



INTRODUCTION

When a person is brought into court to stand trial, it is legally imperative that they understand what is happening to them and to be able to assist in their defense. If they are unable to do so, they may be found to be incompetent to stand trial (IST) and ordered to inpatient or outpatient treatment to restore competency.¹ A person cannot legally be tried for an offense if he or she is found to be incompetent to stand trial.

The most recent U.S. estimates suggest that 50,000 to 60,000 people undergo competency evaluations every year,² and that in about a fifth of these cases the person was found incompetent to stand trial.³ In other words, around 12,000 people are found incompetent to stand trial in the U.S. every year, and around 4,000 of these people are hospitalized for treatment to restore competency at some point during a single incident of court involvement.⁴

Over the years, states have enacted laws addressing the constitutional standards and due process rights of people found incompetent to stand trial. While some have adopted reasonable maximum treatment periods and have shifted to greater use of outpatient treatment to attempt to restore competency, others require costly inpatient treatment for too many people and allow

those people to remain confined for long periods of time.⁵

As people's liberty is denied when they are involuntarily confined to a mental institution pretrial, and is severely curtailed when required to enroll in residential and outpatient programs, it is critical that they not be held in "competency limbo" beyond the time that research shows is reasonable to either restore competency or to determine that he or she is not substantially likely to be restored. Failure to do so raises questions not only of civil liberties, but also of fiscal efficacy, as state mental hospitals frequently cost significantly more than community-based treatment programs.

WHAT IS THE LAW?

In 1972, the U.S. Supreme Court ruled in *Jackson v. Indiana* that people can only be held for a "reasonable period of time" to determine

"In reality, statutes tying treatment to the maximum sentence attempt to assure that incompetent defendants are punished sufficiently for their alleged crimes."

~ Grant H. Morris and J. Reid Meloy

whether there is a substantial probability that they may soon be restored to competency to stand trial.⁶ The Court did not set a maximum time limit on attempts to restore

competency, leaving it up to the states to make this determination. A number of states base this time limit on research that shows that most people will be restored within six months to a year, and continued treatment and detention to restore competency beyond this time period is unnecessary.⁷ Twenty

states have a maximum treatment period of one year or less (see chart on pages 4 - 5).⁸ Yet, other states, like Maryland, base this maximum treatment period on other conditions, including the maximum possible sentence for the alleged offense, a practice that goes against research and against the purpose of competency treatment.

RESEARCH SHOWS THAT PEOPLE ARE LIKELY TO BE RESTORED TO COMPETENCY WITHIN SIX MONTHS OF RECEIVING TREATMENT.

A number of factors can determine whether a person will be restored to competency with specific treatment and within a given time period. But research shows that for the majority people who are likely to be restored, it usually happens within the first six months starting treatment to restore competency. Studies are inconclusive on the exact factors that will increase a person's likelihood of restoration. However, a number of studies report characteristics that may make a person more or less likely to be restored. A study out of Ohio, for example, found that people who are chronically psychotic with a history of lengthy inpatient hospitalization and people whose incompetence stems from irreparable cognitive disorders like an intellectual disability have a low probability of competency restoration.⁹

American Bar Association standards recommend that a person be re-evaluated for competency whenever a staff person feels that competency has been restored, if the person is not likely to have their competency restored, or at a minimum of every 90 days.¹⁰ But some states are not following these

recommendations, resulting in people remaining in treatment for longer than necessary.

Studies also show that the majority of people who are restored to competency are restored within a certain timeframe. Research on competency restoration for people with mental illness shows that 70 percent or more become competent within six months of starting treatment;¹¹ nine out of 10 will be restored within a year. A very small percentage of people do take longer to be restored to competency, and if substantial progress is shown, and the state's interest in prosecution is great, it may be appropriate to continue treatment for a brief additional period.

- A study of people in Oklahoma found that the average length of stay for people who were restored to competency was 63.7 days; less than 6 percent of the subjects had a length of stay greater than six months.¹²
- A study that reviewed 18 years of data in Indiana found that 72.3 percent of people admitted for incompetency to stand trial were restored within six months and 83.9 percent restored within one year.¹³
- A Florida study found that 40 percent of people were restored to competency in three months or less and 78 percent within six months.¹⁴

People with intellectual disabilities and brain disorders such as dementia, may face particular challenges in restoring competency to stand trial.

The issue of competency to stand trial for people with an intellectual disability is vital,¹⁵ yet most programs designed to restore competency do not explicitly consider the

needs of people with intellectual disabilities.¹⁶ One study found that 60 percent of people with an intellectual disability who undergo competency hearings are found incompetent.¹⁷ Restoring competency can be a challenge for people with an intellectual disability; a study of 75 people with an intellectual disability who were incompetent to stand trial found that two-thirds failed to be restored.¹⁸ Multiple studies have shown that people with dementia have lower chances of being restored to competency once deemed incompetent.¹⁹ And for people with Traumatic Brain Injury (TBI) and other acquired brain injuries (ABI) the traditional treatments provided in state hospitals may be ineffective and inappropriate, due to the unique characteristics of people with these injuries.

RECOMMENDATIONS

People who are mentally ill generally spend more time in the criminal justice system under some form of incarceration both pretrial and post-conviction than the general public due to their unique cases.²⁰ The lack of community-based treatment options, the training for police officers, and available crisis services, have been leading to more people with mental illness in the justice system, including prisons and jails as well as secure hospitals, many for minor offenses. While not everyone who has a mental illness who comes into contact with the justice system will be found incompetent to stand trial, for those who do, the consequences can be dire and long-lasting. Reducing the impact of the justice system on people with mental illness will lead to better life outcomes for individuals, fewer people in prisons and jails, reduced costs and improved public safety.

1. Ensure that effective community-based mental health resources are available and properly utilized.

2. Develop policies and practices for people with TBI or other ABI, including valid and reliable measures for screening, training for court personnel and treatment providers, and appropriate community-based programs.
3. Invest in quality, affordable and supportive housing for people who need it.
4. Eliminate quality of life policing sweeps that bring more people with mental illness and other mental disabilities, including TBI, into the justice system.
5. Expand Baltimore's existing special police team to one based on Memphis' Crisis Intervention Teams model used to respond to mental health or other behavioral crises that warrant police attention.²¹

Justice Policy Institute is a national nonprofit organization that changes the conversation around justice reform and advances policies that promote well-being and justice for all people and communities. For the full report, *When Treatment in Punishment*, please visit our website, www.justicepolicy.org, or call 202-558-7974 for more information.

State	Maximum Defined Competency Treatment Periods
Alabama	No max treatment
Alaska	180 days for crimes not involving force; 1 year crime of force against another
Arizona	21 months
Arkansas	1 year
California	Misdemeanor charges – lesser of 1 year or maximum sentence; felony – lesser of 3 years or maximum sentence.
Colorado	max sentence
Connecticut	Lesser of max sentence or 18 months.
Delaware	No max
D.C.	180 days total if charge did not involve crime of violence; If crime of violence max is required dismissal of charges at 5 years (except murder or 1st degree sex abuse and 1st degree sex abuse of child, in which case, no requirement to dismiss charges).
Florida	No max treatment limit. Criminal charges dismissed after 1 year for misdemeanors and 5 years for felonies.
Georgia	1 year.
Hawaii	No treatment maximum; no required dismissal of charges.
Idaho	270 days.
Illinois	At the end of 1 year, state either asks to dismiss charges or there is a “discharge hearing” in which there must be a finding of guilt “beyond a reasonable doubt,” or person released or civilly committed. If found “guilty” can have treatment for an additional 15 months to 5 years, depending on criminal charge.
Indiana	6 months
Iowa	Lesser of 18 months or maximum sentence of charged offense
Kansas	6 months.
Kentucky	60 days.
Louisiana	maximum sentence
Maine	1 year.
Massachusetts	40 days (plus possible 6 month civil commitment).
Michigan	Lesser of 1/3 of max sentence or 15 months.
Minnesota	Cannot be ordered for treatment on misdemeanors (charges dismissed); felonies, excluding murder = 3 years.
Mississippi	No max either treatment or criminal charges.
Missouri	12 months.
Montana	No max treatment or criminal charges.
Nebraska	No max treatment or criminal charges.
Nevada	Lesser of max sentence or 10 years.
New Hampshire	12 months.

New Jersey	No max treatment or required dismissal of charges.
New Mexico	9 months, except if felony involving “infliction of great bodily harm on another person,” use of firearm, aggravated arson, criminal sexual penetration or sexual contact of a minor, in which case (unless charges dropped) court may order hearing on “factual guilt” and if found “guilty and dangerous may order continued treatment for period not to exceed max sentence.
New York	90 days misdemeanor; felonies 2/3 of max sentence.
North Carolina	60 days.
North Dakota	No maximum treatment; charges dismissed at max sentence.
Ohio	1 year maximum through tiered system: 3rd or 4th degree misdemeanor = 30 days; 1st or 2nd degree misdemeanor = 60 days; Non-violent felonies = 6 months; Violent felonies = 1 year
Oklahoma	Lesser of max sentence or 2 years.
Oregon	Lesser of 3 years or max sentence.
Pennsylvania	No maximum; criminal charges dismissed after lesser of maximum or 10 years except 1st or 2nd degree murder can remain indefinitely.
Rhode Island	2/3 of maximum term of imprisonment for most serious charged offense.
South Carolina	90 days total.
South Dakota	1 year for other than Class A or B felony; in those cases, maximum sentence could have received.
Tennessee	no maximum treatment; no requirement for charges dismissed.
Texas	180 days maximum.
Utah	36 months if charged with aggravated murder; 18 months serious felony; 1 year all other charges (not to exceed maximum penalty).
Vermont	No commitment
Virginia	Misdemeanors max 45 days (except for “peeping into dwelling/enclosure or disorderly conduct in public places); for all other charges – lesser of max penalty or 5 years, except murder charge, no limit.
Washington	Non-felony & no history of violence or previous findings of IST or NGRI = no commitment Non-felony and history of one or more violence acts or previously been found IST or NGRI = 120 days
West Virginia	9 months
Wisconsin	Lesser of 12 months or max sentence
Wyoming	No maximum.

Source: Based on a 2005 review of the 50 state statutes and District of Columbia, conducted by the Maryland Disability Law Center.

¹ RD Miller, "Hospitalization of criminal defendants for evaluation of competence to stand trial or for restoration of competence: clinical and legal issues," *Behavioral Science in the Law* 21 (2003):369–91; DA Pinals, "Where two roads meet: restoration of competence to stand trial from a clinical perspective," *New England Journal of Criminal Civil Confinement* 31 (2005): 81–108.

² JL Skeem, SL Golding, G Berge, et al, "Logic and reliability of evaluations of competence to stand trial," *Law of Human Behavior* 22 (1998): 519–47; RJ Bonnie and T Grisso, "Adjudicative competence and youthful offenders, in *Youth on Trial: A Developmental Perspective on Juvenile Justice*," Edited by T Grisso and RG Schwartz. Chicago: University of Chicago Press, 2000, pp 73–103

³ GB Melton, J Pettila, NG Poythress, et al, *Competency to stand trial, in Psychological Evaluations for the Courts* (ed 2). New York: Guilford Press, 1997; JI Warren, WL Fitch, PE Dietz, et al, "Criminal offense, psychiatric diagnosis, and psycholegal opinion: an analysis of 894 pretrial referrals," *Bulletin of the American Academy of Psychiatry & Law* 19 (1991):63–9, Cited in Douglass Mossman, et al, "AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial," *The Journal of the American Academy of Psychiatry and the Law* 35, no. 4 (2007) www.forensic-experts.net/files/Forensic%20Psychiatry%20CTST%20evaluation.pdf

⁴ TG Gutheil and PS Appelbaum, *Clinical Handbook of Psychiatry and the Law* (ed 3). Philadelphia: Lippincott Williams & Wilkins, 2000; D Mossman, "Is prosecution 'medically appropriate'?" *New England Journal of Criminal Civil Confinement* 31 (2005):15– 80, Cited in Douglass Mossman, et al, 2007

⁵ See Grant H. Morris and J. Reid Meloy, "Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants," *U.C. Davis Law Review* 1, no. 27 (1993).

⁶ 406 U.S. 715 (1972).

⁷ See Grant H. Morris and J. Reid Meloy, 1993

⁸ Based on a 2005 review of the 50 state statutes and District of Columbia, conducted by the Maryland Disability Law Center.

⁹ D. Mossman, "Predicting restorability of incompetent criminal defendants," *Journal of the American Academy of Psychiatry & Law* 35 (2007): 34–43

¹⁰ American Bar Association, Mental Health, Competence to Stand Trial, Accessed July 2011. www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html#7-4.11

¹¹ See, G. Bennett and G. Kish, "Incompetency to stand trial: Treatment unaffected by demographic variables," *Journal of Forensic Sciences* 35 (1990): 403–412; S. L.

Golding, D. Eaves, and A. Kowaz, "The assessment, treatment and community outcome of insanity acquittees: Forensic history and response to treatment," *International Journal of Law and Psychiatry* 12 (1989): 149–179; D. R. Morris and G. F. Parker, "Jackson's Indiana: State hospital competence restoration in Indiana," *Journal of the American Academy of Psychiatry and Law* 36 (2008): 522–534; R. Nicholson and J. McNulty, "Outcome of hospitalization for defendants found incompetent to stand trial," *Behavioral Sciences and the Law* 10 (1998): 371–383.

¹² RA Nicholson and JL McNulty, 1998

¹³ D. R. Morris and G.F. Parker, 2008

¹⁴ Data provided by Forensic Services Division, Florida Department of Children and Families cited in Gary B. Melton and others, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 3rd Edition (New York: The Guilford Press, 2007)

¹⁵ R. Bonnie, "The competence of criminal defendants: A theoretical reformulation," *Behavioral Sciences and the Law* 10 (1990): 291–316.

¹⁶ Barry W. Wall and others, "Restoration of Competency to Stand Trial: A Training Program for Persons with Mental Retardation," *Journal of the American Academy of Psychiatric Law* 31, No. 3 (2003): 189–201, p. 189.

¹⁷ C. Everington and C. Dunn, "A second validation study of the competence assessment for standing trial for defendants with mental retardation (CAST-MR)," *Criminal Justice and Behavior* 22 (1995): 44–59

¹⁸ Shawn D. Anderson and Jay Hewitt, "The Effect of Competency Restoration Training on Defendants with Mental Retardation Found Not Competent to Proceed," *Law and Human Behavior* 26, no. 3 (2002): 343–351, p. 348.

¹⁹ Douglas R. Morris and George F. Parker, "Effects of advanced age and dementia on restoration of competence to stand trial," *International Journal of Law and Psychiatry* 32 (2009): 156–160, p. 158; Richard L. Frierson and others, "Competence-to-Stand-Trial Evaluations of Geriatric Defendants," *The Journal of the American Academy of Psychiatry and the Law* 30 (2002): 252–256, p. 254

²⁰ Criminal Justice/Mental Health Consensus Project (Washington, D.C.: Council of State Governments, 2002). www.consensusproject.org.

²¹ For more information on the Memphis Crisis Intervention Teams model, see Justice Policy Institute, *Due South: Looking to the South for Criminal Justice Innovations* (Washington, D.C.: 2011)