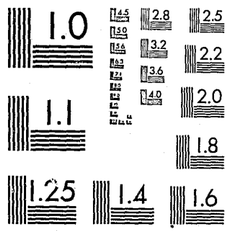

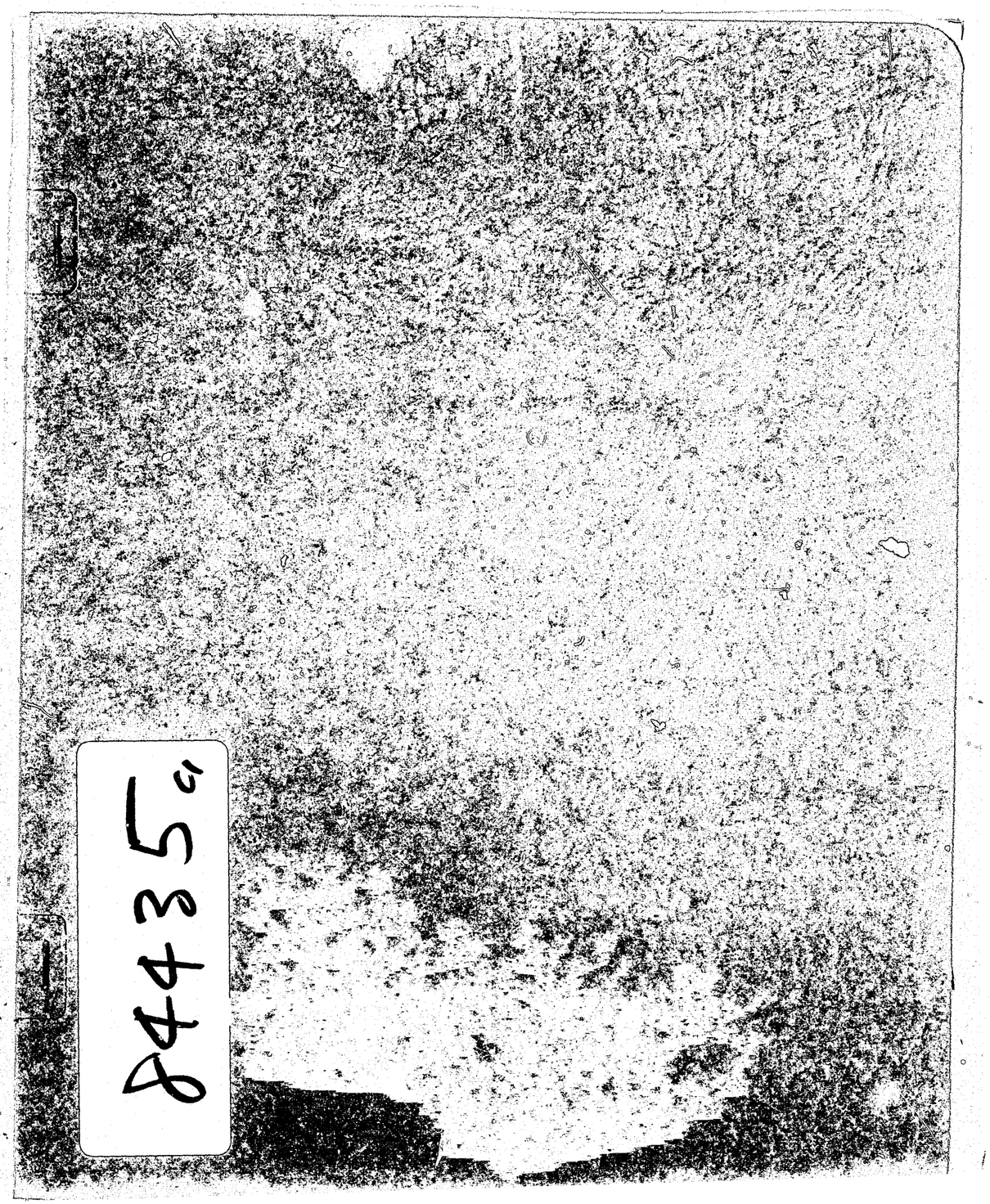

Department of Justice

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STATEMENT

OF

RUDOLPH W. GIULIANI
ASSOCIATE ATTORNEY GENERAL

BEFORE THE

SENATE JUDICIARY
COMMITTEE

CONCERNING THE INSANITY DEFENSE

JULY 19, 1982

Mr. Chairman and members of the Committee, I reiterate the Attorney General's call for prompt and effective legislative action to amend the insanity defense as it exists today in the federal courts. The Attorney General has outlined the development of the law and the two critical flaws we perceive in the current formulation of the insanity defense. He has explained the Administration's position in support of the formulation set forth in Title VII of S. 2572. At this time, I would like to analyze in detail the other possible ways in which the Congress might modify the insanity defense. The Administration believes that none of these other approaches would be as effective as that set forth in S. 2572.

There are four possible ways in which to modify the insanity defense. The first such approach would shift to the defendant the burden of proving that he was insane. Of course, under present law, the government bears the burden of proving beyond a reasonable doubt that the defendant was not insane at the time of the crime charged. The federal courts first placed this burden on the prosecution in 1895 in the case of Davis v. United States, 160 U.S. 469. The Davis rule departs from the common law, under which the burden of proving all affirmative defenses, including insanity, rested with the defendant.

Placing the burden of proof on the defendant might alter the result in some cases. Certainly, this course of action would be constitutionally permissible, so long as it was not applied to relieve the government of the burden of proving every essential element of the crime charged, including any required state of mind.

See Patterson v. New York, 432 U.S. 197, 203-204 (1977); Leland v. Oregon, 343 U.S. 790, 798 (1952).

Nevertheless, this approach fails to narrow the scope of the defense. It would still permit the introduction of confusing psychiatric testimony on the defendant's moral capacity or ability to conform his conduct to the law. The insanity defense would still exist, and as such, would continue to permit or require the acquittal of persons who committed all the elements of the crime with which they were charged. In short, this change would yield very little practical difference and fails even to attempt to resolve the basic problem of assuring justice and efficiency in the trial process.

A second approach is to permit the jury to return a verdict of "guilty but insane." Such a verdict could be rendered where the defendant's actions constitute all necessary elements of the offense charged other than the requisite state of mind, and the defendant lacked the requisite state of mind as a result of mental disease or defect.

In our view, this approach raises serious constitutional concerns. The due process clause requires that the government prove every element of the offense, including the requisite mental state. In re Winship, 397 U.S. 358, 364 (1970). This approach, however, would apparently permit a jury to convict a defendant even though he lacks the statutorily required mental state.

For example, murder requires proof that the defendant acted "knowingly" or "willfully," concepts embraced within the language of 18 U.S.C. § 1111, which defines murder as "the unlawful killing

of a human being with malice aforethought." Under this approach, a jury could find a defendant "guilty but insane" even if the defendant thought that the gun in his hand was actually a fishing pole. An identical result could obtain even if the defendant, because of mental disease or defect, shot a person believing he was shooting at a tree.

In short, a verdict of guilty (but insane) would be permissible even in cases in which proof of knowledge or willfulness were lacking. Under these circumstances, we believe that this approach may well go too far to pass constitutional muster.

A third approach to modifying the defense is to provide for a special verdict of "guilty but mentally ill." The Attorney General's Task Force on Violent Crime recommended this approach in its Final Report last year. A few states have recently enacted legislation to this effect. This approach does not alter the requirement that the government prove every essential element of the offense, including the required state of mind. Under the Task Force approach, a verdict of "guilty but mentally ill" could be returned only if the mental illness does not negate the defendant's ability to understand the unlawful nature of his conduct and does not negate his ability to conform his actions to the requirements of the law.

This approach avoids constitutional problems and offers a jury an attractive alternative to the stark choice between conviction and acquittal. The Task Force approach allows the jury to recognize that a defendant may be mentally ill even if his illness is not directly related to the mental element that

must be shown for a conviction of the crime. It does not, however, eliminate confusing psychiatric testimony concerning a wide range of issues not directly related to the mental element, such as delusions of a divine calling. This may serve to confuse the jury. Therefore, this approach would still lead to a battle of expert witnesses on issues as wide and varied as under present procedures.

The final approach -- and the one incorporated in S. 2572 -- permits a jury to return a verdict of guilty, not guilty or "not guilty only by reason of insanity." This last verdict may be returned only if the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense. Mental disease or defect would not otherwise constitute a defense.

As the Attorney General noted, this would effectively eliminate the insanity defense except in those rare cases in which the defendant lacked the state of mind required as an element of the offense. Under this formulation, a mental disease or defect would be no defense if a defendant knew he was shooting at a human being to kill him, even if the defendant acted out of an irrational or insane belief. Mental disease or defect would constitute a defense only if the defendant did not even know he had a gun in his hand or thought, for example, that he was shooting at a tree.

This would abolish the insanity defense to the maximum extent permitted under the Constitution and would make mental illness a factor to be considered at the time of sentencing, just like any other mitigating factor. It would appropriately narrow the

test of insanity, as well as the presentation at trial of the confusing psychiatric testimony on the issue.

Of course, as the Attorney General noted, the insanity defense can ever be completely eliminated. Under any approach, the government will always be required to prove every element of the statutory offense charged, including any intent or knowledge required by the statute. Thus, in the rare case in which a defendant is so deranged that he could not form the statutorily required mental state, the government would fail to prove a required element and a conviction cannot constitutionally be obtained. He could not be convicted of the charged offense under current law or under any constitutionally supportable variation of the above approaches. However, under the approach embodied in S. 2572, this rare case is the only one in which a defendant committing a criminal act could not be found guilty. Thus, S. 2572 eliminates the defense as far as constitutionally permissible.

Mr. Chairman, that summarizes and analyzes the various possible approaches to an amendment of the insanity defense. I stand ready to answer any questions you and the members of the Committee may have.