METHODS OF DEALING WITH THE CRIMINAL INSANE—DEFECTS IN PRESENT METHODS AND SUGGESTED REMEDIES.*

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The distinctly criminal insane, notably paranoiacs, if at large and not under restraint, are admitted to be dangerous to the public peace and safety. In the State of New York, this class of offenders, when dealt with according to the provisions of the Code of Criminal Procedure, is under restraint in the custody of the Matteawan State Hospital, an institution devoted exclusively to this purpose. The jubilee of the hospital was celebrated in 1909; and the report shows that during the 50 years of its existence it has received in all 3160 patients. Of this number, 313 had been indicted for homicide. In addition, 598 patients had been indicted for burglary, a certain number of these, for burglary with assault. Thus, more than 50 per cent of the total number committed or transferred to Matteawan were more or less dangerous to the public peace and safety.

Of the 313 homicidal insane received at Matteawan, 121 were convicts and 192 are classed in the report as "unconvicted." Nearly all those classed as "convicts" were women; which is explained by a provision in the statutes, that women are to be received irrespective of length of sentence. No male convicts are received except those "undergoing a sentence of one year or less or convicted of a misdemeanor." (The Insanity Law, §118.) The problem of dealing with these dangerous and irresponsible offenders is indeed formidable; but their care is an unavoidable public burden, which involves a large expenditure of money. As regards Matteawan, it is a conservative estimate that the cost of site and construction was at least \$2,000,000. The cost of maintenance for the year 1908-1909 was \$155,000. The State of New

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York, therefore, pays yearly about \$250,000 for protection of the people against crimes by the insane.

The average population of the Matteawan State Hospital for 1908-1909 was a fraction more than 755. The normal capacity of the hospital is 550. The institution, therefore, is now seriously overcrowded; and this condition has existed for several years. Overcrowding, unfortunately, exists in nearly all public institutions; and it is seldom, indeed, that provisions for public dependants keep pace with the requirements.

The congested condition of Matteawan, which is unsafe and demoralizing, is in a measure remediable. While a reduction in the number of convicts seems impracticable, the class of "unconvicted"—from 25 to 50 per cent of the total population—includes many who might properly be returned to the courts for trial.

The conditions at Dannemora are quite different from those at Matteawan, although both institutions are under the control, as regards general administration, of the Superintendent of Prisons. The Dannemora State Hospital is "used for the purpose of confining and caring for such male prisoners as are declared insane while confined in a State prison or reformatory, or while serving a sentence of more than one year in a penitentiary. (The Insanity Law, §140.) The Matteawan State Hospital is "used for the purpose of holding in custody and caring for such insane persons as may be committed to the said institution by courts of criminal jurisdiction, or transferred thereto by the State Commission in Lunacy, and for such convicted persons as may be declared insane while undergoing sentence of one year or less or for a misdemeanor at any of the various penal institutions of the State, and for all female convicts becoming insane while undergoing sentence." (The Insanity Law, §110.)

The requirements of the Dannemora State Hospital are simple. This institution is for the custody and care of insane convicts. Such inmates are retained only for so long as they are insane. Those who recover are returned to prison to serve out their terms. Those remaining in hospital after expiration of sentence are retained for so long as they are insane or they may be transferred, by order of the State Commission in Lunacy, to any of the so-called civil hospitals.

The inmates of the Matteawan State Hospital, with few and negligible exceptions, may be divided into convicts and unconvicted. Of the 3160 received since 1859, 809 are recorded as "unconvicted," a little more than 25 per cent; 2326 are recorded as convicts, and 25 as "cases showing criminal tendencies, transferred from other State hospitals, order State Commission in Lunacy." Of those admitted during the year ending September 30, 1909, 45 are classed as "unconvicted," with 46, as under sentence, about 50 per cent of a total of 91 of the two classes.

The "unconvicted" are persons committed by the courts, as in such a mental condition as to be incapable of understanding the proceeding (trial) or making their defense.

It is provided that this class of inmates, when restored to reason, shall be returned to the courts for trial. That this should be done, and done without undue delay, is just, both to the public and the inmate; and it is here that a reform in procedure is demanded.

Patients received in a hospital for the insane under ordinary commitment are held under an order by a court of record, based on an examination and certificate of two qualified examiners in lunacy. This certificate gives a fairly complete medical history of the case. It is said by superintendents of hospitals for the criminal insane that they receive patients from the courts, either without histories or with histories so imperfect as to render diagnosis and prognosis difficult. This often leads to undue detention of patients, an injustice to the patient and the public alike.

In my opinion, it should be provided by statute, that when an alleged lunatic is committed by the court, a complete medical record of the case should accompany the order, the same to be incorporated in the case book. In the Insanity Law of the State of New York it is provided that, in cases of habeas corpus, . . . "the medical history of the patient, as it appears in the case book, shall be given in evidence, . . ." (The Insanity Law, §93.)

It is peculiarly important that full records should be on file at hospitals for criminal insane in cases of those indicated as "unconvicted." This class includes a few cases of persons acquitted on the ground of insanity but committed to an institution as dangerous to public safety. It seems to me that a new section should be incorporated in the Insanity Law, which would provide for a

complete medical record of each and every person sent to the institution as incapable, by reason of insanity, of making his defense in court, or acquitted on the ground of insanity and dangerous to public peace or safety, such record to accompany the order of commitment. This new section should also provide for reports to the courts, at stated periods, by the superintendent, as to the existing mental condition of such patients. Insane convicts are transferred to Matteawan from penal institutions (state prisons for women, county penitentiaries or workhouses, etc., under the provisions of §118 of the Insanity Law). These transfers are made under an order by a judge of a court of record on an examination and certificate by two legally qualified examiners in lunacy. This certificate is a sufficient history of the case; and the Insanity Law already provides for the disposal of such persons, either by discharge or by return to prison in the event of recovery.

The proposed new section to be incorporated in the Insanity Law might read as follows:

§121a. When a person indicted for crime, but adjudged to be incapable of understanding the proceeding of a trial or making his defense, or when a person has been acquitted on the ground of insanity, but it is deemed by the court that his immediate discharge would be dangerous to public peace or safety, is committed to a state hospital, the court shall direct that the medical record of such person or persons shall be sent to the said hospital, the same to be incorporated in and become a part of the case book. In such cases, the order shall state that such person or persons are committed to the said hospital for observation and report; and the superintendent of the said hospital shall make reports to the court, within six months dating from the time of commitment, as to the mental condition of such person or persons, and shall continue to make such reports at intervals not longer than six months.

Within one year after the passage of this act, the superintendent of the state hospital for the criminal insane shall report, for each and every patient in his custody and care, to the committing court, the mental condition of such patients, including diagnosis and prognosis, and especially whether the mental diseases from which they are suffering are recoverable or not recoverable.

After the first reports, if there shall have been no material change in the mental condition of a patient or patients, a statement of such fact shall be deemed a sufficient report.

Such reports as suggested above, made at stated intervals, would certainly contribute to relieve the congestion of state hos-

pitals for the criminal insane, especially in the class of unconvicted. The criminal calenders, at least in the county of New York, are always overburdened; and many under indictment are deprived thereby of their right to speedy trial. Under these conditions, persons under indictment sent to a state hospital as insane practically disappear and are forgotten. If desirous of trial, such persons have a remedy only in writs of habeas corpus. The published statistics of Matteawan, unfortunately for my purposes, do not show the present number of inmates in the so-called unconvicted class; but if it be assumed that this is about 33 per cent of the total population, there would be 250 inmates whose cases should be reported to the courts. It is probable that a considerable proportion of these could be certified as not proper subjects for further retention in hospital.

§1120. *Penal Law*.—An act done by a person who is an idiot, imbecile, lunatic or insane, is not a crime. A person cannot be tried, sentenced to any punishment or punished for a crime when he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense.

A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of the alleged criminal act, he was laboring under such a defect of reason as either,

1. Not to know the nature and quality of the act he was doing; or
2. Not to know that the act was wrong.

It would appear, from this section of the Penal Law, that the first question to be inquired into and determined, in the case of a person indicted for crime, in which it is alleged that he was, at the time of committing the act, laboring under such a defect of reason as "not to know the nature and quality of the act he was doing; or not to know that the act was wrong," should be whether the alleged insanity at the time of committing the criminal act was continued and rendered him "incapable of understanding the proceeding or making his defense"; in which case he could not, under the statute, be tried, sentenced or punished. In cases of acquittal on the ground of insanity, it is evident that the rights of the defendant would not have been affected by a failure to inquire into his mental condition at the time of trial.

In cases in which a plea of insanity is entered according to the

provisions of Section 336 of the Code of Criminal Procedure, it seems logical that the court should at once proceed to inquire into and determine the existing mental condition of the defendant and whether he is capable of understanding the proceeding and making his defense. Statutes already exist which provide for such action; but a slight change, which makes such action, before or during the trial, mandatory would often forestall long and expensive trials, by determining, at the same time, the mental condition of the defendant at the time he committed the criminal act. As the statute now reads, the matter is within the discretion of the trial court.

§658. *Code of Criminal Procedure*.—When a defendant pleads insanity, as prescribed in §336, the court in which the indictment is pending, instead of proceeding with trial of the indictment [*must inquire into and determine the mental condition of the defendant or*] may appoint a commission of not more than three disinterested persons to examine him and report to the court as to his sanity at the time of commission of the crime. . . .

§454 of the code provides that:

When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane.

To return to §658, the second paragraph provides that:

. . . . If a defendant in confinement, under indictment, appears to be, at any time before or after conviction, insane, the court in which the indictment is pending, unless the defendant is under sentence of death, may appoint a like commission to examine him and report to the court as to his sanity at the time of the examination. . . .

The next section of the code provides for the disposition of the defendant if found insane during the progress of the trial:

§659. If the commission find the defendant insane, the trial of judgment must be suspended until he becomes sane; and the court, if it deem his discharge dangerous to the public peace or safety, must order that he be, in the meantime, committed by the sheriff to a state lunatic asylum; and that upon his becoming sane, he be re-delivered by the superintendent of the asylum to the sheriff.

An examination of the sections just quoted from the code shows that the provisions of §454 and §659 are mandatory; but in

§658, an investigation, by commission or otherwise, is discretionary with the court.

"This section invests the trial court with a discretion to order such examination or not as it might, from inspection, observation, and information, judge to be necessary or expedient." *People vs. McIlvaine*, 125 N. Y., 609, 8 N. Y. Cr. 159.

If it should be made mandatory in §658, by the introduction, as suggested, of the words *must inquire into and determine the mental condition of the defendant or*, this would render less frequent, frivolous pleas of not guilty by reason of insanity; for a plea of not guilty, qualified only by the specification of insanity, is an indirect admission of the crime. Indeed, in most cases of this kind, the corpus delicti is practically admitted.

MISUSE OF THE WRIT OF HABEAS CORPUS.

It is boldness approaching temerity for a layman to venture upon a discussion of the sacred writ of habeas corpus. Nevertheless, it is only too evident that the writ is sometimes grossly misused, especially by the reasoning insane in confinement. A recent flagrant example of this is the case of the People against Thaw, who is now an inmate at the Matteawan State Hospital as a dangerous person. The defendant was acquitted, on a second trial, of murder in the first degree and was committed to Matteawan on February 1, 1908. In May, 1908, he obtained a writ of habeas corpus returnable before Justice Morschauser. *People ex rel. Peabody (Thaw) vs. Baker*, 59 Misc. 359, May, 1908. After a long and costly trial, the writ was dismissed, and the relator was remanded to Matteawan as still insane and dangerous to public peace and safety. On a second writ, in July, 1909, returnable before Justice Mills, a longer and more costly trial was had, and the relator was again remanded as still insane and dangerous and probably incurable. *People ex rel. Thaw vs. Lamb*, 118 N. Y. Supp. 389, August, 1909. Various other proceedings, instituted with the object of releasing the defendant, have contributed to render this case peculiarly scandalous.

The writ of habeas corpus is for the purpose of determining whether or not the relator is deprived of his liberty "without due process of law." In the case of Thaw, this question was settled

definitively in accordance with an overwhelming array of precedent. The defendant was committed as a dangerous person, as a plain duty devolving upon the trial judge under the statute, but only until he should become sane. It was "not a sentence of the court. . . . The commitment to the asylum is only part of the duty cast upon the court" (Clearfield Co. *vs.* Cameron Township, 135 Pa. St., at top of p. 93); and the commitment was essentially temporary. Indeed, public safety requires immediate commitment of dangerous lunatics without notice. "It is not open to contest that such temporary commitments of a summary character may be made *ex parte* and in the exercise of the general police power of the State to arrest and temporarily confine dangerous persons. They are due process of law." Patterson, J. People *ex rel.* Ordway *vs.* St. Saviour's Sanitarium, 34 App. Div. 363, 370. The consensus of scientific opinion is that paranoia, from which the relator (Thaw) is suffering, is incurable; and the universal opinion of alienists is expressed in the general statement that the persecuted paranoiac is the most dangerous of the insane. It has been held in law "that the presumption of insanity, once found, continues; that the fact that the defendant killed a man is conclusive that he is 'manifestly dangerous,' in the absence of clear evidence that his mental condition has undergone a radical change." State *ex rel.* Thompson *vs.* Snell, 46 Wash. 327.

I have cited the Thaw case as a striking example of misuse of the writ of habeas corpus, in which it became necessary to have two reinvestigations into the mental condition of the relator in addition to the question of legality of his confinement. The Matteawan State Hospital contains a large number of highly dangerous paranoiacs, and I am personally familiar with the cases in many instances. A large majority of these persons were indicted for murder in the first degree. The desire for repeated writs is almost universal with these inmates. One always has a writ pending; and in another case, counsel has a new writ ready to present to the court the moment a pending writ is dismissed.

A writ of habeas corpus in behalf of a relator who is in custody as an insane person and dangerous is quite different from an ordinary writ. It involves much more than the question as to whether the relator is illegally detained. To quote again from the exhaustive and convincing brief of Asst. Dist. Atty. Robert C.

Taylor, of counsel, in the matter of the People *ex rel.* A. Russell Peabody, Relator and Appellant *vs.* Robert W. Chanler, Sheriff of the County of Dutchess, and Robert B. Lamb, Superintendent of the Matteawan State Hospital, Respondents (Thaw case), Reported 133 App. Div. 159, Affd., 196 N. Y. 525 on opin. below

It is obvious that this special habeas corpus provided by §93, Insan. Law, provides a remedy far more comprehensive than the ordinary writ of habeas corpus. It permits an inquiry *de novo* into the prisoner's present mental state whenever and so often as he claims that he has been restored to reason.

It is not probable that the framers of the Insanity Law contemplated investigation and reinvestigation following reinvestigation into the mental condition of patients; yet practically this is the effect of the law in cases in which a command of money affords opportunity for endless writs. Without abridging in any degree the right of prisoners to inquire into the legality of their restraint of liberty, it seems possible to remedy this evil by an amendment of the present law :

§93. *Habeas Corpus*.—Any one in custody as an insane person is entitled to a writ of habeas corpus, upon proper application made by him or some friend in his behalf. Upon the return of such writ, the fact of his insanity shall be inquired into and determined. The medical history of the patient, as it appears in the case book, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any proper person, shall be sworn touching the mental condition of such person.

After one such proceeding, upon which it has been determined that the relator is still insane, he shall not be entitled to another such writ within a period of one year, except for cause shown and in the discretion of the judge to whom the application is made.

It is evident that the State Board of Insanity of Massachusetts has recognized the misuse of the writ of habeas corpus by the insane, notably the criminal insane. In "the Massachusetts Laws relating to Insane Persons, revised and codified, June, 1909," is a section on "Commitment of Persons acquitted of Murder, etc., by Reason of Insanity," which reads as follows :

§104. If a person who is indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital for the insane during his natural life, and

he may be discharged therefrom by the governor, with the advice and consent of the council, when he is satisfied after an investigation by the state board of insanity that such person may be discharged without danger to others.

Of course this law does not deprive any person of his right to an ordinary writ of habeas corpus; but on the return of such writ, the issue would be simply to determine as to whether this person is illegally restrained. The question of mental condition is, as it should be, left to those whom training and experience have qualified to inquire into and determine such matters.

At Bridgewater, in the State of Massachusetts, is a State Asylum for insane criminals; and it probably is to this institution that the section just quoted is intended to apply. The statute has been in force since 1873; and it does not appear that its constitutionality has yet been called in question. I venture to say, however, that if the question of its constitutionality should arise, the fact of commitment of a person not convicted of crime, "during his natural life," the only remedy being a difficult and complex *ex parte* proceeding such as provided in the statute, could be strongly urged against the law. In the "Thaw case," the defendant was committed by Justice Dowling to "be detained in safe custody and be sent to the Matteawan State Hospital, there to be kept in said hospital until thence discharged by due process of law." The "due process of law" referred to undoubtedly is indicated in §454 of the Code of Criminal Procedure:

"When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane."

The "commitment," in such case, is "essentially temporary" and cannot be regarded as a sentence. In the Massachusetts statute it is provided that "the court shall order him to be committed to a State hospital for the insane during his natural life." It might well be argued that this is practically a life-sentence of a person acquitted by the jury.

DISMISSAL OF INDICTMENTS IN CASES OF INMATES OF THE MATTEAWAN STATE HOSPITAL WHO ARE NOT CONVICTS.

§120 of the Insanity Law reads, in part, as follows:

. . . . Any inmate not a convict, held upon an order of a court or judge, in a criminal proceeding, may be discharged therefrom, upon the superintendent's certificate of recovery, made to and approved by such court or judge.

This section does not indicate the procedure in such discharges; but this is provided by the code:

§661. If the defendant be received into the asylum, he must be detained there until he becomes sane. When he becomes sane, the superintendent must give a written notice of that fact to a judge of the supreme court of the district in which the asylum is situated. The judge must require the sheriff without delay to bring the defendant from the asylum, and place him in the proper custody until he be brought to trial, judgment, or execution as the case may be, or be legally discharged.

As regards the Matteawan State Hospital these statutes apply to inmates classed as "unconvicted," with the exception of those who have been acquitted on the ground of insanity and those transferred to Matteawan from other state hospitals. It seems to me unwise to dismiss indictments in certain of these cases while the defendants are still in the hospital, as is not infrequently done. Many of the "unconvicted" are affected with forms of insanity that are recoverable but likely to recur if the patients are removed from restraint. Typical examples are certain cases of alcoholic insanity. About 50 per cent of those committed to Matteawan since 1859 were classed as "intemperate" (1494 out of 3160). Under hospital restraint and care, most subjects of alcoholic insanity recover; but if immediately relieved from restraint on discharge from the hospital, renewed indulgence in alcohol is likely to lead to renewed criminal acts. On removal from the hospital, such persons should be brought to trial or otherwise disposed of according to law. A subject of alcoholic insanity with criminal tendencies, so far as his relations to society are concerned, is little different from an "habitual criminal," who, under the statute, may be made subject to legal supervision during his natural life "to the same extent that a minor is subject to the control of his parent or guardian." It is unfortunate that the

Penal Law does not provide for a similar supervision of persons subject to recurrent insanity with criminal tendencies, even after acquittal on the ground of insanity; but it does not appear how such a statute could be framed so as not to invade constitutional rights.

The evil of dismissal of indictments of persons in custody as unfit to go to trial is emphasized by a recent case of which I have some personal knowledge:

PEOPLE OF THE STATE OF NEW YORK AGAINST JAMES COURTNEY,
INDICTED FOR MURDER IN THE FIRST DEGREE.

In November, 1907, I examined the defendant with Dr. William Mabon. We testified that he was, at the time of such trial, in such mental condition "as to be incapable of understanding the proceeding or making his defense." The defendant was then committed to Matteawan, where I saw him on several occasions, improved, but still insane. He was then, however, fairly coherent and connected in his ideas and conversation. He told me that he intended to apply for a writ of habeas corpus. I saw him last in November, 1909. The rest of the history of this case I take from "The Sun" and have no reason to think it inaccurate:

The District Attorney's office heard nothing of the matter until last month, when Mr. Hyde (of counsel for Courtney) informed Assistant District Attorney Nott that he had been in correspondence with Dr. R. B. Lamb at Matteawan and that Dr. Lamb had written that Courtney's condition had not improved. Mr. Nott then wrote to Dr. Lamb, who replied that he believed Courtney's condition of insanity was permanent.

Upon that representation, on March 8 last Mr. Nott went before Judge Foster and had the indictment for murder dismissed. . . .

On March 26, 1910, Courtney was committed to the "Tombs," on an order from Justice Tompkins, of Nyack, before whom he had appeared on a writ of habeas corpus obtained on his personal application by mail.

The prisoner was taken before Judge Tompkins, who conducted the examination himself. No attorney appeared for Courtney and no experts were heard. Dr. R. F. Kieb of the Matteawan Asylum staff opposed the removal of Courtney from the hospital on the ground that he was not a safe person to be at large. Judge Tompkins decided that the prisoner was in a fit condition to stand trial and ordered that he be turned over to

the New York authorities, evidently supposing that the ten-year old indictment still stood. No notice of the dismissal of the indictment had been received at Matteawan.

As a result of these complications, Justice Tompkins decided to remand Courtney to Matteawan and reopen the case. A rehearing was held on April 2 and the case was adjourned for two weeks in order to obtain additional testimony. On April 16, Dr. Mabon testified that it was not safe for the public for Courtney to be at large. The writ was accordingly dismissed, and Courtney was sent back to Matteawan. A new indictment had been prepared to take the place of the indictment that was dismissed, in case it should be needed; but detectives reported that, of the witnesses to the murder, "some had died and none of the others could be found." The crime was committed October 7, 1900.

The case of Courtney is exceptional; but the conditions existing in the State of New York are such, that an indefinite continuance of indictments of persons charged with murder in the first degree would be unjust to assigned counsel, without some modification of the penal law, as will be seen by the following section:

§308. . . . When services are rendered in pursuance of such assignment in a case where the offense charged in the indictment is punishable by death, or on an appeal from a judgment of death, the court in which the defendant is tried or the action or indictment is otherwise disposed of, or by which the appeal is finally determined, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with the clerk of such court, not exceeding the sum of five hundred dollars, which allowance shall be a charge upon the county in which the indictment for the action is found, to be paid out of the court fund, upon the certificate of the justice presiding at the trial or otherwise disposing of the indictment, or upon the certificate of the appellate court, but no such allowance shall be made unless an affidavit is filed with the clerk of the county by or on behalf of the defendant showing that he is wholly destitute of means.

It has been held, however, that an allowance is not authorized where the defendant is found, by a commission, to be insane—*People ex rel. Mullen vs. Coler*, 61 App. Div. 538.

In the case of Courtney, the defendant's insanity was found by the court on the testimony of the people's experts, and not by a commission; and it is probable that counsel asked for a dismissal of the indictment so as to obtain the allowance by the court.

It seems to me proper that an indictment should be dismissed, while the defendant is still in Matteawan, on a certificate by the superintendent that he is incurably insane and an affidavit by the district attorney that he believes the defendant could not be convicted if brought to trial. To provide for this is the object of the following proposed new section of the Code of Criminal Procedure:

§661a. *When a person under indictment for a crime has been found to be in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense and has been committed to a state lunatic asylum until he becomes sane, the indictment against him shall not be dismissed while he is in custody in such asylum; and the indictment can be dismissed only after such defendant, in case he should have become sane, has been redelivered to the sheriff, either on a certificate by the superintendent of the asylum that he has become sane or under a writ of habeas corpus. In case the defendant is under indictment for an offense punishable by death, the indictment may be dismissed upon presentation to a court of competent jurisdiction, in the county in which the indictment was found, of a verified statement by the superintendent of the asylum that he is incurably insane and an affidavit by the district attorney of the said county that he believes the defendant could not be convicted of the crime charged in the indictment or of any degree of murder or manslaughter.*