1969

Criminal Insanity Procedures in Kentucky

James Whitlow

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Procedure Commons

Click here to let us know how access to this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol57/iss3/10

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
CRIMINAL INSANITY PROCEDURES IN KENTUCKY

I. INTRODUCTION

The mental condition of the accused is one of the significant factors in the criminal process. Every American jurisdiction has statutory procedures for determining this condition.\(^1\) In many instances, however, these procedures are vague and incomplete.\(^2\) Therefore, several states have revised, or are currently revising, their criminal laws on this subject.\(^3\) In general, the revisions have been directed toward determining: (1) a defendant's mental capacity to stand trial; (2) his criminal responsibility at the time of the offense; and (3) the disposition of the mentally ill offender after trial.\(^4\)

The purpose of this note is to examine Kentucky's criminal law in the above areas, and to compare its procedures with methods employed by other jurisdictions. Finally, the psychiatric treatment provided for the criminal in Kentucky's mental hospitals and penitentiaries will be discussed.

II. PRE-TRIAL MENTAL EXAMINATION—INCOMPETENCY

According to common law, a defendant is not tried for a crime if he is unable to understand the charges brought against him or if he cannot assist counsel in preparing his defense.\(^5\) Courts consider it fundamentally unfair to convict a man who does not meet minimum standards of mental competency.\(^6\) Moreover, some authorities consider such a conviction, a violation of constitutional due process.\(^7\) Therefore, when a defendant is found to be mentally incompetent, trial proceedings are postponed until his health is restored.

The common law criteria for competency to stand trial have been approved by the American Law Institute in the Model Penal Code\(^8\)

\(^2\) Id.
\(^3\) Illinois, Minnesota, New York and Wisconsin are examples of states which have revised their laws on criminal insanity. Current proposals for such revisions have been made in the states of Delaware, Michigan and Texas.
\(^6\) *Mental Illness, Due Process and the Criminal Defendant*, supra note 5; *The Mentally Disabled and the Law*, supra note 1, at 357.
\(^7\) *The Mentally Disabled and the Law*, supra note 1, at 357.
and are embodied in the statutes of many states. Kentucky has no statute which states the standard for determining mental competency to stand trial. The Kentucky Court of Appeals, however, adopted the common law standard in *Strickland v. Commonwealth:*\(^9\)

The terms 'insane,' 'unsound mind,' and 'mental illness' are too loose to serve as a reasonable test of whether a person is properly fit to plead or defend himself in a criminal proceeding. For this purpose, whatever may be the technical classification of his mental state, legally or medically, the test is whether he has substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense.\(^1\)

Almost anyone can raise the issue of a defendant's capacity to stand trial, but in most cases the defendant is not examined unless the court considers it necessary. However, in Massachusetts a court is required to order a mental examination of all defendants who are accused of certain crimes.\(^12\) Kentucky has a similar statute,\(^13\) but it has been interpreted to be permissive rather than mandatory.\(^14\)

Kentucky provides for the determination of a defendant's competency to stand trial in Kentucky Rule of Criminal Procedure 8.06. This Rule states that if the court has reasonable grounds to believe that the defendant is insane, the trial proceedings shall be postponed until his mental capacity is determined. This Rule has been construed to give the trial judge complete discretion on whether to order a mental examination.\(^15\) Furthermore, a ruling by the trial judge on a defendant's motion for a mental examination is an interlocutory decree which will be reviewed only if there is a clear abuse of discretion.\(^16\)

The criminal law in Kentucky does not specify what procedures the trial judge must follow to ascertain whether the defendant is

---

10 375 S.W.2d 701 (Ky. 1964).
11 Id. at 703.
12 Mass. Gen. Laws ch. 128, § 100A (1964 Supp.). All defendants who are indicted for capital offenses or as habitual defendants are given a mental examination.
14 Copeland v. Commonwealth, 397 S.W.2d 59 (Ky. 1965).
15 Kilgore v. Commonwealth, 310 Ky. 826, 222 S.W.2d 600 (1949); Murrell v. Commonwealth, 291 Ky. 65, 168 S.W.2d 1 (1942).
16 Murrell v. Commonwealth, 291 Ky. 65, 163 S.W.2d 1 (1942). For a shocking case in which defendant was denied a sanity inquest before trial, see Robinson v. Commonwealth, 243 S.W.2d 673 (Ky. 1951). The defendant was accused of strangling a three year old girl to death and afterwards of "committing perverted sexual acts upon her body." The Court declared, "[c]learly there is no showing" that the trial judge abused his discretion by refusing to conduct a sanity hearing. *See also* McElwain v. Commonwealth, 400 S.W.2d 512 (Ky. 1966); Vincent v. Commonwealth, 394 S.W.2d 929 (Ky. 1965); *Court of Appeals Review,* 55 Ky. L.J. 385-86 (1967); *But see* Earnes v. Commonwealth, 397 S.W.2d 44 (Ky. 1965).
mentally competent to stand trial. Rule 8.06 states only that the issue of sanity shall be "determined as provided by law." This phrase probably refers to civil competency procedures, since the defendant obviously is not a criminal until proven guilty. This probability is buttressed by a Kentucky Attorney General Opinion which suggests that civil procedures be used,\(^{17}\) and by the Kentucky Court of Appeals, which holds that a jury is not necessary to determine competency.\(^ {18}\) Nevertheless, if Rule 8.06 is intended to refer to civil competency procedures, it should be made more specific. At present, a criminal defendant cannot be sure what competency procedures will be used by the trial judge.

In 1968, the Kentucky General Assembly enacted many new mental health laws which streamline civil commitment procedures and provide legal safeguards for mental patients.\(^ {19}\) For example, statutes now provide for the protection of a patient's right to communicate with his attorney\(^ {20}\) and to enter into contractual relationships.\(^ {21}\) In addition, new statutes specify definite time periods in which the patient's mental condition must be reviewed.\(^ {22}\) This later provision is designed to prevent the possibility of a patient becoming "lost" in a mental institution.\(^ {23}\) Because of these new laws, it is now even more important that Kentucky's Criminal Rules make civil procedures applicable to the criminal defendant.

The Kentucky Rules of Criminal Procedure need revision in other important areas. For example, the Rules should expressly provide that a court may dismiss charges against an incompetent defendant who has been committed for treatment. The Model Penal Code contains such a provision which states that an incompetent defendant should be discharged or placed in an appropriate institution subject to civil mental health procedures when it would be unjust to resume the criminal prosecution.\(^ {24}\) Although the Kentucky courts have sometimes followed this procedure, there is no authority for such action in

\(^{17}\) 1964 Ky. ATT'Y GEN. Op. 521.
\(^{18}\) Commonwealth v. Strickland, 375 S.W.2d 701 (Ky. 1964). There is some question, however, whether the Court would recommend civil procedures since it has adopted a different standard of competency for the criminal defendant from that which is used in the civil procedures.
After a defendant has spent months or years in a mental institution, it is difficult to find evidence or to obtain witnesses for his case. To prevent injustice, the court should have authority to dismiss the criminal charges.

Of course, if the court believes a fair trial is possible, the criminal proceedings against a mentally restored defendant should be resumed. Any prison sentence given in such a case, however, should be reduced by the amount of time the defendant has already spent in a mental institution. A defendant should not be required to endure many months in a mental institution only to be released with his full prison sentence remaining. Such a procedure would not only hinder any chance of rehabilitating the criminal, but it might encourage attorneys to advise incompetent defendants to stand trial. Illinois has recognized this problem and has included such a time credit in its Code of Criminal Procedure, but Kentucky's Criminal Rules do not contain this needed provision.

Because many states do not provide proper mental health facilities or have adequate criminal procedures, strong objections have been made to pre-trial competency proceedings. One author has asserted that forty-five percent of persons committed because of incompetency meet the test of competency and that the procedural rule for determining incompetency is merely employed to accomplish preventive detention. Another writer has stated, "that because of the enormous potential threat to civil liberties, psychiatrists would do better to define incompetency only in the most severe case of deficiency, confusion or disorganization."

In Kentucky, the General Assembly has provided fair and equitable competency procedures. When a defendant's mental condition is in question a circuit court appoints at least two physicians to submit a

---

25 Dr. John Corcella, M.D., Chief of Staff at Eastern State Hospital, Lexington, Ky., stated in an interview on November 4, 1968, that the criminal defendant is rarely declared incompetent. Dr. Corcella added, however, that if a defendant is admitted to the hospital for incompetency, the courts normally drop the criminal charges against him.


27 ILL. CODE CRIM. PROC. § 104-3(c) (1963).


certified opinion of his mental health.\textsuperscript{32} If the physicians believe the defendant should be committed to an institution for treatment, the court must conduct a hearing. Although the hearing is somewhat informal, witnesses are examined and evidence is introduced. The defendant is entitled to an attorney at the hearing.\textsuperscript{33} If the court finds that the defendant is mentally ill and will probably cause injury to himself or others, or that he lacks capacity to make responsible decisions, he is committed to an institution for an indeterminate period.\textsuperscript{34} However, the institution must submit a report of the defendant's condition to the court at least every six months.\textsuperscript{35}

If all the states would end the inequities in pre-trial competency determination, the whole criminal process dealing with mentally ill offenders might be improved. The early detection of an incompetent defendant would reduce expensive judicial proceedings and would provide psychiatric help at a time when recovery may be possible. Furthermore, the problems encountered by the courts in dealing with the insanity defense at trial might be avoided. The psychiatrist would escape the difficult job of testifying under the rigid criminal responsibility standards, and of determining the defendant's prior mental condition.\textsuperscript{36}

\section*{III. Insanity Defense at Trial}

At trial, a defendant may raise the issue of his mental condition by pleading insanity. Although every offender is presumed to be responsible for his criminal acts,\textsuperscript{37} he has traditionally been excused for such acts when he lacks "free will" over his conduct,\textsuperscript{38} or commits a crime for no rational reason.\textsuperscript{39} Unlike pre-trial incompetency, criminal insanity is determined at the time of the offense, and if proven, will absolve a defendant of a crime.\textsuperscript{40}

\begin{flushleft}
\textsuperscript{33} Id.
\textsuperscript{34} KRS § 202.239 (Cumm. Supp. 1968).
\textsuperscript{35} Polsky, supra note 5, at 505-06; Sadoff, supra note 4, at 567.
\textsuperscript{36} E.g., Morris, Criminal Insanity, 43 WASH. L. REV. 583, 585 (1968).
\textsuperscript{37} E.g., Comment, Mental Illness and Criminal Responsibility, 5 TULSA L.J. 171, 178 (1968).
\textsuperscript{38} The Mentally Disabled and the Law, supra note 1, at 330.
\textsuperscript{40} See generally 21 AM. JUR. 2D Criminal Law 26 (1965). In California, the defense of diminished responsibility is available to a defendant in addition to the defense of insanity. Under the diminished responsibility doctrine, a defendant cannot be convicted of certain crimes, such as murder, burglary, and assault, unless it is shown that he possessed the requisite elements of criminal intent. This doctrine was established in People v. Gorshen, 336 P.2d 492 (Cal. 1959), where the court stated:
\end{flushleft}
Criminal insanity is defined in legal rather than medical terminology. Although the legal authorities have struggled for years to define the boundaries of criminal responsibility, at present there is no uniform standard applied by all states. The "knowledge of right and wrong" test applied in the famous M'Naghten Case was one of the first standards formulated by the courts. This rule, or an adaptation of it, is still employed by the majority of states, although it has been the subject of endless controversy.

Many medical authorities have often complained that the M'Naghten rule is such a restrictive approach that it forces the medical witness to make the moral decision of what is right or wrong. Partly because of this criticism, such standards as the Durham rule, the

(Footnote continued from preceding page)

... on the trial of the issues raised by a plea of not guilty to a charge of a crime which requires proof of a specific mental state, competent evidence that because of mental abnormality not amounting to legal insanity defendant did not possess the essential specific mental state is admissible. Id. at 498.

In People v. Fortham, 64 Cal. Repr. 669, 257 A.C.A. 58 (1967), the court stated: It is now well established in this state that substantial evidence of mental illness short of legal insanity is a significant factor in negating the specific legal intent essential to an offense. Under this rule, if murder is charged and it is shown that the defendant, though legally sane, was suffering from a diminished mental capacity caused by intoxication, trauma or disease which prevented his acting with malice aforethought or with premeditation and deliberation, he cannot be convicted of murder in the first degree. Id. at 672, 257 A.C.A. at 60.

Diminished responsibility is presently being asserted in the trial of Sirhan Sirhan, the accused murderer of Robert F. Kennedy.

43 The M'Naghten rule is usually given as follows:
To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong. 8 Eng. Rep. 718, 722 (1843).
44 In some states the M'Naghten rule is combined with an irresistible impulse test. This test applies to a defendant who may know right from wrong but who cannot resist the criminal act. See The Mentally Disabled and the Law, supra note 1, at 332-33.
45 See Cohen, Criminal Responsibility and the Knowledge of Right and Wrong, 14 U. Miami L. Rev. 30 (1959); Diamond, From M'Naghten to Currens, and Beyond, 50 Calif. L. Rev. 188 (1962); Mueller, M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity, 50 Geo. L.J. 105 (1962).
47 Under the Durham rule, "... an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).
Model Penal Code rule,\(^4\) and the *Currens* rule\(^5\) have been formulated. Of the new standards, the Model Penal Code rule has been the most widely accepted. The states of Vermont, Illinois, New York, Wisconsin and Maryland have adopted this rule,\(^6\) and some authorities believe that it will eventually be approved by a majority of states.\(^7\) It will be unfortunate if all states do not agree on a uniform criminal responsibility standard. As one writer has noted, at present, one state may determine a defendant to be criminally insane, while at the same time another state might hold him responsible.\(^8\)

For various reasons, objections have been raised concerning the use of any criminal insanity test.\(^9\) Some writers contend that a defendant cannot be neatly classified as sane or insane, and any criminal responsibility standard must necessarily require such classification.\(^10\) Other authorities believe that a standard is unnecessary because the issue of insanity is inevitably determined by a jury.\(^11\) These writers argue that juries ignore insanity instructions and base their decisions on their own understanding of criminal responsibility. One author states, "[j]uries want to know whether the defendant is really a "bad" person and they could not be less interested in the complexities of his psycho-motivation."\(^12\) Regardless of these objections, however, the courts have continued to make use of insanity standards.

In Kentucky there is no codified standard for criminal responsi-

---

\(^4\) Model Penal Code § 4.01 (Proposed Official Draft, 1962) provides:
(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

\(^5\) United States v. Currens, 290 F.2d 751 (3d Cir. 1961). The *Currens* rule provides:
A person is not criminally responsible for his conduct if at the time he acts, as a result of mental disease or defect, he lacks capacity to conform his conduct to the requirements of law. Id. at 774.


\(^8\) Broder & Merson, *supra* note 41.


\(^11\) See, e.g., Newsome v. Commonwealth, 366 S.W.2d 174, 179-80 (Ky. 1962) (dissenting opinion); Slovenko, *supra* note 29, at 68.

\(^12\) Note, *Madness in the Criminal Law*, 40 TEMP. L.Q. 348, 357 (1967).
bility. Until recently, the Kentucky courts used the M'Naghten rule in jury instructions on insanity. In *Terry v. Commonwealth*, however, the Kentucky Court of Appeals held that the standard used in the Model Penal Code "properly reflects the law." The Court stated that a jury should be instructed on insanity as follows:

The law presumes every man sane until the contrary is shown by the evidence. Before the defendant can be excused on the ground of insanity the jury must believe from the evidence that at the time of the killing [criminal conduct], the defendant, as a result of mental disease or defect, (a) was substantially unable to understand that he was violating the law or, (b) if he did understand it, was nevertheless substantially unable to resist his impulse to commit the illegal act.

Although the Court in *Terry* supposedly adopted the standard of the Model Penal Code, it failed to use its exact language. The Model Penal Code provides:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Despite the discrepancy between the two standards, the Court has upheld the use of either standard by lower courts. For instance in *Graham v. Commonwealth*, the Kentucky Court of Appeals upheld a circuit court's application of the Code in an insanity instruction. Although the Court regarded the use of the *Terry* instruction as a "safer and better practice," it held that the use of the Code was not improper. The Court added, "In our view the two instructions express the same thought in different language, either of which adequately presents so much of the insanity defense as it purports to cover."

Since the Kentucky Court has made no legal distinction between the two instructions, why a deviation was made in the language of the Code is not clear. The use of different insanity standards within the State will impede the chances for uniformity in insanity instructions in Kentucky as well as in the United States, and may lead to inconsistent decisions. Although a jury may not always recognize the distinction, a

---

57 *Terry v. Commonwealth*, 371 S.W.2d 862, 865 (Ky. 1963).
58 371 S.W.2d 862 (Ky. 1963).
59 Id. at 865.
60 Id.
62 420 S.W.2d 575 (Ky. 1967).
63 Id. at 577-78.
64 Id.
65 Id.
psychiatrist could conceivably express a different opinion depending on the standard employed. As Justice Palmore stated with regard to the distinction between the M’Naghten and Terry rules, "certainly the medical witness, on whose testimony life and death may hang in the balance, will recognize that the improvement in terminology is far more than 'technical'." The legislature should clarify the law in this area by codifying the standard of criminal responsibility to be used by the courts.

Most states allow not only the court, but also the state or defense counsel, to call psychiatrists to testify concerning the defendant's mental condition. Because the average jury cannot detect mental illness, it must rely heavily on the testimony of these medical witnesses in reaching a verdict. In most cases, however, the jury is confronted with the problem of choosing between conflicting opinions from equally qualified witnesses.

The conflicting testimony of the medical experts most often occurs when hypothetical questions are used. These questions are usually allowed whenever the witness has not personally examined the defendant. In such cases the witness is asked to give his opinion on an assumed set of facts. The examining party is generally permitted to select, at his discretion, any set of facts available from evidence presented at the trial. Some authorities assert that this method of selection enables the parties to ask the type of question which will elicit the "desired" answer from the witness. Thus, while the medical witnesses may be correctly answering the questions posed, they are reaching different conclusions concerning the defendant's mental condition. To prevent this result, critics suggest that the courts either forbid the use of hypothetical questions or regulate the facts to be assumed. Perhaps the Model Penal Code has reached a better solution by prohibiting a medical expert from testifying if he has not examined the defendant. With such a prohibition, the need for hypothetical questioning in most cases is eliminated.

Another reason often cited for the cause of conflicting testimony is the application of exclusionary rules of evidence to the opinions given

---

66 Terry v. Commonwealth, 371 S.W.2d 862, 866 (Ky. 1963) (concurring opinion).
67 Kentucky follows this procedure for employing expert witnesses.
68 Cf. Willis, supra note 23, at 53.
70 Id.; Willis, supra note 23, at 92.
by the medical witness. Courts sometimes allow the use of such evidentiary rules as privileged communications, opinion, and hearsay to exclude much of the psychiatrist's testimony. In some instances, therefore, medical opinions on the defendant's condition seem conflicting because the facts on which they were based are not given.

The use of these exclusionary rules of evidence may also cause the jury to unjustifiably reject, or accept, a psychiatrist's conclusions. The psychiatrist must consider all information he has received concerning the defendant in making a determination of his condition, regardless of whether it is admissible as evidence. If the witness cannot testify on this information the jury cannot properly weigh his opinion. Due to the ambiguous language used in psychiatry, the mere classification of a defendant into a certain mental category is practically meaningless. Therefore, the jury is left with nothing but the credibility of the psychiatrist as a basis in making its decision.

To prevent the application of the exclusionary rules of evidence to the testimony of the medical witness, the criminal law should provide that a psychiatrist be permitted to make any explanation reasonably necessary to clarify his diagnosis and opinion, and may be cross-examined concerning any matter bearing on his competency or credibility or the validity of his diagnosis or opinion. By allowing such open testimony, the jury would then have some means other than the witness' personality or professional credentials to evaluate the medical opinion. Moreover, the psychiatrist would assume his proper role as a physician rather than as a judge.

IV. DISPOSITION OF THE CRIMINALLY INSANE

Generally, when a defendant is acquitted on the grounds of insanity, he is examined to determine his present mental condition. The purpose of this examination is to assure the court that the defendant is no longer dangerous to society. Therefore, although a defendant may have only been suffering from temporary insanity at the time of his

74 Allen, supra note 73, at 206.
77 S. HALLECK, supra note 30, at 225.
78 Cf. Usdin, supra note 45, at 119.
criminal conduct, a presumption remains that insanity has continued past the conclusion of the trial.\textsuperscript{80}

The Model Penal Code\textsuperscript{81} and a minority of states\textsuperscript{82} require the commitment of a defendant to an appropriate institution for custody and observation after trial if he is acquitted on the grounds of insanity. Assertions have been made that this mandatory commitment procedure makes the defense of insanity more acceptable to the public and the jury.\textsuperscript{83} In addition, some authorities have contended that, although the defendant's mental condition may have improved, his personality and background may still make him dangerous.\textsuperscript{84}

In Kentucky, the Criminal Rules do not specifically require the commitment of a defendant who has been acquitted for insanity. Rule 9.90 states that the court \textit{may} on motion of the prosecuting attorney, or on its own motion, impanel a jury to determine the defendant's present mental condition, or it \textit{may} have the issue determined as otherwise provided by law. The latter provision of this Rule apparently means that civil insanity procedures are employed when the court does not impanel a jury. If the defendant is found to be presently insane, he is committed to a mental hospital for treatment. However, the defendant is released when he is found in good mental condition.\textsuperscript{85}

For various reasons, Kentucky's method of handling the acquitted defendant seems preferable to the mandatory commitment procedure. Obviously not every defendant is presently insane merely because he was insane at the time of the criminal act. Yet, when a state employs an automatic commitment procedure, each defendant, including those in good health, is committed to a mental institution. Because these institutions are often severely understaffed and have inadequate facilities, such defendants may be confined for a considerable time before they are examined.\textsuperscript{86} In many jurisdictions the mental health laws are so incomplete that the defendant is left without a remedy.\textsuperscript{87}

The automatic commitment procedure may provide a means for a state to control those defendants who may have feigned mental illness to gain an acquittal.\textsuperscript{88} By following such a scheme, however, the defendant is punished despite his acquittal, and consequently the

\begin{flushright}
\textsuperscript{80} 21 AM. JUR. 2d Criminal Law § 55 (1965).
\textsuperscript{81} MODEL PENAL CODE § 4.08 (Proposed Official Draft 1962).
\textsuperscript{82} MODEL PENAL CODE § 4.08, Comment (Tent. Draft No. 4, 1955).
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Interview with Dr. John Corcella, M.D., Chief of Staff at Eastern State Hospital, in Lexington, Kentucky, November 4, 1968.
\textsuperscript{87} Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia, supra note 26, at 164-69.
\textsuperscript{88} SLOVENKO, supra note 29, at 76.
\end{flushright}
mental institutions are changed from hospitals to prisons. Moreover, if medical authorities are allowed to determine who has feigned mental illness, then they are, in effect, replacing the court and jury in determining the disposition of the defendant. If this is the desired result, the criminal law on disposition should be changed, rather than using commitment procedures for this purpose. The states, by using the commitment procedures to detain a criminal, have shown a basic mistrust for the jury system in deciding the disposition of a defendant.

V. Psychiatric Treatment for the Convicted

A convicted offender who is serving a penitentiary term receives very little psychiatric treatment. Estimates show that in the United States there is only one psychiatrist for every two to three thousand federal prisoners and only one for every ten to twelve thousand offenders in state prisons. In Kentucky, there is not one psychiatrist in the entire penal system. Nevertheless, at just one of Kentucky’s penitentiaries, there are approximately ninety psychotic prisoners and approximately two hundred more who are so retarded as to be a problem. Those offenders who are thought to be mentally ill are transferred to state mental hospitals for short periods. The mental hospitals are so overcrowded, however, that these mentally disturbed prisoners can be given only minimum treatment. In addition, the prisoners create security problems for the mental institutions since there is only one state mental hospital equipped with a maximum security ward and it is needed entirely by the Mental Health Department.

Many times a prisoner’s emotional problems are created by the prison itself. A recent study of prison conditions in Kentucky states:

There are hundreds of youthful, impressionable inmates confined in these institutions with hardened criminals, aggressive psychopaths, degenerates, and almost every type of perverted person, in some instances without even the most elementary provision for their personal welfare, physical needs and protection—much less rehabilitation. There are hundreds of others—adult offenders—confined for the first time, who, while they have made serious mistakes, are not basically criminal. These are in the same institution.

---

89 Slovenko, supra note 26, at 76.
92 KENTUCKY LEGISLATIVE RESEARCH COMMISSION, supra note 90, at 11.
94 Id. at 3.3.
Both of the prisons for male offenders in Kentucky are populated at 125 per cent of optimum capacity. In 1963, a prison newspaper in Kentucky reported that in the prison there had been four suicides by hanging within one year. The paper reported that at least two of the four prisoners had backgrounds of mental illness.

The most frequent answer given to the problems of the prisons is to provide more money. Of course much more money will be needed to provide better personnel and physical facilities, but the prisons must also develop worthwhile rehabilitation programs. Correctional institutions should study the various types of rehabilitation centers now in existence to aid them in planning these programs. In addition, the criminal law should allow the release of a prisoner before his time for parole has expired when the prison authorities believe it will be helpful. As one writer has stated, "Psychiatrists have learned that one of the vital secrets of rehabilitation is that when a patient responds to the corrective program he must be returned to a suitable place in society when ready."

VI. CONCLUSIONS

In Kentucky, courts have frequently formulated the law on criminal insanity. In areas where the legislature has failed to act, or where the statutes have been vague and incomplete, courts have been required to construct the law. Partly because of this, there are many gaps in Kentucky criminal insanity procedures. Some of the more obvious deficiencies are:

(1) There is no codified standard for either pre-trial competency or criminal responsibility.

(2) The Kentucky Court of Appeals has recognized the use of two criminal responsibility standards in Kentucky. Such a practice could conceivably, and probably does, lead to inconsistent decisions.

(3) There has been no attempt by the legislature to formulate laws which might eliminate the troublesome problem of conflicting testimony among medical witnesses. Some states have effectively restricted the use of hypothetical questioning and the application of exclusionary rules of evidence in this area.

(4) The criminal procedures are ambiguous on whether the recently revised civil mental health laws are applicable to the criminal de-
fendant. Due to the intolerable conditions in some of Kentucky's mental institutions, it is extremely important that these civil laws apply to the criminal defendant.

(5) There is no authority for the courts to dismiss criminal charges against an incompetent or mentally ill defendant who has been committed to a mental institution.

(6) There is no statutory provision for allowing the courts to deduct from a prison sentence the time spent by a defendant in a mental institution.

Of course, this list is by no means complete. It is presented merely to illustrate the inadequacies and inequities in the Kentucky insanity laws. If the criminal defendant is to obtain due process, the legislature cannot delay in revising its law and procedure.

James Whitlow