangerous persons civilly committed after a verdict of NGRI. Given New Mexico's treatment of mentally ill defendants, it may be that this concern is misplaced on two counts. First, the low incidence of successful insanity defenses minimizes whatever public exposure there may be to danger from that source. Second, it may be that competency procedures are the most significant source of civil commitment diversions from the criminal justice system.

D. Likely Effect on Treatment of Mentally and Emotionally Disturbed Prison Inmates

Under the New Mexico GBMI statute, the Department of Corrections is not required to provide mental health care to those found GBMI. It is only required to evaluate their mental condition and provide such care "as it deems necessary."[73]

The new provision adds nothing to the legal rights of New Mexico inmates to mental health care. The stipulated agreement among the parties in *Duran v. King*[74] adopted by the United States District Court for the District of New Mexico in its Order of July 14, 1980, went well beyond the vague language of the GBMI statute in setting out mental health care rights of New Mexico inmates.[75] The agreement required that "all [inmates] who are in need of mental health care as determined by a qualified practitioner, will be identified and the needed care and/or treatment programs will be provided when needed."[76]

Unfortunately, the mental health-care provisions in the agreement have not been fully effective. New Mexico has special problems within its

70. N.M. Stat. Ann. § 43-1-10(A) (Repl. Pamp. 1979).
71. N.M. Stat. Ann. § 43-1-11(A) (Repl. Pamp. 1979).
72. N.M. Stat. Ann. § 43-1-12(C) (Repl. Pamp. 1979). This statute also gives the client the right to have a trial by a six-person jury if requested.
73. N.M. Stat. Ann. § 31-9-4 (Cum. Supp. 1982). See *supra* note 4 for text of statute.
74. Circuit No. 77-721-C (1980).
75. *Id.*
76. *Id.*

Department of Corrections as illustrated by the riot at the State Penitentiary in February 1980. New Mexico also has limited treatment facilities for the inmates presently in need of counseling. Mental treatment facilities at the penitentiary itself presently consist of thirty beds for long-term treatment at the Forensic Hospital and some room at the penitentiary for short-term care. The second floor of the penitentiary is being remodeled to add twelve to twenty more beds but these will not be suited for long-term care.[77]

The Department of Corrections issued a report on the impact of the GBMI bill when it was proposed. The report indicated that, if passed, the bill would have significant budgetary implications and that based on the Michigan experience, the number of commitments increases when this intermediate plea and verdict becomes available.[78] To meet the anticipated increase the report indicates an additional forty beds would be needed at the Forensic Hospital, along with staff and equipment and available out-patient treatment when necessary at a proposed cost of $400,00.00.[79] The legislature made no such appropriation when it enacted the GBMI provision. The Department of Corrections signed a federal court consent decree after the riot to provide psychiatric treatment to the inmates who survived the riot. At this time there is a six-month waiting list for inmates in Santa Fe in need of pre-prosecutory and post-prosecutory evaluations.[80]

Thus, it is likely that if there is an increase in demand for forensic services from the Department of Corrections, that demand will merely create greater backlogs in services. The wording of the new law, however, allows the Department to provide that which it "deems necessary." A Department official called this language an "escape clause" which allows the Department to provide treatment at its option and according to its capital outlay.[81] In sum, little in the way of increased mental health care for inmates is likely to emerge from the enactment of the GBMI provision.

In Michigan several defendants challenged their GBMI convictions by claiming that after sentencing they did not receive requisite treatment. The defendants requested either a reversal of their convictions or withdrawal of their pleas.[82] In *People v. Sorna*,[83] the court held that the proper remedy was not reversal or withdrawal, but mandamus:

77. Interview with John Ramming, Special Assistant to the Secretary of Corrections, Santa Fe, New Mexico (Feb. 26, 1982) [hereinafter cited as Interview with John Ramming].

78. N.M. Dep't of Corrections Internal Report (Feb. 11, 1982).

79. *Id;* Interview with John Ramming, *supra* note 77.

80. Interview with Robert Garcia, Acting Director of the Behavioral Health and Residential Treatment Division of the Health and Environment Department, Santa Fe, New Mexico (Feb. 26, 1982).

81. Interview with John Ramming, *supra* note 77.

82. People v. Mack, 104 Mich. App. 560, 305 N.W.2d 264 (1981); People v. Thomas, 96 Mich. App. 210, 292 N.W.2d 523 (1980); People v. Ramsey, 89 Mich. App. 468, 280 N.W.2d 565 (1979); People v. Sharif, 87 Mich. App. 196, 274 N.W.2d 17 (1979).

83. 88 Mich. App. 351, 276 N.W.2d 892 (1979).

> If the Department of Corrections is failing to meet its statutory obligation to provide the psychiatrically-indicated treatment for the defendant and other inmates . . . then the appropriate remedy would be a complaint for a Writ of Mandamus to the Department of Corrections to enforce its duty under the statute, rather than reversal of defendant's conviction.[84]

It is unlikely that New Mexico's courts will recognize such a duty because the Michigan statute expressly *requires* mental health care for GBMI defendants, while New Mexico's provision does not.[85] Even when a defendant is found GBMI, the Department of Corrections is only obligated to "examine the nature, extent, continuance and treatment of the defendant's mental illness. . . ."[86] Beyond that, the Department need only provide care which "it deems necessary." Under these circumstances, mandamus in New Mexico is unlikely to be useful as a remedy for non-treatment.[87]

IV. CONCLUSION

There are, as a practical matter, two ways of viewing the purpose of the GBMI plea and verdict. On the one hand, it can be seen as an effort to undercut the defense of insanity arising from a lack of confidence that civil commitment meets the legitimate interest of societal self-protection. On the other hand, the GBMI verdict may be perceived as an effort to provide needed mental health care for those who are not criminally insane, but are in need of such treatment.

The foregoing discussion demonstrates that the GBMI statute adds nothing to existing alternatives for treatment of mentally ill defendants. The new plea and verdict does not then serve the purpose of enhancing the available treatment option. Moreover, although the statute may well undercut the insanity defense in New Mexico, it leaves the statutory civil commitment procedures untouched and thus does little, if anything, to reduce the possibility of improper release of dangerous persons under civil commitment.

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84. *Id.* at ___, 276 N.W.2d at 897.

85. N.M. Stat. Ann. §31-9-4 (Cum. Supp. 1982). See *supra* note 4 for text of statute.

86. N.M. Stat. Ann. §31-9-4 (Cum. Supp. 1982).

87. An argument can be made that in a capital case, the GBMI verdict may prevent execution of the death penalty. For this to be the case, however, the new statute must provide some semblance of right to mental health treatment for defendants found GBMI. As discussed, the statutory language appears to provide no such right but rather to leave provision of care to the complete discretion of the Department of Corrections. Only if the verdict's determination of GBMI is meaningful and creates a right to mental treatment could a capital sentence be stopped even temporarily.