Seattle Journal for Social Justice

Volume 19 | Issue 2 Article 12

4-14-2021

Sentencing Alternative to an Insanity Defense

Michael Mullan

Follow this and additional works at: https://digitalcommons.law.seattleu.edu/sjsj

Recommended Citation
Mullan, Michael (2021) "Sentencing Alternative to an Insanity Defense," *Seattle Journal for Social Justice*: Vol. 19: Iss. 2, Article 12.
Available at: https://digitalcommons.law.seattleu.edu/sjsj/vol19/iss2/12

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

Sentencing Alternative to an Insanity Defense

Michael Mullan*

I. INTRODUCTION

In the 2020 case *Kahler v. Kansas*, the U.S. Supreme Court held that under the Due Process Clause of the Fourteenth Amendment, it is constitutional to abolish the affirmative insanity defense.[1] The Court accepted the view that Kansas's provision for mental illness evidence to be introduced at the sentencing stage of a criminal trial, as well as to be adduced to deny mens rea at trial, was a constitutionally acceptable alternative to an affirmative insanity defense. This article focuses on the sentencing alternative. The alternative to the insanity defense of making mental illness solely relevant at the sentencing stage of a criminal trial is insufficient given the profound legal, historical, and moral underpinnings of the defense itself.[2]

First, the facts of the case and the issues that Kahler had with the Kansas provisions will be examined. In then analyzing the sentencing alternative, this article will highlight the reality that mental illness often works to aggravate, not mitigate, criminal punishment, and that separate sentencing discretion restraints, such as mandatory minimum sentences and future

* *S.J.D. Candidate, American University Washington College of Law; LL.M., Harvard Law School, 2017; LL.B., Trinity College, University of Dublin, 2014.* *Michael would like to thank his wife Mel and his family for bringing this publication to print. Thank you also to Dr. David Prendergast, Prof. Michael A. Stein and Prof. Michael L. Perlin for acting as Michael's mentors and for inspiring him. Also, thanks to Michael's medical team at Dana Farber, particularly Dr. Toni Choueiri, Dr. Douglas Brandoff, Megan English and Ally Mulloy, for the great care that they showed to Michael over the years.*

1 Kahler v. Kansas, 140 S. Ct. 1021 (2020).

2 KAN. STAT. ANN. § 21-6815(c)(1) (2019); KAN. STAT. ANN. § 21-6625(a) (2011); MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (3d ed. 2016).

dangerousness criteria, serve to impede deserved mitigation based on mental illness. In addition to noting some reform options for addressing sentencing shortcomings, this analysis serves to critique the *Kahler* decision by showing the inadequacy of the sentencing alternative in reaching criminal justice outcomes that aptly reflect the reduced responsibility and culpability of mentally ill defendants.

II. *KAHLER*: FACTS AND APPEAL

In 2011, James Kahler was found guilty of first degree murder and sentenced to death by a jury for killing his wife, Karen, his two daughters, Emily and Lauren, and his grandmother-in-law, Dorothy Wight, in November 2009.[3] In the months leading up to the crime, Kahler had separated from his wife after discovering that she had had an affair with another woman.[4] In addition to his marital issues, his mental health was significantly impacted because he had been fired from his job.[5] The defense expert stated that Kahler was suffering from a severe mental disorder at the time of the crime.[6] On the day of the murder, Kahler's son had requested to spend another day at his father's home.[7] Upon hearing that the boy's mother declined his request, Kahler "snapped"[8] and drove to the home of his ex-

[3] State v. Kahler, 410 P.3d 105, 113–14 (Kan. 2018).
[4] *Id.* at 113.
[5] *Id.*; Brief for Petitioner at 8–9, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).
[6] Stephen J. Morse & Richard J. Bonnie, *Insanity and the Supreme Court: The Defense May Be Unpopular, but It's a Fundamental Part of Due Process*, WALL ST. J. (Oct. 6, 2019, 4:26 PM), https://www.wsj.com/articles/insanity-and-the-supreme-court-11570393616 [https://perma.cc/4M7Y-LULY] ("The defense psychiatrist testified that Mr. Kahler had lost touch with reality due to a serious mental disorder. But the defendant couldn't offer an insanity defense, because Kansas passed a law abolishing it in 1995."). *See also* Brief for Petitioner at 10–11, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).
[7] Brief for Petitioner at 10, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).
[8] Steve Frye, *U.S. Supreme Court Will Review James Kahler Insanity Defense*, WIBW (Oct. 7, 2019, 3:30 PM), https://www.wibw.com/content/news/US-Supreme-Court-will-review-James-Kahler-insanity-defense-562463181.html [https://perma.cc/FY93-RS3K].

wife's mother with loaded rifles in the trunk that he kept for hunting.[9] Upon arrival, Kahler proceeded to shoot and kill members of his family, including his ex-wife, his two daughters, and his wife's grandmother—all except for his son.[10] Kahler's psychiatrist concluded that at the time of the shooting, Kahler temporarily lost control.[11] Another expert psychiatrist concluded that Kahler did not make a rational choice to kill.[12]

A. Kahler's Problem with the Kansas Scheme

Kahler's appeal contended that he should have been able to argue that his mental illness prevented him from appreciating the wrongfulness of his actions and therefore that he should not have been found guilty.[13] Kahler had attempted to raise an insanity defense at trial, saying that he had not known what he was doing was wrong, and that he should be excused for his otherwise criminal behavior.[14] In this manner, the affirmative insanity defense is an excuse defense, as opposed to a justification defense.[15] The excuse of insanity concedes that the defendant has committed an otherwise punishable crime, but indicates they are excused from criminal punishment due to the impact their mental illness had on their behavior.[16]

Kahler was precluded from using his insanity as a criminal law excuse based on a Kansas statute that abolished the insanity defense and only permitted the introduction of mental illness evidence at a criminal trial where it helped establish that the defendant did not have the requisite mens

---

9 Brief for Petitioner at 10, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).
10 Kahler v. Kansas, 140 S. Ct. 1021, 1027 (2020).
11 Frye, *supra* note 8.
12 *Id.*
13 *See* State v. Kahler, 410 P.3d 105, 125 (Kan. 2018). In fact, Kansas was a specifically M'Naghten insanity defense jurisdiction before abolition. State v. Smith, 574 P.2d 548 (Kan. 1977).
14 *See Kahler*, 410 P.3d at 125.
15 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES: CRIMINAL PRACTICE SERIES (2018); REID GRIFFITH FONTAINE, THE MIND OF THE CRIMINAL: THE ROLE OF DEVELOPMENTAL SOCIAL COGNITION IN CRIMINAL DEFENSE LAW 10 (2012).
16 ROBINSON, *supra* note 15, at § 173.

rea—in this case, the intent to murder.[17] The mens rea approach permits the defense to argue that the prosecution failed to offer sufficient evidence to meet all statutory elements.[18] Under Kansas law, a defendant can introduce evidence of mental illness, and its impact on the criminal behavior, insofar as it acts as a mitigating factor at the sentencing stage of a criminal trial.[19] Based on this evidence guideline together with the mens rea approach, the Supreme Court ultimately found that there is no due process right, under the Fourteenth Amendment, to a particular formulation of an insanity defense—in this case, the moral-incapacity test.[20] The Supreme Court did

---

[17] KAN. STAT. ANN. § 21–5209 (2011) ("It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense."); *see also* Amy Howe, *Opinion Analysis: Majority Upholds Kansas Scheme for Mentally Ill Defendants,* SCOTUSBLOG (Mar. 23, 2020, 2:22 PM), https://www.scotusblog.com/2020/03/opinion-analysis-majority-upholds-kansas-scheme-for-mentally-ill-defendants/ [https://perma.cc/U8DK-3W87].

[18] Jordan Berman, *Overworking the Presumption of Sanity: Clark's Use of Mental Disease Evidence to Negate Mens Rea*, 55 UCLA L. REV. 467, 467 (2007).

[19] KAN. STAT. ANN. § 21-6625(a)(6) (2011).

[20] Recent commentary post-release of the decision in *Kahler* was critical of the Court's failure to find a constitutional right to an insanity defense. For example, the influential scholar Bonnie (who submitted an amicus brief, along with Prof. Stephen Morse, in the *Kahler* case supporting the petitioner, on behalf of many mental health law professors) reacted to the decision by stating, "[a]ll I can say now is that I am surprised and disappointed." Mike Fox, Kahler v. Kansas, Listed in *Faculty Available for Comment on 2019 Supreme Court Term*, U. VA. SCH. L. (Sept. 9, 2019), https://www.law.virginia.edu/news/201909/faculty-available-comment-2019-supreme-court-term#kahler [https://perma.cc/27YL-FURG]. Bravin believes that the *Kahler* decision "exemplifies a significant turn in the philosophy of criminal law." Jess Bravin, *Lawmakers Can Narrow Insanity Defense, Supreme Court Rules*, WALL ST. J. (Mar. 23, 2020 7:27 PM), https://www.wsj.com/articles/lawmakers-can-narrow-insanity-defense-supreme-court-rules-11584999118 [https://perma.cc/52K6-7N9H]. She also points out that this decision is likely to encourage states to shrink the definition of the insanity defense or ultimately abolish it following in the footsteps of Kansas. *Id.* In contrast, Minkowitz believes the abolition of the insanity defense is a step in the right direction in terms of U.S. law being compatible with international human rights law, in particular the Convention on the Rights of Persons with Disabilities. Tina Minkowitz, *Supreme Court Decides Case on Insanity Defense*, MAD AM. (Apr. 3, 2020), https://www.madinamerica.com/2020/04/supreme-court-decides-case-insanity-defense/ [https://perma.cc/WT42-GCKM]. Minkowitz does however find trouble with the framing

not consider whether there was a right to the insanity defense under the Eighth Amendment's cruel and unusual punishment clause because the issue was not properly raised in the lower courts by the petitioner.[21]

III. SENTENCING ALTERNATIVE

Although not discussed at length in the amicus briefs submitted to the Supreme Court in the *Kahler* case, the central issue of the *Kahler* decision was whether making mental illness evidence available at the sentencing stage of a criminal trial, when taken with the mens rea approach, is an adequate substitute to an affirmative insanity defense.[22] This section argues that the Supreme Court came to the wrong conclusion on this issue. This argument arises from the observation that "[d]efenses are about blocking convictions; sentencing factors just set punishment after a conviction."[23]

A. Mental Illness in Sentencing: Mitigating or Aggravating?

The sentencing alternative is insufficient because in practice trial judges tend not to consider mental illness as a mitigating factor at sentencing. It has been shown that evidence of a mental illness, and associated perceived

---

of the issue by both the majority and dissenting opinions. *Id.* She believes that even the mens rea approach needs to be framed in a disability-neutral matter, rather than using stigmatic, sanist, and discriminatory language like incapacity. *Id.* Instead, the mens rea approach should ask how any issue, including a simple mistake or poor eyesight for example, influences the defendant's ability to meet the mens rea requirement of the given criminal offense. *Id.* She also believes that psychiatrists and psychologists should not be the only experts called upon to determine how unusual mental states influence a defendant's mens rea. *Id.* Minkowitz believes that "peer supporters/Hearing Voices Network facilitators" should be called upon as experts in this manner. *Id.* Overall, Minkowitz welcomes the abolition of the insanity defense, but is critical of the use of the medical model (as opposed to the social model of disability) underlying the Court's argument. *Id.* She provides examples of this language in the Court's description of those who have mental illnesses as beasts or child-like. *Id.*

[21] Kahler v. Kansas, 140 S. Ct. 1021, 1059 n.4 (2020).

[22] *Id.* at 1024–25.

[23] Carissa Byrne Hessick, *The Supreme Court Let States Kill the Insanity Defense*, SLATE (Mar. 24, 2020), https://slate.com/news-and-politics/2020/03/kahler-kansas-insanity-defense-supreme-court.html [https://perma.cc/R937-R2PQ].

future dangerousness, actually acts as an aggravating factor at sentencing.[24] Defendants with mental illnesses have been found on average to receive longer sentences than defendants without mental illnesses.[25] Ronnie Mackay, Professor of Criminal Policy and Mental Health at Leicester De Montfort Law School, points out that insanity acquittees remain institutionalized, not at liberty to leave, up to twice as long as their imprisoned counterparts.[26] The U.S. courts have upheld laws that allow for a longer term of commitment than the prison sentence given for the criminal offense originally charged.[27]

In terms of the federal sentencing guidelines, as this author has previously argued, judges appear to treat sentencing guidelines as quasi-compulsory when it comes to sentencing defendants with mental illnesses, even though they are only advisory.[28] In theory, federal sentencing guidelines are conducive to having a positive effect on reducing sentence

---

[24] Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 435 (1995).

[25] Patricia A. Zapf et al., *Insanity in the Courtroom: Issues of Criminal Responsibility and Competency to Stand Trial*, in PSYCHOLOGICAL EXPERTISE IN COURT 79, 84 (Daniel A. Krauss & Joel D. Lieberman eds., 2009); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 171–72 (1982); Mirko Bagaric, *A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational - The Sentencing of Offenders with Mental Disorders*, 29 HARV. HUM. RTS. J. 1, 27 (2016). Other reasons for this trend include the reduced ability of defendants to assist counsel and the reduced ability to understand their criminal proceedings. Jeff Bouffard et al., *The Effectiveness of Specialized Legal Counsel and Case Management Services for Indigent Offenders with Mental Illness*, 4 HEALTH JUST. 7 (2016); Joe Hennell, *Mental Illness on Appeal and the Right to Assist Counsel*, 29 J. CONTEMP. HEALTH L. & POL'Y 350 (2013); Rebecca J. Covarrubias, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413 (2009); Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 PSYCHIATRIC SERVS. 19, 20 (2004); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 L. & HUM. BEHAV. 79, 81–82 (2010).

[26] R. D. MACKAY, MENTAL CONDITION DEFENCES IN CRIMINAL LAW 112 (1995).

[27] Jones v. United States, 103 S. Ct. 3043 (1983).

[28] Michael Mullan, *How Should Mental Illness Be Relevant to Sentencing?*, 88 MISS. L.J. 255, 266 (2019).

length for offenders with mental illnesses. This is because evidence of a mental illness is supposed to only operate in a mitigating manner and act as a downward departure from the recommended sentence.[29] However, in reality the opposite often occurs.[30] According to *United States v. McBroom*,[31] mental illness can be considered as a mitigating factor in three sections of the federal sentencing guidelines: First, § 5H1.3 can allow a judge to bring in sentencing related-evidence on mental illness because this section of the guidelines looks at the mental and emotional conditions of the offender.[32] Second, mental illness could also be relevant to the sentencing decision under § 3553(a)(1), as this concerns the history and characteristics of the defendant.[33] Finally, under § 5K2.13,[34] if a defendant's mental illness significantly reduced their mental capacity at the time of the offense and this substantially contributed to their commission of the crime, then that mental illness can act as a mitigating factor. Unfortunately, as Perlin and Gould point out, the exceptions to the recommended sentencing guidelines based on a defendant's mental illness are rarely used by the judiciary.[35] It is uncertain how often a similar provision in Kansas's statute book is used. This statute provides that the trial judge can take into account how "[t]he

---

[29] *See* United States v. Portman, 599 F.3d 633, 638 (7th Cir. 2010); United States v. Pinson, 542 F.3d 822, 838–39 (10th Cir. 2008).

[30] MORRIS, *supra* note 25, at 171–72; Bagaric, *supra* note 25, at 27.

[31] United States v. McBroom, 124 F.3d 533 (3d Cir. 1997).

[32] U.S. SENT'G COMM'N, 2016 GUIDELINES MANUAL (2016), https://www.ussc.gov/guidelines/2016-guidelines-manual [https://perma.cc/M65N-2TLM].

[33] 18 U.S.C. § 3553(a)(1) (2018).

[34] 2016 GUIDELINES MANUAL, *supra* note 32, at § 5H1.3.

[35] Perlin & Gould, *supra* note 24, at 447 (citing United States v. Speight, 726 F. Supp. 861 (D.D.C. 1989)) as an exception to this trend); *See also* Michael L. Perlin, *"I Expected It to Happen/I Knew He'd Lost Control": The Impact of PTSD on Criminal Sentencing After the Promulgation of DSM-5,* 4 UTAH L. REV. 881, 886 (2015).

offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed."[36]

On the other hand, mental illness can be an aggravating factor at sentencing, in particular under § 3553(a) which lists factors that are designed "to protect the public from further crimes."[37] We can see here, under either sentencing guidelines or state criminal law, how a defendant's mental illness can be indicative of future dangerousness.[38] In *United States v. Hines*, the defendant received a harsher sentence due to his "extraordinary danger to the community" as evidenced by his severe mental illness.[39] Similarly, a heightened sentence was handed down in *United States v. Strange* largely due to the defendant's schizophrenia.[40] In *United States v. McKenley*, the trial court considered prior dangerous crimes, namely murder/manslaughter and prior assaults.[41] Although the defendant was found not guilty by reason of insanity, *McKenley* held that it could be used as evidence of future dangerousness, and the trial court was allowed use this factor to impose a higher sentence than the sentencing guidelines recommended.[42] As LaFave points out, in cases such as this, "[p]ast violent acts may be used in sentencing, even if they did not lead to conviction."[43] Conversely, in *United States v. Moses*, the court vacated the lengthier sentence that was based on perceived enhanced dangerousness and the

---

[36] Orin S. Kerr, *Due Process and the Criminal Law: A Few Thoughts on Kahler v. Kansas*, REASON (Mar. 24, 2020), https://reason.com/2020/03/24/due-process-and-the-criminal-law-a-few-thoughts-on-kahler-v-kansas/ [https://perma.cc/8WEE-976Y].

[37] 18 U.S.C. § 3553(a)(2)(C)) (2018).

[38] Fatma Marouf, *Assumed Sane*, 101 CORNELL L. REV. ONLINE 25, 37 (2016); Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility / Consequences Talk?*, 57 ARK. L. REV. 447, 522 (2004).

[39] United States v. Hines, 26 F.3d 1469, 1477 (9th Cir. 1994).

[40] United States v. Strange, 892 F.2d 1044 (6th Cir. 1989).

[41] United States v. McKenley, 895 F.2d 184 (4th Cir. 1990).

[42] *Id.*

[43] *See* ROBINSON, *supra* note 15, at § 173.

defendant's mental illness.[44] Additionally, the appellate court recommended that civil commitment was the preferred sentence type.[45] The relevance of mental illness to the sentencing decision is uncertain and unpredictable—it can be ignored by the judge, act as a mitigating factor, or act as an aggravating factor.[46]

B. Constraints on Sentencing Discretion

Outside of the sentencing guidelines, judges can be constrained by mandatory minimums,[47] whereby they are encouraged to ignore a defendant's mental illness as being relevant to the sentencing decision.[48] In another way, the trial judges are not similarly restrained, as they have the discretion to reduce the sentence based on the three options outlined above and can also change the punishment type. 18 U.S.C. § 3563 allows judges to make "medical, psychiatric, or psychological treatment" as a provision of the defendant's probation.[49] Kansas has a similar provision that allows the sentencing judge to send the defendant to a psychiatric institution for treatment and the same rules around civil commitment apply.[50]

While administering higher sentences based on future dangerousness stemming from their mental illness appears unfair, the question nonetheless arises: do not all individuals with and without mental illness receive higher sentences in accordance with their perceived dangerousness to society? Is mental illness a reasonable indicator of future dangerousness?[51] Another

---

[44] United States v. Moses, 106 F.3d 1273, 1273 (6th Cir. 1997).
[45] *Id*. at 1280–81.
[46] Mullan, *supra* note 28, at 273.
[47] Fiona Sampson, *Mandatory Minimum Sentences and Women with Disabilities*, 39 OSGOODE HALL L.J. 589 (2001).
[48] Perlin & Gould, *supra* note 24, at 444.
[49] 18 U.S.C. § 3563(b)(9).
[50] KAN. STAT. ANN. § 22-3430 (2014).
[51] Perlin & Gould, *supra* note 24, at 444; Melissa Schaefer Morabito & Kelly M. Socia, *Is Dangerousness a Myth? Injuries and Police Encounters with People with Mental Illnesses*, 14 CRIMINOLOGY & PUB. POL'Y 253, 254 (2015).

reason for reducing the sentence of offenders with mental illnesses is due to the predicated harsher punishment based on their heightened negative experience of prison as a result of their mental illness.[52] Given that prisoners with mental illnesses are more likely to experience "physical and sexual assault, behavioral issues, solitary confinement, and exacerbation of their mental illness,"[53] we can see how such punishment undermines the punishment goals of equality and parity.[54]

C. Reform Questions and the Problem with Kahler

In terms of sentencing reform, Bagaric, an expert on sentencing and punishment, believes there should be an automatic 10% reduction in sentence length where mental illness is proved to have existed at the time the crime was committed.[55] Because causation is too difficult to prove, Bagaric also recommends that a link between the mental illness and the crime need not be proved.[56] He also calls for a further reduction in sentence

---

[52] E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 147 (2013).

[53] Mullan, *supra* note 28, at 421–26; FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS 32–33 (rev. ed. 1998); Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391 (2006); E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625, 636–43 (2014) (noting in most states insanity defenses are not allowed in disciplinary hearings); SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003), https://www.hrw.org/sites/default/files/reports/usa1003.pdf [https://perma.cc/2AZ2-SEFH].

[54] Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097 (2006).

[55] Bagaric, *supra* note 25, at 5.

[56] Bagaric, *supra* note 25, at 6. In terms of any affirmative insanity defense, it is not enough to merely prove that a defendant has a diagnosis of a mental illness as found in the DSM VI. Jareb Gleckel & John Blume, *Kahler v. Kansas: Oral Argument 2.0*, OYEZ, https://argument2.oyez.org/2019/kahler-v-kansas/ [https://perma.cc/H39X-BF5X]. The mental illness must have with it a symptom that results in a "significant disturbance of thought." *Id.* Penultimately, in terms of causation, the defendant must prove a link between the mental illness at hand and the crime that was committed. *Id.* Then, the

length (up to 50%) if it can be proven that the defendant is particularly vulnerable to experience their prison sentence in a harsher manner than the average prisoner, as explained in the previous paragraph.[57] Another element of reform should include judicial training on the matter because judges are either unaware of or unwilling to use the opportunities currently available to reduce the sentence of offenders with mental illnesses.[58] Efforts should also be made to improve presentence reports[59]— they should include the relevant medical history of the defendant[60]—so that the trial judge and jury are provided with sufficient background information on the defendant's mental illness.[61]

In regard to the Supreme Court's evaluation of mental illness evidence being allowed at the sentencing stage, the Court in the *Kahler* case explained that this allows the trial judge to channel the consideration of the mental illness to the penalty stage of a trial. The introduction of mental illness evidence allows the sentencing judge to individualize the sentence given, to allow punishment to reflect the defendant's lower culpability.[62] This mental illness evidence can also affect the punishment type in Kansas law, allowing judges to place the defendant in a psychiatric institution

---

defendant through expert testimony from a psychiatrist or psychologist, must prove that she or he meets the test for insanity that exists in that jurisdiction. *Id.*

[57] Bagaric, *supra* note 25, at 5–6.

[58] JOHN S. GOLDKAMP & CHERYL IRONS-GUYNN, U.S. DEP'T OF JUST., EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE (2000), https://www.ncjrs.gov/pdffiles1/bja/182504.pdf [https://perma.cc/TLE9-RAU4].

[59] MORRIS, *supra* note 25, at 131.

[60] COUNCIL STATE GOV'TS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 117 (2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf [https://perma.cc/MLD5-9KGM].

[61] THE SENT'G PROJECT, MENTALLY ILL OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM: AN ANALYSIS AND PRESCRIPTION 16 (2002), https://www.sentencingproject.org/wp-content/uploads/2016/01/Mentally-Ill-Offenders-in-the-Criminal-Justice-System.pdf [https://perma.cc/UR48-EYJ4].

[62] KAN. STAT. ANN. § 21-6815(c)(1)(C) (2019); KAN. STAT. ANN. § 21-6625(a) (2011).

rather than prison.[63] More generally, it is worth noting that this judicial power to divert is discretionary,[64] and it is uncertain how often this occurs in practice. In Kansas, although the defendant can introduce mental illness evidence relating to his ability to tell right from wrong,[65] or introduce evidence that he could not conform his behavior to the law,[66] these considerations are permitted too late and have insufficient consequences. Although mental illness evidence is *admissible*, this does not *require* that the evidence be admitted in all cases and it does not require it to have a mitigating effect. In fact, it could be, and often has been, considered an aggravating circumstance in some criminal trials, as outlined in the previous paragraph. The majority in *Kahler* believes the sentencing alternative allows for a more "nuanced evaluation of blame, rather than choose, as a trial jury must, between all and nothing."[67] However, the Court did not consider that an insanity defense can allow for different outcomes to facilitate individualization and nuance: (1) outright guilt; (2) mitigated guilt at sentencing; (3) outright innocence; and (4) not guilty by reason of insanity.[68] In comparison, under the Kansas statute, the judge can only lessen the sentence or opt for commitment to a psychiatric hospital at best; the judge cannot eliminate the punishment altogether, as would occur under an affirmative insanity defense. Moving consideration of mental illness to the sentencing stage does nothing to "alleviate the stigma and the collateral consequences of a criminal conviction,"[69] when compared with the consequences of a finding of not guilty by reason of insanity. As the

63 KAN. STAT. ANN. § 22-3430 (2014).
64 State v. Maestas, 316 P.3d 724 (Kan. 2014).
65 KAN. STAT. ANN. § 21-6625(a) (2011).
66 KAN. STAT. ANN. § 21-6625(a)(6) (2011).
67 Kahler v. Kansas, 140 S. Ct. 1021, 1031 (2020).
68 FONTAINE, *supra* note 15, at 142. As such, Fontaine calls the affirmative insanity defense a "complete defense" as it results in no blame or punishment. *Id.* Their commitment to a psychiatric institution is not framed as nor designed to be punishment; instead, it is focused on rehabilitation of the individual. *Id.*
69 *Kahler*, 140 S. Ct. at 1050 (Breyer, J., dissenting).

Washington Supreme Court in *State v. Strasburg* observed, the stigma associated with criminal punishment is greater than that of being adjudged insane.[70]

IV. CONCLUSION

The sentencing alternative to an affirmative insanity defense provides too little, too late. Even where trial judges want to allow mental illness to act as a mitigating factor at sentencing, often their hands are tied statutorily. Furthermore, the type of sentence that is desirable in most cases, namely treatment in a psychiatric institution, is often restricted. In *Kahler*, the Supreme Court's constitutional validation of a system that does not have an affirmative insanity defense is a worrying development which may lead other states to follow Kansas's example and abolish the insanity defense.

---

[70] State v. Strasburg, 110 P. 1020, 1025 (Wash. 1910).