NON-RESTORABLE COMPETENCE TO STAND TRIAL: A LOOPHOLE IN KENTUCKY'S LAW

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INTRODUCTION

In Kentucky, a defendant's competence to stand trial may be called into question at any point after arraignment.[2] If reasonable grounds exist for the court to believe that the defendant is not competent to stand trial, the proceedings are halted and a full determination of the defendant's capacity must be made.[3] The court must then appoint a psychologist or psychiatrist to assess the defendant's competence and file a report with the court detailing his or her findings.[4] Once the report is submitted, the court holds a hearing to determine if the defendant is competent to stand trial.[5] If the court deems the defendant incompetent to stand trial (IST), such a defendant may not be "tried, convicted, or sentenced so long as the incompetency continues."[6] Kentucky is not unique in this procedure—the federal judiciary, as well as a majority of states, use this same process to assess a defendant's ability to stand trial.[7]

Competency proceedings increase in complexity when courts are faced with the decision of how to treat, detain, and rehabilitate such IST defendants. In Kentucky, the appointed psychologist or psychiatrist is required to make a second finding: What is the likelihood of the defendant's competence being restored in the foreseeable future?[8] When a defendant is found to be incompetent, but competence is substantially likely to be restored in the foreseeable future, the court will generally commit the defendant to a forensic psychiatry facility for competency restoration treatment for a period of sixty days.[9] At the end of those sixty days, if the defendant is found competent to stand trial, the proceedings against him will continue.[10]

A defect appears in Kentucky's criminal procedure, however, when a defendant is found incompetent and his competence is deemed unlikely to be restored in the foreseeable future. In this case, the court is required to conduct an involuntary hospitalization of the defendant pursuant to chapter 202A or 202B of the Kentucky Revised Statutes.[11] The proscribed chapters outline the criteria for involuntary

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[2] KY. R. CRIM. P. 8.06 (West 2020).
[3] *Id.*
[4] KY. REV. STAT. ANN. § 504.100(1) (West 2020).
[5] KY. REV. STAT. ANN. § 504.100(3) (West 2020).
[6] KY. REV. STAT. ANN. § 504.090 (West 2019).
[7] *See* Jennifer Piel, Michael J. Finkle, Megan Giske, & Gregory B. Leong, *Determining a Criminal Defendant's Competency to Proceed With an Extradition Hearing*, 43 J. AM. ACAD. PSYCHIATRY LAW 201, 202 (2015).
[8] KY. REV. STAT. ANN. § 504.100(2) (West 2020).
[9] KY. REV. STAT. ANN. § 504.110(1) (West 2020).
[10] KY. REV. STAT. ANN. § 504.110(3) (West 2020).
[11] KY. REV. STAT. ANN. § 504.110(2) (West 2020).

hospitalization for a person with a mental illness[12] or a person with an intellectual disability.[13] One element of both criteria is that the patient can reasonably benefit from the treatment provided in the hospitalization.[14] When a person is deemed to have non-restorable competence, however, there is, by definition, no possible treatment which could benefit their condition. Thus, once such a defendant is hospitalized involuntarily, the hospital must discharge him because he fails to meet the criteria for an admission under KRS 202A or 202B.[15] Kentucky law provides little recourse for courts to prevent such defendants from being discharged.[16]

This Note will examine the legal and historical framework that has led to this gap in criminal procedure in Kentucky and other states. Part I will outline the history of competence as a critical element of a criminal defense. Part II will distinguish the legal determination of competence from the clinical determination of capacity. Part III will address the due process and equal protection concerns associated with involuntary hospitalization or commitment for incompetency to stand trial. Part IV will explore Texas's recent statutory scheme aimed at addressing the loophole in criminal procedure created by non-restorable competence. Part V will consider a pending criminal case against a Kentucky defendant who has been repeatedly classified as incompetent to stand trial and unlikely to regain competence. Part VI will examine proposed legislation and other measures to assure both due process to defendants and public safety to community-members. Lastly, Part VII will propose the simplest, least expensive criminal procedural reform in Kentucky's history.

I. THE HISTORY OF COMPETENCE

As early as 1845, courts recognized the need for unique legal treatment of those designated criminally insane.[17] In the Massachusetts case *The Matter of Josiah Oakes*, Judge Shaw found the "great law of humanity" to be sufficient legal basis for involuntary hospitalization of an insane person who presented a danger to himself or others.[18] Further, Shaw found that the restraint could continue for an indefinite period of time—as long as the restraint was necessary to protect the defendant or others.[19] Shaw's theory of indefinite restraint and imprisonment of the criminally insane was popular among the states.[20] By 1890, every state in the U.S. operated

[12] KY. REV. STAT. ANN. § 202A.026 (West 2020).
[13] KY. REV. STAT. ANN. § 202B.040 (West 2020).
[14] *Id.*; KY. REV. STAT. ANN. § 202A.026 (West 2020).
[15] *See* KY. REV. STAT. ANN. § 202A.026 (West 2020); KY. REV. STAT. ANN. § 202B.040 (West 2020).
[16] *See generally* Jason Riley & Chad Mills, *Attorney Asks Judge to Dismiss Cane Madden's Child Rape Case*, WDRB.COM (Oct. 18, 2019), https://www.wdrb.com/in-depth/attorney-asks-judge-to-dismiss-cane-madden-s-child-rape/article_0d3d533c-f1da-11e9-8ef6-b7ec86cdb9bb.html [https://perma.cc/9SGY-NQAS] (describing the loophole in Kentucky's involuntary hospitalization statutes).
[17] *See generally* Matters of Josiah Oakes, 8 Law Rep. 123 (Mass. 1845) (holding that criminally insane defendants can be involuntary hospitalized if they are deemed a danger to themselves or others).
[18] *Id.* at 123.
[19] *Id.*
[20] *See* FREDERIC GARVER, THE SUBVENTION IN THE STATE FINANCES OF PENNSYLVANIA 229 (1919).

some form of "publicly-supported mental hospital,"[21] the earliest being Virginia's Eastern State Hospital, established in 1773.[22]

The process by which a person was relegated to these facilities varied: a husband could have his wife committed,[23] a family member could recommend commitment, or a judicial decision could require commit.[24] These early involuntary commitments were subject only to the requirement that the individual would benefit from treatment.[25] As cases alleging wrongful commitment began to arise commonly in the late 1800s, institutions began identifying more formal criteria for admission.[26] States soon began to enact stricter methods for commitment,[27] but in criminal cases, a finding that a defendant lacked the mental competence to stand trial often resulted in an indefinite, automatic commitment to an asylum or psychiatric treatment facility.[28]

Beginning in 1960, a series of Supreme Court decisions began to create guidelines for the legal treatment of criminal defendants whose competence was in question.[29] In *Dusky v. U.S.*, the Court held that a defendant's competence is determined by his "present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational and factual understanding of the proceedings against him."[30] The Court also distinguished mere orientation and recollection from legal competence to stand trial.[31] In 1975, the Court further held that a defendant must also be able to assist in preparing his defense in order to be found competent to stand trial.[32]

As courts adopted higher standards for involuntary and criminal commitments, Congress passed the Community Mental Health Act, moving funding out of state mental hospitals and into smaller treatment centers, intending to allow those housed in state mental hospitals to be treated quickly and released back into society.[33] In combination with the release of the first anti-psychotic drug, this

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[21] *Early Psychiatric Hospitals & Asylums*, U.S. NAT'L LIBR. OF MED., https://www.nlm.nih.gov/hmd/diseases/early.html [https://perma.cc/T54N-6KZE].
[22] *The History of Eastern State*, VIRGINIA.GOV, http://www.esh.dbhds.virginia.gov/History.html [https://perma.cc/WJK8-AXX5].
[23] MAUREEN DABBAGH, PARENTAL KIDNAPPING IN AMERICA: AN HISTORICAL AND CULTURAL ANALYSIS 36 (2012).
[24] SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 3 (2019), available at https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care_041919_508.pdf [https://perma.cc/GYG3-W8NN].
[25] *Id.*
[26] *Id.*
[27] *See id.* ("Following a series of celebrated cases in the late 1800's alleging wrongful commitment, procedures for commitment (but not legal criteria) were tightened.").
[28] *See* Douglas R. Morris & Nathaniel J. DeYoung, *Long-Term Competence Restoration*, 42 J. AM. ACAD. PSYCHIATRY L. 81 (2014).
[29] 18 U.S.C. § 4244 (2020); 18 U.S.C. § 4241 (2020); 18 U.S.C. § 4246 (2020).
[30] Dusky v. United States, 362 U.S. 402, 402 (1960).
[31] *Id.*
[32] Drope v. Missouri, 420 U.S. 162, 171 (1975).
[33] Michelle R. Smith, *Kennedy's Vision for Mental Health Never Realized*, ASSOCIATED PRESS (Oct. 20, 2013), https://apnews.com/4423a7a8da484b7fb0cb29dfdd1ddb96 [https://perma.cc/SWW5-G8WZ].

legislation enabled many mentally ill patients to return to their homes.[34] Those with the most severe mental conditions, however, were left without treatment options.[35]

Between 1970 and 2014, the U.S. has experienced a 77% decline in total capacity for 24-hour psychiatric treatment.[36] This decline can be attributed to the increase in outpatient treatment and the push for deinstitutionalization.[37] Instead of returning home, many of these patients were "transinstitutionalized" into incarceration.[38] Between four to seven percent of the growth in U.S. incarceration rates between 1980 and 2000 is attributable this lack of psychiatric care.[39] To its shame, the three largest mental health treatment facilities in the U.S. are the Cook County Jail, Los Angeles County Jail, and Rikers Island.[40]

II. COMPETENCE AND CAPACITY: LEGAL AND CLINICAL DIFFERENTIATION

Kentucky's problems in dealing with IST defendants begin with the designation of incompetence itself. In 1966, the U.S. Supreme Court held that if a district court does not allow an inquiry into a defendant's competence to stand trial, the court deprives the defendant of his "constitutional right to a fair trial."[41] The appointed expert, however, can only provide advisory information to the judge who makes the ultimate competency assessment.[42] Kentucky statutory law provides little discussion of what constitutes competence to stand trial.[43] Although the Supreme Court has provided instruction on the theoretical basis of competence, little guidance is given for situations in which a judge might disagree with the psychiatric appointee's recommendation.

When making a ruling on the defendant's competence, the court is not limited to specific criteria to consider.[44] Some federal courts have considered factors like inability to communicate intelligently,[45] family history of mental health issues,[46]

However, Kennedy is not all to blame. *See* Samantha Raphelson, *How the Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis*, NPR (Nov. 30, 2017, 1:15AM), https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis [https://perma.cc/XC28-FUP5] (explaining that a provision in Medicaid prevents the program from covering long-term care in state institutions).

[34] Smith, *supra* note 33.

[35] *Id.*

[36] TED LUTTERMAN, ROBERT SHAW, WILLIAM FISHER & RONALD MANDERSCHEID, TREND IN PSYCHIATRIC INPATIENT CAPACITY, UNITED STATES AND EACH STATE, 1970 TO 2014 29 (2017).

[37] Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 Psychiatry 30, 33 (2010).

[38] Steven Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42 J. LEGAL STUD. 187, 189, 219 (2013).

[39] *Id.* at 190.

[40] Smith, *supra* note 33.

[41] Pate v. Robinson, 383 U.S. 375, 385 (1966).

[42] KY. REV. STAT. ANN. § 504.100 (West 2020).

[43] *See* KY. REV. STAT. ANN. § 504.090 (West 2020) (stating that incompetent defendants cannot stand trial but does not define what it means to be incompetent).

[44] *See* KY. REV. STAT. ANN. § 504.110 (West 2019) (listing the procedure for judicial determinations of incompetence)

[45] United States v. Nichelson, 550 F.2d 502, 504 (8th Cir. 1977).

[46] *Id.*

self-defeating behavior,[47] hallucinations,[48] prior use of antipsychotic medications,[49] and more. A mental disorder alone is not dispositive in showing incompetence.[50] The judicial determination of competence revolves around one legal question—whether continuing with judicial proceedings affords the defendant a reasonable opportunity to participate in his defense.[51]

When the court disagrees with the assessment performed by the appointed psychiatrist or psychologist, the court is at liberty to act against the expert's recommendation.[52] Because the current legal framework grants wide latitude and little concrete guidance on the specific criteria of a competency analysis, judges have become dependent upon appointed experts for diagnoses of defendants' mental deficits.[53] However, a study conducted on competence-to-stand-trial assessments in Hawaii found that judges are more likely to rule a defendant incompetent, rather than competent, after hearing conflicting expert testimony on competency.[54]

The determination of the restorability of a defendant's competence is even more convoluted. In some states, the court assesses the likelihood of restoration of a defendant's competence within a statutorily specified timeframe; in other states, the court decides if restoration is likely in the foreseeable future.[55] In Texas, restoration is predicated on guidance from the facility where the defendant was being treated. [56]

The greatest disparity between the legal and clinical distinctions occurs when an IST defendant whose competence is unlikely to be restored is relegated to involuntary commitment in a psychiatric treatment facility. In Kentucky, this issue manifests in the difference between the legal criteria for incompetence and the legal criteria for involuntary hospitalization.[57] A defendant may be found incompetent by the courts, but his incompetence does not necessarily make him a candidate for involuntary hospitalization.[58] Although the statutes allow an IST defendant to be committed into a psychiatric facility for hospitalization,[59] they do not allow the facility to continue such a hospitalization once they deem the defendant to be

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[47] Torres v. Prunty, 223 F.3d 1103, 1109 (9th Cir. 2000).
[48] Tiller v. Esposito, 911 F.2d 575, 577 (11th Cir. 1990).
[49] Cowley v. Stricklin, 929 F.2d 640, 641 (11th Cir. 1991).
[50] Wolf v. United States, 430 F.2d 443, 445 (10th Cir. 1970).
[51] Barry W. Wall et. al., *AAPL Practice Resource for the Forensic Psychiatric Evaluation of Competence to Stand Trial,* 46 J. AM. ACAD. PSYCHIATRIC L. S1, S30 (2018).
[52] Randy K. Otto, *Competency to Stand Trial*, 2 APPLIED PSYCH. CRIM. JUST. 82, 84 (2006) ("Competence is ultimately a legal issue that is to be decided by the legal decision maker.").
[53] David Collins, *Re-Evaluating Competence to Stand Trial*, 82 L. & CONTEMP. PROBS. 157, 176 (2019).
[54] W. Neil Gowensmith, Daniel C. Murrie & Marcus T. Boccaccini., *Field Reliability of Competence to Stand Trial Opinions: How Often Do Evaluators Agree, and What Do Judges Decide When Evaluators Disagree?*, 36 L. & HUM. BEHAV. 130, 135 (2012).
[55] Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1, 10 (1993).
[56] TEX. CODE CRIM. PROC. ANN. art. 46B.079 (West 2020).
[57] *Compare* KY. REV. STAT. ANN. § 504.100 (West 2020) (discussing the appointment of mental health experts to determine defendant competency), *with* KY. REV. STAT. ANN. § 202B.040 (West 2020) (listing the criteria for a intellectually disabled defendant to be involuntarily committed), *and* KY. REV. STAT. ANN. § 202A.026 (West 2020) (listing the criteria for a mentally ill defendant to be involuntarily committed).
[58] KY. REV. STAT. ANN. § 202A.026 (West 2020); KY. REV. STAT. ANN. § 202B.040 (West 2020).
[59] KY. REV. STAT. ANN. § 504.110 (West 2020).

unlikely to benefit from treatment.[60] By creating the legal category of "non-restorable competence," the Kentucky legislature has created a class of criminal defendants whom they cannot legally jail, try, or commit. Any solution offered to this issue will require a standardization of language and a revision of the statutes to create a cohesive plan of both legal and psychiatric treatment for such IST defendants.

III. DUE PROCESS AND EQUAL PROTECTION CONCERNS

In *Pate v. Robinson*, the Supreme Court made a definitive ruling that to try or sentence a defendant who is incompetent to stand trial is a denial of due process of law.[61] With substantive due process, a defendant has the right to not be prosecuted while incompetent.[62] With procedural due process, a defendant has the right to a reasonable examination of his competency to stand trial.[63] However, if a defendant's competence is found unlikely to be restored, the application of due process to his circumstances becomes less clear.

Nearly a decade after *Pate*, in *Jackson v. Indiana*, the Court addressed the issue of competence that is unlikely to be restored.[64] Theon Jackson, a deaf-mute defendant accused of two thefts amounting to less than $10, was found incompetent to stand trial after a court-appointed psychiatrist testified that no state facilities were capable of developing Johnson's communication abilities.[65] Additionally, experts testified that even if Jackson were to gain "minimal communication skills," he would still lack the mental capacity necessary to be found competent to stand trial.[66] Jackson was committed by the lower court until he could be deemed "sane."[67] On appeal, Jackson's counsel argued that this commitment violated the Fourteenth Amendment's Equal Protection Clause[68] and Due Process Clause.[69]

Jackson's claim that he was deprived of equal protection of the law stems from Indiana's standards for commitment and release of criminal defendants in comparison to the commitment and release of individuals with mental illness who are undergoing civil commitment proceedings.[70] The Court agreed with Jackson, finding that the State's standard for commitment of criminal defendants was more lenient than the standard for commitment of mentally ill individuals under the civil commitment statute.[71] Under both standards, commitment required examination by

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[60] KY. REV. STAT. ANN. § 202A.026 (West 2020) (defendant must "reasonably benefit" from treatment to be legally hospitalized involuntarily); *accord* KY. REV. STAT. ANN. § 202B.040 (West 2020).
[61] Pate v. Robinson, 383 U.S. 375, 378 (1966); *see also* United States v. Gonzalez-Ramirez, 561 F.3d 22, 28 (1st Cir. 2009) ("A defendant's due process right to a fair trial includes the right not to be tried, convicted or sentenced while incompetent.").
[62] David W. Beaudreau, *Due Process or "Some Process"? Restoring Pate v. Robinson's Guarantee of Adequate Competency Procedures*, 47 CAL. W. L. REV. 369, 370–71 (2001).
[63] *Id.*
[64] Jackson v. Indiana, 406 U.S. 715 (1972).
[65] *Id.* at 717–19.
[66] *Id.* at 719.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 723.
[71] *Id.* at 730.

two doctors, a judicial hearing with opportunity for cross-examination, opportunity to introduce evidence, and opportunity for appellate review.[72] However, the standard for commitment of a criminal defendant only required the State to show that Jackson was incompetent to stand trial.[73] Also, the State applied a more stringent standard for release for those committed as criminal defendants than those committed for mental illness.[74] Under the civil commitment statute, a person committed for mental health reasons could be released as soon as the head of the commitment facility believed that their condition no longer justified commitment.[75] A criminal defendant who had been committed, however, could only be released from his commitment after a "substantial change for the better in his condition."[76]

In Jackson's case, the standard for release was especially stringent, considering experts had testified that he was likely unable to ever regain competence.[77] The Court upheld Jackson's equal protection challenge, finding that that the leniency in the standard for commitment of criminal defendants and the stringency of the standard for release of committed criminal defendants deprived Jackson of equal protection of the laws.[78]

Further, Jackson contended that his right to due process of the law was violated by his indefinite commitment on the sole account of his incapacity to stand trial.[79] By recognizing that Jackson's competence was unlikely to be restored, but still committing him until he regained sanity, the district court's commitment was a life sentence.[80] The Court agreed with Jackson, holding that a criminal defendant may only be held a length of time reasonable to determine his competence and the likelihood of restoration of competence.[81] If competence is deemed unlikely to be restored, the state must either drop the charges against the defendant or commit him under the state's civil commitment procedures.[82] If the defendant's competence is deemed likely to be restored, his commitment must be beneficial in advancing his competence.[83] Thus, if the defendant is not progressing or not able to progress toward competence, his remaining in state criminal custody is improper.[84]

A more recent attack on modern competence restoration schemes turns on a defendant's deprivation of protections afforded by the Americans with Disabilities Act.[85] In *Olmstead v. L.C.*, the Supreme Court held that Title II of the ADA prohibits

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[72] *Id.* at 727.
[73] *Id.*
[74] *Id.* at 728–29.
[75] *Id.* at 728.
[76] *Id.* at 729.
[77] *Id.* at 719.
[78] *Id.* at 730.
[79] *Id.* at 719.
[80] *Id.*
[81] *Id.* at 738.
[82] *Id.*
[83] *Id.*
[84] *See id.*
[85] Alexandra Douglas, *Caging the Incompetent: Why Jail-Based Competency Restoration Programs Violate the Americans with Disabilities Act Under* Olmstead v. L.C., 32 GEO. J. LEGAL ETHICS 525, 528 (2019).

discrimination on the basis of disability[86] and requires States to allow individuals with mental disabilities to be treated in community-based programs if a State treatment professional has deemed community placement appropriate, the transfer is unopposed by the individual, and the placement can be reasonably accommodated by the State.[87]

In adopting jail-based competency restoration programs,[88] several states have begun placing IST defendants in jail, regardless of the seriousness of their alleged crime or the danger they pose to themselves or others.[89] Because many of these defendants would benefit from treatment in an integrated, community-based setting due to their mental disability, their assignment to jail-based competency restoration programs constitutes discrimination on the basis of disability.[90] Broadly placing IST defendants into jail-based competency restoration programs neglects the ADA's mandate for the least restrictive treatment setting necessary, and states that continue to disregard this requirement risk being found in violation of the ADA, regardless of intent.[91]

IV. CASE STUDY: TEXAS

In 2007, Advocacy, Inc., on behalf of a group of defendants deemed incompetent to stand trial, filed suit against the Texas Department of State Health Services, arguing that the defendants' due process rights were violated by the State's policy of holding IST defendants in jail, without treatment, until psychiatric treatment facility beds became available.[92] Obtaining a bed in such a facility often took six months or longer.[93] After the aforementioned case was decided on jurisdictional grounds, a Texas state court considered the issue and ordered that IST defendants be given a bed within 21 days from the day he receives notice of his commitment.[94]

However, in 2014, the Texas Court of Appeals overturned this decision[95] and IST defendants were once again forced to remain in jail for months before placement in psychiatric treatment facilities.[96] Texas lawmakers' solution to this

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[86] 42 U.S.C. § 12132 (2019).
[87] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 607 (1999)
[88] *See infra* Part IV.
[89] *See* Douglas, *supra* note 85.
[90] *Olmstead*, 527 U.S. at 597.
[91] *See* Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 32 (2012).
[92] Lakey v. Taylor *ex rel.* Shearer, 278 S.W.3d 6, 11 (Tex. Ct. App. 2007); Brian Chasnoff & Melissa Fletcher Stoeltje, *Texas 49th in Mental Health Funding*, SAN ANTONIO EXPRESS-NEWS (Nov. 1, 2010), https://www.mysanantonio.com/news/local_news/article/Texas-49th-in-mental-health-funding-780070.php [https://perma.cc/29SW-UZRZ].
[93] *Lakey*, 278 S.W.3d at 12.
[94] Lakey v. Taylor, 435 S.W.3d 309, 316 (Tex. Ct. App. 2014).
[95] Brian D. Shannon, *Competency, Ethics, and Morality*, 49 TEX. TECH. L. REV. 861, 872 (2017).
[96] Keri Blakinger, *Lack of Beds for Inmates Needing Mental Health Help*, HOUSTON CHRON. (Oct. 10, 2017), https://www.houstonchronicle.com/news/article/Lack-of-beds-for-inmates-needing-mental-health-12268349.php [https://perma.cc/Z5T7-GFRC].

dilemma was the creation of jail-based competency restoration programs.[97] In response, Texas lawmakers began to consider an alternative option for competency restoration in IST defendants—jail-based competency restoration programs.[98]

During the 2013 Texas legislative session, legislators passed a bill that utilized state funds to create jail-based competency restoration pilot programs,[99] but the program was never implemented due to lack of personnel.[100] Funding for the program was renewed in 2015, but implementation was further delayed by the "lack of a strong competitive pool" of bids for the contract for jail-based competency restoration services.[101] In 2016, the Texas Judicial Council created a Mental Health Committee to explore the effectiveness and cost of various measures to determine the "best practices" of civil and criminal justice for those with mental illness, including IST defendants.[102] The committee's findings included a recommendation that current state law be changed to allow for alternative competency restoration settings, including jail-based programs.[103] In 2017, the Texas legislature approved an appropriation for a pilot program for a third time.[104] In addition to the appropriation, but without performing a pilot, lawmakers passed S.B. No. 1326, allowing for the use of jail-based competency restoration programs as an alternative to outpatient competency restoration programs or inpatient hospital competency programs.[105]

The Texas Health and Human Services Commission awarded $1.9 million of the 2017 appropriation to four Texas jail-based competency restoration programs.[106] The services the programs provided included multidisciplinary treatment, cognitive behavioral therapy, coordination of general healthcare, competency restoration education, and interviewing .[107] During 2019, these programs served 346 patient-defendants and restored competency to over 30% of those patient-defendants.[108] Of those whose competence was not restored, some were sent to state hospitals and others had their charges dropped and were released.[109]

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[97] HOGG FOUND. FOR MENTAL HEALTH, *Texas 83rd Legislative Session: Summary of Mental-Health Related Legislation* 1, 10 (2013).
[98] Brandi Grissom, *Proposal: Allow Private Firms to Provide Mental Health Services in Jails*, TEX. TRIB. (Apr. 9, 2013), http://www.texastribune.org/2013/04/09/proposal-allow-private-mental-health-services-jail/ [https://perma.cc/2LY9-Q5DB].
[99] Act of Sept. 1, 2013, ch. 797, § 2, 2013 Tex. Sess. Law Serv. 1, 1–2 (West) (codified as TEX. CODE CRIM. PROC. ANN. art. 46B.090)
[100] AMANDA WIK, ALTERNATIVES TO INPATIENT COMPETENCY RESTORATION PROGRAMS: JAIL-BASED COMPETENCY RESTORATION PROGRAMS 1, 7 (2018).
[101] HEALTH & HUM. SERVICES COMM'N, REPORT ON THE JAIL-BASED COMPETENCY RESTORATION PILOT PROGRAM 1, 5 (2017).
[102] TEX. JUD. COUNCIL, MENTAL HEALTH COMMITTEE REPORTS & RECOMMENDATIONS 1, 7 (2016).
[103] *Id.* at 6.
[104] Act of Sept. 1, 2017, ch. 748, § 29, 2017 Tex. Sess. Law Serv. 1, 33–36 (West) (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 46B.090).
[105] Act of Sept. 1, 2017, ch. 748, § 14, 2017 Tex. Sess. Law Serv. 1, 17–19 (West) (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 46B.073).
[106] LAQUINTA SWAN & LUCRECE PIERRE-CARR, TEXAS COMPETENCY RESTORATION: OUTPATIENT AND JAIL-BASE 1, 13 (2019).
[107] *Id.* at 14.
[108] *See id.* at 15.
[109] *Id.* at 9.

Upon review, a representative of the pilot program at Lubbock considered the programs successful and was pleased with the program's progress.[110]

The Texas legislation allowing for jail-based competency restoration would be toothless were it not for another law passed in the 2007 legislative session: Article 46B.0095.[111] This statute includes a provision allowing an IST defendant to be committed to a mental hospital, inpatient competency restoration program, or jail-based competency restoration program for a period of time up to the length of the maximum term for the offense of which the defendant is accused.[112] If the court has found that a defendant's competence is unlikely to be restored, this provision allows for a de facto finding of guilt—a maximum sentence for a crime for which the defendant has neither been tried nor found guilty. In essence, this is a sentence punishing the crime of incompetence.

By imposing the sentencing term from the patient-defendant's accused crime, the Texas legislature has circumvented the Court's decision in *Jackson v. Indiana* that held that the indefinite commitment of an IST defendant is a violation of due process.[113] However, the Texas statute creates a constitutional issue by affording a de facto sentence to a defendant who has neither been tried nor found guilty.[114] This violation of procedural due process is particularly offensive because it preys upon defendants who do not have the practical capacity to question the statute's constitutionality.

To date, only one case has addressed Texas's practice of applying statutory sentences to civil commitments. In *Reinke v. State*, Mr. Reinke, a defendant declared by the court to be incompetent to stand trial, was committed to a mental health facility.[115] On appeal, Mr. Reinke challenged the lower court's use of punishment enhancements to increase his commitment from 20 years (the statutory maximum for attempted murder, the crime of which he was accused), to 99 years.[116] The court held that the use of enhancements was improper, and that the authorizing statute's language[117] did not provide for the use of sentence enhancements.[118] The court remanded the case to the district court for readjustment of Mr. Reinke's commitment to 20 years.[119]

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[110] TEX. JUD. COMM'N ON MENTAL HEALTH, MEETING NOTEBOOK 1, 19 (2019).
[111] TEX. CODE CRIM. PROC. ANN. art. 46B.0095 (West 2017) (previously codified as TEX. CODE. CRIM. PROC. ANN. art. 46B.009).
[112] *Id*.
[113] Jackson v. Indiana, 406 U.S. 715, 731 (1972) ("[W]e . . . hold that Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process.").
[114] *See* art. 46B.0095.
[115] Reinke v. State, 348 S.W.3d 373, 375 (Tex. Ct. App. 2011).
[116] *Id.*
[117] TEX. CODE. CRIM. PROC. ANN. art. 46B.0095 (West 2020).
[118] *Reinke*, 348 S.W.3d at 381 (interpreting TEX. CODE. CRIM. PROC. ANN. art. 46B.0095 (West 2020)).
[119] *Id*. (failing to show any indication that Mr. Reinke's attorney raised the issue that the commitment itself may be a violation of Mr. Reinke's procedural due process rights: an issue of constitutionality that Texas courts have not yet been faced with respect to this statutory scheme).

At present, six states allow courts to involuntarily commit IST defendants for the maximum sentence for the crime of which they are accused.[120] Other states employ varying standards, including commitment for the "two-thirds of the authorized maximum term of imprisonment for the highest class felony charged"[121] and "three years" except when charged with murder.[122]

V. AN URGENT NEED FOR CHANGE

The problem with Kentucky's law regarding incompetence is highlighted in the case of Cane Madden. In August 2019, a Louisville, Kentucky court found Madden incompetent to stand trial for a charge of burglary from May 2019, and he was involuntarily committed to Central State Hospital.[123] But because administrators at Central State deemed Madden to be unresponsive to treatment,[124] he was released less than 24 hours later.[125] In August 2019, an eight-year-old girl in Louisville was hit in the head with a shovel, fracturing her skull, and raped.[126] Madden was seen in the area before and after the assault, and he was arrested by Louisville police during the early hours of the morning.[127] Madden revealed to officers explicit details of the assault and rape.[128]

When Madden appeared in court, his attorney requested that the charges against him be dropped, citing a past criminal matter against Madden were charges dropped due to incompetence.[129] Judge O'Connell denied the motion and scheduled

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[120] LA. CODE CRIM. PROC. ANN. art. 648 (2017); N.D. CENT. CODE ANN. § 12.1-04-08 (West 2013); S.C. CODE ANN. § 44-23-460 (2011); S.D. CODIFIED LAWS § 23A-10A-15 (2020); TEX. CODE CRIM. PROC. ANN. art. 46B.0095 (West 2017); UTAH CODE ANN. § 77-15-6 (West 2018).

[121] N.Y. CRIM. PROC. LAW § 730.50 (McKinney 2013).

[122] MINN. STAT. ANN. § 20.01 (West 2020) (not specifying the time frame for commitment for a defendant accused of murder). Courts have generally upheld these qualified statutory commitments, with the exception of a Massachusetts statute that was held in violation of due process when it authorized commitment for the maximum time of imprisonment that person would serve before becoming eligible for parole for their most serious charge. Sharris v. Commonwealth, 106 N.E.3d 661 (Mass. 2018). Because the Massachusetts statutory scheme denies parole eligibility to those serving a life sentence for first degree murder, the Massachusetts Supreme Court held that the application of this statutory commitment to an IST defendant accused of first-degree murder amounted to an indefinite commitment and a violation of substantive due process. *Id.* at 664; *see* MASS. GEN. LAWS ANN. ch. 123, § 16 (West 2015); *see also* MASS. GEN. LAWS. ANN. ch. 265, § 2 (West 2014).

[123] Jason Riley & Chad Mills, *'Every Prosecutor's Nightmare': Sex Assaults Highlight 'Crazy Loophole' Freeing Mentally Ill Defendants*, WDRB.COM (Aug. 25, 2019), https://www.wdrb.com/in-depth/sunday-edition-sex-assaults-highlight-crazy-loophole-freeing-mentally-ill/article_a4a498f2-c5bb-11e9-9284-ffe7e1349599.html [https://perma.cc/5KVF-GENR].

[124] *See id.*

[125] *Id.*

[126] Billy Kobin, *Louisville Man Fractured 8-Year-Old's Skull With a Shovel and Raped Her, Police Say*, COURIER JOURNAL (Aug. 12, 2019, 4:34 PM), https://www.courier-journal.com/story/news/crime/2019/08/10/louisville-police-man-cane-madden-raped-8-year-old-fractured-her-skull-shovel/1975531001/ [https://perma.cc/DS2S-9HT6].

[127] *Id.*

[128] *Id.*

[129] Deni Kamper, *Man Accused of Raping 8-Year-Old is Example of Crack in System, Lawmaker Says*, WLKY.COM (Oct. 25, 2019, 5:09 PM), https://www.wlky.com/article/man-accused-of-raping-8-year-old-is-example-of-crack-in-system-lawmaker-says/29591750# [https://perma.cc/H8SZ-BHQ5].

a hearing, allowing the Kentucky legislature the opportunity to amend the statutory provisions governing IST defendants with no substantial likelihood of regaining competence.[130]

Madden's case has garnered national attention,[131] and Kentucky legislators encountered outrage from the community, including a petition with over 11,000 signatures demanding that Madden not be released.[132] On February 20, 2020, Senator Morgan McGarvey, a Democrat from Kentucky's 19th District, filed Senate Bill 188.[133] The bill, co-sponsored by Senator Julie Raque Adams (a Republican from Kentucky's 36th District) and Senator Denise Harper Angel (a Democrat from Kentucky's 35th district),[134] would enable certain violent criminal IST defendants, with no substantial probability of attaining competency, to be placed on *judicial commitment*.[135] Under this form of commitment, a judge appoints a guardian ad litem to the defendant who is then tasked with advising and representing the defendant at all legal proceedings.[136]

Although Senate Bill 188 proposed solutions, it also introduced a myriad of constitutional, procedural, and logistical problems. The first problem encountered is with the appointment of a guardian ad litem to an IST defendant.[137] The use of a guardian ad litem in representing a criminal defendant is unprecedented in the United States. To appoint a guardian ad litem to a criminal defendant is to acknowledge his incompetence, and such an acknowledgement mandates that the criminal proceedings be halted until competence is regained.[138] Regardless of the advocacy a guardian ad litem might provide, the defendant still does not have the ability to understand the proceedings against him, and that is the crux of his substantive due

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[130] *See id.*

[131] John Hirschauer, *Kentucky's Insane Civil-Commitment Policy*, NAT'L REV. (Oct. 24, 2019, 9:01 PM), https://www.nationalreview.com/2019/10/kentuckys-insane-civil-commitment-policy/ [https://perma.cc/P673-ZZ5R]; Josh Saunders, *Man, 29, is Arrested for Raping an 8-Year-Old Girl After First Hitting Her Over the Head with a Shovel – Two Years After He Was Let Off On Another Sex Assault Charge*, DAILYMAIL.COM (Aug. 12, 2019, 9:55 PM), https://www.dailymail.co.uk/news/article-7346203/Man-29-arrested-hitting-eight-year-old-girl-head-shovel-raping-her.html [https://perma.cc/RM7F-8E4T]; Dom Calicchio, *Man Raped 8-Year-Old Girl After Hitting Her in Head with Shovel, Fracturing Her Skull: Police*, FOX NEWS (Aug. 10, 2019), https://www.foxnews.com/us/man-hit-8-year-old-girl-in-head-with-shovel-fracturing-her-skull-then-raped-her-police [https://perma.cc/GV23-6ARK].

[132] Denita Wright, *California Neighborhood Residents Request the Non-Release of Cane Madden*, CHANGE.ORG, https://www.change.org/p/senator-morgan-mcgarvey-california-neighborhood-residents-request-the-non-release-of-cane-madden [https://perma.cc/B67C-5WTS].

[133] S. B. 188, 2020 Reg. Sess. (Ky. 2020).

[134] *Senate Members by Name*, KY. GEN. ASSEMBLY, https://apps.legislature.ky.gov/Legislators/smembers_alpha.html [https://perma.cc/8WS2-ZWK3]. Somewhat inexplicably, Senator Harper Angel is the only one of the bill's sponsors whose district includes the location of Madden's last alleged attack.

[135] Ky. S.B. 188.

[136] *Id.*

[137] *Id.*

[138] *See* Pate v. Robinson, 383 U.S. 375, 378 (1966) ("[T]he conviction of an accused person while he is legally incompetent violates due process . . . .").

process rights.[139] The ability of a defendant to participate in his defense is crucial.[140] The appointment of a guardian ad litem simply does not comport with the spirit or letter of the law requiring a court to halt proceedings against an incompetent defendant.

Further, Senate Bill 188 called for the application of a "clear and convincing evidence" standard of proof in the competency hearing the bill prescribes.[141] Under current Kentucky law, the standard of proof at a competency hearing is the same as that for all evidentiary hearings.[142] This standard is in compliance with Supreme Court precedent, which clearly prohibits a state from requiring a defendant's incompetence to be proven by a "clear and convincing evidence" standard, because it would allow a state to try a defendant who is more likely incompetent than competent, a clear violation of due process.[143] For this reason, if enacted, S.B. 188 would be susceptible to constitutional challenges on the standard of proof it seeks to impose.

Lastly, Senate Bill 188 implicitly authorized indefinite commitment of IST defendants.[144] After a defendant has been committed, he must undergo periodic review hearings to reassess competency.[145] During the first year of commitment, the defendant's competence shall be reviewed every three months; during the second year of commitment, the defendant's competence shall be reviewed every six months; and during subsequent years, the defendant's competence shall be reviewed annually.[146] In fewer words, the proposed bill authorized the commitment of an IST defendant until the end of his life or until he regains competence, whichever happens sooner.[147] This indefinite commitment is in clear defiance of the Court's holding that such commitments resulting from incompetence to stand trial are in violation of the Fourteenth Amendment's guarantee of due process.[148]

Before Senate Bill 188 could be approved by the Senate Health, Welfare, and Family Services Committee, COVID-19 eclipsed the state's legislative agenda.[149] The bill never reached the Senate floor for a vote.[150]

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[139] *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (holding that test of competency is whether a defendant has reasonable ability to consult with his lawyer and reasonably comprehends the legal proceedings against him).
[140] *See* Drope v. Missouri, 420 U.S. 162, 172 (1975) ("[A] person whose mental condition is such that he lacks the capacity to . . . assist in preparing his defense may not be subjected to trial.").
[141] Ky. S.B. 188.
[142] Chapman v. Commonwealth, 265 S.W.3d 156, 174 (Ky. 2007).
[143] Cooper v. Oklahoma, 517 U.S. 348, 369–70 (1996).
[144] *See* Ky. S.B. 188.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] Jackson v. Indiana, 406 U.S. 715, 732 (1972).
[149] Jack Brammer & Daniel Desrochers, *Beshear Gives Lawmakers 2 Options Amid Controversy Over Legislature Continuing to Meet*, HERALD LEADER (Mar. 17, 2020, 8:25 PM), https://www.kentucky.com/news/coronavirus/article241261676.html.
[150] *See* Mills & Riley, *supra* note 123.

VI. CLOSING THE LOOPHOLE IN KENTUCKY

Community members, prosecutors, victims' advocates, judges, and public defenders have all voiced opinions on how Kentucky's laws might be amended in order to prevent situations like Madden's from occurring. The suggestions carry varying levels of applicability, relevance, and constitutionality and are individually considered here.

Wendy Morris, Commissioner of the Kentucky Department for Behavioral Health, recently suggested that creation of more mental health courts could prevent exploitation of this loophole in Kentucky's competency laws.[151] However, the jurisdiction of Kentucky's mental health courts will require significant expansion. At present, none of Kentucky's mental health courts accept defendants charged with violent felonies or sexual offenses.[152] Further, most mental health courts across the country do not provide services to IST defendants because involvement in such courts is supposed to be voluntary and participatory.[153] For these reasons, the institution of more mental health courts in Kentucky is unlikely to create a meaningful impact on the loophole at hand.

Another proposed solution is to add a provision to Kentucky's statutes that allows for the involuntary commitment of an incompetent criminal defendant for a length of time up to the maximum statutory sentence for the crime of which he is accused.[154] This strategy is employed by a few other states and has weathered challenges thus far.[155] However, the implementation of such legislation is likely to be unpopular among mental health advocates who find this form of sentencing without trial or verdict to be an alarming threat to the constitutional rights afforded to criminal defendants.

Instead of committing IST defendants under KRS 202A.026 or KRS 202B.040, the legislature could create a third provision exclusively for criminal commitment. To pass such a law would, in effect, be to revive the age of the asylum, as these indefinitely committed criminals would require housing in forensic psychiatry facilities. If such a provision were to contain similar criteria to that of KRS 202A.026 and KRS 202B.040, the statute could experience challenges on the grounds of imposing unnecessary restraint on defendants and on the grounds of the *Jackson v. Indiana* ruling prohibiting indefinite commitment.[156]

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[151] *Id.*

[152] *See Adult Mental Health Treatment Court Locator*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults?field_gains_mhc_state_value=KY [https://perma.cc/TKD7-EXVA].

[153] MICHAEL THOMPSON, FRED OSHER & DENISE TOMASINI-JOSHI, IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT 1, 5 (2007); SHELLI B. ROSSMAN ET AL., CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATION OF MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK 1, 45 (2012).

[154] *See* TEX. CODE. CRIM. PROC. ANN. art. 46B.0095 (West 2019).

[155] LA. CODE CRIM. PROC. ANN. art. 648 (2017); N.D. CENT. CODE ANN. § 12.1-04-08 (West 2013); S.C. CODE ANN. REGS. § 44-23-460 (2011); TEX. CODE. CRIM. PROC. ANN. art. 46B.0095 (West 2017); UTAH CODE ANN. § 77-15-6 (West 2020); WASH. REV. CODE ANN. § 10.77.025 (West 2018).

[156] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

If the criminal commitment statute created varied from those criteria set out in KRS 202A.026 and KRS 202B.040, however, the statute could be challenged for violation of the Equal Protection Clause. Equal Protection Clause violations like the one the court found in *Jackson v. Indiana* could be avoided by placing the same standards for commitment and release on criminal defendants that KRS 202A.026 and KRS 202B.040 place on those undergoing civil commitment and release proceedings.[157]

Kentucky is one of only three states which require in statute that a patient be likely to benefit from treatment in order to remain involuntarily committed in an inpatient facility.[158] If Kentucky were to change this requirement from mandatory criteria to permissive criteria, the problem of mental health administrators releasing dangerous, IST defendants with no substantial likelihood of restoration would likely be avoided. The statutory language "benefit from treatment" harkens back to the earliest days of involuntary commitment when such benefit comprised the sole criterion for commitment.[159] However, as Kentucky's statutory scheme for commitments have undergone numerous revisions,[160] and include other criteria in step with the commitment statutes of most other states,[161] there is no longer a need for such an ambiguous nicety. The statutory provisions already in place, regarding the least restrictive care setting possible, and regarding a defendant's threat of danger to self or others provide sufficient safeguards for the humane treatment of involuntarily committed psychiatric patients.

VII. CONCLUSION: RETHINKING COMMITMENT STANDARDS

The eyes of Kentuckians are upon the legislature as it attempts to both close this loophole in Kentucky's law and determine the disposition of Cane Madden's pending criminal charges. The implications of Kentucky's action regarding incompetency will extend far beyond the case at hand, despite the limited impact the state's legislature anticipates. Fiscal impacts aside, the legislation Kentucky enacts will reflect the esteem with which it regards public safety, accountability, and due process.

Among the solutions offered here, the most feasible, wholistic option is the removal of "who can reasonably benefit from treatment" from the commitment criteria under KRS 202A and 202B. Under such circumstances, a defendant like Cane Madden could be civilly committed on the criteria that he is a danger to himself or others, and that such commitment is the least restrictive form of treatment available. Such commitment would end, then, not when the defendant achieved competence, but when he no longer posed a danger to himself or others. Although the United States Supreme Court has struck down statutes authorizing indefinite

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[157] *Id.* at 727.
[158] TREATMENT ADVOC. CTR., STATE STANDARDS CHARTS FOR ASSISTED TREATMENT CIVIL COMMITMENT CRITERIA AND INITIATION PROCEDURE 1, 4–11 (2011).
[159] SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., *supra* note 24.
[160] *See* KY. REV. STAT. ANN. § 202.012 (West 2020) (repealed 1976); KY. REV. STAT. ANN. § 202.027 (West 2020) (repealed 1976); KY. REV. STAT. ANN. § 202.060 (West 2020) (repealed 1976).
[161] TREATMENT ADVOC. CTR., *supra* note 158.

commitment for the reason of incompetence alone,[162] the Court has found that proof of dangerousness, in combination with incompetence, is sufficient grounds for the commitment of civil defendants.[163]

No Kentucky case law gives significant meaning to the phrase "can reasonably benefit from treatment." The phrase is a remnant of the intake procedure of 17th century insane asylums, and has regularly been embedded within Kentucky's commitment statutes. There is little risk to removing this criterion, but there is great protection to be gained from it. Without it, administrators of forensic psychiatry facilities must justify the release of IST defendants on either the grounds that they are no longer dangerous, or there is a less restrictive mode of treatment available to the defendant.[164]

This solution is most feasible because it does not require the creation of a new system of courts, it does not require the addition of a new classification of commitment, and it does not face inevitable constitutional challenge. It does, however, preserve the rights of IST criminal defendants and limit the court's ability to commit them indefinitely for non-violent offenses. With the disposition of Cane Madden's case hanging in the balance, it is essential that Kentucky lawmakers choose a course of statutory action that maximizes protection of the public and preservation of constitutional rights—and in this circumstance, the simplest solution just might be the best one. Deleting this element of commitment criteria could be the simplest, least-expensive, most popular criminal procedural reform in Kentucky's history.

[162] *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 731 (1972).
[163] Kansas v. Hendricks, 521 U.S. 346, 358 (1997).
[164] KY. REV. STAT. ANN. § 202A.026 (West 2021); KY. REV. STAT. ANN. § 202B.040 (West 2021).