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# Competency for Trial in North Dakota

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# COMPETENCY FOR TRIAL IN NORTH DAKOTA

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## I. INTRODUCTION

When common law principles were taking root in England, if a person accused of crime should be stricken by mental disease, it was viewed as an interdictory act of Almighty God. With the hand of God so visibly at work upon the case, all criminal proceedings were thereupon halted.[1] The common law rule which evolved forbade arraignment, trial or sentence of one whose mental faculties had suffered discernable impairment.[2]

Aside from supernatural consideration, there were also rational and practical grounds for suspending criminal proceedings against an insane accused. These reasons were aptly stated by Blackstone in his famed Commentaries:

> [I]f a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded the prisoner becomes mad, he shall not be tried, for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if after judgment he becomes of nonsane memory, execution shall be stayed, for, peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged something in stay of judgment or execution.[3]

These common law precepts have now been widely incorporated into the statutes of the member states of the Union, as well as those of the federal government.[4]

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1. People v. Reeves, 412 Ill. 555, 107 N.E.2d 861 (1952).
2. *In re* Buchanan, 129 Cal. 330, 61 P. 1120 (1900).
3. *Id. citing* 4 BL. COMM. 24.
4. 18 U.S.C. §§ 4244 et. seq. (1970).

The issue of insanity can be introduced into a criminal case in two distinct ways. Most familiarly, it is interposed as a defense to a criminal charge through a claim that the defendant was insane when the crime was committed. Resolving that issue calls for standards dissimilar to those relating to competency to stand trial.

Before insanity can succeed as an affirmative defense it must meet the "right and wrong" test found in the classic M'Naghten case: was the defendant, at the time of the crime "laboring 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?"[5]

The matter of present insanity is notably different. It does not constitute a defense to crime. It has nothing to do with criminal responsibility. Rather, the issue is whether an accused is mentally incapacitated to the degree that he cannot comprehend the nature and peril of the proceedings against him or cooperate with his counsel to properly defend against the charge. The leading American case on the point, *Dusky v. United States*,[6] describes the test of present insanity to be:

> [W]hether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him.'[7]

## II. NORTH DAKOTA STATUTORY PROVISIONS

In North Dakota prior to 1933, whenever doubt arose regarding a defendant's present sanity, a separate jury was impaneled to resolve the issue.[8] If the jury found the defendant sane, the prosecution was immediately resumed. If the defendant was found to be insane, proceedings were suspended until restoration of his faculties.

The 1933 Legislative Assembly enacted new procedures.[9] These were based upon the model statute prepared and approved by the American Law Institute.[10] As amended slightly in 1967,[11] this law now comprises Sections 29-20-01 and 29-20-02 of the North Dakota Century Code.[12]

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5. M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Reprint 718 (Eng. 1843).
6. Duskey v. United States, 362 U.S. 402 (1960).
7. *Id.*
8. 1913 COMPILED LAWS OF N.D. § 11064 (repealed 1933).
9. Ch. 216, [1933] N.D. Laws 334.
10. According to a Revisor's Note, Code Revision Report, North Dakota Revised Code of 1943, the 1933 act was a verbatim text of the model act.
11. Ch. 214, [1967] N.D. Laws 429.
12. These sections read as follows:

> If, before or during the trial, the court has reasonable grounds to believe that the defendant against whom an indictment has been found or an information filed is insane or mentally defective to the extent that he is unable

In its present form, the law eliminates the jury and requires the court to determine a defendant's mental state. The judge must hold a hearing whenever he has "reasonable grounds" to believe that insanity or mental deficiency disables the defendant "to the extent that he is unable to understand the proceedings against him or to assist in his defense."[13] Prior to the hearing, the court may select "two disinterested qualified experts" to examine the accused.[14] This examination is to equip the experts to give evidence at the competency hearing,[15] to which they would come as nonadversary officers of the court.[16] Presumably the order appointing the experts would instruct them explicitly as to their objectives, i.e., to ascertain the defendant's capacity to understand the criminal proceedings and to assist in his defense. Otherwise, their reports and testimony are apt to be based on inappropriate standards or be so burdened with irrelevancies and confused by contradictions as to be of little service to the court.[17]

The statute permits an alternate procedure. The court may commit the accused to either the state hospital for the mentally ill,

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to understand the proceedings against him or to assist in his defense, the court immediately shall fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing, or it may commit the defendant to the state hospital at Jamestown or the state school at Grafton for observation and examination regarding his present mental condition. The proper officer of such institution shall present to the court which conducted the hearing a report regarding the defendant's present mental condition. He also may be summoned to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party. N.D. CENT. CODE § 29-20-01 ((1971 Supp).

If the court, after the hearing, decides that the defendant is able to understand the proceedings and to assist in his defense, it shall proceed with the trial, but if it decides that the defendant, because of insanity or mental deficiency, is not able to understand the proceedings or to assist in his defense, it shall take proper steps to have the defendant committed to the state hospital at Jamestown or the state school at Grafton, whichever institution seems most appropriate. If thereafter the proper officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report this fact to the court which committed the defendant. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is able to understand the proceedings and to assist in his defense. This hearing shall be conducted in all respects like the original hearing to determine the defendant's mental condition. If, after this hearing, the court decides that the defendant is able to understand the proceedings against him and to assist in his defense, it shall proceed with the trial. If, however, it decides that the defendant still is not able to understand the proceedings against him or to assist in his defense, it shall recommit him to the state hospital at Jamestown or state school at Grafton, whichever the case may be. N.D. CENT. CODE § 29-20-02 (1971 Supp).

13. N.D. CENT. CODE § 29-20-01 (1971 Supp.).
14. *Id.*
15. *Id.*
16. *In re* Harmon, 425 F.2d 916, 918 (2d Cir. 1970).
17. Experience has taught that medical experts frequently misinterpret their assignment and misunderstand the governing legal standards. Their training prompts them to rely on medical criteria for mental illness which are largely irrelevant to the legal criteria for determining competency to stand trial. *See* Rosenberg, *Competency for Trial—Who Knows Best?* 6 CRIM. L. BULL. 577 (1970).

or to the state school for mental defectives for "observation and examination."[18] In practice, this is the course quite routinely selected—despite the apparent preferability in many cases of using disinterested experts. The probable reason why the commitment route is usually taken is the failure of the statute to intimate how or by whom the independent experts will be paid.

Under the statute, when a defendant suspected of mental derangement is committed for examination, the "proper officer"[19] of the institution is required to furnish the court with a report.[20] The statute says the officer making the report "may" be summoned to testify at the competency hearing. Although apparently not mandatory, it would seem only prudent to always have him present. This would avoid the many evidentiary problems that would inevitably arise if he were not present for cross-examination by counsel.

Once "reasonable grounds" are found to exist for doubting the competency of an accused, a hearing must be held.[21] The statute appears to contemplate a hearing even though the conclusions contained in preliminary reports indicate the defendant is competent.[22]

Section 29-20-02 details what is to happen in the aftermath of the hearing. It provides that if the defendant is found to suffer no present impairment, he must be tried in due course. However, if he is deemed unable to understand the proceedings or assist in his defense, the court is required to have him committed.[23] He then remains institutionalized at either the state hospital or the Grafton State School until he is reported fit to stand trial. Upon receiving such a report, the court is required to hold a new competency hearing. The defendant is then either tried, or recommitted, depending upon the showing made at the new hearing.[24]

## III. RAISING THE ISSUE OF INCOMPETENCY

An inquest into mental capacity to stand trial can be started in several ways. The law requires only that "reasonable grounds" be shown before the court is authorized to order a hearing.[25] Usually

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18. N.D. CENT. CODE § 29-20-01 (1971 Supp).
19. *Id.* The statute neglects to tell us who this "proper officer" is. Presumably he is the superintendent of the institution.
20. *Id.* The law does not make clear the role this report is to play in the proceedings. Is it merely for the information of the court? Is it to be furnished to counsel for inspection prior to the hearing to avoid surprise? Is it to become a part of the record at the hearing? Can it be entered into evidence over objection that it is hearsay—which it obviously is? These questions remain unanswered in this jurisdiction.
21. *Id.*
22. There is respectable authority holding that a preliminary report showing competency may obviate the need for a hearing. Markham v. United States, 184 F.2d 512 (4th Cir. 1950), *cert. denied,* 340 U.S. 936 (1951); Cheely v. United States, 367 F.2d 547 (5th Cir. 1966).
23. N.D. CENT. CODE § 29-20-02 (1971 Supp.).
24. *Id.*
25. N.D. CENT. CODE § 29-20-01 (1971).

the question is initiated by the written motion of defense counsel, supported by affidavit.[26] The affidavit should contain substantial intelligence from a reputable source.[27]

The prosecution, too, has a duty to request a sanity hearing if its information suggests incompetency.[28] And certainly the court's own observation and knowledge can require it to initiate such a hearing upon its own motion.[29]

The sanity question can, according to the statute, be brought up at any time "before or during the trial."[30] It should, of course, be raised before the conclusion of the trial.[31] A court ought to guard against imposture, and should look carefully at a request which by undue tardiness suggests it is tactical rather than factual.

Insanity can also be raised as a reason for not pronouncing judgment.[32] That, however, is outside the intendment of the present article.

## IV. SCOPE OF THE COMPETENCY STATUTE

When the present law was first enacted in 1933, its provisions were to control only proceedings in the district courts and county courts of increased jurisdiction. Section 1 of the act read:

> The provisions of this act shall apply in all criminal cases tried in District Courts or County Courts with increased jurisdiction.

This provision, however, was not included in the 1943 revision of the Code. Neither was it incorporated into the present Century Code. This omission signifies its repeal.[34]

It appears that elimination of Section 1 limits the statute to district court proceedings. As it now reads, the statute specifies that

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26. The federal practice under 18 U.S.C. § 4244 (1970) does not require an affidavit. An embellished motion for psychiatric examination *must* be granted unless it is frivolous. United States v. Burgin, 440 F.2d 1092 (4th Cir. 1971); Lebron v. United States, 229 F.2d 16 (D.C. Cir. 1956); Wear v. United States, 218 F.2d 24 (D.C. Cir. 1954).

27. Hinex v. State, 417 P.2d 339 (Okla. 1966); State v. Bessar, 213 La. 299, 34 So. 2d 785 (1948).

28. State v. Smith, 173 Kan. 813, 252 P.2d 922 (1953); Magenton v. State, 76 S.D. 512, 81 N.W.2d 894 (1957).

29. State v. Childs, 198 Kan. 4, 422 P.2d 898 (1967); Bingham v. State, 165 P.2d 646 (Okla. 1946); Morales v. State, 427 S.W.2d 51 (Tex. 1968); A court must halt a trial where ground for doubt as to defendant's mental capacity arises. Bizarre or singularly detached and withdrawn behavior during trial may signal the presence of mental disorder of which the court should takek cognizance. People v. Aparicio, 38 Cal. 565, 241 P.2d 221 (1952). Or, as in Pate v. Robinson, 383 U.S. 375 (1966), the testimony of lay witnesses during trial may obligate the court to hold a competency hearing, even though defendant's demeanor at the trial is that of a lucid man.

30. N.D. CENT. CODE § 29-20-01 (1971 Supp.).

31. Chapman v. State, 136 Tex. Cr. 285, 124 S.W.2d 112 (Tex. 1938).

32. N.D. CENT. CODE § 29-26-12 (1960).

33. Ch. 216, § 1, [1933] N.D. Laws 334.

34. Omission from the code acts as a repeal. Satrom v. City of Grand Forks, 150 N.W.2d 700, 704 (N.D. 1967); Higgins v. Hawks, 122 N.W.2d 129, 132 (N.D. 1963).

it applies to defendants "against whom an indictment has been found or an information filed."[35] Prosecution is by criminal complaint in lower courts, rather than by indictment or information.[36] However, in *State v. Iverson*,[37] discussed hereinafter, the North Dakota Supreme Court ruled that the statute applies even to committing magistrate proceedings. This ruling carries with it the inference that the reach of the present competency law is now broad enough to include criminal actions in all state courts, whatever their stature or venue. The naked language of the law does not support such broad application; but this interpretation will be felicitous in one respect at least. The judicial extension of the present competency statute to all courts assures a measure of uniformity and consistency that would otherwise be wanting. Even without a statute, an insane person is entitled to exemption from prosecution in all courts, including justice court and police magistrate's court.[38] With no statute for guidance, the procedure would be governed by the common law, which leaves the mode of inquiry to the discretion of the court.[39]

## V. PROOF OF DISABILITY

The original North Dakota law relating to competency in criminal cases detailed carefully the hearing procedure.[40] The present law is silent on the subject. Generally it has been held that the accused is required to show by a preponderance of the evidence that he is mentally incapacitated.[41] Because of the universal legal presumption that a person is *compos mentis*, there must be sufficient proof to overcome that presumption.

Fundamentally, the mental disability must influence his capacity to defend. Only if his reason is impaired in that particular area can an accused avoid present trial, regardless of how defective his reason or judgment may otherwise be.[42] He may be mentally ill

35. N.D. CENT. CODE § 29-20-01 (1971 Supp.).

36. N.D. CENT. CODE § 29-09-01 (1960) states "[a]ll crimes or public offenses triable in the district courts must be prosecuted by information or indictment. . . ." It might be argued though, that N.D. CENT. CODE § 27-08-24 (1960) would still make the competency statute apply to the county courts of increased jurisdiction. That section makes district court rules of procedure generally applicable to such county courts.

37. State v. Iverson, 187 N.W.2d 1 (N.D. 1971).

38. "In cases of minor crimes, triable by the magistrate himself, the question of the defendant's mental capacity to make a rational defense, must, of course, be decided by the magistrate. . . ." H. WEIHOFTEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 436 (1954).

39. "At common law it was for the court to determine whether a defendant was mentally fit to be put on trial or sentenced and the nature of the investigation to be made on the issue of sanity was vested in the sound discretion of the court." State v. Anderson, 186 Neb. 435, 183 N.W.2d 766, 768 (1971).

40. 1913 COMPILED LAWS OF N.D. §§ 11065, 11066 (repealed 1933).

41. H. WEIHOFTEN, *supra* note 38, at 434-35.

42. *In re* Buchanan, 129 Cal. 330, 61 P. 1120 (1900); Freeman v. People 4 Denio 9, 47 Am. Dec. 216 (N.Y. 1847).

and in need of treatment or hospitalization, but still be fit to stand trial. Monomaniacs, paranoiacs, schizophrenics, hallucinators all suffer from mental illness, but may nonetheless be able to comprehend fully the proceedings against them and give rational assistance to counsel.[43] In such cases there is no reason for intermission in the course of the prosecution. The trial should proceed.

The accused is entitled to have the aid of counsel and to be present at the sanity hearing.[44] The court is usually accorded wide latitude of discretion on the question of competency, and its finding is ordinarily regarded as res judicata.[45]

## VI. STATE V. IVERSON

### A. NARRATIVE

The only reported decision where the state courts have been confronted with the North Dakota law on present insanity is *State v. Iverson*,[46] decided in 1971. In that case the defendant Iverson was convicted on two charges of murder. Upon appeal, one of his numerous specifications of error charged that he was mentally incompetent at the time of the preliminary examination.[47] His incompetence, he asserted, rendered him incapable of giving assistance to his court appointed counsel. Hence, he reasoned, he was unconstitutionally deprived of the effectual aid of counsel at a critical stage of the criminal proceedings.[48]

Iverson had a history of mental illness. Therefore, prior to the preliminary hearing, the state moved the magistrate to commit him to the state hospital for a report on his ability to assist his defense. The magistrate declined. Instead, he ordered that examinations be made by two employees of the state Regional Mental Health Center — one a psychiatrist, the other a psychologist. One of these experts expressed the opinion that the accused could neither understand the criminal proceedings nor assist in his de-

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43. U.S. v. Gundelfinger, 98 F. Supp. 630 (W.D. Pa. 1951).
44. Martin v. Settle, 192 F. Supp. 156 (W.D. Mo. 1961).
45. Krupnick v. United States, 264 F.2d 213 (8th Cir. 1959).
46. State v. Iverson, 187 N.W.2d 1 (N.D. 1971).
47. The purpose of a preliminary examination is to determine if there is a basis to hold an accused person for trial.

> If it appears from a preliminary examination that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate should hold him to answer. N.D. CENT. CODE § 29-07-20 (1960).

48. State v. Iverson, 187 N.W.2d 1, 35 (N.D. 1971). In Coleman v. Alabama, 399 U.S. 1 (1970), (decided *after* the Iverson trial) the United States Supreme Court ruled that the preliminary hearing is a critical stage of a criminal case at which an accused is constitutionally entitled to aid of counsel. The North Dakota Supreme Court in *Iverson* noted that, at the time of their decision, the retroactive effect of *Coleman* had not yet been determined. State v. Iverson, *supra* at 35. However, that question proved to be essentially irrelevant because the court ruled that the magistrate's error in going forward with the preliminary hearing was harmless. State v. Iverson, *supra* at 35.

fense. The other diagnosed the case as "Schizophrenic Reaction, Paranoid Type, Chronic."

After receiving the evaluations, the magistrate decided the issue of incompetency should properly be reserved for the trial court.[49] He therefore held the preliminary examination, entered a finding of probable cause, and bound the defendant over to the district court. The North Dakota Supreme Court decided this was improper. It ruled that provisions of Section 29-20-01[50] governed committing magistrate proceedings, and stated:

> The magistrate erred, however, when he failed to immediately fix a time for a hearing to determine Iverson's mental condition, as required by Section 29-20-01 N.D.C.C. This error was compounded when he proceeded to hold a preliminary hearing while he had before him two reports indicating that Iverson was not capable of understanding the nature of the charges against him or assisting in his own defense, thereby raising the inference that he was denied the assistance of counsel under the standards of *Dusky*.[51]

The Supreme Court decided, however, that the magistrate's action, even though erroneous, was not sufficiently grave to require intervention. The whole record, including in particular a subsequent report indicating that Iverson was competent to stand trial, rendered the error harmless, the court concluded.[52] None of the other grounds for appeal were found meritorious, and the trial court's judgment was affirmed. This adverse outcome was appealed by Iverson to the United States Supreme Court, but that court declined to accept it for review.[53]

Iverson then took a new tack. He filed a petition for a writ of habeas corpus in the United States District Court, claiming he was being unlawfully imprisoned. A principle ground asserted for his release was again his claimed incompetency at his preliminary hearing. The federal court agreed with the state court that the magistrate erred in proceeding with the preliminary hearing.[54] It did *not* agree that the error was harmless, however.[55] It ruled that be-

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49. According to the North Dakota Supreme Court opinion, the magistrate felt that "a preliminary examination must be held to allow the defendant and his counsel to examine the state's case, and to allow the public to hear the facts upon which the state had commenced a case against the defendant." State v. Iverson, 187 N.W.2d 1, 34 (N.D. 1971).

50. N.D. CENT. CODE § 29-20-01 (1971 Supp.).

51. State v. Iverson, 187 N.W.2d 1, 35 (N.D. 1971).

52. *Id.* at 35-36.

53. State v. Iverson, 404 U.S. 956 (1971).

54. Iverson v. State, 347 F. Supp. 251, 260 (D.N.D. 1972).

55. *Id.* The reasons given by the North Dakota Supreme Court for viewing the magistrate's error as harmless were severely scored by the federal court. The North Dakota court had held that experts reports did not constitute conclusive proof of incompetency, and that the force of the reports was diminished by a later state hospital evaluation which found Iverson legally competent. State v. Iverson, 187 N.W.2d 1, 36 (N.D. 1971).

cause professional expert opinion had stated Iverson was legally incompetent, his substantial rights had been violated by holding the hearing. The professional opinions clearly established, the court declared with colorful simile, that Iverson "could be of no more help to his lawyer than a tailor's mannequin."[56] His condition, the court said, "was known to the magistrate, and that by no stretch of the imagination can the Supreme Court (of North Dakota) dismiss the procedure followed as 'harmless error'."[57] It caustically dismissed as "a judicial cop out"[58] weight given by the state court to the state hospital examination made following the preliminary hearing that indicated Iverson was legally competent. The court pointed out that "both reports could have been correct *at the time they were made.*"[59]

For this, as well as other reasons not germane to this discussion, the federal court announced that it would free Iverson on a writ of habeas corpus unless the state promptly retried him.[60] The state thereupon pursued an appeal to the Court of Appeals for the Eighth Circuit.[61]

## B. COMMENT

There are two features of the *Iverson* case that invite comment. The first is this: neither the state nor federal court addressed any discussion to whether the issue of competency to proceed is properly raised before the committing magistrate. Each court appears to suppose that the magistrate had full authority under the present sanity statute to determine whether or not a hearing should be held; to appoint experts to examine the defendant; to hold a sanity inquest; and to confine the defendant for the duration of the disability if legal incompetence was learned to exist.

That such expansive powers belong to a committing magistrate is open to the gravest doubt. As alluded to earlier, the legislature originally limited the compass of the present sanity statute to include only district courts and courts of increased jurisdiction.[62] The

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* Emphasis by the court. The contradictory reports were separated by an interim of about three months. The first examination was about six weeks before preliminary examination; the other about eight weeks afterward.
60. *Id.* at 261. It is difficult to see how a re-trial will correct fault stemming from abridgement of defendant's constitutional rights at his preliminary hearing. The state trial court found him competent to stand trial. This finding is not challenged. If the error is at the preliminary hearing level, it would seem its cure should be there ,rather than at the trial level.
61. As this issue was being prepared for publication, the Court of Appeals for the Eighth Circuit handed down its decision in Iverson v. State, No. 72-1600 (8th Cir., June 11, 1973). The author discusses the Court of Appeal's opinion in an addendum following this article.
62. Ch. 216, § 1, [1933] N.D. Laws 334.

abandonment of that specific limitation through subsequent codification would not, it seems, expand the statute to cover other courts. On the contrary, as measured by present language, its dominion appears contracted. Now included within its embracement are only defendants "against whom an indictment has been found or an information filed" and no others.[63] And, of course, only in the district court can be found defendants who are under indictment or informed against.[64]

The weight of recorded judicial authority upon the question rejects the proposition that committing magistrates have any prescription to resolve sanity questions.[65] Directly in point is the recent Arizona case, *State v. Pima County Superior Court*.[66]

Arizona has a competency rule that is virtually identical to the North Dakota statute.[67] In the *Pima County* case the question of applicability of that rule to committing magistrate proceedings was considered. The supreme court of that state declared:

> The rule clearly indicates that it has no application to preliminary hearings since the rule does not come into play until an indictment has been found or an information filed. Judicial inquiry into defendant's ability to present a defense is vested only in the trial court which has the power to try the felony offense charged.[68]

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63. N.D. CENT. CODE § 29-20-01 (1971 Supp.).

64. Moreover, N.D. CENT. CODE § 29-20-02 (1971 Supp.) confirms that only proceedings in trial court were contemplated by directing that if the defendant is found competent, the court should "proceed with the trial."

65. Mance v. Cameron, 260 F. Supp. 851 (D.D.C. 1966); Flint v. Sater, 374 P.2d 929 (Okla. 1962); State v. McCredden, 33 Wisc. 661, 148 N.W.2d 33 (1967); Schwader v. District Court, 172 Colo. 474, 474 P.2d 607 (1970); State v. Pima County Superior Court, 103 Ariz. 369, 442 P.2d 113 (1968). New York, however, by statute specifically confers authority to hold a sanity hearing upon a magistrate. People v. Dumas, 51 Misc.2d 929, 274 N.Y.S.2d 764 (1966).

66. State v. Pima County Superior Court, 103 Ariz. 369, 442 P.2d 113 (1968).

67. ARIZONA. R. CRIM. P. 250 provides:

> A. If before and during the trial the court has reasonable ground to believe that the defendant, against whom an indictment has been found or information filed, is insane or mentally defective, to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately set a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.
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> B. If the court, after the hearing, decides that the defendant is able to understand the proceedings and to assist in his defense it shall proceed with the trial. If it decides that the defendant through insanity or mental deficiency is not able to understand the proceedings or to assist in his defense, it shall have the defendant committed to the institution authorized to receive him, and the commitment of the defendant shall exonerate his bail. If thereafter the authorized officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report such fact to the court which conducted the hearing. If the officer so reports, the court shall proceed with the trial, and may again admit the defendant to bail, if he is bailable.

68. State v. Pima County Superior Court, 103 Ariz. 369, 442 P.2d 113, 116 (1968). Thus the Arizona court's conclusion supports the action of the magistrate in the *Iverson* case, who likewise felt that the trial court alone was vested with authority to inquire into a defendant's sanity.

The Arizona court went on to discuss the proper course when the question of competency is raised in a preliminary hearing. The magistrate must, the court said, proceed with the preliminary hearing. If probable cause is found, the defendant should be bound over to the trial court. There the issue of competency can be properly heard and settled. In those cases where the defendant is committed, the court said, he would be eligible for a new preliminary hearing upon his restoration to competency.[69]

This appears to be sturdy reasoning. It is an interpretation that harmonizes agreeably with the wording of the statute. In addition, it demonstrably shows that no permanent harm will ensue by suspending the question of competency until the case is in the hands of the trial judge. A new preliminary hearing upon recovery from the disability would cure any due process defect.

Furthermore, it may well be premature and unjust for a magistrate to commit a person as an insane criminal prior to any exposure whatsoever of circumstances connecting him with a crime. If the state in its zeal has accused the wrong person, and he is insane, he could be confined indefinitely with no determination whether the case against him warrants his being held. If his impairment is permanent, the basis for holding him can never be aired. The state's case may be too fragile to withstand cautious judicial scrutiny for probable cause at a preliminary examination. Thus it can pose a greater threat to due process, and work more of an injustice to order commitment prior to a preliminary examination than to hold the examination despite the accused's impaired condition. Commitment prior to a preliminary hearing may serve to deprive the accused entirely of the hearing. It would seem that a hearing, held even though the accused may be legally incompetent, is preferable to no hearing at all. And in any event, as the Arizona court indicated, an insane accused would be entitled to another preliminary hearing upon restoration of his faculties.

The second point of comment on the *Iverson* case concerns only the Federal District Court opinion. It has to do with the imperative weight given to the reports of experts. The court's language—perhaps inadvertently—confers upon expert evaluations an aura of inviolability. The court declares, without qualification, that the opinion of experts indicating an inability to understand the criminal proceedings or assist in the defense, is conclusive of the issue. This view, in effect, endorses unsworn, untested, out-of-court professional opinions and raises them to the dignity of a judicial determination. The court said:

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69. *Id.* at 117.

> How may a defendant in a criminal case be of any assistance to his counsel when qualified professional experts have said he was incapable of understanding the nature of the proceedings against him and not mentally competent to assist in his own defense?[70]

Thus the court has embraced as proven fact, without a competency proceeding, that Iverson was mentally disabled in the statutory sense at the time of his preliminary examination.

Further, the federal court said that it was manifest "on the face of the record" that Iverson could not assist his lawyer.[71] Yet, the only "record" of incompetency before the court was the opinion of experts. Using this source alone, the court pronounced Iverson to be as helpless in aiding his attorney as "a tailor's mannequin."[72]

Even conceding that failure of the committing magistrate to hold a sanity hearing was error, it was not, as the federal court avers, because the opinions of the experts established legal incompetency. It would have been error because those opinions raised a sufficient inference of incompetency to require a judicial inquiry on the question prior to holding the preliminary examination. The North Dakota Supreme Court recognized this critical distinction.[73]

Taking opinions of experts at face value as established fact runs counter to the existing posture of the law.[74] Courts have uniformly recognized the prerogative of a trier of fact to mitigate the weight of expert testimony, and to reject it entirely when the reasons supporting it are unsound.[75] The Federal District court view would overturn this settled concept of the role of experts in legal proceedings.

## VII. CONCLUSION

The North Dakota statute on competency to stand trial merely codifies the common law rule. It prescribes a method for ascertaining, where the issue is properly raised, whether a defendant is able to understand the proceedings against him and to assist in his defense.

The *Iverson* case is the sole source of judicial interpretation of the North Dakota statute; and that case is still not finally resolved.

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70. Iverson v. State, 347 F. Supp. 251, 260 (D.N.D. 1972).
71. *Id.*
72. *Id.*
73. State v. Iverson, 187 N.W.2d 1, 35 (N.D. 1971). The Supreme Court stated that the magistrate should have proceeded "to immediately fix a time for a hearing to determine Iverson's mental condition." *Id.*
74. WIGMORE, EVIDENCE § 1920 (3rd ed. 1940).
75. "[E]xpert opinion rises no higher than the reasons upon which it is based, and is not binding upon the trier of the facts." Dusky v. United States, 271 F.2d 385, 397 (8th Cir. 1959), *rev'd on other grounds*, 362 U.S. 402 (1960).

Tentatively it has agitated as much perplexity as it has settled. The assumption by both the state and federal court that a committing magistrate has the right and duty to determine present sanity is a singular one. It runs counter to the language of the applicable statute and the trend of reported precedent.

Also disquieting is the standing given to the opinions of professional experts by the Federal District Court decision. Certainly in the light of that decision, no North Dakota court would dare to substitute its own judgment for an uncontroverted contrary one announced by professional experts. In its ultimate effect this would involve a transfer in many cases of judicial decision-making power to an extra-judicial source. This is not a prospect to be applauded. The traditional role and responsibility of the court in competency matters should not be thus diluted.

> The psychiatrists may advise, the lawyers may urge and argue, the defendant may disguise his feelings, act out his emotions or stand mute, but it is the word of the judge that must ultimately prevail in deciding whether the defendant is fit to proceed in the matter before him.[76]

## ADDENDUM

The interim since the foregoing subject matter was written, has been marked by two very significant developments. The 1973 North Dakota Legislative Assembly has enacted a new competency statute designed to become operative in 1975; and the United States Court of Appeals for the 8th Circuit has filed its decision in the *Iverson* case.

A new criminal code of sweeping magnitude was adopted by the 1973 Legislature.[77] It contains somewhat revised procedures for testing a defendant's fitness to stand trial. It provides that after July 1, 1975, when there is "reason to doubt . . . fitness to proceed," the court may order a defendant examined by a licensed psychiatrist, or committed to the state hospital or other suitable

76. Cooper, *Fitness to Proceed*, 52 NEB. L. REV. 44, 67 (1972).

facility for 30 days.[78] If necessary, the commitment can be extended for an additional 30 days. A written psychiatrist's report is then to be made to the court with copies going to counsel for the State and the defendant. If either party takes issue with the report, a hearing is to be held.[79]

Whenever the court finds that the accused is unfit to proceed, he is to be committed to either the state hospital or the state school. If the impairment continues for three years, (or for the maximum time he could have been confined upon conviction, if less than three years) the case against him will be dismissed. He is then to be turned over to the mental health board for possible further action.[80]

An innovative feature of the new law will allow defense counsel to challenge the legality of a prosecution even though the accused is mentally unfit. This right is limited, however, any such objection to the prosecution must be of such character as to be "susceptible of fair determination prior to trial and without the personal participation of the defendant."[81]

On June 11, 1973, the United States Court of Appeals for the Eighth Circuit decided the *Iverson* appeal.[82] It reversed the ruling of the federal district court. Among principal issues discussed was Iverson's contention that he was denied due process because of mental incompetence at the time of the preliminary examination.

Upon review of the record of the preliminary examination the court found that the evidence adduced at that time did not vary materially from facts developed at either the inquest or the trial.[83] Since there was no claim that Iverson was incompetent at the trial, the appeals court concluded that no prejudice could have stemmed from his supposed incompetency during the preliminary examination. The court said:

> It is difficult to know in what manner he might have additionally aided his counsel at the preliminary hearing in order to call additional witnesses, cross-examine witnesses or discover exculpatory evidence.[84]

The circuit court concluded:

Under the circumstances we hold that Iverson's preliminary

77. Ch. 116, [1973] N.D. Laws 215.
78. *Id.* § 12.1-04-06 at 224-25.
79. *Id.* § 12.1-04-07 at 225.
80. *Id.* § 12.1-04-08 at 225.
81. *Id.* § 12.1-04-09 at 225.
82. Iverson v. State of North Dakota, (8th Cir., June 11, 1973) No. 72-1600
83. *Id.* at 10.
84. *Id.* at 10.

hearing conducted on January 21, with Iverson's counsel present, did not violate his due process in the absence of showing of specific prejudice. . . .

. . . We find no prejudice and no denial of Iverson's rights by the conduct of the preliminary hearing.[85]

85. *Id.* at 10.