House
Legislative
Analysis
Section

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# GUILTY BUT MENTALLY ILL: REVISE

**House Bill 5298 with committee amendment**
**First Analysis (1-24-02)**

**Sponsor: Rep. James Koetje**
**Committee: Criminal Justice**

## *THE APPARENT PROBLEM:*

In 1975, due in part to a concern that defendants were abusing the legal insanity defense, legislation was enacted that created the verdict of guilty but mentally ill (GBMI). (For more information, see the House Legislative Analysis Section's analysis of enrolled House Bill 4363, Public Act 180 of 1975, dated 7-15-75.) Until 1994, to refute an insanity defense once it was raised by the defense, the prosecution had to prove beyond a reasonable doubt that the accused was able to appreciate both the criminality of his or her conduct and to conform his or her conduct to the requirements of the law (legal insanity defense, MCL 768.21a). Since the creation of the GBMI verdict in 1975, the prosecution also carried the burden to prove beyond a reasonable doubt that the person was not legally insane, that the person was mentally ill, and that the person was guilty of the offense. In essence, though the prosecution carried the burden of proof under each statute, the two provisions complemented each other. Juries, therefore, could clearly decide which verdict the facts of the case fit into – not guilty by reason of insanity or guilty but mentally ill.

However, some still believed that requiring the prosecutor to prove the defendant's sanity under the two statutes (legal insanity and GBMI) enabled guilty defendants to go free. To address that concern, Public Act 56 of 1994 was enacted to amend the insanity defense provision to shift the burden of proving a defendant's insanity to the defense. (For more information, see the Senate Fiscal Agency's analysis of enrolled Senate Bill 202, Public Act 56 of 1994, dated 5-12-94). Public Act 56 also lowered the standard of proof "from beyond a reasonable doubt" to "a preponderance of the evidence" and revised the definition of "legally insane". The GBMI statute, however, was not amended.

The result has been that since 1994, the two statutes have been in conflict with each other. Since jury instructions are based on the underlying statute, the corresponding jury instructions have also conflicted. On one hand, the defense has the burden to prove the defendant legally insane by a preponderance of the evidence. Yet, for a GBMI verdict, the prosecution must prove beyond a reasonable doubt the defendant is indeed mentally ill, but not ill enough to meet the criteria for legal insanity. The conflict between the two standards of proof, and who has the burden of proof, has been confusing to juries and makes the jury's task of deciding an appropriate verdict much more difficult.

Recently, the Michigan Court of Appeals agreed. When a defendant charged with multiple felony offenses, including first-degree murder, filed notice of an intent to offer an insanity defense, the prosecutor for Oakland County made a pre-trial request that the jury instructions for the GBMI verdict be made to conform with the 1994 changes to the legal insanity defense. The trial court denied the motion and the prosecutor subsequently applied to the Michigan Court of Appeals for an interlocutory appeal. (An interlocutory appeal asks a court to intervene in an ongoing case and decide a point or matter.)

In *People* v *Stephan* [241 Mich App 482, 616 NW2d 188 (2000)], the appellate court acknowledged "that the conflict between these two statutes creates serious problems for trial courts, juries, prosecutors, and defense counsel." However, the court affirmed the trial court's denial of the motion on the basis that because of constitutionally imposed separation of powers, the courts lacked the authority to rewrite or alter the GBMI statute to conform to the 1994 changes in the insanity defense. In the words of the court, "the Legislature alone holds the authority to correct the statutory discrepancy."

Legislation has been offered to make the necessary changes to bring the two statutes into conformity.

## *THE CONTENT OF THE BILL:*

Under the affirmative defense to a criminal charge that the defendant was legally insane (MCL 768.21a), the defense has the burden of proving the defendant legally insane by a preponderance of the evidence. If a defendant offers a defense of insanity, under another provision of law, he or she may be found "guilty but mentally ill" (GBMI) if the prosecution proves beyond a reasonable doubt that the defendant is guilty of an offense, that the defendant was mentally ill at the time of the commission of the offense, and that the defendant was not legally insane at the time of the commission of the offense.

House Bill 5298 would amend the Code of Criminal Procedure to instead specify that for a verdict of GBMI, a jury would have to find 1) the defendant is guilty beyond a reasonable doubt of an offense; 2) the defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of the offense; and 3) the defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.

If a defendant waived a trial and entered a plea of GBMI, a judge could not accept the plea under the bill until the judge was satisfied that the defendant proved by a preponderance of the evidence that he or she was mentally ill at the time the offense was committed. As under current law, the judge would also have to examine any required reports prepared under Section 21a (affirmative defense for legal insanity) and also hold a hearing on the issue of the defendant's mental illness.

Further, if treatment is made a condition of either parole or probation for a defendant found to be guilty but mentally ill, failure to receive treatment is currently grounds for the institution of parole or probation violation hearings. Instead, the bill would specify that failure to receive treatment would be grounds for revocation of parole or probation. (The parolee or probationer would still be eligible for a hearing on the violation.)

(Note: A defendant who offers a defense of insanity must now prove by a preponderance of the evidence that he or she meets the criteria of legal insanity [MCL 768.21a]. A person is "legally insane" if he or she meets criteria in the Mental Health Code for mental illness or mental retardation and lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or mental retardation does not otherwise constitute a defense of legal insanity. Being under the influence of voluntarily consumed alcohol or controlled substances is not considered to meet the criteria for legal insanity solely because the person was under the influence of either substance.)

The bill would take effect on May 1, 2002

MCL 768.36

## *FISCAL IMPLICATIONS:*

According to the House Fiscal Agency, the bill would have an indeterminate fiscal impact on the state and local units of government. (1-23-02)

## *ARGUMENTS:*

### *For:*

Currently, statutes for the defense of legal insanity and guilty but mentally ill (GBMI) are in conflict with each other as to required standards of proof and who carries the burden of proof. This has resulted in juries being given conflicting instructions to use when deciding a verdict. According to a recent Court of Appeals holding, the two statutes are irreconcilable and can be brought into agreement only by legislative action. The bill seeks to do just that.

When Public Act 56 of 1994 took effect, it shifted the burden of proving legal insanity from the prosecution to the defense. It also lowered the standard of proof for proving legal insanity from "beyond a reasonable doubt" to "a preponderance of the evidence." Now, it is up to the defense attorney to prove that his or her client meets the statutory criteria for being legally insane. However, Public Act 56 did not make similar changes to the GBMI statute. Therefore, when the defense raises the legal insanity defense, the prosecution still is required to prove that the defendant is mentally ill, but not legally insane, as well as prove that the defendant is guilty of the offense – all at the "beyond a reasonable doubt" standard of proof.

This is problematic for several reasons. First, to gain a GBMI verdict, prosecutors still must establish a defendant's mental health status. Proponents of the bill maintain that such proof appropriately lies with

the defense counsel, as it is the defendant and his or her attorney that have access to the defendant's medical and mental health records. Secondly, where the defense is attempting to prove that the defendant is legally insane by a preponderance of the evidence, the prosecution is trying to prove beyond a reasonable doubt that the defendant is not legally insane. The result is that the trier of fact (a judge in a bench trial or a jury in a jury trial) has a difficult, if not impossible, task of trying to fit the facts of a case into two conflicting sets of jury instructions. This makes it exceedingly difficult to decide on an appropriate verdict.

Amending the GBMI statute to conform to the current insanity defense would end the confusion. The burden of establishing mental illness and legal insanity would rest with the defense for both statutes, and the standard of proof would be the same. Yet, for a GBMI verdict, prosecutors would still carry the burden of proving beyond a reasonable doubt that the defendant committed the offense.

### *Against:*

The criteria for legal insanity is found in Section 21a of the Code of Criminal Procedure, not in Section 36, the section that the bill would amend. Under Section 21a, to be legally insane, a defendant must meet the definition of mental illness or mental retardation as defined in the Mental Health Code, as well as other criteria. However, the compiled law citations for the definitions of mental illness and mental retardation contained in Section 21a are no longer current, as the Mental Health Code was recodified in 1995. The bill should be amended to include Section 21a so that the compiled law citations for the definitions of mental illness and mental retardation can be corrected.

### *POSITIONS:*

The Office of the Governor supports the bill. (1-22-02)

The Prosecuting Attorneys Association of Michigan supports the bill. (1-22-02)

The Oakland County Prosecutor's Office supports the bill. (1-22-02)

Analyst: S. Stutzky

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■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.