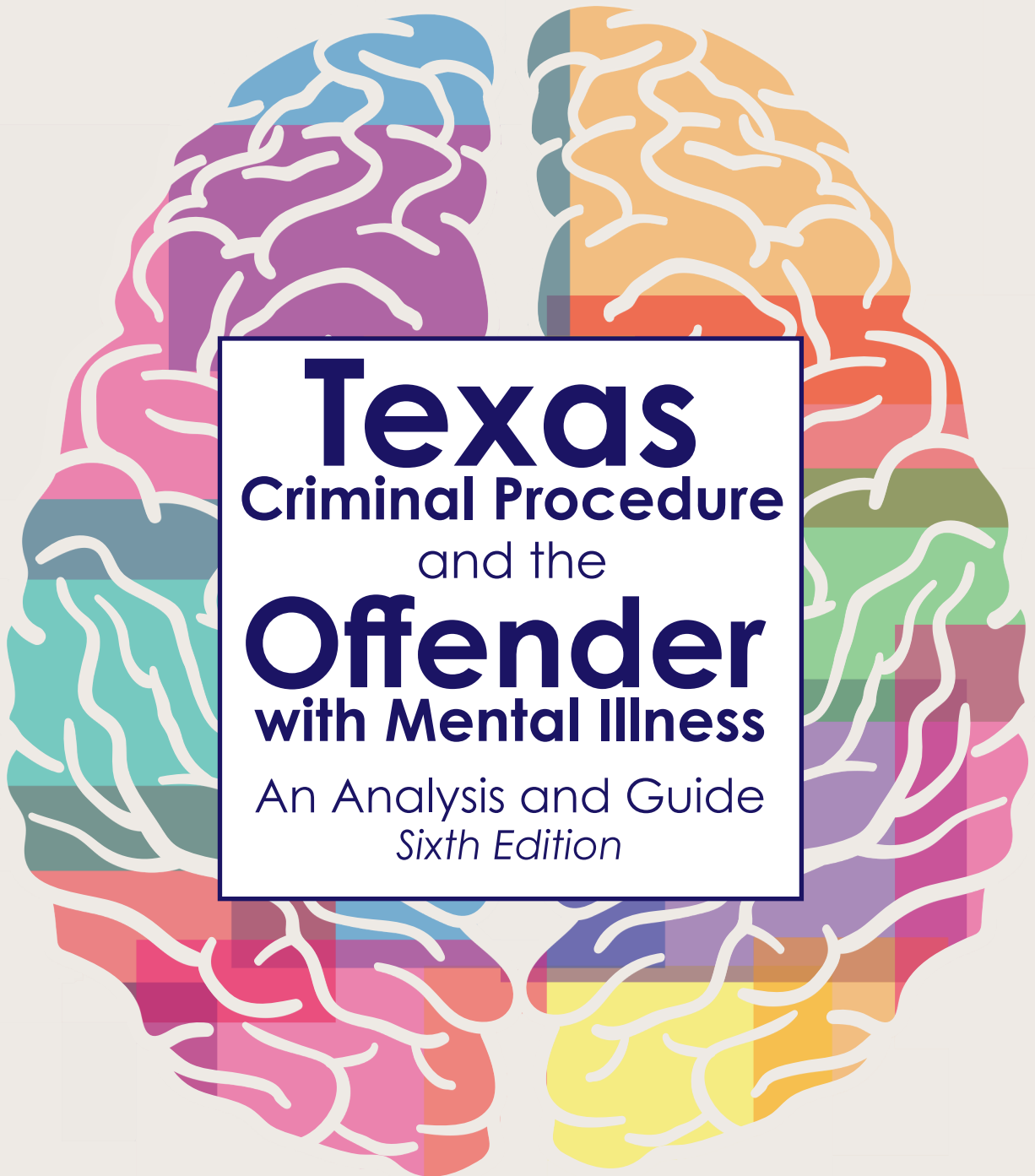


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**Texas**  
**Criminal Procedure**  
and the  
**Offender**  
**with Mental Illness**  
An Analysis and Guide  
*Sixth Edition*

**Brian D. Shannon** • *Paul Whitford Horn Professor*  
**Daniel H. Benson** • *Paul Whitford Horn Professor*  
*(1936-2011)*

**TEXAS TECH UNIVERSITY SCHOOL OF LAW**

**TEXAS CRIMINAL PROCEDURE  
&  
THE OFFENDER  
WITH MENTAL ILLNESS**

**AN ANALYSIS & GUIDE**

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**TEXAS TECH UNIVERSITY SCHOOL OF LAW**

**FOR**

**NAMI TEXAS  
THE NATIONAL ALLIANCE ON MENTAL ILLNESS OF TEXAS**

**THROUGH A GRANT FROM THE  
TEXAS BAR FOUNDATION**

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## I. ACKNOWLEDGMENTS

NAMI Texas (the National Alliance on Mental Illness of Texas) is a 501(c)(3) volunteer grassroots organization, and is also the Texas affiliate of NAMI (the National Alliance on Mental Illness). The mission of NAMI Texas is to improve the quality of life for all individuals living with mental illness and their families. In turn, the NAMI Texas vision is to ensure acceptance of and treatment for all those with mental illness to facilitate recovery. NAMI Texas also works to inform the public about mental illness, provides free education and support programs for family members and peers, and engages in advocacy to effect a positive change in the response of society, government, and business to individuals with a mental illness. Local NAMI Affiliates across the state deliver vital mental health programs and support to their communities. For more information about local NAMI-Texas affiliates, see <https://namitexas.org/affiliates/> and Appendix I.

In 1993 the organization (then known as TEXAMI) sought and obtained the first of six generous grants from the Texas Bar Foundation to prepare the first edition of this book as a guide for attorneys, judges, family members, and individuals living with mental illness who might encounter the Texas criminal justice system. The first edition, which was initially published in March 1994, was widely distributed, free of charge, to county and district court judges, criminal district attorneys, county attorneys, criminal defense attorneys, mental health advocacy groups, family members of persons with mental illness, Texas libraries, and many others. Because of the high demand, TEXAMI obtained an additional grant from the Texas Council of Community Centers to print another 3000 copies in May 1994.

The continued publication and distribution of this guide book regarding Texas criminal law and the offender with mental illness is intended to promote the ends of justice by serving as an important educational tool. Many members of the practicing bench and bar, as well as the public in general, are not well-versed concerning the issues facing persons diagnosed with mental illness – particularly when those persons are also caught up in the criminal justice system.

Given numerous changes in the law subsequent to the first edition, the Texas Bar Foundation and the Texas Council of Community Centers again provided generous financial support for the printing and distribution of a second edition of the book in 1999. For that second edition, we also expanded our analysis of the laws to include more information relating to juvenile offenders with mental illness. In addition, NAMI Texas created a web-based version of the book starting with that second edition.

Of course, the law does not remain static. Following the 1999 publication of the second edition, the Texas Legislature enacted substantial changes to many of the laws addressed in the publication. In particular, the legislature completely overhauled the state's criminal competency statute during the 2003 regular legislative session. One of us was fortunate to participate in the legislative task force efforts that provided the groundwork for the revisions. Those revised provisions became effective on January 1, 2004. The Texas Bar Foundation subsequently

provided another grant to allow for the publication and distribution of the third edition of the guide book in 2004.

Thereafter, the legislature made additional significant changes to the criminal competency statutes in 2005 and 2007, totally overhauled the procedures involved in insanity defense cases in 2005, and enacted further changes to several of the diversion of offenders statutes. Accordingly, a fourth edition became necessary, and the Texas Bar Foundation again provided a grant to allow for the publication and distribution of a fourth edition in 2008. Sadly, that fourth edition was my final opportunity to collaborate with my long-time friend and mentor, Horn Professor Daniel H. Benson, who passed away in 2011. I continue to miss him and his dedication to our students, to the practicing bench and bar, and to the rule of law.

The legislature thereafter amended many of the relevant legal provisions; so, a fifth edition was published in 2016, and a new edition is now necessary given important and sweeping 2017 and 2019 legislative enactments. The Texas Bar Foundation has once again provided a generous grant to NAMI Texas to make this sixth edition possible. This revised volume is intended to update and replace the law and commentary discussed in the first five editions.

I would like, once again, to express my appreciation to the Texas Bar Foundation and NAMI Texas for enlisting me in this worthwhile project. I also wish to recognize Dean Jack Nowlin and the Texas Tech University School of Law for encouragement and support. I would also like to thank my research assistant for this sixth edition, Sara Jaeckle, and all those former students who helped me with previous editions. Also, I want to recognize Dr. Floyd L. Jennings, the Chief of the Misdemeanor Mental Health Division of the Harris County Public Defender's Office, for our many years of delightful exchanges and collaborations on some of the thorny legal problems involving persons with mental illness and the Texas criminal justice system. In addition, Dr. Jennings reviewed drafts of several chapters of this edition and offered very helpful suggestions and edits. His wisdom, experience, and comments made this a better book, and I thank him. Thanks, too, go to Dr. Terri LeClercq, writer extraordinaire, for volunteering her time to review and edit the manuscript. Her comments and suggestions also made this a better book. Finally, I want to thank my student, Taylor Seaton, who designed the beautiful cover art for this edition.

Although I gratefully acknowledge and thank NAMI Texas, the Texas Bar Foundation, and the Texas Tech University School of Law for their support in this project, I accept full responsibility for any errors or omissions in the ensuing analysis. In addition, I would welcome any comments or ideas about my views of the relevant statutes and procedures affecting persons with mental illness in Texas. I hope you find this to be a useful tool in navigating an often-times challenging area of the law that affects the lives of countless Texans.

Brian D. Shannon  
Lubbock, Texas  
October 2019

## II. INTRODUCTION & OVERVIEW

For decades far more persons with mental illness have been confined in our nation's jails and prisons than in state mental hospitals. See Michael Winerip, *Bedlam on the Streets*, N.Y. TIMES MAGAZINE (May 23, 1999). Indeed, as has been widely reported, “the number of mentally ill persons in prisons and jails [nationally] was 10 times the number remaining in state hospitals.” See Treatment Advocacy Center & Nat'l Sheriffs' Assoc., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6 (April 8, 2014), available at <http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf> (estimating there to be over 350,000 inmates with severe mental illness in prisons and jails versus approximately 35,000 in state hospitals). A September 2006 Department of Justice report stated that as of mid-2005 “more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails.” Doris J. James and Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. Department of Justice Bureau of Justice Statistics (Sept. 2006). See <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>. See also Treatment Advocacy Center & Nat'l Sheriffs' Assoc., MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 1 (May 2010), available at [https://www.treatmentadvocacycenter.org/storage/documents/final\\_jails\\_v\\_hospitals\\_study.pdf](https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf) (noting that “at least 16 percent of inmates in jails and prisons have a serious mental illness” and “that 40 percent of individuals with serious mental illnesses have been in jail or prison at some time in their lives”).

The experience has been similar in Texas. As the Texas Judicial Council's Mental Health Committee noted in 2016:

Approximately 20- to 24-percent of the inmate population in Texas has a mental health need; adults with untreated mental health conditions are eight times more likely to be incarcerated than the general population. A 2010 study concluded that nearly eight adults with severe and persistent mental illness were in jail or prison in Texas for every adult in a state psychiatric hospital.

Texas Judicial Council Mental Health Committee Report & Recommendations, at 2 (Oct. 2016), <https://www.txcourts.gov/media/1436230/report-and-recommendations-of-tjc-mental-health-committee-final-w-cover.pdf>. In addition, in 2013 “over 40% of bookings into local Texas county jails were for individuals who had ... some prior contact with the [Texas] public mental health system, whether at a CMHC [community mental health center] or a state hospital.” Center for Public Policy Priorities, *Mental Health Screening and Intake in County Jails* (April 30, 2014), <http://www.legis.state.tx.us/tlodocs/83R/handouts/C2102014050510001/719abd7c-9cd9-4092-aae9-46d5765f52cf.PDF>. Moreover, over a third of Texas state prison inmates had received public mental health services at some point prior to their imprisonment – per 2013 data, and 12% of the 2013 state prison population had a diagnosis of schizophrenia, bipolar disorder, or major depression. Megan Randall and Katharine



Ligon, Center for Public Policy Priorities, *From Recidivism to Recovery* 4 (August 6, 2014), available at [http://forabettertexas.org/images/HC\\_2014\\_07\\_RE\\_PeerSupport.pdf](http://forabettertexas.org/images/HC_2014_07_RE_PeerSupport.pdf).

With our nation now housing an unprecedented number of people in jail or prison, one would expect the percentage of inmates with mental disorders to correspond with the percentage found in the general population. However, the incidence of jail detainees with mental illness has long been far higher than among the general population. Henry J. Steadman and Bonita M. Veysey, *Providing Services for Jail Inmates with Mental Disorders*, Nat'l Inst. of Justice (April 1997). Indeed, as reported by the Justice Center of the Council of State Government's Criminal Justice/Mental Health Consensus Project, "People with mental illness are overrepresented in all parts of the criminal justice system – in their contact with law enforcement, in the courts, in jails and prisons, and in parole and probation caseloads across the country." CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 4, available at <https://csgjusticecenter.org/mental-health-projects/report-of-the-consensus-project/>. See also *Criminal Justice Responses to Offenders with Mental Illness*, Hearing before the Subcomm. on Crime, Terrorism, & Homeland Security, House Comm. of the Judiciary, 110th Cong. 3 (March 27, 2007), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hrg34359/pdf/CHRG-110hrg34359.pdf> [hereinafter House Report] (making a comparable observation and stating that the country was "at a crossroads with regard to treatment of people with mental disorders who are brought in to the criminal justice system").

What has accounted for this great expansion in jail detention of persons with mental impairments? As early as April 1999, a National Institute of Justice report stated the following:

The dramatic growth of the population of jailed mentally ill persons has coincided with the policy of deinstitutionalization that resulted in the release of thousands of mentally ill people from psychiatric facilities to the community. Additional factors, including cuts in public assistance, more stringent civil commitment laws, declines in the availability of low-income housing, and limited availability of mental health care in the community, are thought to have exacerbated conditions for the mentally ill and contributed to their increased involvement in the criminal justice system.

Catherine Conly, *Coordinating Community Services for Mentally Ill Offenders: Maryland's Community Criminal Justice Treatment Program*, Nat'l Inst. of Justice 3 (April 1999).

More recently, a Florida state criminal court judge provided the following testimony before Congress:

The sad irony is that we did not *deinstitutionalize* mental health care. We allowed for the *trans-institutionalization* of people with mental illnesses from state psychiatric facilities to our correctional institutions, and in the process, made our jails and prisons the asylums of the new millennium. In many cases, the conditions that exist in these correctional settings are far worse

than those that existed in state hospitals. The consequences of this system have been increased homelessness, increased police injuries, increased police shootings of people with mental illnesses, critical tax dollars wasted, and the reality that we have made mental illness a crime; or at the very least a significant risk factor for criminal justice system involvement. In 200 years, we have come full circle, and today our jails are once again psychiatric warehouses. To be fair, it's not honest to call them *psychiatric institutions* because we do not provide treatment very well in these settings.

House Report, *supra* at 8 (testimony of the Honorable Steven Leifman, Judge, Criminal Division of Miami-Dade County Court, 11th Judicial District, Miami, FL).<sup>1</sup> Judge Leifman also observed that “[b]ecause of lack of access to community-based care, our police, correctional officers, and courts have increasingly become the lone responders to people in crisis due to mental illnesses.” *Id.* Similarly, one study of the states concluded, “When the mental health system functions poorly, the criminal justice system too often becomes the default provider of treatment and care for people with serious mental illnesses. This mode of operation is inhumane, ineffective, and expensive.” National Alliance on Mental Illness (NAMI), GRADING THE STATES: A REPORT ON AMERICA’S HEALTH CARE SYSTEM FOR ADULTS WITH SERIOUS MENTAL ILLNESS 43 (2009), available at <http://www.nami.org/grades>.

The history of the situation in Texas has been similar. One early report theorized the following:

A deinstitutionalization of state psychiatric hospitals and hospitals for the mentally ill and mentally retarded occurred in Texas in the 1980’s. However, community resources did not keep pace with the needs of the deinstitutionalized population, leaving a significant population of mentally impaired clients with unmet residential and service needs. Many of these clients ended up in the criminal justice system because of these unmet needs.

TEXAS CRIMINAL JUSTICE POLICY COUNCIL, MENTALLY RETARDED AND MENTALLY ILL CRIMINAL OFFENDERS: EFFECTIVENESS OF COMMUNITY INTERVENTION PROGRAMS 1 (March 1993). Moreover, information, procedures and protocols were traditionally lacking in Texas jails to deal with detainees with mental illness. As another early 1990’s report observed:

Historically law enforcement, prosecutorial, judicial, and corrections officials have not had adequate information about the signs and symptoms of mental illness, mental retardation and other developmental disabilities. They understand neither appropriate methods of dealing with signs and symptoms nor the needs of these individuals. Consequently, offenders with mental impairments are often prosecuted, sentenced and incarcerated without consideration of their special needs.

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<sup>1</sup> Judge Leifman was the keynote speaker at both the November 2016 and November 2018 Texas Tech Law School Mental Health Symposia.

TEXAS COUNCIL ON OFFENDERS WITH MENTAL IMPAIRMENTS, BIENNIAL REPORT TO THE TEXAS LEGISLATURE 5 (1993). This same study stressed further that “[t]hese special populations, with their complex needs, the stigma of disability or illness and their status as offenders, face substantial barriers to service. Even when some services are available, the lack of collaboration and coordination among providers create fragmentation of services.” *Id.* at 6.

By the early 2000’s, the Texas Criminal Justice Policy Council provided several reports to the legislature that helped make issues relating to offenders with mental illness a high priority for the 2001 and ensuing sessions. For example, a report prior to the 2003 legislative session made the following blunt assessment: “A high proportion of the offender population is mentally ill. Services for mentally ill offenders in the community are limited. Lack of specialized supervision and treatment services impacts [the] success of mentally ill offenders.” TEXAS CRIMINAL JUSTICE POLICY COUNCIL, IMPLEMENTATION EVALUATION OF THE ENHANCED MENTAL HEALTH SERVICES INITIATIVE 7 (January 2003). Indeed, within the prisons and jails in Texas, as well as in the population of individuals under supervision through probation and parole, mental health services had typically been underfunded and were not a priority. Although jails had all too often become alternative “treatment” facilities within the community, they frequently lacked appropriate and adequate treatment services, and jails were often ill-equipped to provide those services. In addition, the numbers of persons with mental illness who end up in the criminal justice system have only increased since that time.

Who are these individuals with mental illness in our jails? Of course, some persons with mental illness are in jail or prison because they have committed one or more serious criminal offenses. Often, however, the charged crimes are lesser offenses that are products of or connected to the offenders’ mental illness. A 1992 survey of the nation’s 3000-plus jails by the National Alliance for the Mentally Ill and Public Citizen’s Health Research Group determined that the five most common offenses leading to the jailing of mentally ill inmates at that time were simple assault, theft, disorderly conduct, alcohol or drug-related charges, and trespassing. CRIMINALIZING THE SERIOUSLY MENTALLY ILL 46 (Nat’l Alliance for the Mentally Ill & Pub. Citizen’s Health Research Group 1992). The survey authors concluded that the vast majority of crimes committed by persons with serious mental illness are not violent offenses, but “*are trivial misdemeanors that are often just manifestations of mental illness.*” *Id.* at iv (emphasis in original). Two decades later, the “number of seriously mentally ill individuals in jails has increased sharply during the last two decades. ... Many commit minor crimes, such as shoplifting, but a few commit major crimes, including homicides ....” *Criminalizing the Seriously Mentally Ill: Two Decades Later*, 27 PUBLIC CITIZEN HEALTH LETTER 1-2 (July 2011), [http://www.citizen.org/documents/HL\\_201107.pdf](http://www.citizen.org/documents/HL_201107.pdf) (noting also that over “the past two decades, the nation’s jails have indeed become the new mental hospitals”). In addition, individuals with mental illness “not only end up in jail more often than non-

mentally ill ones, but they also stay longer” and are “disproportionately arrested for minor crimes.” E. FULLER TORREY, *THE INSANITY OFFENSE* 131 (2008).<sup>2</sup>

Some things are definitely changing for the good in Texas, however. Over the last 25 years, our legislature has been very forward-thinking and has enacted many reforms relating to criminal laws and offenders with mental impairments. The legislature has also appropriated additional resources to study and begin to address the wide-ranging problem. Both the legislative and judicial branches have undertaken efforts to better understand and respond to the challenges posed by an ever-increasing number of individuals with mental illness being caught up in the state’s criminal justice system. For example, in 2007 Chief Judge Sharon Keller of the Texas Court of Criminal Appeals created a Mental Health Task Force to address problems involving people with mental illness who are in the criminal justice system. That group held hearings around the state in 2007. In November 2015, Texas House Speaker Joe Straus formed the House Select Committee on Mental Health “to take a wide-ranging look at the state’s behavioral health system.” <http://www.house.state.tx.us/news/press-releases/?id=5741>. The select committee delivered a sweeping report to the Texas Legislature prior to the 2017 legislative session. See Interim Report to the 85th Texas Legislature, House Select Committee on Mental Health (December 2016), available at <https://house.texas.gov/media/pdf/committees/reports/84interim/Mental-Health-Select-Committee-Interim-Report-2016.pdf>. Additionally, over the last several legislative sessions, the legislature has provided substantial emphasis and funding to focus on issues relating to persons with mental illness in the criminal justice system.

Then, most notably, the Texas Supreme Court and Texas Court of Criminal Appeals have become very engaged in addressing judicial issues involving persons with mental disabilities. In 2016 the Texas Judicial Council revised its committee structure to establish the Committee on Guardianship, Mental Health, and Intellectual and Developmental Disability. In turn, that committee’s “cornerstone recommendation was to establish a permanent judicial commission on mental health, similar to the Supreme Court Children’s Commission, the Texas Access to Justice Commission, and the Texas Indigent Defense Commission.” See *Creating a Judicial Commission on Mental Health* (Feb. 9, 2018), at 3, available at <http://www.txcourts.gov/media/1441380/jcmh-planning-committee-report-final.pdf>. The Texas Supreme Court and Texas Court of Criminal Appeals jointly created the Texas Judicial Commission on Mental Health in February 2018. Its mission is broad but includes such matters as endeavoring to “identify and assess current and future needs for the courts to be more effective in achieving positive outcomes for Texans with mental illness” and to “promote appropriate judicial training regarding mental health needs, systems, and services.” See *Order Establishing Judicial Commission on Mental Health*, Supreme Court Misc. Docket No. 18-9025 & Court of Criminal

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<sup>2</sup> On this same theme, I would urge the reader of this guidebook to read Pete Earley, *Crazy: A Father’s Search Through America’s Mental Health Madness* (2006). Earley’s book, which was a finalist for the 2007 Pulitzer Prize, is an extraordinary chronicle of the challenges faced within the criminal justice system with regard to individuals with mental illness.

Appeals Misc. Docket No. 18-004, at 3 (Feb. 13, 2018), *available at* <https://www.txcourts.gov/media/1440539/189025.pdf> (setting forth the full charge for the Commission). One of the early and laudable efforts by the Commission was the release of the first edition of the *Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book* to provide guidance to the courts on mental health law issues. See <http://texasicmh.gov/media/1636/jcmh-bench-book-may-2019.pdf> (which will be referenced in the ensuing chapters).<sup>3</sup>

Additionally, an array of Texas counties have become leaders in developing mental health courts, drug courts, and veterans' courts. As of May 2019, there were over 200 specialty courts across Texas, including many mental health courts. See <https://gov.texas.gov/uploads/files/organization/criminal-justice/Specialty-Courts-By-County.pdf> (for a list of the specialty courts throughout the state as of May 2019). Still other counties have received grant funding from the Texas Indigent Defense Commission and have created mental health public and private defenders offices. Early data from these programs demonstrated a significant reduction in recidivism and greater treatment compliance. See Texas Task Force on Indigent Defense & Office of Court Administration, *Representing the Mentally Ill Offender: An Evaluation of Advocacy Alternatives* (April 2010), available at: [https://ppri.tamu.edu/files/Representing the Mentally Ill Offender.pdf](https://ppri.tamu.edu/files/Representing_the_Mentally_Ill_Offender.pdf).

Regardless of the precise reasons for the presence of so many offenders with mental illness in the criminal justice system, many persons from a wide spectrum of experiences and backgrounds should endeavor to better understand the interplay between criminal law and mental illness: lawyers, judges, law enforcement personnel, corrections officials, parole and probation officers, mental health experts, family members, and persons diagnosed with mental illness. Texas law provides various mechanisms to divert offenders with mental illness into alternatives to incarceration – particularly with respect to nonviolent offenses. Moreover, even for those offenders with mental illness who must be confined in jail or prison, proper treatment for these individuals' mental health needs should be a priority concern. The availability of legal options are of little value, however, if persons involved in the criminal justice system lack knowledge or adequate understanding regarding the legal issues and special needs of criminal defendants with mental illness.

Three years prior to the first edition of this book, a 1990 report by the Hogg Foundation for Mental Health emphasized the need for law enforcement personnel such as sheriff's deputies, judges, and parole officers "to become more knowledgeable and understanding of persons with mental illness." TECHNOLOGY, TRAINING, COLLABORATION: COMMITTEE REPORTS OF THE COMMISSION ON COMMUNITY CARE OF THE MENTALLY ILL 9 (Hogg Found. for Mental Health 1990). That same report observed further that "it is also essential for judges and magistrates to be educated, informed, and oriented about basic aspects of mental illness, available resources, and how these factors interface with the legal system." *Id.* at 10. This assessment has not changed. For example, as part of S.B. 362 in 2019, the legislature added Section

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<sup>3</sup> I am currently serving as an appointee on the Commission. A second edition of the Bench Book will be available in late 2019.

22.1106, Texas Government Code, to require the Court of Criminal Appeals to “ensure that judicial training related to court-ordered outpatient mental health services is provided at least once every year.” Moreover, part of the charge of the Judicial Commission on Mental Health is to provide judicial training about mental health law issues. Correspondingly, it has been our intent in preparing the various editions of this book to provide guidance and information to prosecutors, judges, defense attorneys, law enforcement officials, persons with mental illness, family members, and others involved in the criminal justice system.

Specifically, this guide book identifies certain key statutes that relate to offenders and alleged offenders who have mental illness, and then includes analysis of those laws. Because our intended audience has not been limited strictly to attorneys and judges, we have endeavored to adopt a narrative style in analyzing the pertinent statutory provisions, and we have consciously chosen to avoid any detailed case analysis.<sup>4</sup>

What is meant by “mental illness” or “serious mental illness”? Before launching into a discussion of the various statutes covering persons with mental illness who are charged with crimes, it is important to discuss definitions of these terms generally. Recent brain research has revealed and confirmed that serious mental illnesses such as schizophrenia, bipolar disorder, clinical depression, and schizoaffective disorder are neurobiological diseases of the brain. Like other organs of the body, the brain can become ill. Indeed, the medical literature is replete with findings that serious mental illnesses are neurobiological brain diseases. Accordingly, in this book the terms “mental illness” and “serious mental illness” will generally refer to neurobiological brain diseases such as schizophrenia, bipolar disorder, schizoaffective disorder, or severe depressive illness. Correspondingly, these terms are generally not intended to include other purely mental, emotional, behavioral, or coping problems that are not neurobiological in nature.

For purposes of appropriate and required health insurance coverage, the Texas Insurance Code defines the phrase, “serious mental illness,” as follows:

- (1) “Serious mental illness” means the following psychiatric illnesses as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM):
  - (A) bipolar disorders (hypomanic, manic, depressive, and mixed);
  - (B) depression in childhood and adolescence;
  - (C) major depressive disorders (single episode or recurrent);
  - (D) obsessive-compulsive disorders;

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<sup>4</sup> We have also collaborated with Texas Appleseed and the Hogg Foundation for Mental Health in the preparation and later updates of another guidebook, *MENTAL ILLNESS, YOUR CLIENT AND THE CRIMINAL LAW* (4th ed. 2015), available at [https://www.texasappleseed.org/sites/default/files/Mental\\_Health\\_Handbook\\_Printed2015.pdf](https://www.texasappleseed.org/sites/default/files/Mental_Health_Handbook_Printed2015.pdf). For an earlier helpful handbook produced by Texas Appleseed and the Hogg Foundation, see *FINDING HELP WHEN YOU’RE IN TROUBLE WITH THE LAW*, available at <https://www.texasappleseed.org/sites/default/files/14-Mentalhealth-DefendantHandbook.pdf>.



- (E) paranoid and other psychotic disorders;
- (F) schizo-affective disorders (bipolar or depressive); and
- (G) schizophrenia.

Tex. Ins. Code Ann. § 1355.001.

On the other hand, under the state's civil commitment laws, the Texas Mental Health Code defines "mental illness" somewhat more broadly than a mere listing of identifiable, neurobiological brain disorders. Specifically, Subsection 571.003(14) of the Health & Safety Code provides the following definition:

- (14) "Mental illness" means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that:
  - (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or
  - (B) grossly impairs behavior as demonstrated by recent disturbed behavior.

Tex. Health & Safety Code Ann. § 571.003(14). For our purposes of examining the law relating to criminal offenders with mental illness, the Mental Health Code definition of "mental illness" is often important because many of the pertinent criminal statutes also use the definition. *See, e.g.*, Art. 46B.001(12), Tex. Code Crim. Proc. (defining "mental illness" in an almost identical fashion to the Health and Safety Code definition).

The consideration of a bare statutory definition of mental illness, however, is insufficient to gain a full appreciation for this class of brain diseases. Four of the most common serious mental illnesses are schizophrenia, bipolar disorder, schizoaffective disorder, and major depressive illness. "Schizophrenia" is a brain disease that affects a person's thinking and judgment, sensory perception and the ability to interpret and respond to situations appropriately. Symptoms can include poor reasoning, disconnected and confusing language, hallucinations, delusions, and deterioration of appearance and personal hygiene. The NAMI website offers the following description:

Schizophrenia is a serious mental illness that interferes with a person's ability to think clearly, manage emotions, make decisions and relate to others. It is a complex, long-term medical illness, affecting about 1% of Americans. Although schizophrenia can occur at any age, the average age of onset tends to be in the late teens to the early 20s for men, and the late 20s to early 30s for women. It is uncommon for schizophrenia to be diagnosed in a person younger than 12 or older than 40. It is possible to live well with schizophrenia.

<https://www.nami.org/Learn-More/Mental-Health-Conditions/Schizophrenia>.

In turn, the National Institute of Mental Health has described the disease as follows:

Schizophrenia is a chronic and severe mental disorder that effects how a person thinks, feels, and behaves. People with schizophrenia may seem like they have lost touch with reality. Although schizophrenia is not as common as other mental disorders, the symptoms can be very disabling. ... Symptoms include: [h]allucinations, [d]elusions, [t]hought disorders (unusual or dysfunctional ways of thinking), [m]ovement disorders ... [and negative symptoms such as] ‘[f]lat affect’ (reduced expression of emotions via facial expression or voice tone) .... It is important to understand that schizophrenia is a biological illness.

See <http://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml> (also discussing treatments with antipsychotic medications, psychosocial treatment, and coordinated care).

Another of the more prevalent types of serious mental illness is bipolar disorder, which at one time was commonly known as manic depression. In contrast to schizophrenia, persons who are diagnosed with “bipolar disorder” often swing between extremely high and low moods. The NAMI website provides the following description:

Bipolar disorder is a mental illness that causes dramatic shifts in a person’s mood, energy and ability to think clearly. People with bipolar experience high and low moods – known as mania and depression – which differ from the typical ups and downs most people experience. The average age-of-onset is about 25, but it can occur in the teens, or more uncommonly, in childhood. The condition affects men and women equally, with about 2.6% of the U.S. population diagnosed with bipolar disorder and nearly 83% of cases classified as severe. If left untreated, bipolar disorder usually worsens. However, with a good treatment plan including psychotherapy, medications, a healthy lifestyle, a regular schedule and early identification of symptoms, many people live well with the condition.

<https://www.nami.org/Learn-More/Mental-Health-Conditions/Bipolar-Disorder>.

In turn, the National Institute of Mental Health offers this description:

Bipolar disorder is a chronic or episodic (which means occurring occasionally and at irregular intervals) mental disorder. It can cause unusual, often extreme and fluctuating changes in mood, energy, activity, and concentration or focus. Bipolar disorder sometimes is called *manic-depressive disorder* or *manic depression*, which are older terms. Everyone goes through normal ups and downs, but bipolar disorder is different. The range of mood changes can be extreme. In manic episodes, someone might feel very happy, irritable, or



“up,” and there is a marked increase in activity level. In depressive episodes, someone might feel sad, indifferent, or hopeless, in combination with a very low activity level. Some people have hypomanic episodes, which are like manic episodes, but less severe and troublesome. Most of the time, bipolar disorder develops or starts during late adolescence (teen years) or early adulthood. Occasionally, bipolar symptoms can appear in children. Although the symptoms come and go, bipolar disorder usually requires lifetime treatment and does not go away on its own. Bipolar disorder can be an important factor in suicide, job loss, and family discord, but proper treatment leads to better outcomes.

<http://www.nimh.nih.gov/health/publications/bipolar-disorder-in-adults/index.shtml>.

“Schizoaffective disorder” is another serious mental illness, and – although less common than schizophrenia or bipolar disorder – it is also quite disabling. NAMI describes the disease as follows:

Schizoaffective disorder is a chronic mental health condition characterized primarily by symptoms of schizophrenia, such as hallucinations or delusions, and symptoms of a mood disorder, such as mania and depression. ... Because schizoaffective disorder is less well-studied than the other two conditions, many interventions are borrowed from their treatment approaches. Many people with schizoaffective disorder are often incorrectly diagnosed at first with bipolar disorder or schizophrenia because it shares symptoms of multiple mental health conditions. Schizoaffective disorder is seen in about 0.3% of the population. Men and women experience schizoaffective disorder at the same rate, but men often develop the illness at an earlier age. Schizoaffective disorder can be managed effectively with medication and therapy.

<https://www.nami.org/Learn-More/Mental-Health-Conditions/Schizoaffective-Disorder>.

Another prevalent type of serious mental illness is major depressive illness or major depression. Although all humans will occasionally feel depressed, depressive illness is much more severe. The NAMI website includes the following information about depression:

Depressive disorder, frequently referred to simply as depression, is more than just feeling sad or going through a rough patch. It’s a serious mental health condition that requires understanding and medical care. Left untreated, depression can be devastating for those who have it and their families. Fortunately, with early detection, diagnosis and a treatment plan consisting of medication, psychotherapy and healthy lifestyle choices, many people can and do get better. Some will only experience one depressive episode in a lifetime, but for most, depressive disorder recurs. Without treatment, episodes may last a few months to several years. An estimated 16 million American adults—almost 7% of the population—had at least one major depressive episode in the past year. People of all ages and all racial,

ethnic and socioeconomic backgrounds experience depression, but it does affect some groups more than others.

<https://www.nami.org/Learn-More/Mental-Health-Conditions/Depression>. A person with major depression can have severe symptoms that can affect how the person “feel[s], think[s], and handle[s] daily activities, such as sleeping, eating, or working.” There can also be “psychotic depression” in which the “person has severe depression plus some form of psychosis ....” See <https://www.nimh.nih.gov/health/topics/depression/index.shtml>. The disease is usually quite treatable, and “[t]he earlier that treatment can begin, the more effective it is.” *Id.*

As described above, these mental illnesses are neurobiological in nature. They are brain illnesses. Modern research efforts relating to the causes of mental illness indicate that mental illnesses are the result of neurobiological disease, not of weaknesses in character or poor parenting. Although these diseases are not curable at present, they are treatable. For example, one leading psychiatrist has commented that “[c]ontrary to the popular stereotype, schizophrenia is an eminently treatable disease.” E. FULLER TORREY, *SURVIVING SCHIZOPHRENIA: A FAMILY MANUAL* 147 (7th ed. 2019). Dr. Torrey compares the treatment for schizophrenia as being akin to the treatment for diabetes in that “both can usually be well controlled, but not cured, by drugs. Just as we don’t talk of curing diabetes but rather of controlling its symptoms and allowing the person with diabetes to lead a comparatively normal life, so we should also do with schizophrenia.” *Id.* at 148. Moreover, the relatively recent advent of a variety of more effective antipsychotic medications (often called atypical medications) has offered even better treatment outcomes. For example, Dr. Torrey identifies clozapine as the “single most effective antipsychotic, significantly better than the others.” See *id.* at 174-76.

Despite recent advances in medical knowledge about the neurobiological bases of serious mental illnesses, many persons still remain ignorant about the true nature of these diseases. Correspondingly, many persons with these illnesses, as well as their family members, are forced to endure much public stigma. For someone unfamiliar with the true nature of these diseases, symptoms and manifestations like delusional thinking, hallucinations, and other bizarre behavior can be quite frightening. One additional challenge is that many individuals with a mental illness such as schizophrenia or bipolar disorder also have co-occurring anosognosia – a symptom that causes the person to have a lack of insight or awareness that anything is wrong. See Anosognosia, Treatment Advocacy Center, available at <https://www.treatmentadvocacycenter.org/key-issues/anosognosia>. As current evidence about these illnesses and their treatment becomes better known, however, stigmatization problems resulting from ignorance should lessen. Nonetheless, a person with mental illness who encounters the jail system may face heightened stigma not only because of the illness, but also as a consequence of the arrest and incarceration.

Among the many myths relating to mental illness are misconceptions that all or most persons with mental illness must be dangerous. As a general matter, this is

simply not true. Persons with mental illness in the community who are being treated pose no more a risk of violence than the general population; unfortunately, “if a person is off medication and psychotic, he becomes a greater risk for violence.” See Michael Winerip, *supra*. The authors of the 1992 survey of the nation’s jails emphatically observed the following: “It should be clearly stated that the vast majority of seriously mentally ill persons who end up in jail are not dangerous.” CRIMINALIZING THE SERIOUSLY MENTALLY ILL, *supra*, at 85. The authors acknowledged, however, that “it is also clear ... that a *small number* of seriously mentally ill persons, *if not treated for their illness*, do become dangerous, may commit serious crimes, and usually end up in jail.” *Id.* (emphasis in original). After highlighting research in this area, the report concluded, “Mentally ill individuals who *are* being treated are *not* more dangerous than the general population. It is the failure to treat these individuals that makes them potentially dangerous.” *Id.* at 86 (emphasis in original). As Dr. Torrey has summarized more recently in discussing persons with schizophrenia, “Studies have made clear that *most* persons with schizophrenia are not assaultive or violent but that a small number of them are. The common denominators of those who are assaultive and violent are abuse of alcohol or drugs and/or noncompliance with antipsychotic medication.” E. Fuller Torrey, SURVIVING SCHIZOPHRENIA, *supra*, at 269. See also Risk Factors for Violence in Serious Mental Illness, Treatment Advocacy Center (June 2016) (summarizing studies finding that most persons with serious mental illness are not dangerous, but that a small number commit acts of violence, particularly when untreated and abusing alcohol or drugs), available at <https://www.treatmentadvocacycenter.org/evidence-and-research/learn-more-about/3633-risk-factors-for-violence-in-serious-mental-illness>. Thus, treatment initiatives should be pursued not only as a response to medical needs, but to avoid the potential for dangerousness. Put simply, treatment works and can lessen the potential for dangerousness, violence, or recidivism.

Treatment and identification of persons with mental illness were traditionally scarce in jails, but this has been improving in many counties in Texas. Previously, for instance, a 2005 study by the Texas Commission on Jail Standards, with the collaboration of the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI), indicated that the intake process within the jails for mental health screening was unreliable. Based on a random sample of 100 inmates, the local jails identified that 15 (15%) had a mental health diagnosis. However, another 29 of the remaining inmates were found on the CARE (Client Assessment Registry) data system “as current or former clients of MHMR, but no mental health notation was indicated by the jail.” *Id.* at 29. See also <http://www.tcjs.state.tx.us/docs/MH%20Study.pdf> (copy of full report). Thus, these 29 inmates had gone through the entire criminal process and been convicted and sentenced without the jails having ever noted that they either were or had been patients within the state’s public mental health system. The report also bleakly concluded that there appeared “to be an inconsistent interaction [around the state] between local jails and the public mental health system.” *Id.*

Thereafter, the Texas Jail Standards Commission and TCOOMMI have undertaken efforts to encourage greater communication and cooperation between

local jails and community mental health authorities. Working together, they have established a better process for local jails and mental health authorities to cross-reference their databases. In addition, the legislature enacted amendments to Article 16.22, Texas Code of Criminal Procedure, in 2009 and again in 2017 and 2019. The 2009 bill's statement of intent noted that "the legislature has made a commitment to ensure that arrested individuals are appropriately screened and identified for mental illness or ... [intellectual disability] at the jails." Tex. Sen. Research Center, Bill Analysis, Tex. S.B. 1557, S.B. 1557, 81st Leg., R.S. (Aug. 11, 2009).<sup>5</sup> A 2012 state jail survey revealed that most of the responding counties "screened for suicidal ideation and whether or not an inmate took a medicine. About half ... offered in-house care, and the other half referred inmates to the local mental health authority." Emilie Attwell Becker, *Mental Health Services in Texas Jails*, Tex. Med. J. 112 (Nov. 2016), available at <https://www.texmed.org/Nov16Journal/>. Moreover, the Texas Commission on Jail Standards has a prescribed intake "Screening Form for Suicide and Medical/Mental/Developmental Impairments," which was updated in 2015. See [https://www.tcjs.state.tx.us/docs/ScreeningForm-SMMDI\\_Oct2015.pdf](https://www.tcjs.state.tx.us/docs/ScreeningForm-SMMDI_Oct2015.pdf).

These improvements in initial screenings, as well as collaboration between jails, local mental health authorities, and the courts reflect important advances. Additionally, treatment initiatives, whether at the jail or through diversion programs, must also be encouraged. Indeed, the jails have a legal requirement to provide equitable treatment for mental disabilities – like for other health care needs. The Texas Commission on Jail Standards has adopted a rule requiring every jail to comply with the Americans with Disabilities Act (ADA). See 37 Tex. Admin. Code § 269.4 (requiring "equitable treatment regardless of race, religion, national origin, gender, age, or disabilities"). Thus, jails cannot legally discriminate against inmates with mental illness by refusing to provide adequate, appropriate medical care for the illness.<sup>6</sup> An additional rule requires jails to provide medical and mental services. *Id.* §§ 273.1 – 273.2.

Of course, this book is not intended to be a primer on mental health treatment issues concerning defendants with serious mental illness. Instead, the primary purpose of the book is to set forth and analyze the relevant criminal procedure statutes that apply to persons with mental illness who get caught up in the criminal justice system. The reader should note that many of the statutory provisions discussed below, including those relating to incompetency to stand trial and the insanity defense, also include provisions addressing persons with intellectual disabilities (formerly identified as mental retardation). This book's primary focus, however, is to examine and discuss the laws relating to offenders with mental illness. Accordingly, I have typically opted to omit discussion of the application of these laws

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<sup>5</sup> The 2017 and 2019 legislation will be discussed in detail in Chapter III, *infra*, in connection with a discussion regarding sheriffs' and magistrates' duties under Article 16.22.

<sup>6</sup> Unfortunately, however, the two largest mental-health facilities in the state are located in the Harris County and Dallas County jails. See Editorial, *The Largest Mental-Health Facility in Texas Shouldn't be a Jail*, Dallas Morning News (Feb. 17, 2019), available at <https://www.dallasnews.com/opinion/editorials/2019/02/17/largest-mental-health-facility-texas-shouldnt-jail>.

to persons with intellectual disabilities. (By way of background, unlike mental illnesses that generally strike individuals with normal intelligence after childhood, an intellectual disability is typically a developmental disability of the brain that is often present from birth and will have developed prior to a person's 18th birthday.) Although there are certainly criminal justice issues relating to offenders who have intellectual disabilities, those matters are beyond the scope of this project. Moreover, if an offender suffers from a dual diagnosis of both a mental illness and an intellectual disability, counsel should consider pursuing arguments based on the statutory provisions relating to both mental illness and intellectual disabilities.

As the reader will have already observed, a myriad of issues surrounds persons with mental illness who are charged with crimes. By and large, however, the public seems to pay little attention to these matters until some notorious crime is committed by a person with mental illness. Consider, for example, the media clamor relating to two high-profile Texas cases almost twenty years ago involving Andrea Yates and Deanna Laney, along with the 2015 trial following the killing of the noted "American Sniper" Chris Kyle. The resulting publicity from those tragic cases provides insight into the types of criminal justice issues and problems relating to offenders with mental illness who commit serious crimes. Ms. Yates, as most people will recall, was initially convicted of capital murder in March 2002 in connection with having systematically killed her five children by drowning in June 2001. In finding Ms. Yates guilty, the Houston jury in the first trial rejected her plea of insanity. As part of the closing arguments in the case, defense counsel summarized that several of the "medical experts who testified said Yates was the sickest patient they had ever seen." *Case of Texas Mother Goes to Jury*, CNN.com (March 12, 2002), available at <http://www.cnn.com/2002/LAW/03/12/yates.trial/index.html>. After a reversal by the court of appeals, however, Ms. Yates was found not guilty by reason of insanity in the re-trial. Similarly, in April 2004 a Tyler jury found Ms. Laney not guilty by reason of insanity following her having bludgeoned her three sons with rocks in May 2003, killing two of the boys and causing profound brain damage to the youngest. In contrast, and as is much more typical, a Texas jury rejected the insanity defense in the 2015 trial of Eddie Ray Routh, who was found guilty of murdering famed "American Sniper" Chris Kyle. National and state media fixated on this case for weeks. *See, e.g., Terence McCoy, Trial of "American Sniper" Chris Kyle's Killer: Why the Insanity Defense Failed*, Washington Post (Feb. 25, 2015), available at <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/25/trial-of-american-sniper-chris-kyles-killer-why-the-insanity-defense-failed/>.

Without doubt, these cases caused substantial public debate in the Texas legal and political communities about issues relating to the Texas insanity defense, appropriate treatment, and even the role of capital punishment for offenders with serious mental illness. I will return to a further discussion of such cases in the chapter on the insanity defense.

Of course, most of the offenses for which persons with mental illness are charged are not as serious as homicide. Moreover, the insanity defense is seldom raised and even more seldom successful. By way of contrast, however, competency issues arise daily in our state's criminal justice system, as do issues relating to the possible

diversion of defendants with mental illness charged with non-violent or non-serious crimes. Thus, it is critical that attorneys within the system be familiar with both the nature of the defendant's illness and the various legal options that can be pursued. Lawyers have a high duty in this regard. Indeed, criminal defense attorneys have been found to have provided ineffective assistance of counsel when not investigating an alleged offender's mental illness. For example, in *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990), the court observed the following:

Where a condition may not be visible to a layman, counsel cannot depend on his or her own evaluation of someone's sanity once he has reason to believe an investigation is warranted because, where such a condition exists, the defendant's attorney is the *sole hope* that it will be brought to the attention of the court.

*Id.* at 597 (emphasis supplied) (footnote omitted).

In *Bouchillon*, the defense attorney declined to pursue any investigation regarding the defendant's competency despite being told by the defendant that he had mental problems, had been hospitalized previously, and was on medication. *Id.* at 596 (observing that defense counsel had declined to investigate further because "it was difficult to prove an insanity defense in Lubbock, Texas"). The court determined that the attorney's lack of further investigation after he had notice of the defendant's "past institutionalization, fell below reasonable professional standards." *Id.* at 597. As evidenced by cases such as *Bouchillon*, an attorney's unfamiliarity with mental illness may jeopardize a mentally ill client's legal rights and medical treatment needs. Moreover, post-conviction attempts to correct errors of counsel will often prove to be inadequate as a substitute for knowledgeable, informed representation.

The presence of both offenders and accused individuals with mental illness in our jails and prisons continues to be a very real and pressing problem facing the Texas criminal justice system. In the ensuing chapters I will examine certain processes that arise subsequent to arrest and prior to trial (with a particular focus on the Texas diversion of offenders statutes), the criminal competency process (which was completely revamped in 2003 and has been modified a number of times thereafter), the insanity defense (as to which all the relevant procedures were completely re-codified in 2005, with fine-tuning amendments thereafter), and certain post-conviction issues. It is my hope that the analysis set forth in the following chapters regarding the relevant Texas statutes will prove beneficial to judges, prosecutors, defense attorneys, law enforcement officials, parole and probation officers, persons with mental illness, family members, and all others interested in criminal justice issues involving persons with mental illness.



### III. DIVERSION STATUTES

As noted in the previous chapter, many individuals with serious mental illness who get caught up in the criminal justice system have been charged with relatively minor, non-violent crimes. There is general consensus that efforts should be made to divert these individuals, when possible, out of the criminal justice system and into appropriate treatment. Although Texas was a national leader in adopting diversion of offenders statutes as early as 1993, there was not significant attention paid to the various diversion statutes until recent years. For example, in 2017 the legislature enacted Article 16.23, Texas Code of Criminal Procedure, to encourage law enforcement agencies to engage in diversion efforts. That statute provides the following:

#### **ART. 16.23, TEXAS CODE OF CRIMINAL PROCEDURE.**

**Art. 16.23. Diversion of Persons Suffering Mental Health Crisis or Substance Abuse Issue.** (a) Each law enforcement agency shall make a good faith effort to divert a person suffering a mental health crisis or suffering from the effects of substance abuse to a proper treatment center in the agency's jurisdiction if:

- (1) there is an available and appropriate treatment center in the agency's jurisdiction to which the agency may divert the person;
- (2) it is reasonable to divert the person;
- (3) the offense that the person is accused of is a misdemeanor, other than a misdemeanor involving violence; and
- (4) the mental health crisis or substance abuse issue is suspected to be the reason the person committed the alleged offense.

(b) Subsection (a) does not apply to a person who is accused of an offense under Section 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, Penal Code.

Moreover, separate from this specific legislation, a peace officer has broad discretion to make a warrantless apprehension of a person with mental illness when the officer has reason to believe that because of the mental illness "there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained." Tex. Health & Safety Code § 573.001(a)(1)(B). Moreover, "substantial risk of harm" for purposes of this subsection may be demonstrated either by the person's behavior or "evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty." *Id.* § 573.001(b). The statute authorizes the peace officer in such a situation to transport the individual to a mental health facility for emergency detention and medical evaluation under Chapter 573, Health and Safety Code. In other words, the officer has the discretion, even in the event of possible criminal activity, to divert the individual for a mental health evaluation and possible services, rather than making an arrest and transporting the individual to jail.



In November 2018, the Texas Judicial Commission on Mental Health released the first edition of the *Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book* to provide guidance to the courts on these important issues. An update was provided in May 2019. See <http://texasjcmh.gov/media/1636/jcmh-bench-book-may-2019.pdf>. The first edition focused on early identification, assessment, and diversion of persons with mental health and intellectual disabilities. The procedural guide (for which this author participated in the editing and drafting) is organized around the “widely recognized Sequential Intercept Model.” *Id.* at 8. The Bench Book includes substantial discussion of community services and law enforcement involvement in possible diversion. *Id.* at 12-40.

Many police departments and sheriff’s offices in Texas have engaged in significant diversion of offenders efforts, working in close coordination with their local mental health authority. The Houston Police Department has developed a very helpful guide which recognizes that law enforcement personnel typically are the first responders to a person in a mental health crisis. See *Responding to the Mentally Ill: A Guide for Texas Peace Officers* (May 2018), available at <http://www.houstoncit.org/wp-content/uploads/2018/06/Texas-Peace-Officer-Guide-for-Responding-to-the-Mentally-Ill-May-2018.pdf>. One tremendous advance in community policing vis-à-vis persons with mental illness has been the development of Crisis Intervention Team (CIT) programs to create community partnerships “of law enforcement, mental health and addiction professionals, individuals who live with mental illness and/or addiction disorders, their families and other advocates” for first-responder crisis intervention. *CIT is More than Just Training ... it’s a community program*, <http://www.citinternational.org/Learn-About-CIT>.

Some police departments and other law enforcement agencies have remained reluctant to exercise their discretion under the Health and Safety Code to make warrantless detentions to divert individuals to mental health services. It is to be hoped that the 2017 enactment of Article 16.23, quoted above, will provide a catalyst to these departments or agencies to engage in broader diversion efforts. Despite that new section, some officers have expressed worries about possible liability for apprehending a person and taking him or her to a mental health facility for an evaluation. That should not be a concern. Section 571.019(a) of the Health and Safety Code provides that a “person who participates in the examination, certification, apprehension, custody, transportation, detention, treatment, or discharge of any person ... and who acts in good faith, reasonably, and without negligence is not criminally or civilly liable for that action.”

**Jail Diversion Statutes.** What should happen when a person with mental illness is arrested and jailed? The legislature first added several jail diversion provisions to the Texas Code of Criminal Procedure in 1993 as part of an extensive package of criminal justice reforms. These provisions were significantly amended in both 2017 and 2019, and will be discussed below.

As described in the official analysis of the original version of the 1993 legislation, previous “Texas Law ha[d] no codified procedure for allowing the transfer of suspected mentally ill ... defendants who are in jail. These individuals await[ed] trial

without the benefit of any treatment.” HOUSE COMM. ON CRIM. JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 1605, 73rd Leg. (1993). The bill analysis also declared that there is a

grave injustice that is visited on those who are mentally ill ... and who are in need of medical care. Regardless of guilt or innocence, these citizens should be provided appropriate care. The system of justice may proceed with the procedure that is called for; but, the health care issue is to be addressed if we are to act as a civilized society.

*Id.* This assessment still resonates today. And, thus, the legislature took steps to begin addressing these concerns, with far more attention paid in recent years. Three key sections will be discussed below: Article 16.22, Article 17.032, and Article 42A.506.

#### **ART. 16.22, TEXAS CODE OF CRIMINAL PROCEDURE.**

**Art. 16.22. Early Identification of Defendant Suspected of Having Mental Illness or Intellectual Disability.** (a)(1) Not later than 12 hours after the sheriff or municipal jailer having custody of a defendant for an offense punishable as a Class B misdemeanor or any higher category of offense receives credible information that may establish reasonable cause to believe that the defendant has a mental illness or is a person with an intellectual disability, the sheriff or municipal jailer shall provide written or electronic notice to the magistrate. The notice must include any information related to the sheriff’s or municipal jailer’s determination, such as information regarding the defendant’s behavior immediately before, during, and after the defendant’s arrest and, if applicable, the results of any previous assessment of the defendant. On a determination that there is reasonable cause to believe that the defendant has a mental illness or is a person with an intellectual disability, the magistrate, except as provided by Subdivision (2), shall order the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health authority, the local intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert to:

(A) interview the defendant if the defendant has not previously been interviewed by a qualified mental health or intellectual and developmental disability expert on or after the date the defendant was arrested for the offense for which the defendant is in custody and otherwise collect information regarding whether the defendant has a mental illness as defined by Section 571.003, Health and Safety Code, or is a person with an intellectual disability as defined by Section 591.003, Health and Safety Code, including, if applicable, information obtained

from any previous assessment of the defendant and information regarding any previously recommended treatment or service; and (B) provide to the magistrate a written report of an interview described by Paragraph (A) and the other information collected under that paragraph on the form approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments under Section 614.0032(c), Health and Safety Code.

(2) The magistrate is not required to order the interview and collection of other information under Subdivision (1) if the defendant in the year preceding the defendant's applicable date of arrest has been determined to have a mental illness or to be a person with an intellectual disability by the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health authority, the local intellectual and developmental disability authority, or another mental health or intellectual and developmental disability expert described by Subdivision (1). A court that elects to use the results of that previous determination may proceed under Subsection (c).

(3) If the defendant fails or refuses to submit to the interview and collection of other information regarding the defendant as required under Subdivision (1), the magistrate may order the defendant to submit to an examination in a jail or in another place determined to be appropriate by the local mental health or intellectual and developmental disability authority for a reasonable period not to exceed 72 hours. If applicable, the county in which the committing court is located shall reimburse the local mental health authority or local intellectual and developmental disability authority for the mileage and per diem expenses of the personnel required to transport the defendant calculated in accordance with the state travel regulations in effect at the time.

(a-1) If a magistrate orders a local mental health authority, a local intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert to conduct an interview or collect information under Subsection (a)(1), the commissioners court for the county in which the magistrate is located shall reimburse the local mental health authority, local intellectual and developmental disability authority, or qualified mental health or intellectual and developmental disability expert for the cost of performing those duties in the amount provided by the fee schedule adopted under Subsection (a-2) or in the amount determined by the judge under Subsection (a-3), as applicable.

(a-2) The commissioners court for a county may adopt a fee schedule to pay for the costs to conduct an interview and collect information under Subsection (a)(1). In developing the fee schedule, the commissioners court shall consider the generally accepted reasonable cost in that county of performing the duties

described by Subsection (a)(1). A fee schedule described by this subsection must be adopted in a public hearing and must be periodically reviewed by the commissioners court.

(a-3) If the cost of performing the duties described by Subsection (a)(1) exceeds the amount provided by the applicable fee schedule or if the commissioners court for the applicable county has not adopted a fee schedule, the authority or expert who performed the duties may request that the judge who has jurisdiction over the underlying offense determine the reasonable amount for which the authority or expert is entitled to be reimbursed under Subsection (a-1). The amount determined under this subsection may not be less than the amount provided by the fee schedule, if applicable. The judge shall determine the amount not later than the 45th day after the date the request is made. The judge is not required to hold a hearing before making a determination under this subsection.

(a-4) An interview under Subsection (a)(1) may be conducted in person in the jail, by telephone, or through a telemedicine medical service or telehealth service.

(b) Except as otherwise permitted by the magistrate for good cause shown, a written report of an interview described by Subsection (a)(1)(A) and the other information collected under that paragraph shall be provided to the magistrate:

- (1) for a defendant held in custody, not later than 96 hours after the time an order was issued under Subsection (a); or
- (2) for a defendant released from custody, not later than the 30th day after the date an order was issued under Subsection (a).

(b-1) The magistrate shall provide copies of the written report to the defense counsel, the attorney representing the state, and the trial court. The written report must include a description of the procedures used in the interview and collection of other information under Subsection (a)(1)(A) and the applicable expert's observations and findings pertaining to:

- (1) whether the defendant is a person who has a mental illness or is a person with an intellectual disability;
- (2) whether there is clinical evidence to support a belief that the defendant may be incompetent to stand trial and should undergo a complete competency examination under Subchapter B, Chapter 46B; and
- (3) any appropriate or recommended treatment or service.

(c) After the trial court receives the applicable expert's written report relating to the defendant under Subsection (b-1) or elects to use the results of a previous determination as described by Subsection (a)(2), the trial court may, as applicable:

- (1) resume criminal proceedings against the defendant, including any appropriate proceedings related to the defendant's release on personal bond under Article 17.032 if the defendant is being held in custody;

(2) resume or initiate competency proceedings, if required, as provided by Chapter 46B;

(3) consider the written report during the punishment phase after a conviction of the offense for which the defendant was arrested, as part of a presentence investigation report, or in connection with the impositions of conditions following placement on community supervision, including deferred adjudication community supervision;

(4) refer the defendant to an appropriate specialty court established or operated under Subtitle F, Title 2, Government Code; or

(5) if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person, release the defendant on bail while charges against the defendant remain pending and enter an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services under Chapter 574, Health and Safety Code.

(c-1) If an order is entered under Subsection (c)(5), an attorney representing the state shall file the application for court-ordered outpatient services under Chapter 574, Health and Safety Code.

(c-2) On the motion of an attorney representing the state, if the court determines the defendant has complied with appropriate court-ordered outpatient treatment, the court may dismiss the charges pending against the defendant and discharge the defendant.

(c-3) On the motion of an attorney representing the state, if the court determines the defendant has failed to comply with appropriate court-ordered outpatient treatment, the court shall proceed under this chapter or with the trial of the offense.

(d) This article does not prevent the applicable court from, before, during, or after the interview and collection of other information regarding the defendant as described by this article:

(1) releasing a defendant who has a mental illness or is a person with an intellectual disability from custody on personal or surety bond, including imposing as a condition of release that the defendant submit to an examination or other assessment; or

(2) ordering an examination regarding the defendant's competency to stand trial.

(e) The Texas Judicial Council shall adopt rules to require the reporting of the number of written reports provided to a court under Subsection (a)(1)(B). The rules must require submission of the reports to the Office of Court Administration of the Texas Judicial System on a monthly basis.

(f) A written report submitted to a magistrate under Subsection (a)(1)(B) is confidential and not subject to disclosure under Chapter 552, Government Code, but may be used or disclosed as provided by this article.

Although Article 16.22 was first enacted in 1993, the legislature substantially overhauled it in 2017,<sup>7</sup> and there were some fine-tuning amendments in 2019. Specifically, Article 16.22 *requires* a sheriff or municipal jailer to provide notice to a magistrate within 12 hours of receiving credible information that may establish reasonable cause to believe that a defendant has a mental illness or is a person with an intellectual disability. The statute employs the term “shall,” and the 12-hour reporting mandate was added by the legislature in 2017 (amending the former 72-hour requirement). Relevant information may include “information regarding the defendant’s behavior immediately before, during, and after the defendant’s arrest” or the results of any previous assessment.

Once the magistrate receives the written or electronic notice regarding this credible information that may establish reasonable cause to believe that the defendant has a mental illness or is a person with an intellectual disability, the magistrate must conduct the proceedings specified in Articles 16.22 and 17.032. *See* Art. 15.17(a-1), Tex. Code Crim. Proc. Then, upon reviewing the credible information from the sheriff, and upon a determination that “there is reasonable cause to believe that the defendant has a mental illness or is a person with an intellectual disability,” then the magistrate typically must order that the defendant be interviewed by an appropriate expert as specified by Article 16.22(a)(1) to (1) collect information regarding whether the alleged offender has a mental illness or has an intellectual disability, and (2) submit a written report back to the magistrate. Note that this process is unnecessary if the individual has been similarly evaluated and determined to have a mental illness or be a person with an intellectual disability in the year prior to this most recent arrest. (County jails and mental health authorities should keep records of such evaluations and reports that can be made available to magistrates in such cases.) If there is not a prior report from the previous year on file, subsection (a-4) permits the subsection (a)(1) interview to be conducted by the appropriate expert “in person in the jail, by telephone, or through a telemedicine medical service or telehealth service.”

In turn, pursuant to subsection (a)(3) of Article 16.22, if the defendant refuses to submit to the collection of mental health information ordered under subsection (a)(1), the magistrate may order the defendant to submit to an examination in the jail or another place deemed to be appropriate by the local mental health authority within 72 hours. After the expert’s interview with the defendant, a report must be provided to the magistrate within 96 hours of the date of the order if the defendant is in custody, or within 30 days if the defendant is not then in custody. The legislature also tasked the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) to develop and make available a standardized reporting form. *See* [https://www.tdci.texas.gov/documents/rid/SB\\_1326.pdf](https://www.tdci.texas.gov/documents/rid/SB_1326.pdf).

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<sup>7</sup> Prior to the 2017 legislative session, the Texas Judicial Council’s Mental Health Committee made recommendations to enhance and improve the use of Articles 16.22 and 17.032. Texas Judicial Council Mental Health Committee Report & Recommendations, at 4-5 (October 2016), available at <https://www.txcourts.gov/media/1436230/report-and-recommendations-of-tjc-mental-health-committee-final-w-cover.pdf>.

Article 16.22 was enacted with the specific intent to require the sheriff and magistrate to intervene at an *early* stage in the proceedings – shortly following arrest or after a psychiatric “break” in the jail – to have the defendant receive a prompt examination to identify whether he or she has a mental illness (or is a person with an intellectual disability). The clear intent of Article 16.22 was to assure an expedited evaluation and diagnosis for a defendant who is evidencing behavior or symptoms associated with mental illness and to recommend treatment.

Several amendments to Article 16.22 over the years have clarified that Article 16.22 is indeed intended to require a quick, early evaluation report for a defendant suspected of having a mental illness or a developmental disability (or to locate the results of a comparable report if one has been conducted within the previous year’s time). The Article 16.22 evaluation does not contemplate the conducting of a full mental health assessment or competency assessment. (Indeed, the legislature removed the term “assessment” from the statute in 2019 amendments.) Instead, subsection (b) requires the examining expert to provide a written report to include findings on three matters:

- (1) whether the person has a mental illness (or is a person with a developmental disability),
- (2) “whether there is clinical evidence to support a belief that the defendant may be incompetent to stand trial and *should* undergo a complete competency examination” (emphasis added), and
- (3) any appropriate or recommended treatment or service.

It is worth emphasizing that the evaluator’s report must include a discussion of recommended treatment. This recommendation can assist jail officials in identifying and providing appropriate mental health treatment services at the jail. (It should be noted, however, that for larger counties that employ or contract with psychiatrists, the local mental health authority, or other psychiatric service providers, the identification, diagnosis, and treatment of jail inmates with mental illnesses are likely being undertaken separate and apart from any efforts undertaken to follow the process described in Article 16.22.) The Office of Court Administration has developed a helpful flowchart of the processes addressed by Article 16.22. See <https://www.txcourts.gov/media/1438893/screeningassessment-sep2017.pdf>.

It is also important to note that although the Article 16.22 report must state whether there is clinical evidence to support the need for a complete competency evaluation, if there are no charges yet pending it is premature to order that competency evaluation. Chapter 46B applies only to a defendant *who has been charged* with a felony or a misdemeanor punishable by confinement. See also Floyd L. Jennings, *Statutory Changes Regarding Mentally Ill Defendants*, Voice for the Defense Online (Oct. 31, 2017), available at <http://www.voiceforthedefenseonline.com/story/statutory-changes-regarding-mentally-ill-defendants> (observing that the competency evaluation issue is not yet ripe if charges have not been filed). On the other hand, the finding in the Article 16.22 report that there is evidence to support the belief that the defendant may be incompetent to stand trial can serve to “tee up” the issue for the court should charges be filed against the defendant. As Dr. Jennings has noted, “[T]he 16.22 report can serve as the

evidence needed to order competency proceedings [once charges are filed] unless jail-based treatment has already resulted in sufficient stability.” *Id.*

Once the magistrate receives the expert’s report, the magistrate must provide copies to the prosecutor, defense counsel, and the trial court. Thereafter, what should the trial court do with the findings in the report? Subsection (c) identifies five possibilities and several immediate options. First, under subsection (c)(1), the trial court can resume criminal proceedings, including giving consideration to the defendant’s release on personal bond (for nonviolent offenses), coupled with court-ordered treatment conditions. This personal bond authority is set forth in Article 17.032, Texas Code of Criminal Procedure, and is discussed below.

Second, the trial court, pursuant to subsection (c)(2) can take note of the evaluator’s opinion that a full competency exam is warranted and thus order the exam and proceed under the competency provisions in Chapter 46B.

Third, under subsection (c)(4), the court may refer the defendant to an appropriate specialty court, presumably a mental health court.

Fourth, in an appropriate case, and as will be discussed below, the court may transfer the case under subsection (c)(5) to the court with probate jurisdiction for consideration of court-ordered outpatient mental health services.

Finally, as provided by subsection (c)(3), the trial court can utilize the Article 16.22 report during the punishment phase following a conviction, or potentially in connection with imposing treatment conditions as part of deferred adjudication community supervision.

The intent of the original legislation and more recent amendments has been to identify (promptly) persons in custody who will likely need treatment intervention. One challenging and concerning aspect of the statute, however, is the added requirement in Subsection (b)(2) to collect the required information for defendants who have been *released* from custody and to provide the statutory report within 30 days of the order. The volume of these cases – for example when a surety bond has been provided for release – is large. Moreover, with various bail reform efforts having been undertaken across the state, even larger numbers of persons have been and will be released before Article 16.22 interviews can be conducted. This aspect of the statute will need to be reassessed in a future legislative session.<sup>8</sup>

Subsection (c)(3) was added in 2009. It permits the trial court to consider the Article 16.22 report’s findings about a defendant’s mental illness and recommended

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<sup>8</sup> The Meadows Mental Health Policy Institute (“Meadows”) has reported on the large volume of orders subject to this provision, but concluded that there “is no capacity in the system to conduct the required number” of ordered interviews. Meadows has recommended eliminating the mandatory process for defendants who are no longer in jail custody. Tony Fabelo, Meadows Mental Health Institute, *The Challenge of Identifying, Diverting, and Treating Justice-Involved People with Mental Illness*, at 46 (Dec. 3, 2018).



treatment as part of the punishment phase following conviction, as part of a presentence investigation report, or in connection with imposing treatment conditions as part of placing the defendant “on community supervision, including deferred adjudication community supervision.” (See below for further discussion of Article 42A.506, Texas Code of Criminal Procedure.) This aspect of the statute provides the trial court with a great deal of latitude to impose mental health treatment conditions as part of disposing of a case; it also offers significant opportunities for prosecutors and defense attorneys to work out agreed treatment plans as part of a plea negotiation when appropriate. Moreover, given that Article 16.22 subsection (c)(3) provides the ability for the court to make use of the findings set forth in the Article 16.22 report during the punishment phase, it is not only prudent for, but also appears to be ethically incumbent on defense attorneys to assure that the sheriff and magistrate have complied with Article 16.22’s requirements.

The legislature added subsection (c)(5) as part of S.B. 362 in 2019. Prior to the 2019 legislative session, the Texas Judicial Council’s Guardianship, Mental Health, & Intellectual/Developmental Disability Committee recommended that Article 46B be amended “to create a new civil commitment option for Class B misdemeanor defendants.” Texas Judicial Council Guardianship, Mental Health, & Intellectual/Developmental Disability Committee Report & Recommendations, at 9 (June 2018), *available at* <https://www.txcourts.gov/media/1441879/guardianship-mental-health-idd-committee-report.pdf>. Interestingly, however, that authority already existed under the Texas Health and Safety Code.

Prior to discussing the 2019 addition of subsection (c)(5), some historical context is worthy of consideration. Before 1995, the Texas Mental Health Code precluded a court from issuing a civil commitment order for either temporary or extended mental health services for a proposed patient who faced charges for *any* criminal offense. Thus, law enforcement officials often found themselves in the difficult position of considering whether to drop criminal charges as a means of assuring that an alleged offender could obtain mental health services pursuant to the Mental Health Code. *See generally* MICHAEL J. CHURGIN, AN ANALYSIS OF THE TEXAS MENTAL HEALTH CODE 129-30 (2nd ed. 1994). In 1995, however, the legislature narrowed this restriction on the availability of civil commitment orders only to any “proposed patient who is charged with a criminal offense *that involves an act, attempt, or threat of serious bodily injury to another person.*” Correspondingly, however, after the 1995 amendments civil commitment *became* an available option for persons facing criminal charges as long as the charges *do not* involve an act, attempt, or threat of serious bodily injury. For the current versions of these provisions, see Tex. Health & Safety Code §§ 574.034(h), 574.0345(d), 574.035(i), and 574.0355(e).

Unfortunately, however, although this civil commitment authority has been available for such non-violent offenses since 1995, because the authority is located in the Texas Mental Health Code (a part of the Health and Safety Code), most criminal court judges and prosecutors were unfamiliar with this possible alternative. Accordingly, to flag the possibility for criminal trial courts, the legislature as part of

S.B. 362 in 2019 added subsection (c)(5) to Article 16.22. Specifically, the new section was intended to alert the trial court that “if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person,” the court may release the defendant on bail and order that the case be transferred to the court with probate jurisdiction to consider court-ordered outpatient mental health services. This should help in diverting more offenders out of the jail setting and into appropriate court-ordered outpatient mental health services.<sup>9</sup>

The same section of S.B. 362 in 2019 also added subsections (c-1), (c-2), and (c-3) to Article 16.22. If the court enters a (c)(5) transfer order, an attorney for the state must file the application for court-ordered mental health services. Thereafter, should the defendant be ordered to outpatient mental health services and complies with all appropriate treatment, subsection (c-2) creates a mechanism for the court to dismiss the charges. But, the state and the court have the ability, per subsection (c-3), to resume with the criminal case should the defendant fail to comply with any court-ordered outpatient mental health services.

Subsection (d) provides that Article 16.22 does not prevent the court from either releasing a defendant with mental illness on personal or surety bond, possibly with a “condition of release that the defendant submit to an examination or other assessment,” or ordering a competency exam “before, during, or after the interview and collection of other information regarding the defendant” pursuant to an Article 16.22 magistrate’s order. Accordingly, the magistrate or trial court has authority to release a defendant with mental illness on bond, but should also impose a condition that the defendant submit to the expert’s interview and evaluation under Article 16.22. As described above, however, the utility and feasibility of conducting these interviews after release on personal or surety bond is questionable. Moreover, notwithstanding the language in subsection (d)(2), there cannot be a proper order for a competency examination if charges are not pending.

Finally, although the language in Article 16.22 speaks primarily in terms of authorizing sheriffs to invoke the provisions of the act (through the statutory directive to provide information about the defendant’s possible mental illness to the magistrate), that language should not be read as a bar against other individuals providing pertinent information to a sheriff’s office concerning an alleged offender with mental illness. It may be prudent for defense counsel, the prosecutor, a mental health worker, or a family member or friend to inform law enforcement officials within the sheriff’s office concerning the alleged offender’s history of mental illness. That information could prove useful not only with respect to invoking this statute, but also in assuring the provision of appropriate mental health services at the jail. The information can also be relayed to the prosecuting attorney involved in the case or to the county attorney who has responsibility for the legal duties imposed on the

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<sup>9</sup> In actuality, the relevant Chapter 574 Health and Safety Code provisions provide authority to the court with probate jurisdiction to consider either inpatient or outpatient civil commitment when such non-violent charges are pending. However, given the dearth of available inpatient civil commitment resources, the language added to Article 16.22 focused solely on outpatient civil commitment proceedings.

sheriff. Additionally, it is important that counties and mental health authorities develop memoranda of understanding (MOUs) regarding the providing of mental health services in the jail given the large number of individuals who are arrested yet who also have received treatment services by a community mental health center or a state hospital (or both).<sup>10</sup>

**ART. 17.032, TEXAS CODE OF CRIMINAL PROCEDURE.**

**Art. 17.032. RELEASE ON PERSONAL BOND OF CERTAIN DEFENDANTS WITH MENTAL ILLNESS OR INTELLECTUAL DISABILITY.** (a) In this article, “violent offense” means an offense under the following sections of the Penal Code:

- (1) Section 19.02 (murder);
- (2) Section 19.03 (capital murder);
- (3) Section 20.03 (kidnapping);
- (4) Section 20.04 (aggravated kidnapping);
- (5) Section 21.11 (indecentcy with a child);
- (6) Section 22.01(a)(1) (assault), if the offense involved family violence as defined by Section 71.004, Family Code;
- (7) Section 22.011 (sexual assault);
- (8) Section 22.02 (aggravated assault);
- (9) Section 22.021 (aggravated sexual assault);
- (10) Section 22.04 (injury to a child, elderly individual, or disabled individual);
- (11) Section 29.03 (aggravated robbery);
- (12) Section 21.02 (continuous sexual abuse of young child or children); or
- (13) Section 20A.03 (continuous trafficking of persons).

(b) Notwithstanding Article 17.03(b), or a bond schedule adopted or a standing order entered by a judge, a magistrate shall release a defendant on personal bond unless good cause is shown otherwise if:

- (1) defendant is not charged with and has not been previously convicted of a violent offense;
- (2) defendant is examined by the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health authority, the local intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert under Article 16.22;
- (3) applicable expert, in a written report submitted to the magistrate under Article 16.22:

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<sup>10</sup> For an extended analysis of Article 16.22, see Texas Judicial Commission on Mental Health, *Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book*, at 41-53 (May 2019), available at <http://texasjcmh.gov/media/1636/jcmh-bench-book-may-2019.pdf>. A new edition will be available in late 2019.

(A) concludes that the defendant has a mental illness or is a person with an intellectual disability and is nonetheless competent to stand trial; and

(B) recommends mental health treatment or intellectual and developmental disability services for the defendant, as applicable;

(4) the magistrate determines, in consultation with the local mental health authority or intellectual and developmental disability authority, that appropriate community-based mental health or intellectual and developmental disability services for the defendant are available in accordance with Section 534.053 or 534.103, Health and Safety Code, or through another mental health or intellectual and developmental disability services provider; and

(5) the magistrate finds, after considering all the circumstances, a pretrial risk assessment, if applicable, and any other credible information provided by the attorney representing the state or the defendant, that release on personal bond would reasonably ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense.

(c) The magistrate, unless good cause is shown for not requiring treatment or services, shall require as a condition of release on personal bond under this article that the defendant submit to outpatient or inpatient mental health or treatment intellectual and developmental disability services as recommended by the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, the local mental health authority, the local intellectual and developmental disability authority, or another qualified mental health or intellectual and developmental disability expert if the defendant's:

(1) mental illness or intellectual disability is chronic in nature; or

(2) ability to function independently will continue to deteriorate if the defendant does not receive the recommended treatment or services.

(d) In addition to a condition of release imposed under Subsection (c), the magistrate may require the defendant to comply with other conditions that are reasonably necessary to ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense.

(e) In this article, a person is considered to have been convicted of an offense if:

(1) a sentence is imposed;

(2) the person is placed on community supervision or receives deferred adjudication; or

(3) the court defers final disposition of the case.

Another section of the 1993 penal reforms that first became effective in 1994 is Article 17.032 of the Texas Code of Criminal Procedure. Similar to Article 16.22, this statute represented an attempt by the legislature to identify promptly and divert certain alleged offenders with mental illness or intellectual disabilities into pre-trial treatment outside of the jail environment. Article 17.032 received new attention prior to the 2017 legislative session. See Texas Judicial Council Mental Health Committee Report & Recommendations, at 4 (October 2016), *available at* <https://www.txcourts.gov/media/1436230/report-and-recommendations-of-tjc-mental-health-committee-final-w-cover.pdf> (noting the “statutory authorization for magistrates to release a nonviolent defendant with a mental illness on a personal bond and require treatment as a condition of release” and recommending potential amendments “to increase flexibility regarding bond availability and conditions for mentally ill, non-violent defendants”). Indeed, Article 17.032 generally *requires* magistrates to release certain alleged offenders with mental illness or intellectual disabilities on personal bond pending further criminal proceedings unless good cause is shown otherwise. If a defendant is released on personal bond, there is no requirement for sureties or other security (no bail).

Specifically, the provisions of Article 17.032 direct a magistrate to release a defendant with mental illness on personal bond, unless good cause is shown, if (1) the pending charges do not include any of the violent crimes identified in Subsection (a) of the statute, and (2) the alleged offender has not been previously *convicted* of any such violent crime. (S.B. 1326 in 2017 narrowed this list to exclude most simple assault charges, other than for family violence.) In addition, an appropriate expert must have examined the defendant pursuant to Article 16.22, Texas Code of Criminal Procedure, as described above. Additional criteria for the defendant’s release under this statute are that the examining expert’s report must include (1) findings that the defendant has a mental illness or is a person with an intellectual disability, but is nonetheless *competent* to stand trial, and (2) a recommendation that the defendant receive mental health treatment or intellectual disability services, as appropriate.

Keep in mind, of course, that the Article 16.22 mental health evaluation is *not* a competency examination. (Moreover, under Chapter 46B a competency exam may not in any event be conducted by an expert who is involved in the treatment of the defendant or prior to the bringing of charges.) In addition, if the expert who conducted the Article 16.22 evaluation determines that the defendant has a mental illness and might be *incompetent* to stand trial, the Article 16.22 report must also include that information. In turn, that finding by the Article 16.22 evaluator would in all likelihood be sufficient credible evidence to trigger an informal inquiry by the trial judge to then order a full competency exam and undertake competency proceedings under Chapter 46B (if the defendant has been charged); a release on personal bond would not be relevant at that time. The net effect is that with the scope of Article 17.032 being generally limited to defendants with mental illness or intellectual disabilities who are also competent to stand trial, relatively few individuals will typically satisfy the statute’s opportunity for release on personal bond.

Even if the preceding criteria for release on personal bond are met, however, the magistrate must still determine, after consulting with the local mental health

authority or intellectual and developmental disabilities authority, that appropriate, community-based treatment services are available. For obvious reasons, appropriate local mental health or intellectual disability services *must* be available for this statute to be effective. It would be nonsensical, for example, to release a defendant with serious mental illness on personal bond with mental health treatment conditions, but not have sufficient and appropriate mental health services available in the community for that individual's treatment needs. In fact, intensive services as part of an Assertive Community Treatment (ACT) team are likely warranted. Correspondingly, sufficient funding must be made available and dedicated to carry out the legislative intent.

As originally enacted, the release requirements set forth in Article 17.032 were mandatory provided that the relevant criteria were satisfied. Subsection (b), however, was modified in 1997 to permit a magistrate not to release a defendant with mental illness or an intellectual disability on personal bond if "good cause is shown otherwise." This phrase was not further defined in the 1997 amendments, but it did appear to allow the prosecuting attorney to make arguments against release on personal bond in certain cases. Clearly, however, the legislature was intending "good cause" to apply only in exceptional cases, and not to become the "rule." Then, in 2017, the legislature added subsection (b)(5) to require the magistrate to consider all the circumstances, including any available pretrial risk assessment, in assessing whether to find "that release on personal bond would reasonably ensure the defendant's appearance in court ... and the safety of the community and the victim of the alleged offense."

The most important language included in Article 17.032 is set forth in Subsection (c). For a person with mental illness, as a condition of the defendant's release on personal bond, the magistrate must generally require that the defendant submit either to outpatient or inpatient mental health services, as recommended by the local mental health authority, pending any further criminal proceedings. The magistrate is required to impose that condition upon finding either that (1) the defendant's mental illness is chronic in nature, *or* (2) the defendant's ability to function independently will continue to deteriorate without the benefit of treatment for the mental illness. As originally enacted, Subsection (c) stated only that a magistrate "may" impose such a treatment condition. The legislature modified that language in 1997 by replacing "may" with "shall" ("unless good cause is shown for not requiring treatment"). The 1997 changes demonstrated clear legislative intent that alleged offenders with mental illness should receive adequate and appropriate mental health services pending the resolution of the criminal process. We have long applauded the legislature's 1997 revision making the treatment condition mandatory. This intent was re-emphasized as part of 2017's enactment of S.B. 1326. It would be incongruous to identify an alleged offender's mental illness and need for medical attention, yet release the individual on personal bond with no condition that the person obtain treatment. Exceptions to the treatment condition should be made only in rare circumstances. Also, a lack of funds for treatment should not equate to "good cause" for not requiring the treatment condition. However, sufficient funding should be appropriated to the local mental health authorities to assure that treatment services

are available, such as those provided by an ACT team. Unfortunately, the lack of availability of adequate resources for community-based treatment is often the single most significant obstacle to an effective implementation of this statute.

In addition to authorizing the condition that a defendant submit to mental health treatment for release on personal bond, Subsection (d) permits a magistrate to impose other conditions “reasonably necessary to ensure the defendant’s appearance in court as required and the safety of the community and the victim of the alleged offense.” The statute, however, is otherwise silent with respect to what these “other conditions” might include, although usual bond conditions might be considered. To facilitate treatment, added restrictions under this section, if any, should not be overly broad. On the other hand, certain requirements might be both relevant and appropriate. For example, if a magistrate orders as a condition of release on personal bond that a defendant obtain outpatient care from a local mental health facility, the magistrate might also want to include a condition that the defendant or the facility provide regular reports that all appointments are being kept. Similarly, if a magistrate orders that a defendant receive inpatient services (if space is available), the magistrate might also require reports from the mental health facility as to whether the defendant continues to require inpatient treatment or could be treated satisfactorily on an outpatient basis.<sup>11</sup>

Although Article 17.032 authorizes magistrates to release on personal bond offenders with mental illness who have been charged with nonviolent offenses, the statute is silent about the potential for release on personal bond if the charged offense is for one of the identified “violent crimes.” One may certainly argue from this silence that the legislature must not have intended to authorize any possible release on personal bond for those offenses.

There is an alternative manner by which to analyze this aspect of the statute, however. Subsection (b) of Article 17.03, Texas Code of Criminal Procedure, generally authorizes “the court before whom the case is pending” to consider releasing on personal bond a defendant charged with certain violent crimes. (The list of violent crimes delineated in Article 17.03(b) is similar but not identical to the list set forth in Article 17.032.) Moreover, Subsection (a) of Article 17.03 provides general authority for magistrates to consider releasing defendants on personal bond for all charges except those violent offenses left in the hands of the presiding trial judges under Article 17.03(b). Thus, one may argue that even for the violent crimes identified in Article 17.032, the general grant of authority for releasing defendants on personal bond set forth in Article 17.03 still provides discretion to magistrates (and for certain violent crimes, to trial judges) to consider releasing on personal bond a defendant charged with one of the violent offenses included in Article 17.032. Of course, the magistrate or trial judge, as the case may be, in such a situation has a much greater

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<sup>11</sup> For an extended analysis of Article 17.032, see Texas Judicial Commission on Mental Health, *Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book*, at 60-67 (May 2019), available at <http://texasjcmh.gov/media/1636/jcmh-bench-book-may-2019.pdf>. The Bench Book also includes a helpful flowchart for considering 17.032 issues. *Id.* at 64. A new edition of the Bench Book will be available in late 2019.

degree of latitude in deciding whether to release a defendant on personal bond than in the situations delineated in Article 17.032. Additionally, in cases involving violent offenses, the magistrate or trial judge must of course give strong consideration to the protection of the public. Finally, if release on personal bond is not granted (or is ultimately determined not to be authorized), there will in all likelihood still exist a substantial need for assuring that the alleged offender with mental illness be provided with mental health treatment including appropriate medications within the jail setting (or upon release on bail).

Without doubt, Articles 16.22 and 17.032 collectively represent a clear legislative intent to create opportunities for the provision of mental health treatment or intellectual disability services subsequent to arrest outside of the jail setting for certain alleged offenders with mental illness or an intellectual disability. Particularly for nonviolent offenses, Article 17.032 continues to have the potential to provide an innovative mechanism for authorizing and ensuring treatment or services outside the jail environment pending further criminal proceedings. The same is true with regard to the 2019 addition of subsection (c)(5) to Article 16.22 that allows the trial court in cases in which the charges do “not involve an act, attempt, or threat of serious bodily injury to another person,” to release a defendant on bail and order that the case be transferred to a court with probate jurisdiction to consider court-ordered outpatient mental health services. Of course, implementation of these measures is key to their success.

Finally, and as an additional note, the reader should be aware that the existence of these diversion statutes does not preclude the possibility that a prosecutor might opt to drop criminal charges in exchange for an agreed mental health treatment plan, particularly for nonviolent crimes. This approach might be especially worth pursuing when there is some degree of confidence that the alleged offender will indeed comply with the treatment plan. Defense attorneys should endeavor to develop a prospective treatment plan that can be presented to the prosecution during plea bargaining. Prosecutors retain the discretion not to prosecute all matters and may instead turn to the mental health system in appropriate situations. Mental health courts also provide flexible options for post-booking, pre-trial adjudications in the specialty court context. They, too, typically rely on an agreed treatment plan approach, but with regular judicial oversight. Of course, successful diversion efforts must include increased capacity for more community-based mental health services.

#### **ART. 42A.506, TEXAS CODE OF CRIMINAL PROCEDURE.**

**Art. 42A.506. COMMUNITY SUPERVISION FOR DEFENDANT WITH MENTAL IMPAIRMENT.** If the judge places a defendant on community supervision and the defendant is determined to be a person with mental illness or a person with an intellectual disability, as provided by Article 16.22 or Chapter 46B or in a psychological evaluation conducted under Article 42A.253(a)(6), the judge may require the defendant as a condition of community supervision to submit to outpatient or inpatient mental health or intellectual disability treatment if:



- (1) the defendant's:
  - (A) mental impairment is chronic in nature; or
  - (B) ability to function independently will continue to deteriorate if the defendant does not receive mental health or intellectual disability services; and
- (2) the judge determines, in consultation with a local mental health or intellectual disability services provider, that mental health or intellectual disability services, as appropriate, are available for the defendant through:
  - (A) the Department of State Health Services or the Department of Aging and Disability Services under Section 534.053, Health and Safety Code; or
  - (B) another mental health or intellectual disability services provider.

This article first became effective on January 1, 2017. It is, however, a recodification of statutory language that was previously located at Article 42.12, Sec. 11(d), Texas Code of Criminal Procedure. The former provision was re-codified in a non-substantive manner during the 2015 legislative session. The substance of this legislation was initially also a part of the 1993 diversion reform efforts.

Put simply, Art. 42A.506 provides the court with the ability to utilize the findings regarding the defendant's mental illness in the Article 16.22 report (or in a Chapter 46B competency evaluation report) to impose mental health treatment conditions as part of placing a defendant on community supervision. Accordingly, this statute can facilitate certain plea bargain case resolutions by giving the court the authority to include mandatory mental health treatment as a condition of the community supervision. Similarly, a mental health court could also use the statute as a helpful tool. As with Article 17.032 treatment conditions, the court needs to consult with the local mental health authority regarding the availability of appropriate mental health services. Judges, prosecutors, and defense attorneys can and must help facilitate that dialogue. Counties should give strong consideration to providing payment to the mental health authority to fund these services, particularly if the state has not provided adequate funding to the mental health authority. Placing these defendants on a waitlist for mental health services because of a lack of available resources is not an appropriate action for these individuals.

A few important legal matters must be kept in mind in connection with Article 46A.506. First, the statute is not applicable if the defendant is incompetent. The person's competency must be restored, for example, before a court may accept a plea. But, once competency has been restored, Article 42A.506 could be employed as a means of assisting a defendant in remaining connected to mental health services as part of community supervision (either via a deferred adjudication or otherwise as authorized by Chapter 46A).

Also, even though Article 46A.506 authorizes a court to condition the defendant's community supervision on adherence to mental health treatment, the provision does not authorize the court to compel treatment. For example, Article 46A.506 includes no authorization for forced medication such as may be available in appropriate cases following a due process hearing when permitted under Texas Health and Safety Code

§574.106 or Article 46B.086, Texas Code of Criminal Procedure. Instead, the authority granted by Article 46A.506 to impose a treatment condition is more akin to a situation involving a treatment order as part of an outpatient civil commitment. *See* Texas Health and Safety Code § 574.037(c)(3) (“court shall order the patient to participate in the [treatment] program but may not compel performance”). The court’s remedy for noncompliance with a treatment condition imposed under Article 46A.506 would typically be a revocation of community supervision (or, in a mental health court program, a failure by the defendant to comport with the program agreement).

**Mental Health Courts.** There have also been some impressive efforts to develop mental health courts in an array of Texas counties in recent years. Although most of these have focused on misdemeanors, a few have included felonies. Importantly, as part of S.B. 562, the legislature in 2019 added Section 125.005 to the Texas Government Code to require counties with a population of over 200,000 to establish a mental health court program and to seek funds to pay the costs of the program. The only exception is if neither state nor federal funding is obtained despite the county’s required application(s) for such funding. Another new provision added by S.B. 562 authorizes two or more counties to establish a regional mental health court. Texas Government Code § 125.0025. More mental health courts need to be established, and the overall capacity should be increased to better address the large volume of cases.

**Trained Attorneys.** On a related front, in the last several years the Texas Commission on Indigent Defense has provided generous grants for the development of mental health public defender and mental health private defender offices in a growing number of Texas counties. Collectively, these programs involve specialized and trained attorneys and judges who often work in tandem with caseworkers, treatment teams, and social workers to provide better outcomes for those defendants with mental illness who are caught up in the criminal justice system.

**Summary.** As a final comment, it is worth observing that the legislature has created a viable framework for allowing, encouraging, and even requiring courts to consider pre-trial diversion and treatment efforts for a great many persons with mental illness who face criminal charges. Unfortunately, for many years there was not much activity within the state to implement statutorily authorized diversion programs. With the enactment of S.B. 1326 in 2017, along with fine-tuning amendments in 2019, that is beginning to change for the better. Courts and counties must now adhere to and implement Article 16.22. Moreover, before 2017, identification and treatment within the jails for persons with mental illness was often lacking, particularly in rural counties. That, too, is changing for the better. Indeed, Texas sheriffs have been some of the most vocal and persuasive advocates for improving pre-trial identification and services for alleged offenders with mental illness. For these well-intended diversion initiatives to be successful, judges, prosecutors, and law enforcement officials need to work closely with community and state mental health officials to ensure that the legislative intent is carried out.

**Challenges.** Although the Legislature has done a laudable job in enacting this array of diversion statutes, the ultimate success of these provisions will depend on increased access and greatly increased availability of comprehensive community-based mental health and intellectual disability services. If there continue to be inadequate resources for outpatient or inpatient community-based services (and access to housing and transportation), it will be difficult for the judicial system to achieve success.

Added costs for community-based services should, however, be balanced against the potential for reduced criminal justice costs through lower recidivism. Indeed, for many individuals with mental illness, being “judicially” connected to mental health services through diversion from the criminal justice process can result in reduced recidivism and greater use of available mental health services. Unfortunately, this promise does not extend co-equally to all persons with serious mental illness. Some individuals with serious mental illness, particularly those who are homeless and some who have been arrested and re-arrested many times, are not successful in an outpatient or voluntary setting; they require a highly structured placement in inpatient programs. These are often individuals with serious mental illness who are not medication-compliant on a voluntary basis. If, however, they are able to receive treatment through an inpatient civil commitment, the state can also seek an order for forced medication under Chapter 574 of the Health and Safety Code.<sup>12</sup> Medication stability, in turn, can lead to a better chance of success in any later step-down to intensive outpatient services.

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<sup>12</sup> In contrast, forced medication orders are not an available legal or practical option for outpatient commitments. For further discussion about the Texas forced medication statutes, see Chapter IV, *infra*, in connection with the discussion of Article 46B.086, Texas Code of Criminal Procedure.

## IV. COMPETENCY TO STAND TRIAL

Texas law has two distinct statutory schemes relating to a criminal defendant's competency to stand trial—depending on whether the alleged offender is an adult or a juvenile. Accordingly, this chapter is divided into a general discussion of the law pertaining to adults, followed by an analysis of the provisions relating to juveniles. Then, the final subchapter in this chapter focuses on competency issues in death penalty cases.

As discussed in earlier chapters, persons experiencing the symptoms of serious mental illness often find themselves caught up in the criminal justice system, particularly given our state's historically under-funded public mental health system. Although cases involving the insanity defense often grab the headlines, they are relatively rare. By way of contrast, competency issues arise in practically every Texas county every week of the year. Accordingly, an understanding of the criminal competency process is important for judges, prosecutors, and attorneys who represent individuals accused of crimes who have mental disabilities.

### A. IN GENERAL

**THE STANDARD FOR INCOMPETENCY TO STAND TRIAL.** Under our legal system, a criminal defendant must be able to understand the proceedings that are being conducted against him or her, or the accused may not undergo trial. See *Drope v. Missouri*, 420 U.S. 162 (1975). Similarly, the defendant should also be in a position to communicate with and assist his or her legal counsel. Indeed, if the defendant cannot understand the proceedings or assist defense counsel, serious questions concerning fundamental fairness arise. This subchapter focuses on Texas legislative enactments that allow the courts to address issues relating to whether an adult criminal defendant is competent to stand trial for the charged offense.

Many years ago, a former version of the Texas law on competency to stand trial focused on whether the defendant suffered from “present insanity” at the time of trial. Although no longer a part of the law, this antiquated phrase is useful in understanding that the question of competency relates to a criminal defendant's mental state, not at the time of the events resulting in the criminal charges, but at the time of trial. Unlike the insanity defense, which is discussed in the next chapter, a finding of incompetency to stand trial is not a defense to the crime charged. In other words, a determination of incompetency does not serve to excuse the offense. Instead, it relates to whether the defendant has the present capacity to stand trial at that time. Moreover, a finding of incompetency to stand trial differs from and should not be confused with a general finding of incompetency (by a civil court) in which a guardian might be appointed and a person's rights might be limited.

**SIGNIFICANT LEGISLATIVE ACTIVITY.** During the 2001 legislative session, concerns were raised regarding (1) inconsistencies in competency evaluations and evaluation reports around the state, and (2) wide variations in the expertise, qualifications, and skills of the evaluators conducting competency exams.

Accordingly, the legislature in 2001 passed S.B. 553, which created a 16-member task force to review the competency evaluation process. The task force was led by former Senator Robert Duncan and former Representative Patty Gray, and included representatives from the judiciary, medical schools, agencies, prosecutors, defense attorneys, psychologists, psychiatrists, and law schools (including the author of this guide book). The task force held hearings over the ensuing eighteen months and developed a number of recommendations to ensure appropriate and consistent application of criminal competency laws. From the very first public hearing, numerous witnesses and experts concurred that the former competency statutes primarily set forth in old Article 46.02, Texas Code of Criminal Procedure, were unduly complex, unwieldy, and difficult to interpret and use. The S.B. 553 Task Force's report is available at <http://www.lrl.state.tx.us/scanned/interim/77/sb1.pdf>.

Among its recommendations, the task force strongly urged the enactment of a revamped, new competency statute to streamline the process and ensure consistent application throughout the state. The task force developed proposed legislation that then-Senator Duncan filed as S.B. 1057 during the 2003 legislative session. The bill, which was supported by prosecutors, the defense bar, the judiciary, and organizations of psychiatrists and psychologists, moved rapidly through the legislative process with little debate or controversy. Governor Perry signed the bill into law, and S.B. 1057 went into effect on January 1, 2004. Much of the credit for the successful overhaul of the competency statute must go to Senator Duncan, who skillfully guided the task force through the process of developing a bill that greatly improved Texas law. In addition, recognition should be given to another key member of the task force, the late Judge Robert Cheshire, who spent countless hours developing key provisions of the legislation.

As with most comprehensive statutes, some refinements have been necessary over the last fifteen years. The legislature has returned to the topic of criminal competency in several subsequent sessions and has enacted a number of fine-tuning amendments.

**CHAPTER 46B, CODE OF CRIMINAL PROCEDURE.** The remaining portions of this subchapter set forth a section-by-section analysis of Chapter 46B, Texas Code of Criminal Procedure, which initially became effective for all competency proceedings initiated on or after January 1, 2004.

**Art. 46B.001. Definitions**

In this chapter:

- (1) "Adaptive behavior" means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group.
- (2) "Commission" means the Health and Human Services Commission.
- (3) "Competency restoration" means the treatment or education process for restoring a person's ability to consult with the person's attorney with a

reasonable degree of rational understanding, including a rational and factual understanding of the court proceedings and charges against the person.

(4) “Developmental period” means the period of a person’s life from birth through 17 years of age.

(5) “Electronic broadcast system” means a two-way electronic communication of image and sound between the defendant and the court and includes secure Internet videoconferencing.

(6) “Executive commissioner” means the executive commissioner of the Health and Human Services Commission.

(7) “Inpatient mental health facility” has the meaning assigned by Section 571.003, Health and Safety Code.

(8) “Intellectual disability” means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(9) “Local mental health authority” has the meaning assigned by Section 571.003, Health and Safety Code.

(10) “Local intellectual and developmental disability authority” has the meaning assigned by Section 531.002, Health and Safety Code.

(11) “Mental health facility” has the meaning assigned by Section 571.003, Health and Safety Code.

(12) “Mental illness” means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that grossly impairs:

(A) a person’s thought, perception of reality, emotional process, or judgment; or

(B) behavior as demonstrated by recent disturbed behavior.

(13) “Residential care facility” has the meaning assigned by Section 591.003, Health and Safety Code.

(14) “Subaverage general intellectual functioning” means a measured intelligence two or more standard deviations below the age-group mean, using a standardized psychometric instrument.

#### **Art. 46B.002. Applicability**

This chapter applies to a defendant charged with a felony or with a misdemeanor punishable by confinement.

#### **Art. 46B.0021. Facility Designation**

The commission may designate for the commitment of a defendant under this chapter only a facility operated by the commission or under a contract with the commission for that purpose.

The first three articles set forth in Chapter 46B provide definitions and a statement of general applicability. Of note, Article 46B.002 makes the chapter

applicable to defendants who have been charged with felonies or with misdemeanors in which they could be punished with jail or prison time. (Thus, other misdemeanor offenses in which fines are the only punishment are excluded. On the other hand, Constitutional requirements for competency should nonetheless be applicable to minor offenses.) In addition, as highlighted in the next subchapter, comparable issues involving juvenile offenders are covered by provisions in the Family Code, not Chapter 46B.

It is important to recognize, then, that a competency exam cannot be ordered for a defendant who has been arrested, but who has not yet been charged. If mental illness is suspected or documented, however, there is an ability to consider ordering an assessment under the provisions of Article 16.22, Texas Code of Criminal Procedure, which is discussed in detail in Chapter III above.

As its title suggests, Article 46B.001 sets forth various definitions that apply throughout the overall chapter. In 2019, as a part of S.B. 562, the legislature added items (1)-(6), as well as (8), (12), and (14). The reader should note that the legislature has opted to incorporate by reference several existing legal definitions as set forth in other areas of Texas law, most notably the Texas Health and Safety Code. For other definitions, the legislature has largely repeated existing definitions from the Health and Safety Code. For example, the recently added definition of “mental illness” in subsection (12) is generally consistent with the Health and Safety Code’s definition. That definition, along with further descriptions of specific serious mental illnesses, is discussed in detail in Chapter II, *supra*.

**THE STANDARD FOR INCOMPETENCY TO STAND TRIAL HAS NOT CHANGED.** The next article in Chapter 46B identifies the standard for incompetency to stand trial, as well as a key legal presumption.

**Art. 46B.003. Incompetency; Presumptions**

- (a) A person is incompetent to stand trial if the person does not have:
- (1) sufficient present ability to consult with the person’s lawyer with a reasonable degree of rational understanding; or
  - (2) a rational as well as factual understanding of the proceedings against the person.
- (b) A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.

In enacting Chapter 46B the legislature did not intend to change the underlying standard for incompetency. These provisions, sometimes called the *Dusky* standards, were established by the United States Supreme Court many years ago in the case of *Dusky v. United States*, 362 U.S. 402 (1960). A person is incompetent to stand trial on criminal charges if that person either (1) cannot communicate with his or her lawyer with a reasonable degree of rational understanding, OR (2) does not have a rational and factual understanding of the ongoing proceedings at that time. Accordingly,

under Chapter 46B, the focus is on whether the criminal defendant possesses sufficient mental competency to stand trial with respect to the charged offense(s). In addition, as a general matter, the defendant has the burden of proving that he or she lacks competency to stand trial by a preponderance of the evidence. Thus, the defendant must demonstrate with evidence that it is more likely than not that he or she is presently incompetent to stand trial. Otherwise, the defendant is presumed to be competent to stand trial. (Compare, however, the discussion of *Manning v. State*, 730 S.W. 744, 748 (Tex. Crim. App. 1987), *infra*, regarding a shift in the burden of proof in certain cases involving an unvacated prior adjudication of incompetence.) In addition, mere evidence that the defendant is suffering from a mental illness is legally insufficient to establish that the defendant is incompetent to stand trial. Instead, the evidence must support either of the two criteria identified in this section. See *Moore v. State*, 999 S.W.2d 385, 395 (Tex. Crim. App. 1999).

On a related note, given the general rules regarding competency, a criminal conviction should not stand if indeed the defendant was incompetent to stand trial but was tried nonetheless. See *Morales v. State*, 587 S.W.2d 418, 421 (Tex. Crim. App. [Panel Op.] 1979). Moreover, if a defendant is incompetent to stand trial, that defendant is also incompetent to plead guilty to an offense. See *Ex parte Lewis*, 587 S.W.2d 697, 700 (Tex. Crim. App. [Panel Op.] 1979). It is logically inconsistent to suggest that a defendant understands the ramifications of a guilty plea if the defendant is truly incompetent and, accordingly, unable to understand the proceedings against him or her. Although the Supreme Court has held that the general competency standard for pleading guilty is no higher than the standard for standing trial, the Court has acknowledged that a defendant must *knowingly* and *voluntarily* enter any guilty plea. *Godinez v. Moran*, 113 S.Ct. 2680, 2687-88 (1993).

A defendant with mental illness might also be competent to proceed, but still not be viewed as sufficiently competent to be allowed to insist on proceeding without counsel. Consider the 2008 decision of *Indiana v. Edwards*, 128 S.Ct. 2379 (2008), in which the United States Supreme Court determined that the Constitution does not preclude a state from rejecting a mentally ill defendant's request for self-representation and requiring that the defendant proceed to trial with counsel, even when the court viewed the defendant to be otherwise competent to proceed. The Court reasoned that the *Drope* competency "standards assume representation by counsel and emphasize the importance of counsel," and that given such a defendant's uncertain mental state, self-representation "threatens an improper conviction or sentence" and undercuts the prospect of a fair trial.

For an appalling case in which a Texas court inexplicably allowed a defendant with serious mental illness whose competence was questionable to represent himself at trial, consider the facts of *Panetti v. Quarterman*, 551 U.S. 930, 949-52 (2007). Despite a lengthy history of psychiatric illness and bizarre behavior both before and during trial, the trial court found Panetti competent both to stand trial and to waive counsel and represent himself at trial. *Id.* at 936-37. For a thoughtful discussion of *Panetti*, see Richard J. Bonnie, Commentary, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 Ohio St. J. Crim. L. 257, 257 (2007)



(asserting that *Panetti* exposed “the utter failure of the criminal justice system to take adequate account of the effects of severe mental illness in capital cases, specifically by failing to assure a fair defense for defendants with mental disabilities, by failing to give morally appropriate mitigating effect to claims of diminished responsibility” and in not correcting “these deficiencies in post-conviction proceedings”). Compare, however, *Long v. State*, 525 S.W.3d 351, 369-70 (Tex. App. – Houston [14th Dist.] 2017, *no pet.*), in which the court relied on *Indiana v. Edwards* to uphold the trial court’s rejection of the defendant’s request for self-representation despite having been found competent to stand trial.

**RAISING THE INCOMPETENCY ISSUE.** The incompetency statutes require a separation of the proceedings to determine whether a defendant is incompetent to stand trial from the actual trial on the merits of the case. In general, questions about competency should ordinarily be resolved at the outset of the proceedings, before commencement of the trial on the merits. Of course, it is possible that the issues relating to a defendant’s competency will not manifest themselves until after the criminal trial has begun.

**Art. 46B.004. Raising Issue of Incompetency to Stand Trial**

(a) Either party may suggest by motion, or the trial court may suggest on its own motion, that the defendant may be incompetent to stand trial. A motion suggesting that the defendant may be incompetent to stand trial may be supported by affidavits setting out the facts on which the suggestion is made.

(b) If evidence suggesting the defendant may be incompetent to stand trial comes to the attention of the court, the court on its own motion shall suggest that the defendant may be incompetent to stand trial.

(c) On suggestion that the defendant may be incompetent to stand trial, the court shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial.

(c-1) A suggestion of incompetency is the threshold requirement for an informal inquiry under Subsection (c) and may consist solely of a representation from any credible source that the defendant may be incompetent. A further evidentiary showing is not required to initiate the inquiry, and the court is not required to have a bona fide doubt about the competency of the defendant. Evidence suggesting the need for an informal inquiry may be based on observations made in relation to one or more of the factors described by Article 46B.024 or on any other indication that the defendant is incompetent within the meaning of Article 46B.003.

(d) If the court determines there is evidence to support a finding of incompetency, the court, except as provided by Subsection (e) and Article 46B.005(d), shall stay all other proceedings in the case.

(e) At any time during the proceedings under this chapter after the issue of the defendant’s incompetency to stand trial is first raised, the court on the motion

of the attorney representing the state may dismiss all charges pending against the defendant, regardless of whether there is any evidence to support a finding of the defendant's incompetency under Subsection (d) or whether the court has made a finding of incompetency under this chapter. If the court dismisses the charges against the defendant, the court may not continue the proceedings under this chapter, except that, if there is evidence to support a finding of the defendant's incompetency under Subsection (d), the court may proceed under Subchapter F. If the court does not elect to proceed under Subchapter F, the court shall discharge the defendant.

Article 46B.004 includes language to encourage early and prompt court review and evaluations of persons who might lack competency to be tried. With regard to raising the issue of incompetency with the court, Article 46B.004 intentionally uses terms such as "suggest" and "suggestion" with regard to when a court must conduct an informal inquiry to determine whether there is evidence from any source that would support a finding of incompetency to stand trial. These terms are in contrast to earlier case law interpreting former Art. 46.02 that required a judge to have a "bona fide doubt" prior to conducting such an informal inquiry. *Cf. McDaniel v. State*, 98 S.W.3d 704 (Tex. Crim. App. 2003). The language used in Article 46B.004 was specifically intended to expand the scope of situations in which the trial court must conduct an informal inquiry to assess whether there is some evidence – from any credible source – regarding the defendant's possible incompetency. The revised statute was intended to make it easier than under the old law to raise the incompetency issue before trial.

During the S.B. 553 task force process, the members were very intentional in moving away from a limiting standard such as *McDaniel's* "bona fide doubt" approach. Accordingly, defense counsel or the prosecution should file a motion with the court to suggest that the defendant lacks competency to stand trial before the date set for the trial if there is any indication of the person's lack of competency. Article 46B.004 also allows the judge to act on his or her own motion. This situation would likely occur in a case in which the judge believes that there are indications of a lack of competency despite the lack of any written motion to that effect by defense counsel or the prosecutor. Moreover, subsections (b) and (c) mandate that the court conduct an informal inquiry if *any evidence* suggesting the defendant's lack of competency comes to the attention of the judge.

Unfortunately, subsequent to Chapter 46B's 2004 effective date, the Texas courts by and large failed to take note that the legislature had intentionally changed the law in Article 46B.004(a)-(c) away from the old "bona fide doubt" standard through the use of the new terms, "suggest" and "suggestion." Indeed, a number of courts of appeal continued to apply the former standard, and the "bona fide doubt" approach was then resurrected and upheld by the Court of Criminal Appeals in *Montoya v. State*, 291 S.W.3d 420, 425 (Tex. Crim. App. 2009). As a direct response to *Montoya*, however, the legislature added Tex. Crim. Proc. art. 46B.004(c-1) in 2011. (The author of this guide book assisted in drafting subsection (c-1) for then-Senator Robert

Duncan.) Under subsection (c-1), the legislature has stated emphatically that the “bona fide doubt” standard is no longer the law. *See also Turner v. State*, 422 S.W.3d 676, 692-93 (Tex. Crim. App. 2013) (recognizing that the legislature in 2011 had rejected *Montoya* and the “bona fide doubt” standard).

Under Article 46B.004, if a suggestion of incompetency has been made through either subsection (a) or (b), subsection (c) requires the court to conduct an informal inquiry to assess whether there is “some evidence from any source” that would support a finding that the defendant may be incompetent. Thus, the present quantum of evidence necessary to raise an issue of competency is “a suggestion of incompetency,” and upon “some evidence from any source that would support a finding that the defendant may be incompetent to stand trial,” and “may consist solely of a representation from any credible source that the defendant may be incompetent.” Then, upon a showing of “some evidence” at the informal inquiry, the court is required to stay other proceedings and move forward to Article 46B.005 to order a competency examination.

As under prior law, any person can produce evidence of the defendant’s incompetency to stand trial, not just the defendant or defense counsel. Thus, a family member, a sheriff or deputy, a prosecutor, a mental health care worker, or some other interested person may come forward and offer evidence or information about the defendant’s lack of competency to be tried.

Once the judge makes a determination that there is some evidence of incompetency from any source, then all other pending proceedings in the case must be halted – unless, per Article 46B.005(d), the issue has been raised *after* the trial has begun, or if the prosecutor dismisses the charges per subsection (e). Thus, in the typical case in which incompetency issues are raised prior to the trial on the merits, other proceedings will be stayed once some evidence of incompetency is determined to exist.

It is worth noting that there was no intent in enacting the “some evidence” language to diverge from prior law with regard to the requisite evidentiary threshold for establishing that there is “some evidence.” For example, under prior law the court was required to conduct further incompetency proceedings upon the introduction of *some* probative evidence, *more than a scintilla*, regarding the defendant’s lack of competency. *See Sisco v. State*, 599 S.W.2d 607, 613 (Tex. Crim. App. 1980). Similarly, and as described more recently by the Court of Criminal Appeals,

In making this determination, a trial court must consider only that evidence tending to show incompetency, putting aside all competing indications of competency, to find whether there is some evidence, a quantity more than none or a scintilla, that rationally may lead to a conclusion of incompetency. If so, then evidence exists to support a finding of incompetency, and the statutory scheme requires the trial court to conduct a formal competency trial.

*Turner v. State*, 422 S.W.3d 676, 692-93 (Tex. Crim. App. 2013) (internal quotations and citations omitted). The court in *Turner* also indicated that even when a defendant might initially be deemed competent, the trial court should “remain ever vigilant for changes in circumstances that would make a formal adjudication [of competency] appropriate.” *Id.* at 693.

More recently, the Court of Criminal Appeals revisited these provisions in *Boyett v. State*, 545 S.W.3d 556 (Tex. Crim. App. 2018). In *Boyett*, defense counsel filed a motion raising the issue of the defendant’s competency, and the trial court proceeded to an informal inquiry. *Id.* at 558-59. At the conclusion of the informal inquiry, the court determined that “the evidence [was] insufficient to support a finding of incompetence and resumed the trial ...” *Id.* at 561. On appeal, the defendant challenged the trial court’s refusal to order a competency evaluation and conduct a competency trial. *Id.* The court of appeals affirmed. The Court of Criminal Appeals, however, ultimately determined that the court of appeals erred by not focusing solely on evidence of incompetency at the informal inquiry stage, and by improperly applying a “substantial possibility” of incompetency standard, rather than the “some evidence” standard required for an informal inquiry. *Id.* at 565-66.

There is typically no benefit in waiting for any significant period before urging the trial court to conduct an informal inquiry, and if some credible evidence suggests incompetence, the court must order a competency examination. Counsel should try to avoid any unnecessary delay, inasmuch as obtaining a competency report will, by statute, require as much as thirty days, with a possible extension for good cause. See *infra* Article 46B.026, Texas Code of Criminal Procedure. The caveat to this approach, however, may depend on the availability of jail psychiatric services. That is, if the county jail is providing appropriate jail psychiatric services and is both aggressively screening inmates and prescribing psychoactive medications, then it may be desirable simply to suggest a 14-21 day pause if the defendant has been examined and medication prescribed, but there has been insufficient time to stabilize the person (which is often 14-21 days or less).

Legislation in 2005 added subsection (e), which addresses situations in which the prosecutor elects to dismiss charges after an incompetency issue has been raised. The court may then dismiss the charges regardless of whether evidence supports a finding of the defendant’s incompetency. As a general matter, no further competency proceedings should take place. However, should the court be of the view that evidence supports a finding of incompetency, the court may (and should) proceed under Subchapter F of Chapter 46B. That subchapter, which as of 2019 includes only Article 46B.151, permits the court to enter an order transferring the defendant to the appropriate court for civil commitment proceedings. (Article 46B.151 is discussed in detail, *infra*.)

**WHAT HAPPENS ONCE THE COURT MAKES A DETERMINATION THAT EVIDENCE EXISTS TO SUPPORT A FINDING OF INCOMPETENCY?**  
Prior to 2004, if a court determined that there was evidence to support the possibility of a defendant’s incompetency, the court had to convene a *jury trial* solely to address

the defendant's possible lack of competency. By way of contrast, Chapter 46B made substantial changes to the procedures that follow this initial determination. These are included, in significant part, in Article 46.05.

**Art. 46B.005. Determining Incompetency to Stand Trial**

(a) If after an informal inquiry the court determines that evidence exists to support a finding of incompetency, the court shall order an examination under Subchapter B to determine whether the defendant is incompetent to stand trial in a criminal case.

(b) Except as provided by Subsection (c), the court shall hold a trial under Subchapter C before determining whether the defendant is incompetent to stand trial on the merits.

(c) A trial under this chapter is not required if:

- (1) neither party's counsel requests a trial on the issue of incompetency;
- (2) neither party's counsel opposes a finding of incompetency; and
- (3) the court does not, on its own motion, determine that a trial is necessary to determine incompetency.

(d) If the issue of the defendant's incompetency to stand trial is raised after the trial on the merits begins, the court may determine the issue at any time before the sentence is pronounced. If the determination is delayed until after the return of a verdict, the court shall make the determination as soon as reasonably possible after the return. If a verdict of not guilty is returned, the court may not determine the issue of incompetency.

First, if the court has determined in the informal inquiry that there indeed exists evidence to support a finding of incompetency, the court must order a competency examination. (The legislature intentionally included the word "shall.") *But see State v. Lopez*, 563 S.W.3d 409, 417 (Tex. App. – San Antonio 2018, *pet. granted*, March 19, 2019) (recognizing that Art. 46B.005(a) "imposes a mandatory duty on the trial court" to appoint an expert, but finding no error where the trial court instead dismissed the case given the prosecution's violation of the defendant's constitutional right to a speedy trial given the lapse of time following arrest).<sup>13</sup> Moreover, unlike under earlier law, there is no default requirement for a jury trial to determine incompetency. Indeed, Article 46B.005(c) relieves the court from having to hold a trial – at all – on the question of the defendant's incompetency if (1) neither party's counsel requests a trial on the issue, (2) neither party's counsel opposes a finding of incompetency, and (3) the court does not decide, on its own motion, that a trial on incompetency is necessary. Thus, the parties and court can *agree* that the defendant lacks competency to stand trial. Moreover, as will be discussed *infra*, even when a trial on incompetency is undertaken either because a party has opposed the finding of incompetency or the court has ordered an incompetency trial on its own motion, no

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<sup>13</sup> As of October 5, 2019, when this chapter was completed for publication, the Court of Criminal Appeals had not issued an opinion in the State's appeal.

jury trial is required unless either party affirmatively requests a jury (or on the court's own motion). Art. 46B.051(a).

These provisions represent a substantial and significant change from prior law. The S.B. 553 task force determined that the issue of incompetency was unopposed in 80-90% of all cases in which the issue arose. Nonetheless, substantial judicial resources were being expended to conduct jury trials despite any opposition to the determination of incompetency. In addition, research was provided to the task force which revealed that many counties were improperly selecting "pick up" juries to conduct incompetency hearings (in which courthouse personnel or other citizens were being rounded up to sit as jurors without all the usual procedures for juror identification and selection). In sum, the task force concluded that the former "practice of [utilizing] 'pick up' juries or utilizing a jury when all parties agree to the competency issue is not a sound practice." S.B. 553 Task Force Report, at 10, available at <http://www.lrl.state.tx.us/scanned/interim/77/sb1.pdf>. Thus, Article 46B.005(c) authorizes the court to forego a trial on the incompetency issue when none is sought, neither party objects, and the court is not of the view that it should order an incompetency trial on its own motion. The defendant's state constitutional right to a jury trial on the issue, however, is nonetheless preserved because the defendant can oppose a finding of incompetency and demand a jury trial on the issue.

**ISSUE OF INCOMPETENCY ARISING AFTER BEGINNING OF TRIAL ON THE MERITS.** Although the better practice is to resolve incompetency issues prior to the trial on the merits, Subsection 46B.005(d) carries forward language from prior law relating to procedural steps to be employed if the issue of incompetency does not arise until after the trial on the merits has begun. It should not be surprising to those who have knowledge of serious mental illnesses that a situation could arise in which a defendant diagnosed with mental illness might have been stabilized on medication prior to and at the outset of trial, but later suffer a relapse of the symptoms of the illness during the proceedings. Given the stresses of a criminal trial, some defendants might decompensate during the course of the process. Others might stop taking prescribed antipsychotic medication. Accordingly, the statute authorizes the court to consider questions about the defendant's incompetency even after the trial has begun. Moreover, the failure to pursue a review of the defendant's incompetency before the trial on the merits does not waive the opportunity to raise the question at a later stage of the proceedings. Case law interpreting the predecessor statute pointed out that evidence "may come from the trial court's own observations, known facts, evidence presented, motions, affidavits, or any other claim or credible source." *Brown v. State*, 960 S.W.2d 772, 774 (Tex. App. – Dallas 1997, pet. ref'd). Subsection (d) allows the court to determine the issue at any time before the sentence is pronounced. Thus, the court can halt the proceedings and undertake a competency determination at the time there is evidence of incompetency or wait until after a verdict is returned. As with a case in which the question is considered prior to the trial on the merits, per Subsection (c) no trial on incompetency will be required if the issue is not contested. Moreover, the trial on incompetency can be held before the court unless either party requests a jury. It should be noted, however, that if a jury trial is sought on the issue of incompetency,

as under prior law the court should conduct the more limited trial on the incompetency issue outside the presence of the jury that is considering the merits.

Per subsection (d), as under the former law, the judge can allow the criminal trial to be completed and undertake incompetency proceedings after the return of a verdict and before pronouncement of sentence. If the judge opts not to conduct the incompetency review immediately upon the raising of the issue, an incompetency trial is not necessary, or even allowed, if the jury acquits the defendant. For purposes of judicial economy, many courts have traditionally pursued this latter approach to avoid suspending ongoing trials. If, however, the incompetency assessment is postponed until post-trial, a finding of guilty will not be allowed to stand if the defendant is found to be incompetent. Additionally, given that the defendant may truly be incompetent to understand the proceedings or assist in his or her own defense, at some level it is conceptually incongruous to postpone an incompetency proceeding until *after* the trial on the merits. It would seem that the purposes of assuring that the defendant is able to understand the ongoing proceedings and assist in his or her defense could well be skewed if the judge does not proceed to resolve the incompetency issue at the time it arises.

**NO INTERLOCUTORY APPEAL.** Although taken out of numerical order, it is appropriate to mention Article 46B.011 at this point in our discussion.

**Art. 46B.011. Appeals.** Neither the state nor the defendant is entitled to make an interlocutory appeal relating to a determination or ruling under Article 46B.005.

This provision bars interlocutory appeals of determinations or rulings made by a court pursuant to the foregoing section, Article 46B.005, at the time of such rulings. Any appeal relating to such issues would have to be raised at the conclusion of the ensuing proceedings.

**WHEN TO APPOINT COUNSEL.** One concern that was raised before the S.B. 553 task force was the frequent situation of a defendant being ordered to undergo a competency evaluation *prior* to the appointment of legal counsel. Under prior law, subsection 4(b) of old Art. 46.02 only required appointment of counsel “prior to the competency hearing.” The law was vague about requiring such an appointment prior to any competency exam. Article 46B.006 provides specific direction as to this issue.

**Art. 46B.006. Appointment of and Representation by Counsel**

(a) A defendant is entitled to representation by counsel before any court-ordered competency evaluation and during any proceeding at which it is suggested that the defendant may be incompetent to stand trial.

(b) If the defendant is indigent and the court has not appointed counsel to represent the defendant, the court shall appoint counsel as necessary to comply with Subsection (a).

Article 46B.006 requires the court to appoint counsel for an indigent defendant prior to any court-ordered competency evaluation and during any proceeding in which it has been suggested that the defendant might not be competent to stand trial. This, coupled with the provisions of the Indigent Defense Act, should assure that a defendant does not undergo important aspects of a criminal matter – such as an incompetency proceeding or evaluation – prior to the appointment of legal representation. Moreover, given the provisions of Article 46B.005 in which a defendant can waive the right to a jury trial on the question of incompetency or potentially waive the right to a trial on the issue *at all*, it is important that the individual be represented by counsel – and, preferably, by counsel who has received continuing education and is knowledgeable about the competency statutes and related mental health proceedings.

#### **USE OF STATEMENTS MADE BY A DEFENDANT AT AN EXAM OR HEARING ON INCOMPETENCY.**

**Art. 46B.007. Admissibility of Statements and Certain Other Evidence.** A statement made by a defendant during an examination or trial on the defendant’s incompetency, the testimony of an expert based on that statement, and evidence obtained as a result of that statement may not be admitted in evidence against the defendant in any criminal proceeding, other than at:

- (1) a trial on the defendant’s incompetency; or
- (2) any proceeding at which the defendant first introduces into evidence a statement, testimony, or evidence described by this article.

Article 46B.007 places greater limitations on the use of statements made by a defendant during an examination or at an incompetency trial, or the testimony of an expert based on those statements, than under prior law. Subsection 3(g) of former Art. 46.02 stated, “No statement made by the defendant during the examination or the hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding.” Thus, although the predecessor statute precluded the later use of statements made by the defendant during an incompetency exam or incompetency trial at the ensuing trial on the merits, the statute did not expressly bar the use of such statements for other purposes, such as during the punishment phase of the criminal proceeding.

By way of contrast, Article 46B.007 was intentionally drafted to be much broader in scope than prior law. It excludes statements made by the defendant during an incompetency exam or incompetency trial, if any, except at the incompetency trial or in *any* later criminal proceeding – unless the defense first opens the door by introducing such statements from an examination or the prior incompetency trial. In this regard, consider *Johnson v. State*, No. 13-15-00461-CR, 2017 Tex. App. LEXIS 9769 (Tex. App. – Corpus Christi, *pet. ref’d*) (holding that it was error for the trial court to have allowed statements from a competency examination to be used as impeachment of an expert during a punishment trial when the defendant had not



first opened the door by introducing any statement she made during her competency examination; nonetheless, finding error to be harmless).

**RULES OF EVIDENCE.** Article 46B.008 was included to require that the Rules of Evidence apply to *any* incompetency trial under the revised statutory scheme regardless of whether it is conducted before the court or in front of a jury.

**Art. 46B.008. Rules of Evidence.** Notwithstanding Rule 101, Texas Rules of Evidence, the Texas Rules of Evidence apply to a trial under Subchapter C or other proceeding under this chapter whether the proceeding is before a jury or before the court.

**CREDIT FOR TIME SERVED.** If a person is ultimately convicted of a crime, the court must provide a credit to the person's sentence for any time that the person has been confined in a mental health facility, residential care facility, or jail pending trial.

**Art. 46B.009. Time Credits.** A court sentencing a person convicted of a criminal offense shall credit to the term of the person's sentence each of the following periods for which the person may be confined in a mental health facility, residential care facility, or jail:

- (1) any period of confinement that occurs pending a determination under Subchapter C as to the defendant's competency to stand trial; and
- (2) any period of confinement that occurs between the date of any initial determination of the defendant's incompetency under that subchapter and the date the person is transported to jail following a final judicial determination that the person has been restored to competency.

This provision is very similar to section 9 of the old Art. 46.02, and provides quite succinctly that, once a person is sentenced upon conviction, the judge must credit the time spent in incompetency proceedings in a mental health facility, residential care facility, or jail to the term of the sentence. This section has long represented an attempt by the legislature to provide a measure of fairness in the sentencing process. Were the time not credited toward a convicted defendant's sentence, an individual who has spent time in a mental health facility attaining competency before being convicted could be deprived of his or her liberty for a much longer period than a person convicted of the same offense who remains competent throughout the criminal proceedings. Legislation enacted in 2011 added subsection (2) to clarify that time credits should also extend to time spent in jail after an adjudication of incompetency and prior to being sent to a facility or outpatient placement for competency restoration treatment.

**CONTINUITY OF CARE.** Although Art. 46B.009 provides a time credit in the event of an ultimate conviction, the section does not, however, address any time credits in other situations. The S.B. 553 task force heard testimony that it is not unheard of for a defendant to spend *more* time in one or more mental health facilities as a result of competency proceedings than would have been spent in jail or prison

upon a conviction. In effect, the defendant can be caught in a revolving door between the county jail and the state hospital for years on end. For example, suppose a person is found incompetent and sent for competency restoration treatment. Typically, that treatment will be effective, particularly in the case of treatment for mental illness. The person will become competent, and then be returned to the county jail to face the pending criminal charges. Unfortunately, however, all too often jails have not continued the treatment begun at the state hospital or the criminal proceedings are unduly delayed. Then, in all too many cases, the person's mental condition deteriorates and the person is once again incompetent to proceed. Accordingly, it is hardly surprising that defense counsel and defendants with mental illness were traditionally reluctant to raise the competency issue when the potential criminal sentence involved relatively brief jail time.

Given this issue, in early editions of this book we argued that, as a matter of policy, the legislature should consider amending the act to preclude a person from spending more time in jail awaiting trial and in mental health or residential care facilities as a result of competency proceedings than the person would have faced following an immediate trial or guilty plea. Although the underlying purpose of any criminal or civil commitment differs from the reasons for punishment in jail or prison, the defendant will ultimately have been deprived of his or her liberty for a similar period under either scenario. Alternatively, we urged that until the legislature enacted this type of change to the prior law, prosecutors should consider exercising their considerable discretion to dismiss charges once a defendant spent as much time in a holding pattern between the criminal competency proceedings and mental health facilities as would likely have been spent in jail or prison as a result of a conviction. Happily, in more recent legislative sessions, the legislature has endeavored to address this revolving door problem in several ways.

**Art. 46B.0095. Maximum Period of Facility Commitment or Outpatient Treatment Program Participation Determined by Maximum Term for Offense.**

(a) A defendant may not, under Subchapter D or E or any other provision of this chapter, be committed to a mental hospital or other inpatient or residential facility or to a jail-based competency restoration program, ordered to participate in an outpatient competency restoration or treatment program, or subjected to any combination of inpatient treatment, outpatient competency restoration or treatment program participation, or jail-based competency restoration under this chapter for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried, except that if the defendant is charged with a misdemeanor and has been ordered only to participate in an outpatient competency restoration or treatment program under Subchapter D or E, the maximum period of restoration is two years.

(b) On expiration of the maximum restoration period under Subsection (a), the mental hospital, facility, or program provider identified in the most recent order of commitment or order of outpatient competency restoration or treatment

program participation under this chapter shall assess the defendant to determine if civil proceedings under Subtitle C or D, Title 7, Health and Safety Code, are appropriate. The defendant may be confined for an additional period in a mental hospital or other facility or may be ordered to participate for an additional period in an outpatient treatment program, as appropriate, only pursuant to civil proceedings conducted under Subtitle C or D, Title 7, Health and Safety Code, by a court with probate jurisdiction.

(c) The cumulative period described by Subsection (a):

(1) begins on the date the initial order of commitment or initial order for outpatient competency restoration or treatment program participation is entered under this chapter; and

(2) in addition to any inpatient or outpatient competency restoration periods or program participation periods described by Subsection (a), includes any time that, following the entry of an order described by Subdivision (1), the defendant is confined in a correctional facility, as defined by Section 1.07, Penal Code, or is otherwise in the custody of the sheriff during or while awaiting, as applicable:

(A) the defendant's transfer to:

(i) a mental hospital or other inpatient or residential facility; or

(ii) a jail-based competency restoration program;

(B) the defendant's release on bail to participate in an outpatient treatment program; or

(C) a criminal trial following any temporary restoration of the defendant's competency to stand trial.

(d) The court shall credit to the cumulative period described by Subsection (a) any time that a defendant, following arrest for the offense for which the defendant was to be tried, is confined in a correctional facility, as defined by Section 1.07, Penal Code, before the initial order of commitment or initial order for outpatient treatment program participation is entered under this chapter.

(e) In addition to the time credit awarded under Subsection (d), the court may credit to the cumulative period described by Subsection (a) any good conduct time the defendant may have been granted under Article 42.032 in relation to the defendant's confinement as described by Subsection (d).

This provision was first added by S.B. 867 in 2007, and it has been amended and clarified multiple times since then. It addresses the problem identified above by limiting the total amount of time a defendant can spend in incompetency proceedings and related pre-trial transfers to the maximum sentence possible for the pending charges. The one key exception identified in subsection (a) is for outpatient competency restoration treatment ordered under Subchapters D or E of Chapter 46B, for which a maximum cumulative period of two years may be authorized (and which might exceed the possible sentencing). *See also Ex Parte Reinke*, 370 S.W.3d 387, 388 (Tex. Crim. App. 2012) (holding that the maximum period set forth in the statute is the sentence specified by the offense itself, and that maximum period does not

include possible enhancements due to prior convictions). Note, however, that although no requirement exists for time credits as would apply to outpatient competency restoration services, a person charged with a Class A misdemeanor may be committed to such a program for 120 days, with a possible 60-day extension. See *infra* Article 46B.072(b) and related discussion.

Subsection (b) includes a process by which a person who is still in need of commitment for mental health treatment even after the maximum period identified by subsection (a) has been reached, can be ordered to receive treatment. The statute allows the state to seek that care, however, only through civil commitment proceedings conducted in front of a court with probate jurisdiction. At that point there is no longer a basis for the criminal court's involvement.

Subsection (c) provides that the maximum cumulative period described by the statute begins on the date of the initial competency commitment order and includes any additional time in which the defendant remains in jail after the signing of the order and prior to being transferred to, as applicable, an inpatient facility or outpatient placement. Unfortunately, in many counties and given a persistent problem of state-wide backlogs for available forensic hospital bed space, this maximum cumulative period can often be reached given these delays. Legislation enacted in 2017 added references to possible jail-based competency restoration as an alternative.

It is also important to note subsection (d) which *requires* the court to credit to the cumulative period any amount of time in which the defendant is held in jail following arrest that comes *prior to* the initial order of commitment or for outpatient treatment. In addition, subsection (e) permits the court also to credit any good conduct time.

This statute requires the courts to have an effective means of keeping track of the appropriate timeframes, and it is incumbent on counsel to do the same. For certain offenses, *e.g.*, Class B misdemeanors, the prospect of the defendant "timing out" under this statute is particularly relevant.

**Art. 46B.010. Mandatory Dismissal of Misdemeanor Charges.** If a court orders that a defendant charged with a misdemeanor punishable by confinement be committed to a mental hospital or other inpatient or residential facility or to a jail-based competency restoration program, that the defendant participate in an outpatient competency restoration or treatment program, or that the defendant be subjected to any combination of inpatient treatment, outpatient competency restoration or treatment program participation, or jail-based competency restoration under this chapter, and the defendant is not tried before the expiration of the maximum period of restoration described by Article 46B.0095:

(1) on the motion of the attorney representing the state, the court shall dismiss the charge; or

(2) on the motion of the attorney representing the defendant and notice to the attorney representing the state, the court:

(A) shall set the matter to be heard not later than the 10th day after the date of filing of the motion; and

(B) may dismiss the charge on a finding that the defendant was not tried before the expiration of the maximum period of restoration.

With regard to misdemeanor offenses, Article 46B.010 works in tandem with Article 46B.0095 to generally require a dismissal of charges for misdemeanors punishable by incarceration if the defendant has not been tried prior to the maximum period of restoration described in Art. 46B.0095. This provision is further recognition that substantial time can elapse before trial if a defendant is cycling between competency restoration and any subsequent relapse(s). This statute, along with Article 46B.0095, should serve as encouragement to local prosecutors to proceed to trial promptly upon a person's return to the county jail after competency restoration.

**LACK OF COMPLIANCE WITH CHAPTER.** Article 46B.012 provides that a lack of appropriate compliance with the provisions of the Chapter will not operate as a basis for the defendant to obtain a dismissal of the charges.

**Art. 46B.012. Compliance with Chapter.** The failure of a person to comply with this chapter does not provide a defendant with a right to dismissal of charges.

**INTERACTIVE VIDEO HEARINGS.** Subchapter A of Chapter 46B concludes with a section that authorizes interactive video hearings. Article 46B.013 was added by S.B. 679 in 2005 primarily to address concerns relating to transfers of individuals serving long-term commitments. Consider, by way of an example, a situation involving a person whose competency has not been restored. As will be described below, should the charges remain pending, eventually that individual's continued commitment will need to be the subject of civil commitment proceedings for extended hospitalization. It is arguably both more efficient and humane to authorize interactive video hearings between the state hospital and the committing court, rather than transporting the individual back to the county jail to await a further hearing before the committing court, and then transporting that individual back to the state hospital. In addition, doing so can avoid the prospect that the person will "lose" a coveted bed at a state hospital.

**Art. 46B.013. Use of Electronic Broadcast System in Certain Proceedings under this Chapter.** (a) A hearing may be conducted using an electronic broadcast system as permitted by this chapter and in accordance with the other provisions of this code if:

(1) written consent to the use of an electronic broadcast system is filed with the court by:

(A) the defendant or the attorney representing the defendant; and

(B) the attorney representing the state;

(2) the electronic broadcast system provides for a simultaneous, compressed full motion video, and interactive communication of image and sound between the judge, the attorney representing the state, the attorney representing the defendant, and the defendant; and

(3) on request of the defendant or the attorney representing the defendant, the defendant and the attorney representing the defendant are able to communicate privately without being recorded or heard by the judge or the attorney representing the state.

(b) On the motion of the defendant, the attorney representing the defendant, or the attorney representing the state or on the court's own motion, the court may terminate an appearance made through an electronic broadcast system at any time during the appearance and require an appearance by the defendant in open court.

(c) A recording of the communication shall be made and preserved until any appellate proceedings have been concluded. The defendant may obtain a copy of the recording on payment of a reasonable amount to cover the costs of reproduction or, if the defendant is indigent, the court shall provide a copy to the defendant without charging a cost for the copy.

**EXPERTS AND EVALUATIONS.** Subchapter B of Chapter 46B addresses both the qualifications and appointment of experts and the evaluation process. This portion of S.B. 1057 enacted significant changes from prior law.

**Art. 46B.021. Appointment of Experts.** (a) On a suggestion that the defendant may be incompetent to stand trial, the court may appoint one or more disinterested experts to:

(1) examine the defendant and report to the court on the competency or incompetency of the defendant; and

(2) testify as to the issue of competency or incompetency of the defendant at any trial or hearing involving that issue.

(b) On a determination that evidence exists to support a finding of incompetency to stand trial, the court shall appoint one or more experts to perform the duties described by Subsection (a).

(c) An expert involved in the treatment of the defendant may not be appointed to examine the defendant under this article.

(d) The movant or other party as directed by the court shall provide to experts appointed under this article information relevant to a determination of the defendant's competency, including copies of the indictment or information, any supporting documents used to establish probable cause in the case, and previous mental health evaluation and treatment records.

(e) The court may appoint as experts under this chapter qualified psychiatrists or psychologists employed by the local mental health authority or local intellectual and developmental disability authority. The local mental health

authority or local intellectual and developmental disability authority is entitled to compensation and reimbursement as provided by Article 46B.027.

(f) If a defendant wishes to be examined by an expert of the defendant's own choice, the court on timely request shall provide the expert with reasonable opportunity to examine the defendant.

**APPOINTMENT OF EXPERTS.** Art. 46B.021 addresses the appointment of experts. Subparts (a) and (b) relate to the timing of these appointments. Under subsection (a) if there has been a suggestion to the court that the defendant may be incompetent to stand trial, the court *may* appoint one or more experts at that time to conduct a competency evaluation. Under subsection (b), once there has been a determination that "evidence" exists to support a finding of incompetency to stand trial, the statute mandates that the court *shall* appoint an expert or experts to conduct the competency evaluation(s). Of course, subsection (b) will not be operative if the court has already exercised discretion to appoint an expert – per subsection (a) – upon a "suggestion" of incompetency. In addition, if a defendant has the resources to obtain an additional competency evaluation, subsection (f) requires the court to provide a reasonable opportunity for the additional expert to examine the defendant.

The court is tasked with appointing "disinterested" experts under Art. 46B.021. Accordingly, subsection (c) disallows the appointment of an expert who is involved in the treatment of the defendant. Correspondingly, the statute includes no provisions requiring the court to appoint an expert of the defendant's or prosecutor's choosing. In addition, as under prior law, the court may appoint experts who are employed by the local mental health authority (or, if relevant, the local intellectual and developmental disability authority) – provided that they are not then involved in the defendant's treatment, e.g., a treating doctor at a facility operated by the local mental health authority. (At one time there was concern in certain parts of the state that an employee of a local mental health authority could not be disinterested – even if not involved in the treatment of the defendant. That issue was resolved by 2001 legislation, which was carried forward in subsection (e)). Subsection (e) requires that the local mental health authority be compensated should one of its employees be appointed as the expert. Also, to assure that the expert has ample information on hand before conducting the evaluation, subsection (d) authorizes the court to direct that relevant documents such as the indictment or information and mental health treatment records be made available to the expert.

A few possible glitches have been raised regarding the repeal of former Article 46.02 and the revamped provisions of Chapter 46B. One relates to the place of evaluation. Subsection 3(b) of former Article 46.02 included language that allowed the defendant to be transferred to a designated mental health facility (either one operated by a local mental health authority or a state hospital) for an evaluation. That language was inadvertently not carried forward. Nonetheless, there was no intent by the S.B. 553 task force or the legislature to require that competency evaluations be conducted at the jail. Moreover, there is implicit authority under this section (Article 46B.021), and under Articles 46B.005, 46B.022, and 46B.027(b) for the court to order the transfer of the defendant to a mental health authority or state

hospital for an evaluation. Indeed, Article 46B.027(b) specifically refers to reimbursing a facility that accepts a defendant for examination under Chapter 46B for expenses connected to the examination.

**QUALIFICATIONS OF EXPERTS.** One concern regarding experts that was the subject of much discussion by the S.B. 553 task force related to the former law's limited statement of qualifications for appointment. The task force identified this as a problem area, and observed the following: "The evaluators' skill, experience and level of expertise varied from jurisdiction to jurisdiction though the minimum qualifications required in 46.02 appeared to be met in selecting experts. The qualifications, however, appeared to require strengthening to ensure competency of the experts." S.B. 553 Task Force Report, at 4, *available at* <http://www.lrl.state.tx.us/scanned/interim/77/sb1.pdf>. The ensuing legislation indeed strengthened the qualifications requirements.

**Art. 46B.022. Experts: Qualifications.** (a) To qualify for appointment under this subchapter as an expert, a psychiatrist or psychologist must:

(1) as appropriate, be a physician licensed in this state or be a psychologist licensed in this state who has a doctoral degree in psychology; and

(2) have the following certification or training:

(A) as appropriate, certification by:

(i) the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or

(ii) the American Board of Professional Psychology in forensic psychology; or

(B) training consisting of:

(i) at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations; and

(ii) at least eight hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment.

(b) In addition to meeting qualifications required by Subsection (a), to be appointed as an expert a psychiatrist or psychologist must have completed six hours of required continuing education in courses in forensic psychiatry or psychology, as appropriate, in either of the reporting periods in the 24 months preceding the appointment.

(c) A court may appoint as an expert a psychiatrist or psychologist who does not meet the requirements of Subsections (a) and (b) only if exigent circumstances require the court to base the appointment on professional training or experience of the expert that directly provides the expert with a specialized expertise to examine the defendant that would not ordinarily be possessed by a psychiatrist or psychologist who meets the requirements of Subsections (a) and (b).



Unlike prior law, Article 46B.022 generally limits courts to appoint only psychiatrists and Ph.D.-level psychologists who also meet certain training and continuing education requirements to serve as experts to conduct competency evaluations. Not surprisingly, the competency examinations authorized by Chapter 46B are extremely significant. It is important that the court and counsel receive a useful evaluation report from a qualified expert or experts. And, although far fewer jury trials are taking place under the revised law, for those cases in which a jury is sought, the expert's opinion will no doubt continue to play a significant role. Indeed, given the general lack of knowledge and many misconceptions about serious mental illness that predominate in this state and country, it is quite likely that many prospective jurors will have little or no previous experience with mental illness. Accordingly, the findings, report, and testimony of the medical experts are critical not only for establishing a factual basis for meeting the incompetency criteria, but also in educating the jury about the nature of the mental illness involved.

In addition to limiting the array of eligible experts to psychiatrists or Ph.D.-level psychologists, Article 46B.022 delineates the training and continuing education requirements necessary for appointment. First, the expert must be a physician or psychologist who is licensed *in Texas*. Then, one basis for eligibility is board certification. A physician is qualified under subsection (a)(2)(A)(i) if the doctor has been "board-certified" by "the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry;" that is, if he or she is a "board-certified" forensic psychiatrist. Similarly, a Ph.D.-level psychologist is qualified under subsection (a)(2)(A)(ii) if the expert has been "board-certified" by "the American Board of Professional Psychology in forensic psychology;" that is, if he or she is a "board-certified" forensic psychologist. Alternatively, even if the physician or Ph.D.-level psychologist is not board-certified, such a doctor can qualify through specified training as set forth in subsection (a)(2)(B) (both a minimum of 24 total hours of specialized forensic training relating to incompetency or insanity evaluations, *and* at least eight hours of continuing education relating to forensic evaluations completed in the calendar year prior to the appointment).

In addition to the foregoing requirements, subsection (b) requires ***all*** appointed experts to have taken at least "six hours of required continuing education in courses in forensic psychiatry or psychology, as appropriate, in either of the reporting periods in the 24 months preceding the appointment." Accordingly, there is an ongoing obligation for relatively recent continuing education.

There was some confusion with regard to the requirements for training and experience specified in an earlier version of Article 46B.022. Amendments enacted in 2011, however, resolved that confusion – at least with regard to the qualifications for experts to be appointed to conduct competency evaluations. Unfortunately, however, no corresponding amendments were made to the expert qualifications provisions in Article 46C for insanity evaluations (which will be discussed in Chapter V, *infra*). It is to be hoped that the legislature will act in an ensuing session to update the expert qualification requirements in Chapter 46C to mirror those set forth in Article 46B.022.

It should also be noted that subsection (c) allows a court to appoint as an expert a licensed psychiatrist or psychologist who does not otherwise meet the requirements of Article 46B.022, but only when “exigent circumstances require the court to base the appointment on professional training or experience of the expert that directly provides the expert with a specialized expertise to examine the defendant that would not ordinarily be possessed by a psychiatrist or psychologist who meets” the usual requirements of the statute. This was intended to be a very narrow exception and should be reserved for extraordinary situations. For example, the S.B. 553 task force discussed a case arising in the western part of the state in which a defendant not only appeared to lack competency because of either mental illness or an intellectual and developmental disability, but was also profoundly deaf. The court needed an expert psychologist who was primarily knowledgeable about the individual’s hearing disability, but that expert might not have had the usual forensics experience and training typically required by the revised law. Subsection (c) would allow an appointment of such an expert in such exceptional case.

As a side note, there was discussion during the S.B. 553 task force process of requiring the creation of a registry of qualified experts to be administered by the appropriate state agency licensing board(s). Because of fiscal concerns, however, that concept was not included in the final enactment. Instead, the courts should require prospective experts to provide current, updated information demonstrating their qualifications. Counsel should also raise objections to any prospective expert who does not meet the statute’s requirements.

As noted above, the appointed expert must not have been involved with treatment of the defendant. *See* Article 46B.021. The goals of forensic examinations are quite different from those relating to clinical treatment and involve inevitable and unacceptable conflicts of interest.

In addition, and arguably all too often, a practitioner with a long history of ties to the court will be appointed to conduct a competency examination, even though there has been scant (or no) scrutiny of the expert’s qualifications. Counsel and the court should endeavor to determine whether any desired examiner is statutorily qualified for the appointment. For a case involving serious issues that arise in utilizing an expert who does not qualify under this statute, see *Owens v. State*, 437 S.W.3d 584, 588 (Tex. App. – Texarkana 2014), *rev’d*, 473 S.W.3d 812 (Tex. Crim. App. 2015) (determining that the testimony of appointed expert who did not meet statutory qualifications must be disregarded, but the case was reversed on appeal based on a harmless error analysis); *Johnson v. State*, No. 04-13-00912-CR, 2015 Tex. App. LEXIS 5824, at \*10 (Tex. App. – San Antonio 2015, *pet. ref’d*) (holding that because expert was not qualified under Art. 46B.022, “his evaluation was not admissible and thus constituted no evidence of incompetence”). But, also consider *Pham v. State*, 463 S.W.3d 660, 668-70 (Tex. App. – Amarillo 2015, *pet. ref’d*), in which the court concluded that the comparable expert qualifications provisions in Chapter 46C apply only to court-appointed experts, and not to experts retained by the state or defense. Even if the Amarillo Court of Appeals was correct in its statutory interpretation, a

trial court should give much less weight to any expert who does not meet the statutory requirements and should strongly consider excluding that expert's testimony under Rule 702 of the Texas Rules of Evidence.

Finally, as will be discussed below in connection with Article 46B.025, although the court may appoint the same expert to examine the defendant for both competency and sanity, if the expert determines that the defendant is not competent, the expert may not issue an opinion on the defendant's sanity. *Id.* at art. 46B.025(c).

**CUSTODY STATUS.** The next section, Art. 46B.023, relates to a defendant's custody or status during an examination.

**Art. 46B.023. Custody Status.** During an examination under this subchapter, except as otherwise ordered by the court, the defendant shall be maintained under the same custody or status as the defendant was maintained under immediately before the examination began.

Under Article 46B.023, the fact of a court's order for a competency examination does not – standing alone – alter a person's custody status. Thus, a court can order that the competency examination be conducted in the jail. Of course, as discussed above, the court can also order that the defendant be transported to a facility designated by the local mental health authority or to a state hospital for the competency examination. This authority, although perhaps somewhat cryptic, is present in the language, "except as otherwise ordered by the court." This provides the court with authority, as under prior law, to order a defendant to be transported and examined at a facility outside the jail setting. Correspondingly, if the defendant's status at the time of the examination order is of a different nature – perhaps the individual is free on bail or without bond per Article 17.032, Texas Code of Criminal Procedure, then that status is not changed absent some other court order.

**FACTORS TO BE CONSIDERED DURING THE EXAMINATION.** In the years leading up to the creation of the S.B. 553 task force, a number of concerns were raised about the lack of standards under former Art. 46.02 for psychiatrists and psychologists to consider and follow when conducting competency evaluations and in preparing their reports. An entity based in Austin, Capacity for Justice, obtained several federal grants to study and make recommendations concerning competency evaluations in Texas. Those studies revealed inconsistencies around the state for evaluation reports (and in the level of training and qualifications of experts). Thereafter, the S.B. 553 task force identified a problem that the "actual evaluations submitted to the courts have been inconsistent in respect to content and compliance to statutorily-required information to be submitted to the courts." S.B. 553 Task Force Report, at 4, available at <http://www.lrl.state.tx.us/scanned/interim/77/sb1.pdf>. Moreover, former Art. 46.02 had scant language relating either to factors to be evaluated or information to be included in the final examination reports. The S.B. 553 task force and the ensuing legislation that enacted Chapter 46B tackled these issues in two regards. First, Article 46B.024 identifies an array of factors that must be considered in the examination; these primarily relate to functional aspects of the

basic competency standards. In addition, Article 46B.025 addresses the information that should be included in the expert's final report.

**Art. 46B.024. Factors Considered in Examination.** During an examination under this subchapter and in any report based on that examination, an expert shall consider, in addition to other issues determined relevant by the expert, the following:

- (1) the capacity of the defendant during criminal proceedings to:
  - (A) rationally understand the charges against the defendant and the potential consequences of the pending criminal proceedings;
  - (B) disclose to counsel pertinent facts, events, and states of mind;
  - (C) engage in a reasoned choice of legal strategies and options;
  - (D) understand the adversarial nature of criminal proceedings;
  - (E) exhibit appropriate courtroom behavior; and
  - (F) testify;
- (2) as supported by current indications and the defendant's personal history, whether the defendant:
  - (A) is a person with mental illness; or
  - (B) is a person with an intellectual disability;
- (3) whether the identified condition has lasted or is expected to last continuously for at least one year;
- (4) the degree of impairment resulting from the mental illness or intellectual disability, if existent, and the specific impact on the defendant's capacity to engage with counsel in a reasonable and rational manner; and
- (5) if the defendant is taking psychoactive or other medication:
  - (A) whether the medication is necessary to maintain the defendant's competency; and
  - (B) the effect, if any, of the medication on the defendant's appearance, demeanor, or ability to participate in the proceedings.

Article 46B.024 represented a substantial change and improvement over the prior law. Largely based on a similar enactment in a sister state (Utah), the statute sets forth an array of issues that relate to the functional aspects of a person's competency – or incompetency – to face a criminal trial. As noted above, there was no intent to change the underlying *Dusky* standards relating to the person's ability to understand the proceedings or ability to consult with counsel. Instead, the statute endeavored to "flesh out" the various components of what is or may comprise the underlying standards. Article 46B.024 was the focus of a great deal of debate during the S.B. 553 task force process and included substantial contributions by representatives from the professional psychiatric and psychological communities. The language was tailored through their assistance to identify the key components comprising the basic framework of what it means to be competent to stand trial. Since the statute's enactment, this type of information has been particularly helpful to counsel and the courts. Amendments enacted in 2011 added subsection (3)

regarding whether the person's condition or illness has lasted or is anticipated to last for at least a year, and modified subsection (4) to require the examiner to report on the *degree* of the person's impairment.

**EVALUATION REPORTS.** For a competency evaluation report to be of value to the courts, it should be thorough in its scope. The S.B. 553 task force received testimony and data that revealed that while many experts in Texas did an excellent job in preparing competency evaluation reports, the quality of the reports was inconsistent around the state, with many being quite conclusory in style. Moreover, the former Art. 46.02 offered little guidance as to the information that should be included in the report. Accordingly, Article 46B.025 is much more specific about the requirements for these reports.

**Art. 46B.025. Expert's Report.** (a) An expert's report to the court must state an opinion on a defendant's competency or incompetency to stand trial or explain why the expert is unable to state such an opinion and must also:

- (1) identify and address specific issues referred to the expert for evaluation;
- (2) document that the expert explained to the defendant the purpose of the evaluation, the persons to whom a report on the evaluation is provided, and the limits on rules of confidentiality applying to the relationship between the expert and the defendant;
- (3) in specific terms, describe procedures, techniques, and tests used in the examination, the purpose of each procedure, technique, or test, and the conclusions reached; and
- (4) state the expert's clinical observations, findings, and opinions on each specific issue referred to the expert by the court, state the specific criteria supporting the expert's diagnosis, and state specifically any issues on which the expert could not provide an opinion.

(a-1) The expert's opinion on the defendant's competency or incompetency may not be based solely on the defendant's refusal to communicate during the examination.

(b) If in the opinion of an expert appointed under Article 46B.021 the defendant is incompetent to proceed, the expert shall state in the report:

- (1) the symptoms, exact nature, severity, and expected duration of the deficits resulting from the defendant's mental illness or intellectual disability, if any, and the impact of the identified condition on the factors listed in Article 46B.024; and
- (2) an estimate of the period needed to restore the defendant's competency, including whether the defendant is likely to be restored to competency in the foreseeable future; and
- (3) prospective treatment options, if any, appropriate for the defendant.

(c) An expert's report may not state the expert's opinion on the defendant's sanity at the time of the alleged offense, if in the opinion of the expert the defendant is incompetent to proceed.

(d) The court shall direct an expert to provide the expert's report to the court and the appropriate parties in the form approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments under Section 614.0032(b), Health and Safety Code.

Article 46B.025 requires specific, detailed information in the expert's report relating to certain delineated matters that are in addition to Article 46B.024's mandate to report on that section's array of factors to be considered in the examination. The clear legislative intent was to guard against conclusory reports, and to encourage thorough write-ups. A well-written evaluation report not only assists the courts, but can be an invaluable resource for the competency restoration treatment team should the defendant be determined to be incompetent to stand trial. As noted by Shannon Edmonds in his excellent article analyzing the 2003 legislation that first enacted Article 46B, "What is clear is that the parties and the court will have substantially more information on each defendant than they have under ... [the former] law." *Incompetency under New Chapter 46B, Code of Criminal Procedure*, THE TEXAS PROSECUTOR 18, 24 (Nov./Dec. 2003). Mr. Edmonds also anticipated that courts and attorneys who are "accustomed to receiving nothing more than a one-page, conclusory memorandum in uncontested competency cases will now have a wealth of new information at their disposal." *Id.* (Mr. Edmonds is the Director of Government Relations for the Texas District and County Attorneys Association and participated in the S.B. 553 task force process.)

In addition to providing certain clarifying language to tighten up the requirements for the experts' reports and to make them more specific, H.B. 2725 enacted in 2011 added subsections (a-1) and (b)(2). Subsection (a-1) precludes the expert from basing his or her opinion on competency or a lack of competency solely on the defendant's refusal to communicate with the expert during the exam. In turn, subsection (b)(2) requires the expert to estimate the likely period for competency restoration and to report on whether it is likely that the defendant will be restored in the foreseeable future. If the expert determines that it is unlikely that there will be a restoration of competency in the foreseeable future, that finding has an important impact on the further procedural processing of the defendant (and will be discussed in connection with Article 46B.071, *infra*).

Subsection (c) of Article 46B.025 represented an important new addition to the state's competency provisions. Often, a court will appoint the same expert to examine the defendant for both competency and sanity (assuming that the defendant has raised the prospect of pursuing the insanity defense). And, conceptually, there is nothing wrong with such a practice. On the other hand, however, should the expert during the course of the examination conclude that the defendant is incompetent to proceed, any additional information elicited through a further evaluation – *at that time* – of the incompetent defendant's sanity would be suspect and likely be of little probative value. Accordingly, the intent of the S.B. 553 task force in drafting subsection (c) was to guard against that possibility. Thus, under subsection (c), if the expert reaches the conclusion that the defendant is incompetent, the expert should stop the examination and not make an assessment regarding sanity. If, however, the

expert is of the view that the defendant is competent, then the expert may proceed and examine for sanity (and thereafter write a separate report relating to the sanity issues). The professional psychiatrists and psychologists who participated on the S.B. 553 task force indicated that subsection (c) also reflected a codification of their respective ethical requirements. The 2005 enactment of Chapter 46C relating to the insanity defense includes a parallel provision in Article 46C.103, which precludes the expert from examining a defendant for purposes of determining sanity “if in the opinion of the expert the defendant is incompetent to proceed.”

Subsection (d) of Article 46B.025 was added by H.B. 2194 in 2005. It requires courts to direct that the appointed expert’s report comport with a format developed and approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI). That same bill tasked TCOOMMI with developing and making available in electronic format a standardized form for use by experts in reporting competency examination results. The form is available online at: <http://www.txcourts.gov/media/518971/templatecompetencyeval.pdf>.

As a side note, court decisions have determined that should a competency evaluation reveal that an indigent defendant might have a viable insanity claim, due process requires the court to appoint or give prior approval for the reimbursement of reasonable expenses for the defendant to obtain a competent psychiatrist or psychologist examiner to assist in the evaluation, preparation, and presentation of the insanity defense. *See, e.g., DeFreece v. State*, 848 S.W.2d 150, 159 (Tex. Crim. App.), *cert. denied*, 510 U.S. 905 (1993).

In addition, another section of S.B. 1057 in 2003 amended § 51.20(a), Texas Family Code, to mandate the use of the same requirements for appointment of experts, scope of evaluations, and expert reports for juvenile evaluations relating to the issue of a juvenile’s fitness to proceed.

**TIMELY PREPARATION OF REPORTS.** To be of maximum value to the courts and attorneys, the report from the expert should be submitted in a timely manner.

**Art. 46B.026. Report Deadline.** (a) Except as provided by Subsection (b), an expert examining the defendant shall provide the report on the defendant’s competency or incompetency to stand trial to the court, the attorney representing the state, and the attorney representing the defendant not later than the 30th day after the date on which the expert was ordered to examine the defendant and prepare the report.

(b) For good cause shown, the court may permit an expert to complete the examination and report and provide the report to the court and attorneys at a date later than the date required by Subsection (a).

(c) Repealed in 2017.

(d) The court shall submit to the Office of Court Administration of the Texas Judicial System on a monthly basis the number of reports provided to the court under this article.

Article 46B.026 creates a default rule that the expert should have the report completed and submitted within 30 days of the court's order appointing that expert. Subsection (b) does, however, authorize an extension upon good cause shown. Article 46B.026 also requires the expert to submit copies of the report to the court, the prosecutor, and the defense counsel. Subsection (d) was added in 2017 by S.B. 1326 to require courts to submit to the Office of Court Administration the total number of reports on a monthly basis.

**PAYMENT/REIMBURSEMENT FOR EXPENSES.** Article 46B.027 carries forward policies from the prior law that require counties to pay the costs for the appointed experts' services for the competency evaluations. Subsection (a) requires payment directly to the expert or, in the case of a qualified psychiatrist or psychologist who is employed by a local mental health or intellectual and developmental disability authority, to that entity. Additionally, subsection (b) requires payment by the county to the facility that has accepted the defendant for examination (*e.g.*, a state hospital or community based facility in the case of a defendant with mental illness). As discussed *supra*, Chapter 46B – unlike prior law – does not directly state that a court may order a defendant to be transported to a state hospital for a competency evaluation (or to a facility operated by a local mental health authority). For reasons described above, however, that authority is implicit in the statute; there was no intent to change that aspect of the former law. Subsection (b) is further support for that proposition. Obviously, if a facility is authorized by this subsection to receive payment for conducting an examination in its facility, then the court can first order that the individual be examined at such a facility. Moreover, because Article 46B.027(a) requires the county to pay for the appointed expert's services, a court may not order a defendant to reimburse the county for this expense following a conviction. *See Morgan v. State*, No. 06-17-00165-CR, 2018 Tex. App. LEXIS 134, at \*6 (Tex. App. – Texarkana 2018, *no pet.*) (holding that trial court erred in assessing the court-appointed psychologist's fees against the defendant).

**Art. 46B.027. Compensation of Experts; Reimbursement of Facilities.** (a) For any appointment under this chapter, the county in which the indictment was returned or information was filed shall pay for services described by Articles 46B.021(a)(1) and (2). If those services are provided by an expert who is an employee of the local mental health authority or local intellectual and developmental disability authority, the county shall pay the authority for the services.

(b) The county in which the indictment was returned or information was filed shall reimburse a facility that accepts a defendant for examination under this chapter for expenses incurred that are reasonably necessary and incidental to the proper examination of the defendant.



**THE INCOMPETENCY TRIAL PROCESS.** Subchapter C of Chapter 46B addresses the incompetency trial process. This subchapter replaced section 4 of former Art. 46.02. Later, in 2005 the legislature replaced the term “hearing” with “trial” to describe the proceedings.

- Art. 46B.051. Trial before Judge or Jury.** (a) If a court holds a trial to determine whether the defendant is incompetent to stand trial, on the request of either party or the motion of the court, a jury shall make the determination.
- (b) The court shall make the determination of incompetency if a jury determination is not required by Subsection (a).
- (c) If a jury determination is required by Subsection (a), a jury that has not been selected to determine the guilt or innocence of the defendant must determine the issue of incompetency.

As discussed above, perhaps the most significant change from the former law included in Chapter 46B is the ability to avoid a jury trial on the issue of incompetency unless the prosecutor, the defense, or the court affirmatively seeks a jury trial. Thus, jury trials are no longer required and are generally rare. Indeed, as provided in Article 46B.005(b) (discussed above), there is no need for a competency trial at all in an uncontested case unless one is sought by either party or the court. In the event a party contests the issue of competency or a competency trial is otherwise ordered by the court, Article 46B.051 also makes clear that a jury trial is only necessary if sought by a party or directed by the court’s own order. Otherwise, the trial may proceed before the court without a jury, which is the approach in the vast majority of cases.

As under prior law, if a jury trial is sought or otherwise ordered by the court, subsection (c) directs that a jury different from the jury that will determine guilt or innocence must determine the incompetency issue. The requirement of a separate jury for the competency trial permits those jurors to focus exclusively on issues relating to the defendant’s competency to stand trial, uncluttered by evidence or argument relating to the charged offense. Accordingly, these jurors may focus solely on questions relating to the defendant’s present competency.

**JURY DETERMINATIONS.** In those rare cases when a jury trial is sought, the jury must state in its verdict whether the defendant is incompetent to stand trial or not. In addition, there must be a unanimous finding by the jury on the question of incompetency to stand trial.

- Art. 46B.052. Jury Verdict.** (a) If a jury determination of the issue of incompetency to stand trial is required by Article 46B.051(a), the court shall require the jury to state in its verdict whether the defendant is incompetent to stand trial.
- (b) The verdict must be concurred in by each juror.

One important aspect of the current law not apparent on the face of Article 46B.052 relates to what is no longer required. Under Section 4 of former Art. 46.02, if the jury found the defendant to be incompetent to stand trial, the jury also had to determine whether the defendant would attain sufficient competency to stand trial in the foreseeable future. Thus, juries not only had to evaluate evidence concerning the defendant's present capacity to understand or participate in the criminal proceedings, they also had to make medical predictions about whether the defendant could attain, or regain, sufficient competency in the foreseeable future. The S.B. 553 task force was of the view that this is largely a medical judgment, and that juries are ill-equipped to make such predictions. Accordingly, the 2003 re-write of the statutes dropped that concept as a requirement for jury consideration. Note, however, that an opinion by the examiner and a corresponding finding by the trial court that a defendant is incompetent, but is unlikely to be restored in the foreseeable future, precludes the option of a commitment to a competency restoration program. *See infra* Article 46B.071(b) and related discussion.

#### **WHAT IF THE DEFENDANT IS DETERMINED TO BE COMPETENT?**

Article 46B.053 addresses the next steps to be taken upon a determination that the defendant is competent to be tried.

**Art. 46B.053. Procedure after Finding of Competency.** If the court or jury determines that the defendant is competent to stand trial, the court shall continue the trial on the merits. If a jury determines that the defendant is competent and the trial on the merits is to be held before a jury, the court shall continue the trial with another jury selected for that purpose.

If the proceeding results in a determination that the defendant is competent to stand trial, the court may proceed with the trial on the merits after dismissing the jury that determined competency. If there is to be a jury trial on the question of guilt or innocence, a new jury must be impaneled.

**WHAT IF THE DEFENDANT IS FOUND TO BE INCOMPETENT TO PROCEED OR THE ISSUE OF INCOMPETENCY IS UNCONTESTED?** The final two sections of Subchapter C of Chapter 46B are, in general, cross-reference sections to Subchapter D, which sets forth the procedures to be followed upon an initial determination of incompetency. For ease of reference, we are quoting these final two sections in reverse order.

**Art. 46B.055. Procedure after Finding of Incompetency.** If the defendant is found incompetent to stand trial, the court shall proceed under Subchapter D.

**Art. 46B.054. Uncontested Incompetency.** If the court finds that evidence exists to support a finding of incompetency to stand trial and the court and the counsel for each party agree that the defendant is incompetent to stand trial, the court shall proceed in the same manner as if a jury had been impaneled and had found the defendant incompetent to stand trial.

Per Article 46B.055, if there has been a trial on incompetency before either the court or a jury, and if the defendant is found to be incompetent to stand trial, the court must then follow the procedures set forth in Subchapter D of Chapter 46B (beginning with Article 46B.071). Alternatively, if the court determines that evidence exists to support a finding of incompetency, and the judge and counsel for both parties *agree* that the defendant is incompetent, *then no trial on incompetency is required*. Instead, Article 46B.054 directs that the court proceed as if a jury had made a finding of incompetency to stand trial. That is, the court should then proceed directly to the process described in Subchapter D, which is discussed immediately below.

**COMMITMENT FOR COMPETENCY RESTORATION TREATMENT.** As noted above, Subchapter D of Chapter 46B sets forth the procedural steps to be followed after an initial finding of incompetency by the court following either a trial on the issue (before the court or a jury), or if there was an uncontested incompetency determination. Article 46B.071 provides various alternatives:

**Art. 46B.071. Options on Determination of Incompetency.** (a) Except as provided in subsection (b), on a determination that a defendant is incompetent to stand trial, the court shall:

- (1) if the defendant is charged with an offense punishable as a Class B misdemeanor:
    - (A) release the defendant on bail under Article 46B.0711; or
    - (B) commit the defendant to:
      - (i) a jail-based competency restoration program under Article 46B.073(e); or
      - (ii) a mental health facility or residential care facility under Article 46B.073(f); or
  - (2) if the defendant is charged with an offense punishable as a Class A misdemeanor or any higher category of offense:
    - (A) release the defendant on bail under Article 46B.072; or
    - (B) commit the defendant to a facility or a jail-based competency restoration program under Article 46B.073(c) or (d).
- (b) On a determination that a defendant is incompetent to stand trial and is unlikely to be restored to competency in the foreseeable future, the court shall:
- (1) proceed under Subchapter E or F; or
  - (2) release the defendant on bail as permitted under Chapter 17.

Article 46B.071 sets forth a roadmap to guide the courts and practitioners as to the next steps under Chapter 46B upon an initial determination that the defendant is incompetent. Subsection (a) applies if the court has determined that the defendant is both incompetent and restorable. Subsection (b) controls, however, if the court's determination is that the defendant is both incompetent and unlikely to be restored in the foreseeable future. The procedures vary considerably.

For those defendants who are found to be incompetent yet restorable, subsection (a) specifies an array of alternatives depending on the level of charges. These provisions were substantially revised by S.B. 1326 in 2017. For persons charged with Class B misdemeanors, the options under the statutory scheme for competency restoration services include possible bail and an outpatient commitment order under Article 46B.0711, jail-based competency restoration under Article 46B.073(e), or commitment to an inpatient facility under Article 46B.073(f). For felony charges or Class A misdemeanors, the statutory options include possible bail and an outpatient commitment order under Article 46B.072, jail-based competency restoration, or an inpatient commitment. It should be noted that the 2017 amendments were intended to create more options to inpatient commitments, particularly given the long waitlists and waiting time to access available state hospital beds for inpatient competency restoration.<sup>14</sup>

If the examiner and court have determined that the defendant is incompetent to stand trial, but also is unlikely to be restored in the foreseeable future, subsection (b) directs the court elsewhere. In such a case, the court must proceed under Subchapters E or F of Article 46B (discussed below), which permit use of the Health & Safety Code provisions for civil commitment, or release the individual on bail under the provisions of Chapter 17 of the Code of Criminal Procedure. Accordingly, a “criminal” commitment for competency restoration is *not an option* in such a case under Articles 46B.0711, 46B.072 or 46B.073.

**Art. 46B.0711. Release on Bail for Class B Misdemeanor.** (a) This article applies only to a defendant who is subject to an initial restoration period based on Article 46B.071.

(b) Subject to conditions reasonably related to ensuring public safety and the effectiveness of the defendant’s treatment, if the court determines that a defendant charged with an offense punishable as a Class B misdemeanor and found incompetent to stand trial is not a danger to others and may be safely treated on an outpatient basis with the specific objective of attaining competency to stand trial, and an appropriate outpatient competency restoration program is available for the defendant, the court shall:

- (1) release the defendant on bail or continue the defendant’s release on bail; and
- (2) order the defendant to participate in an outpatient competency restoration program for a period not to exceed 60 days.

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<sup>14</sup> I have discussed issues relating to the long waitlists elsewhere. See *Competency, Ethics, and Morality*, 49 TEX. TECH L. REV. 861 (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3018532](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3018532). As of this writing, litigation remains pending between Disability Rights Texas and the State of Texas regarding the lengthy waiting time following competency restoration orders and prior to the availability of inpatient services. See *Adickes v. Hellerstedt*, 753 Fed. Appx. 236 (5th Cir. 2018) (reversing previous class certification, but remanding for further consideration).

(c) Notwithstanding Subsection (b), the court may order a defendant to participate in an outpatient competency restoration program under this article only if:

- (1) the court receives and approves a comprehensive plan that:
  - (A) provides for the treatment of the defendant for purposes of competency restoration; and
  - (B) identifies the person who will be responsible for providing that treatment to the defendant; and
- (2) the court finds that the treatment proposed by the plan will be available to and will be provided to the defendant.

(d) An order issued under this article may require the defendant to participate in:

- (1) as appropriate, an outpatient competency restoration program administered by a community center or an outpatient competency restoration program administered by any other entity that provides competency restoration services; and
- (2) an appropriate prescribed regimen of medical, psychiatric, or psychological care or treatment.

The legislature enacted Article 46B.0711 in 2017 as part of S.B. 1326 to respond, in part, to the significant waiting time and lengthy waitlists for available forensic state hospital beds. Article 46B.0711 creates a process by which the court, in an appropriate case involving a defendant charged with a Class B misdemeanor, may release the defendant on bail and order a commitment to an outpatient competency restoration program. This provision pre-supposes, however, the availability of an outpatient competency restoration program. To date, there are not a large number of such programs across the state, and many of the programs that do exist have limited capacity. Other legislation in 2017, however, provided funding for matching grant opportunities to develop programs such as outpatient competency restoration. It is to be hoped that more will be brought online in the near future.

In a thoughtful article, Dr. Floyd Jennings pointed out some of the challenges with outpatient competency restoration orders. Floyd L. Jennings, *Statutory Changes Regarding Mentally Ill Defendants*, Voice for the Defense Online (Oct. 31, 2017), available at <http://www.voiceforthedefenseonline.com/story/statutory-changes-regarding-mentally-ill-defendants>. For example, if a defendant is homeless, an outpatient order is unlikely to be successful. Managing transportation issues to, for example, travel to appointments could also be difficult for someone who is incompetent. There are also challenges with medication management if the person is incompetent.

With regard to medication, subsection (d)(2) authorizes the court to include in the commitment order a requirement that the defendant participate in “an appropriate prescribed regimen of medical, psychiatric, or psychological care or treatment.” The reader should note, however, that this provision does not extend to permitting *forced* medication. In contrast, Section 574.106 of the Texas Health and Safety Code

includes a judicial process for the possibility of forced medication orders, but only for persons in jail or in inpatient settings, not outpatient. Compare also Article 46B.086, discussed *infra*, which authorizes forced medication in certain situations and settings involving incompetent defendants, including jail-based competency restoration programs. It is noteworthy that the amendments to Article 46B.086 relating to jail-based competency restoration and authorizing the possibility of forced medication orders in appropriate cases in that setting were in the same 2017 legislation that created Article 46B.0711 (S.B. 1326), with no similar authorization. Perhaps it would be more helpful to consider the order about appropriate medications authorized by Article 46B.0711(d) as being comparable to orders in civil outpatient commitments that similarly may include adherence to a regimen of treatment including medication. See § 574.037(b)(2), Health and Safety Code. But, in particular, the criminal court should also be guided by analogy to Section 574.037(c-3), Health and Safety Code (“court shall order the patient to participate in the [treatment] program but may not compel performance”).

As more outpatient competency restoration programs are developed across the state, thought should be given to utilizing a hybrid program; that is, an outpatient program that is not entirely outpatient, but includes a residential component. Doing so would address some of the concerns raised by Dr. Jennings concerning housing, transportation, and the potential for better monitoring of medication compliance.

**Art. 46B.072. Release on Bail for Felony or Class A Misdemeanor.** (a) This article applies only to a defendant who is subject to an initial restoration period based on Article 46B.071.

(a-1) Subject to conditions reasonably related to ensuring public safety and the effectiveness of the defendant’s treatment, if the court determines that a defendant charged with an offense punishable as a felony or a Class A misdemeanor and found incompetent to stand trial is not a danger to others and may be safely treated on an outpatient basis with the specific objective of attaining competency to stand trial, and an appropriate outpatient competency restoration program is available for the defendant, the court

(1) may release on bail a defendant found incompetent to stand trial with respect to an offense punishable as a felony or may continue the defendant’s release on bail; and

(2) shall release on bail a defendant found incompetent to stand trial with respect to an offense punishable as a Class A misdemeanor or shall continue the defendant’s release on bail.

(b) The court shall order a defendant released on bail under Subsection (a-1) to participate in an outpatient competency restoration program for a period not to exceed 120 days.

(c) Notwithstanding Subsection (a-1), the court may order a defendant to participate in an outpatient competency restoration program under this article only if:

(1) the court receives and approves a comprehensive plan that:

- (A) provides for the treatment of the defendant for purposes of competency restoration; and
  - (B) identifies the person who will be responsible for providing that treatment to the defendant; and
- (2) the court finds that the treatment proposed by the plan will be available to and will be provided to the defendant.
- (d) An order issued under this article may require the defendant to participate in:
- (1) as appropriate, an outpatient competency restoration program administered by a community center or an outpatient competency restoration program administered by any other entity that provides outpatient competency restoration services; and
  - (2) an appropriate prescribed regimen of medical, psychiatric, or psychological care or treatment, including care or treatment involving the administration of psychoactive medication, including those required under Article 46B.086.

Similar to Article 46B.0711 (which applies only to Class B misdemeanor cases), Article 46B.072 authorizes or requires release on bail for treatment on an outpatient basis in appropriate cases if the pending charges are for felonies or Class A misdemeanors.<sup>15</sup> A court should weigh this option in any case involving nonviolent offenses or when the court is of the view that the defendant is not a danger to others. Treatment in the local community is often much more desirable than commitment to a remote institution. Moreover, this approach for nonviolent offenses is quite consistent with the legislative policy reflected by the diversion legislation highlighted in Chapter III above. Indeed, the statutory language is generally mandatory for Class A misdemeanors and permissive for felonies. Of course, its utilization and potential for successful implementation are contingent on the availability of an outpatient competency restoration program in the community. As well, eligibility for outpatient competency restoration services will, by rule, reside with the provider of the services. Accordingly, the criminal courts should work with the community mental health and intellectual and developmental disability authorities to assure that appropriate outpatient treatment programs are available to provide competency restoration services. Implicit in the legislation is that the courts and the mental health services providers must work closely together to structure and coordinate workable programs. In recent years, the state has funded a number of outpatient competency restoration programs, but more must be done. As the Texas Judicial Council's Mental Health Committee noted prior to the 2017 legislative session, "Successful implementation of this approach [utilizing outpatient competency restoration for defendants charged with Class B misdemeanors] will require creation and expansion of local treatment

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<sup>15</sup> This section also contemplates a change in time frame. Whereas, ordinarily, restoration commitments for alleged misdemeanants are for a period 60 days with one possible 60-day extension, in the case of outpatient competency restoration for persons charged with a Class A misdemeanor, the time frame is the same as for felony charges, 120 days with a possible 60-day extension.

options sufficient to meet demand and the needs of these individuals and their communities.” Texas Judicial Council Mental Health Committee Report & Recommendations, at 6 (October 2016), *available at* <https://www.txcourts.gov/media/1436230/report-and-recommendations-of-tic-mental-health-committee-final-w-cover.pdf>.

Some of the issues and challenges with outpatient competency restoration are detailed above in the discussion of Article 46B.0711. Like that statute, Article 46B.072(d) authorizes the court’s order to include in the order a requirement that the defendant take prescribed medication. Nonetheless, practitioners and the courts should keep in mind that *forced* medication is only authorized under the processes and in the situations described in Section 574.106, Texas Health and Safety Code, and Article 46B.086, discussed *infra*.

In situations in which release on bail to a local outpatient competency restoration program is not deemed appropriate due to concerns of public safety under subsection (a-1), or such services are simply not available in the community, the court is instead required to turn to Article 46B.073 to order the defendant to an inpatient facility or to a jail-based competency restoration program.

**Art. 46B.073. Commitment for Restoration to Competency.**

(a) This article applies only to a defendant not released on bail who is subject to an initial restoration period based on Article 46B.071.

(b) For purposes of further examination and competency restoration services with the specific objective of the defendant attaining competency to stand trial, the court shall commit a defendant described by Subsection (a) to a mental health facility, residential care facility, or jail-based competency restoration program for the applicable period as follows:

(1) a period of not more than 60 days, if the defendant is charged with an offense punishable as a misdemeanor; or

(2) a period of not more than 120 days, if the defendant is charged with an offense punishable as a felony.

(c) If the defendant is charged with an offense listed in Article 17.032(a) or if the indictment alleges an affirmative finding under Article 42A.054(c) or (d), the court shall enter an order committing the defendant for competency restoration services to a facility designated by the commission.

(d) If the defendant is not charged with an offense described by Subsection (c) and the indictment does not allege an affirmative finding under Article 42A.054(c) or (d), the court shall enter an order committing the defendant to a mental health facility or residential care facility determined to be appropriate by the local mental health authority or local intellectual and development disability authority or to a jail-based competency restoration program. A defendant may be committed to a jail-based competency restoration program only if the program provider determines the defendant will begin to receive competency restoration services within 72 hours of arriving at the program.



(e) Except as provided by Subsection (f), a defendant charged with an offense punishable as a Class B misdemeanor may be committed under this subchapter only to a jail-based competency restoration program.

(f) A defendant charged with an offense punishable as a Class B misdemeanor may be committed to a mental health facility or residential care facility described by Subsection (d) only if a jail-based competency restoration program is not available or a licensed or qualified mental health professional determines that a jail-based competency restoration program is not appropriate.

If there is not a release on bail for outpatient competency restoration services, Article 46B.073 requires the court to commit an incompetent defendant to an inpatient treatment facility or to a jail-based competency restoration program for up to 60 days (in the case of misdemeanor charges) or for up to 120 days (in the case of felony charges) for the purpose of providing treatment and services to allow the defendant to attain competency to be tried. This section supplanted the former “criminal” commitment process that was formerly set forth in section 5 of old Article 46.02. One notable difference from the prior law is the duration of this commitment. Under the old law, the section 5 commitment could last up to eighteen (18) months. The S.B. 553 task force received testimony that such a lengthy period does not comport with modern treatment approaches. For a person with mental illness, typically stabilization with appropriate medication can be achieved in far less time. Thus, under Chapter 46B, the limit for an inpatient competency restoration commitment is much shorter: either 60 days (in the case of misdemeanor charges) or 120 days (in the case of felony charges), with one possible extension of another 60 days as authorized by Article 46B.080 discussed below. The legislature added the jail-based competency alternative in 2017 as part of S.B. 1326. One should note, however, that even though 46B.073 authorizes a 120-day commitment period for felonies, if the commitment is to a jail-based competency restoration program, only the first 60 days of services may take place in the jail-based program. See the discussion of Article 46B.091(j), *infra*.

Subsections (c) and (d) pertain to the proper location of the competency restoration services. Prior to 2019 legislation, subsection (c) required a commitment to one of the state’s maximum security hospital facilities if the defendant was charged with certain violent offenses. This provision was amended in 2019, however, to give the Health and Human Services Commission discretion in determining the appropriate inpatient hospital setting in the case of violent charges. Prior to the 2019 session, there was concern that the former law’s requirement to identify placement based solely on the level of pending charges, “rather than a clinical determination ... result[ed] in many defendants who do not meet the standard for dangerousness being sent to the North Texas State Hospital in Vernon [a secure facility].” See Texas House Research Organization Bill Digest, S.B. 562, May 21, 2019, *available at* <https://hro.house.texas.gov/pdf/ba86r/sb0562.pdf#navpanes=0> (also noting that the practice exacerbated waiting lists for available bed space). S.B. 562 and H.B. 601 revised subsection (c) to grant discretion to the state.

For nonviolent offenses, subsection (d) requires the court to commit the defendant to a facility deemed appropriate by the local mental health or intellectual and developmental disability authority. This subsection provides yet another reason why it is important that judges overseeing courts with criminal jurisdiction should regularly communicate and coordinate with the local mental health or intellectual and developmental disability authority.

The interactions of Articles 46B.071, 46B.0711, 46B.072, and 46B.073 are ripe for confusion. Each of these sections has been discussed above, but by way of a brief and very general summary, the legislature has endeavored to create a default to the use of outpatient competency restoration for misdemeanors and nonviolent felonies. Then, the next alternative would be for jail-based competency restoration. Finally, only if “neither an outpatient program is available nor a jail-based program (or the person could not be treated safely on an outpatient basis, or a maximum security program is required), only then may the court commit a person to ...” an inpatient facility. See Floyd L. Jennings, *supra* at <http://www.voiceforthedefenseonline.com/story/statutory-changes-regarding-mentally-ill-defendants> (describing the logic and likely intent behind the order of preference for restoration locales included in 2017’s S.B. 1326). Of course, the legislature has also recognized that in the absence of either an outpatient or jail-based option in many counties in Texas, the statutes must still authorize inpatient commitments for competency restoration.

Dr. Jennings also prepared a helpful table depicting the time limits for the various competency commitments authorized by these sections in his paper on this subject. *Id.* I am including a modified version of his table below:

| <b>Situs</b> | <b>Class of Offense</b> | <b>Commitment Period</b> | <b>Possible Extension</b> |
|--------------|-------------------------|--------------------------|---------------------------|
| Outpatient   | Class B                 | 60 days                  | 60 days                   |
|              | Class A                 | 120 days                 | 60 days                   |
|              | Felony                  | 120 days                 | 60 days                   |
| Jail-based   | Class B                 | 60 days                  | 60 days (inpatient)**     |
|              | Class A                 | 60 days                  | 60 days (inpatient)**     |
|              | Felony                  | 120 days*                | 60 days (inpatient)**     |
| Inpatient    | Class B                 | 60 days                  | 60 days                   |
|              | Class A                 | 60 days                  | 60 days                   |
|              | Felony                  | 120 days                 | 60 days                   |

\* Only the first 60 days of competency restoration services are allowed in a jail-based competency restoration program; the remaining 60 days of the 120-day commitment and possible 60-day extension may only be provided following the defendant’s transfer to an inpatient facility. See discussion of Article 46B.091(j), *infra*.

\*\* Because only 60 days are permitted in a jail-based competency restoration program, any one-time 60-day extension may only apply following the defendant’s transfer to an inpatient facility. *Id.*

Finally, the state continues to grapple with large numbers of individuals in need of court-ordered forensic services. As of August 2018, approximately 60 percent of the bed space at the various Texas state hospitals was dedicated to forensic patients, with significant waiting times for transfers from state jails of over 30 days. The

legislature in 2017 began taking steps to try to address this public policy crisis in several ways. First, as noted, S.B. 1326 was enacted to encourage greater utilization of outpatient competency restoration and jail-based competency restoration. Funds were made available for matching grants to develop or enhance such programs. In addition, the legislature committed \$300 million during the 2017 session toward the planning and construction of new hospital capacity. Then, during the 2019 session, the legislature passed S.B. 500, which directed that an additional \$445,354,363 be appropriated from the state's rainy day fund to replace the Austin and San Antonio State Hospitals and to add capacity at the Rusk State Hospital. I have discussed issues relating to the long waitlists elsewhere. In addition, as of mid-2019, litigation remains pending between Disability Rights Texas and the State of Texas regarding the lengthy waiting time following competency restoration orders and prior to the availability of inpatient services. See *Adickes v. Hellerstedt*, 753 Fed. Appx. 236 (5th Cir. 2018) (reversing previous class certification, but remanding for further consideration. I also discussed some of the issues involved with excessive wait times in an earlier article. See *Competency, Ethics, and Morality*, 49 Tex. Tech L. Rev. 861 (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3018532](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3018532).

**COMPETENT MEDICAL “TESTIMONY.”** Art. 46B.074 permits a criminal commitment under Subchapter D only upon “competent medical or psychiatric testimony” or through a qualifying expert’s report.

**Art. 46B.074. Competent Testimony Required.** (a) A defendant may be committed to a jail-based competency restoration program, mental health facility or residential care facility under this subchapter only on competent medical or psychiatric testimony provided by an expert qualified under Article 46B.022.

(b) The court may allow an expert to substitute the expert’s report under Article 46B.025 for any testimony by the expert that may be required under this article.

In part, Article 46B.074 carries forward into current law language that was formerly located in subsection 5(b) of former Art. 46.02. As initially enacted in 2003, however, the provision caused some confusion in a few courts with respect to uncontested determinations of incompetency. Obviously, in cases in which there is a trial before the court or a jury on the question of a defendant’s competency, then the court or jury will hear testimony from the qualified expert(s). After Chapter 46B’s effective date in 2004, however, questions arose as to the role of Article 46B.074 in cases in which the parties waived a competency trial. Some courts were of the view that notwithstanding an agreed finding of incompetency, a hearing was still needed to accept competent medical testimony. In a previous edition of this book, we argued that Article 46B.074 did not apply to an uncontested case. Under a cardinal rule of statutory construction, potentially conflicting provisions of an enactment must be harmonized to the extent possible. We contended that it would be incongruous to construe Article 46B.074 as requiring some type of limited hearing for the sole purpose of eliciting medical or psychiatric testimony when both parties and the court

had waived the trial on incompetency as is otherwise authorized by the statute. We further posited that albeit not “testimony,” the qualified expert’s report should suffice as sufficient medical or psychiatric evidence for uncontested cases. This uncertainty was clarified by S.B. 679 in 2005, which added subsection (b) to the statute. It is now clear that the expert’s report can be substituted for testimony. Indeed, this has now become the norm in uncontested cases. Finally, S.B. 1326 in 2017 added the reference to a jail-based competency restoration.

**TRANSPORTING THE DEFENDANT TO THE TREATMENT FACILITY OR PROGRAM.** It is the responsibility of the sheriff’s office to transport the defendant to the treatment facility or outpatient facility.

**Art. 46B.075. Transfer of Defendant to Facility or Program.** An order issued under Article 46B.0711, 46B.072, or 46B.073 must place the defendant in the custody of the sheriff or sheriff’s deputy for transportation to the facility or program, as applicable, in which the defendant is to receive competency restoration services.

With regard to the topic of transportation, although not a part of Chapter 46B, another provision of the Code of Criminal Procedure is worthy of mention. Article 46.04, Texas Code of Criminal Procedure, provides a listing of certain basic requirements for transportation for any transfers to mental health or intellectual or developmental disability treatment facilities addressed by the competency statutes, as well as other provisions calling for such transportation in the Code.

**Art. 46.04. Transportation to a Mental Health Facility or Residential Care Facility.** Sec. 1. (a) A patient transported from a jail or detention facility to a mental health facility or a residential care facility shall be transported by a special officer for mental health assignment certified under Section 1701.404, Occupations Code, or by a sheriff or constable.

(b) The court ordering the transport shall require appropriate medical personnel to accompany the person transporting the patient, at the expense of the county from which the patient is transported, if there is reasonable cause to believe the patient will require medical assistance or will require the administration of medication during the transportation.

(c) A female patient must be accompanied by a female attendant.

Sec. 2. The transportation of a patient from a jail or detention facility to a mental health facility or residential care facility must meet the following requirements:

- (1) the patient must be transported directly to the facility within a reasonable amount of time and without undue delay;
- (2) a vehicle used to transport the patient must be adequately heated in cold weather and adequately ventilated in warm weather;

- (3) a special diet or other medical precautions recommended by the patient's physician must be followed;
- (4) the person transporting the patient shall give the patient reasonable opportunities to get food and water and to use a bathroom; and
- (5) the patient may not be transported with a state prisoner.

Article 46.04 was first enacted in 1999 after there had been a series of problems and incidents in connection with the transportation of persons with mental illness from county jails and courts to state mental health facilities. The Bill Analysis accompanying the 1999 enactment stated, "Many of these patients were spending long periods of time on buses making circular routes; being transported in buses without air-conditioning or heating; and being deprived of sufficient bathroom stops." Moreover, as stated in the Bill Analysis, some of the doctors at the North Texas State Hospital (Vernon) registered complaints that their patients were "suffering severe emotional and mental distress as well as life-threatening physical risks; ... in some cases patients have remained shackled for up to twenty-eight hours while being transported; ... denied adequate food and drink; and ... [transported in vans] with no functional air conditioning and windows closed during periods of extreme heat." The Bill Analysis concluded that, "[t]hese practices are demeaning, inhumane, and dangerous."

**WHAT IF THE DEFENDANT'S COMPETENCY IS RESTORED AFTER BEING FOUND INCOMPETENT BUT BEFORE BEING TRANSPORTED FOR TREATMENT?** As described above, there has been a persistent problem of having sufficient forensic hospital bed space available to handle the large volume of defendants who have been found incompetent to stand trial and who need inpatient services. Often, a defendant might languish in jail for many months before bed space becomes available. In some situations, it is possible that the defendant will agree to medication treatment at the jail and the treatment will result in the restoration of his or her competency subsequent to the court's order for competency restoration treatment, but prior to the person's transportation to a facility or program for treatment. Prior to 2011, Chapter 46B did not address this possibility. However, H.B. 2725 in 2011 added Article 46B.0755, which sets out straightforward procedures for addressing such a scenario.

**Art. 46B.0755. Procedures on Credible Evidence of Immediate Restoration.**

- (a) Notwithstanding any other provision of this subchapter, if the court receives credible evidence indicating that the defendant has been restored to competency at any time after the defendant's incompetency trial under Subchapter C but before the defendant is transported under Article 46B.075 to the facility or program, as applicable, the court may appoint disinterested experts to reexamine the defendant in accordance with Subchapter B. The court is not required to appoint the same expert or experts who performed the initial examination of the defendant under that subchapter.
- (b) If after a reexamination of the defendant the applicable expert's report states an opinion that the defendant remains incompetent, the court's order

under Article 46B.0711, 46B.072, or 46B.073 remains in effect, and the defendant shall be transported to the facility or program as required by Article 46B.075. If after a reexamination of the defendant the applicable expert's report states an opinion that the defendant has been restored to competency, the court shall withdraw its order under Article 46B.0711, 46B.072, or 46B.073 and proceed under Subsection (c) or (d).

(c) The court shall find the defendant competent to stand trial and proceed in the same manner as if the defendant had been found restored to competency at a hearing if:

- (1) both parties agree that the defendant is competent to stand trial; and
- (2) the court concurs.

(d) The court shall hold a hearing to determine whether the defendant has been restored to competency if any party fails to agree or if the court fails to concur that the defendant is competent to stand trial. If a court holds a hearing under this subsection, on the request of the counsel for either party or the motion of the court, a jury shall make the competency determination. For purposes of the hearing, incompetency is presumed, and the defendant's competency must be proved by a preponderance of the evidence. If after the hearing the defendant is again found to be incompetent to stand trial, the court shall issue a new order under Article 46B.0711, 46B.072, or 46B.073, as appropriate based on the defendant's current condition.

**DOCUMENTATION TO BE PROVIDED TO THE TREATMENT FACILITY.** Article 46B.076 identifies an array of information that the court is to order to be provided to the treatment facility.

**Art. 46B.076. Court's Order.** (a) If the defendant is found incompetent to stand trial, not later than the date of the order of commitment or of release on bail, as applicable, the court shall send a copy of the order to the applicable facility or program. The court shall also provide to the facility or program copies of the following made available to the court during the incompetency trial:

- (1) reports of each expert;
- (2) psychiatric, psychological, or social work reports that relate to the mental condition of the defendant;
- (3) documents provided by the attorney representing the state or the attorney representing the defendant that relate to the defendant's current or past mental condition;
- (4) copies of the indictment or information and any supporting documents used to establish probable cause in the case;
- (5) the defendant's criminal history record; and
- (6) the addresses of the attorney representing the state and the attorney representing the defendant.

(b) The court shall order that the transcript of all medical testimony received by the jury or court be promptly prepared by the court reporter and forwarded to the applicable facility or program.

Article 46B.076 requires that substantially more documentation be provided to the treatment facility relating to the defendant than under former law. The S.B. 553 task force received testimony from officials at the North Texas State Hospital in Vernon that under prior law their facility would frequently receive only sketchy medical information or documentation about the criminal case when a defendant arrived at the hospital for competency restoration services. Accordingly, the task force endeavored to delineate an array of documentation viewed to be beneficial to a treatment team to allow for an expeditious delivery of appropriate services. The list includes not only the qualified expert's report, but also other medical files relating to the person's mental condition, copies of the charging documents such as the indictment or information, the person's criminal history record, and – in cases involving a trial – a transcript of the medical testimony. S.B. 867 in 2007 added language requiring similar documentation to be provided in the case of competency restoration at an outpatient facility.

**COMPETENCY RESTORATION TREATMENT.** Article 46B.077 requires the treating facility, jail-based competency restoration program, or outpatient competency restoration program to develop and implement an individualized treatment plan with the goal of enabling the defendant to attain competency.

**Art. 46B.077. Individual Treatment Program.** (a) The facility or jail-based competency restoration program to which the defendant is committed or the outpatient competency restoration program to which the defendant is released on bail shall:

- (1) develop an individual program of treatment;
- (2) assess and evaluate whether the defendant is likely to be restored to competency in the foreseeable future; and
- (3) report to the court and to the local mental health authority or to the local intellectual and developmental disability authority on the defendant's progress toward achieving competency.

(b) If the defendant is committed to an inpatient mental health facility, a residential care facility, or jail-based competency restoration program, the facility or program shall report to the court at least once during the commitment period. (c) If the defendant is released to an outpatient competency restoration program, the program shall report to the court:

- (1) not later than the 14th day after the date on which the defendant's competency restoration services begin; and
- (2) until the defendant is no longer released to the program, at least once during each 30-day period following the date of the report required by Subdivision (1).

Article 46B.077(a)(3) and (b) also require an inpatient treatment facility or jail-based program to provide a report to the committing court and the local mental health authority regarding the defendant's progress toward attaining competency at least once during the commitment period. Moreover, there are additional reporting requirements set forth in subsection (c) if the defendant is released to an outpatient competency restoration program.

**DISMISSAL OF CHARGES DURING INCOMPETENCY COMMITMENT.** If the underlying criminal charges pending against the defendant are dismissed during the individual's commitment for competency restoration, the facility competency restoration program, upon receipt of the court's order of dismissal, is required to discharge the defendant into the care of the sheriff's office for transportation back to the committing court. A commitment relating to a criminal case cannot stand if the underlying charges are no longer extant. Below I have set forth the text of both Article 46B.078 and a related subsection, Article 46B.082(a), which discusses the requirements relating to transportation after a dismissal.

**Art. 46B.078. Charges Subsequently Dismissed.** If the charges pending against a defendant are dismissed, the court that issued the order under Article 46B.0711, 46B.072, or 46B.073 shall send a copy of the order of dismissal to the sheriff of the county in which the court is located and to the head of the facility, the provider of the jail-based competency restoration program, or the provider of the outpatient competency restoration program, as appropriate. On receipt of the copy of the order, the facility or program shall discharge the defendant into the care of the sheriff or sheriff's deputy for transportation in the manner described by Article 46B.082.

**Art. 46B.082. Transportation of Defendant to Court.** (a) On notification from the court under Article 46B.078, the sheriff of the county in which the court is located or the sheriff's deputy shall transport the defendant to the court.

**NOTICE AND REPORT TO COURT.** Article 46B.079 covers the requirements for the treating entity to provide notice and a report to the court once the initial commitment period is close to its conclusion.

**Art. 46B.079. Notice and Report to Court.** (a) The head of the facility, the provider of jail-based competency restoration services, or the provider of the outpatient competency restoration program, as appropriate, not later than the 15th day before the date on which the initial restoration period is to expire according to the terms of the order or under Article 46B.0095 or other applicable provisions of this chapter, shall notify the applicable court that the period is about to expire.

(b) The head of the facility or jail-based competency restoration program provider shall promptly notify the court when the head of the facility or program provider believes that:



(1) the defendant is clinically ready and can be safely transferred to a competency restoration program for education services but has not yet attained competency to stand trial;

(2) the defendant has attained competency to stand trial; or

(3) the defendant is not likely to attain competency in the foreseeable future.

(b-1) The outpatient competency restoration program provider shall promptly notify the court when the program provider believes that:

(1) the defendant has attained competency to stand trial; or

(2) the defendant is not likely to attain competency in the foreseeable future.

(c) When the head of the facility or program provider gives notice to the court under Subsection (a), (b), or (b-1), the head of the facility or program provider also shall file a final report with the court stating the reason for the proposed discharge or transfer under this chapter and including a list of the types and dosages of medications prescribed for the defendant while the defendant was receiving competency restoration services in the facility or through the program. The court shall provide to the attorney representing the defendant and the attorney representing the state copies of a report based on notice under this article, other than notice under Subsection (b)(1), to enable any objection to the findings of the report to be made in a timely manner as required under Article 46B.084(a-1).

(d) If the head of the facility or program provider notifies the court that the initial restoration period is about to expire, the notice may contain a request for an extension of the period for an additional period of 60 days and an explanation for the basis of the request. An explanation provided under this subsection must include a description of any evidence indicating a reduction in the severity of the defendant's symptoms or impairment.

Article 46B.079(a) requires the treatment facility, jail-based program, or outpatient restoration program to notify the court not later than the 15th day prior to either (1) the date when the initial restoration treatment period set forth in the court's order is set to expire, or (2) the maximum statutory time limit for the person's possible sentence per Article 46B.0095 (discussed above). In addition, subsections (b) and (b-1) require prompt notification to the court if the services provider has determined either that the defendant has attained competency or that the defendant likely will not attain competency in the foreseeable future.

Importantly, if the treatment facility or program provider is of the view that the original 60-day or 120-day restoration period should be extended, the notice under this Article should include a request for an extension for another 60 days of competency restoration services. The request for this one-time extension must include an explanation of the basis for the request, and a description of any reduction

achieved to date in the severity of the defendant's symptoms or impairment. Article 46B.079(d).

Additionally, if there is a recommendation for a discharge or transfer under Article 46B.079, subsection (c) requires that the facility or program provider file a report that sets forth the reason for the proposed discharge or transfer and include information about the types and dosages of medications by which the defendant had been treated. This should assist with continuity of care.

Language added to subsection (b)(1) in 2017 by S.B. 1326 also requires an inpatient facility or jail-based program to notify the court if the defendant is clinically ready (presumably through medication stabilization) for a safe transition to an outpatient competency restoration program for education services with the continuing goal of attaining competency. The legislature recognized that after medication stabilization, it might be desirable to transfer a defendant to a less-restrictive setting for any remaining competency restoration services. Of course, this would require an accessible continuum of services in the community to permit a step-down from, for example, a jail-based setting to an outpatient program. Few communities currently have this array of services, although one example is StarCare Specialty Health System (the community mental health authority in Lubbock), which operates both a jail-based competency restoration program and an outpatient competency restoration program. For a thoughtful and critical discussion of subsection (b)(1), consider Floyd L. Jennings, *supra* at <http://www.voiceforthedefenseonline.com/story/statutory-changes-regarding-mentally-ill-defendants> (noting the limited availability of programs and observing that in general the "standard for restoration is so low that once a person has any reasonable clinical stability they are restored").

**COMPETENCY RESTORATION EDUCATION SERVICES.** As part of adding the foregoing possibility of a step-down transfer of a person receiving inpatient or jail-based competency restoration services upon medication stabilization, H.B. 1326 in 2017 also added language defining and describing "competency restoration education services." This language is set forth in Article 46B.0805:

**Art. 46B.0805. Competency Restoration Education Services.** (a) On notification from the head of a facility or a jail-based competency restoration program provider under Article 46B.079(b)(1), the court shall order the defendant to receive competency restoration education services in a jail-based competency restoration program or an outpatient competency restoration program, as appropriate and if available.

(b) If a defendant for whom an order is entered under Subsection (a) was committed for competency restoration to a facility other than a jail-based competency restoration program, the court shall send a copy of that order to:

- (1) the sheriff of the county in which the court is located;
- (2) the head of the facility to which the defendant was committed for competency restoration; and

(3) the local mental health authority or local intellectual and developmental disability authority, as appropriate.

(c) As soon as practicable but not later than the 10th day after the date of receipt of a copy of an order under Subsection (b)(2), the applicable facility shall discharge the defendant into the care of the sheriff of the county in which the court is located or into the care of the sheriff's deputy. The sheriff or sheriff's deputy shall transport the defendant to the jail-based competency restoration program or outpatient competency restoration program, as appropriate.

(d) A jail-based competency restoration program or outpatient competency restoration program that receives a defendant under this article shall give to the court:

- (1) notice regarding the defendant's entry into the program for purposes of receiving competency restoration education services; and
- (2) subsequent notice as otherwise required under Article 46B.079.

**EXTENSION OF TREATMENT ORDER.** Chapter 46B authorizes one 60-day extension of the original treatment order for competency restoration. Article 46B.080 sets forth the grounds for such an extension.

**Art. 46B.080. Extension of Order.** (a) On a request of the head of a facility or a program provider that is made under Article 46B.079(d) and notwithstanding any other provision of this subchapter, the court may enter an order extending the initial restoration period for an additional period of 60 days.

(b) The court may enter an order under Subsection (a) only if the court determines that:

- (1) the defendant has not attained competency; and
- (2) an extension of the initial restoration period will likely enable the facility or program to restore the defendant to competency within the period of the extension.

(c) The court may grant only one 60-day extension under this article in connection with the specific offense with which the defendant is charged.

If the treatment facility or program provider submits a proper and timely notice as described by Article 46B.079(d), Article 46B.080 authorizes the court to order *one* 60-day extension of the original competency restoration commitment order. It is important to *stress* that, per subsection (c), the court can grant *only one* such extension in connection with the specific offense charged. Moreover, before an extension may be ordered, the court must determine, based on the information provided by the treating entity, that the extension “will likely enable the facility or program to restore the defendant to competency *within the period of the extension.*” Article 46B.080(b)(2).

Unlike prior law under section 5 of old Art. 46.02, in which the “criminal” commitment for competency restoration could last for up to 18 months, the maximum

duration for treatment under the modern, current law is six months – assuming both an original 120 days (for felonies or for outpatient orders) plus an extension of another 60 days. For persons charged with Class B misdemeanors in any treatment setting, and for those charged with Class A misdemeanors who are ordered either to inpatient services or to a jail-based program, the maximum period is 60 days plus one possible 60-day extension. Any further commitment orders must be entered under the provisions of the civil provisions of the Texas Mental Health Code (set forth in the Health and Safety Code and described *infra*).

**RETURN TO THE COURT FOLLOWING COMPETENCY RESTORATION SERVICES WHILE ON BAIL.** Separate from the situation identified in Art. 46B.078 relating to the dismissal of criminal charges and the scenario covered by Article 46B.082(b) – discussed below, Article 46B.081 identifies the timing for returning a defendant who was released on bail.

**Art. 46B.081. Return to Court.** Subject to Article 46B.082(b), a defendant committed or released on bail under this subchapter shall be returned to the applicable court as soon as practicable after notice to the court is provided under Article 46B.079(a), (b)(2), (b)(3), or (b-1), but not later than the date of expiration of the period for restoration specified by the court under Article 46B.0711, 46B.072, or 46B.073.

Per Article 46B.081, the defendant is to be returned to the criminal court no later than the date of expiration of the competency restoration period ordered by the court. The defendant's return to the court should, of course, come earlier in cases in which the treatment facility or program provider has notified the court that the defendant has attained competency in a shorter period of time. This statute should also be read in context with Article 46B.080, which allows for one 60-day extension of the initial competency restoration order.

**ADDITIONAL TRANSPORTATION PROVISIONS.** As the reader will have noted, Chapter 46B includes several different provisions regarding transportation. Article 46B.082(b) requires that the treatment facility or program must cause the defendant to be transported back to the committing court if the person has not been transported "before the 15th day after the date on which the court received" the notice contemplated by Article 46B.079, or if the defendant has not been transported back to the court by the end of the ordered restoration period.

**Art. 46B.082. Transportation of Defendant to Court.** (a) On notification from the court under Article 46B.078, the sheriff of the county in which the court is located or the sheriff's deputy shall transport the defendant to the court.  
(b) If before the 15th day after the date on which the court received notification under Article 46B.079(a), (b)(2), (b)(3), or (b-1) a defendant committed to a facility or jail-based competency restoration program or ordered to participate in an outpatient competency restoration program has not been transported to the court that issued the order under Article 46B.0711, 46B.072, or 46B.073, as

applicable, the head of the facility or provider of the jail-based competency restoration program to which the defendant is committed or the provider of the outpatient competency restoration program in which the defendant is participating shall cause the defendant to be promptly transported to the court and placed in the custody of the sheriff of the county in which the court is located. The county in which the court is located shall reimburse the Health and Human Services Commission or program provider, as appropriate, for the mileage and per diem expenses of the personnel required to transport the defendant, calculated in accordance with rates provided in the General Appropriations Act for state employees.

The practical effect of this provision is to require transport of the defendant back to the court by the end of the initial treatment restoration period, or 60 days thereafter in cases in which the one-time extension has been granted. The provision is intended to require the treatment period limit to be the *actual* limit, inclusive of transportation requirements. The statute puts the burden of transporting the individual on the treatment facility or program, but also requires the originating county to reimburse the costs if the facility or program has to provide the transportation. It is critical for both the treatment facility and the court to keep track of the time periods.

**MEDICATION ADMINISTRATION DURING TRANSPORTATION BY SHERIFF'S OFFICE.** S.B. 1326 in 2017 added Article 46B.0825 pertaining to medication administration requirements imposed on sheriffs and deputies who are transporting a defendant under various provisions of Chapter 46B.

**Art. 46B.0825. Administration of Medication While in Custody of Sheriff.** (a) A sheriff or sheriff's deputy having custody of a defendant for transportation as required by Article 46B.0805 or 46B.082 or during proceedings described by Article 46B.084 shall, according to information available at the time and unless directed otherwise by a physician treating the defendant, ensure that the defendant is provided with the types and dosages of medication prescribed for the defendant.

(b) To the extent funds are appropriated for that purpose, a sheriff is entitled to reimbursement from the state for providing the medication required by Subsection (a).

(c) If the sheriff determines that funds are not available from the state to reimburse the sheriff as provided by Subsection (b), the sheriff is not required to comply with Subsection (a).

**INFORMATION REGARDING POSSIBLE CIVIL COMMITMENT TO BE PROVIDED BY TREATMENT PROVIDER.** Article 46B.083 requires the facility head, jail-based competency services provider, or outpatient competency restoration provider to submit to the court information in support of a possible *civil* commitment following the competency restoration period.

**Art. 46B.083. Supporting Commitment Information Provided by Facility or Program Provider.**

(a) If the head of the facility, the jail-based competency restoration program provider, or the outpatient competency restoration provider believes that the defendant is a person with mental illness and meets the criteria for court-ordered mental health services under Subtitle C, Title 7, Health and Safety Code, the head of the facility or the program provider shall have submitted to the court a certificate of medical examination for mental illness.

(b) If the head of the facility, the jail-based competency restoration program provider, or the outpatient competency restoration provider believes that the defendant is a person with an intellectual disability, the head of the facility or the program provider shall have submitted to the court an affidavit stating the conclusions reached as a result of the examination.

As under prior law, under Article 46B.083 the head of the treatment facility or other competency restoration program provider must submit to the court a certificate of medical examination for mental illness if the facility head or program provider is of the view that that the defendant is a person with mental illness who meets the criteria for court-ordered inpatient mental health services under the Texas Health & Safety Code. Similarly, Article 46B.083(b) requires a comparable submission of a supporting affidavit in the case of a person with an intellectual disability.

**DETERMINATIONS AS TO WHETHER A DEFENDANT IS MANIFESTLY DANGEROUS.** Article 46B.0831 was added in 2019 to make it clear that the Health and Human Services Commission has significant flexibility and discretion in determining whether a defendant is deemed manifestly dangerous or not. This relates, in particular, to the appropriate placement for competency restoration services. Given this change in the law, after September 1, 2019, a trial court may no longer commit a defendant to a maximum security facility based upon the nature of the charge itself. Instead, the person may be committed to any facility as designated by the Health and Human Services Commission, which will make a determination of the appropriate clinical setting in which the person is to be treated. The impact of this legislative change should have some effect on the lengthy waitlists for persons charged with aggravated offenses. Some are concerned, however, that the legislation will, correspondingly, result in downward pressure for forensic bed space, now occupied by alleged misdemeanants, given that misdemeanor cases have previously been on waitlists for far less time. Thus, this legislation could impact the number of misdemeanor cases that “time-out” due to lack of space in restoration programs.

**Art. 46B.0831. Determination Whether Defendant is Manifestly Dangerous.** A defendant committed to a maximum security unit by the commission may be assessed, at any time before the defendant is restored to competency, by the review board established under Section 46B.105 to determine whether the defendant is manifestly dangerous. If the review board determines the defendant is not manifestly dangerous,

the commission shall transfer the defendant to a non-maximum security facility designated by the commission.

**PROCEDURAL STEPS UPON CONCLUSION OF CRIMINAL COMMITMENT FOR COMPETENCY RESTORATION.** Article 46B.084 sets forth the next procedural steps to be followed upon the defendant's return to the court after the maximum commitment for competency restoration (either the initial period or the initial period plus 60 days in the event the one-time extension was granted).

**Art. 46B.084. Proceedings on Return of Defendant to Court.** (a)(1) Not later than the next business day following the return of a defendant to the court, the court shall notify the attorney representing the state and the attorney for the defendant regarding the return. Within three business days of the date that notice is received under this subsection or, on a showing of good cause, a later date specified by the court, the attorney for the defendant shall meet and confer with the defendant to evaluate whether there is any suggestion that the defendant has not yet regained competency.

(2) Notwithstanding Subdivision (1), in a county with a population of less than one million or in a county with a population of four million or more, as soon as practicable following the date of the defendant's return to the court, the court shall provide the notice required by that subdivision to the attorney representing the state and the attorney for the defendant, and the attorney for the defendant shall meet and confer with the defendant as soon as practicable after the date of receipt of that notice.

(a-1)(1) Following the defendant's return to the court, the court shall make a determination with regard to the defendant's competency to stand trial. The court may make the determination based only on the most recent report that is filed under Article 46B.079(c) and based on notice under that article, other than notice under Subsection (b)(1) of that article, and on other medical information or personal history information relating to the defendant. A party may object in writing or in open court to the findings of the most recent report not later than the 15th day after the date on which the court received the applicable notice under Article 46B.079. The court shall make the determination not later than the 20th day after the date on which the court received the applicable notice under Article 46B.079, or not later than the fifth day after the date of the defendant's return to court, whichever comes first, regardless of whether a party objects to the report as described by this subsection and the issue is set for hearing under Subsection (b).

(2) Notwithstanding Subdivision (1), in a county with a population of less than one million or in a county with a population of four million or more, the court shall make the determination described by that subdivision not later than the 20th day after the date on which the court received notification under

Article 46B.079, regardless of whether a party objects to the report as described by that subdivision and the issue is set for a hearing under Subsection (b).

(b) If a party objects under Subsection (a-1), the issue shall be set for a hearing. The hearing is before the court, except that on motion by the defendant, the defense counsel, the prosecuting attorney, or the court, the hearing shall be held before a jury.

(b-1) If the hearing is before the court, the hearing may be conducted by means of an electronic broadcast system as provided by Article 46B.013. Notwithstanding any other provision of this chapter, the defendant is not required to be returned to the court with respect to any hearing that is conducted under this article in the manner described by this subsection.

(c) [Repealed in 2007 by S.B. 867]

(d)(1) If the defendant is found competent to stand trial, on the court's own motion criminal proceedings in the case against the defendant shall be resumed not later than the 14th day after the date of the court's determination under this article that the defendant's competency has been restored.

(2) Notwithstanding Subdivision (1), in a county with a population of less than one million or in a county with a population of four million or more, on the court's own motion criminal proceedings in the case against the defendant shall be resumed as soon as practicable after the date of the court's determination under this article that the defendant's competency has been restored.

(d-1) This article does not require the criminal case to be finally resolved within any specific period.

(e) If the defendant is found incompetent to stand trial and if all charges pending against the defendant are not dismissed, the court shall proceed under Subchapter E.

(f) If the defendant is found incompetent to stand trial and if all charges pending against the defendant are dismissed, the court shall proceed under Subchapter F.

The lack of timely adjudications of defendants upon their return to the county jails following competency restoration services has been a recurring problem across Texas. Article 46B.084 requires the court to make a *prompt* determination regarding the defendant's competency to stand trial upon the person's return to the court following the commitment. The legislature appears to be quite serious about this principle. In fact, the legislation has been amended multiple times, including significant changes in 2015, to tighten up the deadlines.

It should be noted, however, that H.B. 211 in 2015 created differing deadlines depending on the size of the counties. For most counties (those with populations under one million or greater than four million), the relevant provisions are primarily subsections (a)(2), (a-1)(2), and (d-1)(2). According to 2010 census data, these provisions apply to Harris County (over four million in population) and all other



counties except for Dallas, Tarrant, Bexar, and Travis Counties, which are all over one million in population, but less than four million.

Accordingly, for most Texas counties, as soon as practicable after the defendant's return to the court, the court must notify the prosecutor and defense counsel, and defense counsel must meet with his or her client. In addition, the court is charged with making a determination about the defendant's competency. In most counties, per subsection (a-1)(2), the court must do so *within 20 days of the court's receipt of the notice* from the facility or services provider under Article 46B.079 that the defendant is being returned to the county. Assuming that the report from the head of the facility or other program provider concludes that the defendant is competent to be tried, the court may determine and conclude that the defendant is competent based solely on that most recent report and medical information or personal history regarding the defendant. However, if there is an objection to such a finding, subsection (b) requires the court to hold a further competency hearing. Any such objection must be made within 15 days of the court's receipt of the Article 46B.079 notice from the treatment facility or program. Such a hearing is to be conducted before the court unless the defendant, the defense counsel, the prosecutor, or the court seeks a jury trial. Moreover, even in the case of an objection, the hearing must take place *within 20 days of the court's receipt of the notice*.

In Dallas, Tarrant, Bexar, and Travis Counties, given the 2015 amendments to Article 46B.084, the deadlines are even tighter. Under subsection (a)(1), the court must notify counsel no later than the next business day following the defendant's return to the county, and defense counsel must confer with the defendant within three days of receiving the court's notice. Then, under subsection (a-1)(1), in these four counties, the court must make the determination about the defendant's competency within 20 days of receiving the facility's notice about the defendant's impending return to the county or the fifth day after the date of the defendant's return, *whichever occurs first*, and regardless of whether there has been an objection and a need for a hearing.

The reason for these short periods stems from a very real concern that when a period of time elapses after a defendant is transported back to the county from the treatment facility and prior to the resumption of criminal proceedings, it is not unusual for the defendant – while once viewed as competent by the treating physicians – to deteriorate in medical condition. And, there is then a risk that the defendant will no longer be competent to proceed. This is particularly true for a defendant with mental illness who stops taking prescribed medications for the mental illness or who is not being provided with appropriate continuity of care. The county jail should assure that the individualized treatment plan for the defendant is being continued, and the committing court should resume the proceedings promptly as set out in this statute.

The criminal courts around the state must implement and adhere to administrative procedures to assure that the short time periods prescribed by Article 46B.084 are being applied. All too often criminal defendants return to the committing

court's jurisdiction, but languish in jail before the process is resumed. The 2015 legislation, if followed, should help limit the times in which defendants return to an incompetent state having once had their competency restored.

If the court finds the defendant to be competent to be tried, and no objection has been lodged, in most Texas counties subsection (d)(2) calls for the resumption of the underlying criminal proceedings "as soon as practicable." The same requirement applies if there was an objection and after a hearing the court (or jury) concluded that the defendant is competent. Per subsection (d)(1), however, in Dallas, Tarrant, Bexar, and Travis Counties the criminal proceedings must resume within 14 days.

What about a situation, however, in which the head of the treatment facility or other program provider has concluded that the defendant is competent, but defense counsel believes that the defendant is no longer competent. At that point, defense counsel should object to the findings in the most recent report. The statute is silent, however, with respect to whether the court should appoint a new examiner at that point. Nonetheless, if there is evidence that the defendant is no longer competent notwithstanding the conclusion in the most recent report, the court should appoint a qualified psychiatrist or psychologist to conduct a new evaluation. Of course, then, the 20-day time period for the judge's "determination" under Article 46B.084 would no longer appear to be either practical or logical because the evaluator must have the requisite time to conduct the examination and prepare the proper report.

Article 46B.084 is also silent about the burden of proof when there is a defense objection to the conclusion set forth in the most recent report by the head of the facility or other services provider. There is a plausible argument under *Moralez v. State*, 450 S.W.3d 553, 559-60 (Tex. App. – Houston [14th Dist.] 2014, *pet. ref'd*) that the facility's (or other provider's) opinion on competency would return us to the defendant's initial burden of proof on the issue. However, *Moralez* was focused on the burden of proof in Article 46B.113 proceedings, and so is not directly on point.

In addition, what about a situation in which the head of the treatment facility or other program provider has concluded that the defendant is likely not going to attain competency in the foreseeable future? (Although this scenario is far less likely for a person who has a treatable mental illness than for a defendant who has an intellectual disability, it is still possible.) In this type of scenario, the court may make a determination that the defendant is incompetent to be tried based on the report and other medical information or personal history information. Absent an objection, the court is then to enter a finding of incompetency. Alternatively, if there is an objection – presumably by the prosecutor, there must be a hearing before the court or a jury per subsection (b), and the same time deadlines are applicable as described above. In addition, subsection (b-1) is also relevant in this type of situation. It allows the court to conduct the hearing by means of interactive video. In such a case, the defendant does not have to be returned from the treatment facility to the county with criminal jurisdiction. This approach would seem to be particularly appropriate in a case in which the defendant's competency has not been restored.

Subsections (e) and (f) come into play if there is a determination by the court, either following a hearing or not, that the defendant remains incompetent to be tried. Subsection (e) directs that the court must then proceed under Subchapter E of Chapter 46B if the defendant is incompetent to stand trial and the underlying charges against the defendant have not been dismissed. Alternatively, subsection (f) requires the court to proceed under Subchapter F of Chapter 46B if the defendant is incompetent to stand trial and the prosecutor has opted to dismiss the underlying criminal charges.

**NO SUBSEQUENT COMMITMENTS OR EXTENSIONS ALLOWED UNDER THE CODE OF CRIMINAL PROCEDURE.** Article 46B.085 *bars* any further court orders for competency restoration treatment under Subchapter D of Chapter 46B following the initial 60-day or 120-day period, other than one 60-day extension. As described above, the duration of that initial period varies depending on the situs of the restoration treatment and the level of offense. All felonies, for example, may result in an initial commitment period of 120 days (with only one possible 60-day extension) for competency restoration treatment in connection with the same offense. Any further court orders relating to commitment for treatment must be made in connection with either Subchapter E or Subchapter F, depending on whether the criminal charges remain pending. Under those provisions, which are discussed below, further treatment can only be ordered through use of the Health & Safety Code's commitment procedures. Correspondingly, it would thwart the legislative intent for a court to order serial restoration commitments if the defendant is facing multiple charges, but all such charges have resulted out of the same nexus of events.

**Art. 46B.085. Subsequent Restoration Periods and Extensions of those Periods Prohibited.** (a) The court may order only one initial period of restoration and one extension under this subchapter in connection with the same offense.  
(b) After an initial restoration period and an extension are ordered as described by Subsection (a), any subsequent court orders for treatment must be issued under Subchapter E or F.

**COURT ORDERS FOR ADMINISTRATION OF MEDICATION.** Art. 46B.086 authorizes a court, following a due process hearing, to order medications in certain limited situations.

**Art. 46B.086. Court-ordered Medications.** (a) This article applies only to a defendant:

- (1) who is determined under this chapter to be incompetent to stand trial;
- (2) who either:
  - (A) remains confined in a correctional facility, as defined by Section 1.07, Penal Code, for a period exceeding 72 hours while awaiting transfer to an inpatient mental health facility, a residential care facility, or an outpatient competency restoration program;

(B) is committed to an inpatient mental health facility, a residential care facility, or a jail-based competency restoration program for the purpose of competency restoration;

(C) is confined in a correctional facility while awaiting further criminal proceedings following competency restoration; or

(D) is subject to Article 46B.072, if the court has made the determinations required by Subsection (a-1) of that article;

(3) for whom a correctional facility or jail-based competency restoration program that employs or contracts with a licensed psychiatrist, an inpatient mental health facility, a residential care facility, or an outpatient competency restoration program provider has prepared a continuity of care plan that requires the defendant to take psychoactive medications; and

(4) who, after a hearing held under Section 574.106 or 592.156, Health and Safety Code, if applicable, has been found to not meet the criteria prescribed by Sections 574.106(a) and (a-1) or 592.156(a) and (b), Health and Safety Code, for court-ordered administration of psychoactive medications.

(b) If a defendant described by Subsection (a) refuses to take psychoactive medications as required by the defendant's continuity of care plan, the director of the facility or the program provider, as applicable, shall notify the court in which the criminal proceedings are pending of that fact not later than the end of the next business day following the refusal. The court shall promptly notify the attorney representing the state and the attorney representing the defendant of the defendant's refusal. The attorney representing the state may file a written motion to compel medication. The motion to compel medication must be filed not later than the 15th day after the date a judge issues an order stating that the defendant does not meet the criteria for court-ordered administration of psychoactive medications under Section 574.106 or 592.156, Health and Safety Code, except that, for a defendant in an outpatient competency restoration program, the motion may be filed at any time.

(c) The court, after notice and after a hearing held not later than the 10th day after the motion to compel medication is filed, may authorize the director of the facility or the program provider, as applicable, to have the medication administered to the defendant, by reasonable force if necessary. A hearing under this subsection may be conducted using an electronic broadcast system as provided by Article 46B.013.

(d) The court may issue an order under this article only if the order is supported by the testimony of two physicians, one of whom is the physician at or with the applicable facility or program who is prescribing the medication as a component of the defendant's continuity of care plan and another who is not otherwise involved in proceedings against the

defendant. The court may require either or both physicians to examine the defendant and report on the examination to the court.

(e) The court may issue an order under this article if the court finds by clear and convincing evidence that:

(1) the prescribed medication is medically appropriate, is in the best medical interest of the defendant, and does not present side effects that cause harm to the defendant that is greater than the medical benefit to the defendant;

(2) the state has a clear and compelling interest in the defendant obtaining and maintaining competency to stand trial;

(3) no other less invasive means of obtaining and maintaining the defendant's competency exists; and

(4) the prescribed medication will not unduly prejudice the defendant's rights or use of defensive theories at trial.

(f) A statement made by a defendant to a physician during an examination under Subsection (d) may not be admitted against the defendant in any criminal proceeding, other than at:

(1) a hearing on the defendant's incompetency; or

(2) any proceeding at which the defendant first introduces into evidence the contents of the statement.

(g) For a defendant described by Subsection (a)(2)(A), an order issued under this article:

(1) authorizes the initiation of any appropriate mental health treatment for the defendant awaiting transfer; and

(2) does not constitute authorization to retain the defendant in a correctional facility for competency restoration treatment.

It is not uncommon for a person with mental illness who is so ill as to have been adjudicated incompetent to stand trial also to be unable to provide effective consent for the appropriate medications necessary for restoration and treatment. And, lacking valid consent, emergency situations, or rare circumstances in which the defendant has a guardian who can provide consent, court intervention is required.<sup>16</sup> Article 46B.086 is directed at the possibility of court-ordered medication.

Article 46B.086 was perhaps the one controversial aspect of Chapter 46B during its initial enactment, and it was the subject of brief debate during the 2003 Senate Jurisprudence Committee hearing on S.B. 1057. There was some adverse testimony and a few questions raised about the section, as it was then drafted, during the committee's consideration. The provision was also subject to intensive scrutiny and

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<sup>16</sup> Some of the analysis set forth in this subsection relating to Article 46B.086, including this first paragraph, is drawn from a short CLE paper that was co-authored by Professor Shannon and Dr. Floyd Jennings, Chief, Misdemeanor Mental Health Division, Harris County Public Defender's Office. The presentation was entitled, "Practice Tips: Competency Cases," and was a part of a conference in February 2013 sponsored by the Texas Criminal Defense Lawyers Association in San Antonio.

discussions during the S.B. 553 task force process. The article was initially enacted to address concerns regarding so-called “revolving door” commitments in which a defendant who, after having been restored to competency at the treatment facility, refuses to take medication prescribed as part of the defendant’s individualized treatment/continuity of care plan after returning to the county jail and awaiting further criminal proceedings. Not surprisingly, in many such cases, the person’s mental condition will then deteriorate and he or she can again become incompetent. To address this type of situation, Article 46B.086 created a due process hearing procedure by which a court can compel a defendant to take medication to maintain his or her competency to be tried.

Shortly following the 2003 enactment of the statute, however, the United States Supreme Court decided *Sell v. United States*, 123 S.Ct. 2174 (2003). In *Sell*, the Court observed that earlier cases had determined

that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

*Id.* at 2184-85. In *Sell*, however, the Court found impermissible the involuntary medication of a defendant for purposes of trial competency when that defendant was not dangerous, was competent, and the experts had not focused on “the need to bring him to trial.” *Id.* at 2186-87. We stated the following in the 2004 edition of this book:

The criteria set forth in new Art. 46B.086 for medication hearings appear to square with the standard set forth in *Sell*; however, *Sell* likely places some limits on the employment of the new statute – particularly if the defendant is not dangerous to self or others. Indeed, Mr. Sell was a dentist charged with fraud. Thus, before a prosecutor endeavors to seek an order under Art. 46B.086, a close examination of *Sell* is important.

As Dr. Jennings and I described elsewhere, “Unfortunately, the forced medication statutes in Texas are convoluted and seeking a forced medication order for a defendant [who has been] adjudicated incompetent is a cumbersome process. ... [The required] two-step process involves both a civil and a criminal court.”<sup>17</sup> Specifically, because of concerns regarding *Sell*, in 2005 the legislature amended Article 46B.086 to require an additional, threshold medication hearing in the probate court. This 2005 legislation added the substance of what is now included in subsection (a)(4), which – for a defendant with mental illness – requires an initial medication hearing under § 574.106 of the Texas Health & Safety Code.

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<sup>17</sup> *Id.*

Under Health & Safety Code § 574.106, the state must file a petition seeking to authorize administration of psychoactive medication with a court having mental-health jurisdiction (usually either the constitutional county court or a statutory court with probate jurisdiction). The standards set forth under § 574.106(a-1) require the court to find either dangerousness to self or others, or incapacity and best interest if the person has been subject to court-ordered mental health services in the six months preceding a hearing under that section. Only if such an order is denied by the civil court under the Chapter 574 proceeding will 46B.086 apply – but, then, back in the criminal court.<sup>18</sup>

Thus, given the post-*Sell* amendments, article 46B.086 mandates a threshold medication hearing under chapter 574 of the Health and Safety Code, to be held by the probate court, before the criminal court can conduct a medication hearing under article 46B.086. In effect, the legislature adhered to the admonition in *Sell* by which the Court had urged that a criminal court not consider requiring medication as a means of restoring or maintaining a defendant's competency to stand trial until after the government had first sought an order compelling medication under grounds normally considered by the civil courts.

If the probate court does enter an order for the administration of medication under § 574.106, the order will *remain valid* for a defendant who is then returned to a correctional facility to await trial, and will be in effect for up to 180 days after the date the defendant is returned to the correctional facility (or earlier in case of an acquittal, conviction, entry of a guilty plea, or upon a dismissal of the charges). *See id.* § 574.110.

Should the probate court, however, determine that the defendant does not meet the criteria for court-ordered medication under Health & Safety Code § 574.106, the state can thereafter seek an order for the administration of medication under Article 46B.086. Per Article 46B.086(b), the motion to compel medication must be filed within 15 days after the date the probate judge issues an order declining to order medication under § 574.106. The criminal court must then conduct the Article 46B.086 hearing no later than 10 days following the date the motion to compel is filed (and the hearing can be conducted via a video hearing process).

Subsequent amendments to Article 46B expanded its reach. In 2007, as part of emphasizing the possible use of outpatient competency restoration programs, the legislature further modified Article 46B.086 to apply to persons ordered to outpatient services for competency restoration per Article 46B.072. In turn, 2009 legislation added subsection (a)(2) to allow for consideration of court-ordered medication in the event a defendant has remained in jail for more than 72 hours following a finding of incompetence to stand trial, but before transfer to a facility or program for

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<sup>18</sup> For a detailed discussion of these convoluted provisions and the history of the forced medication statutes, see Brian D. Shannon, *Prescribing a Balance: The Texas Legislative Responses to Sell v. United States*, 41 ST. MARY'S L. J. 309 (2009); available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1556406](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1556406).

restoration services. The two-step/two-court process is still applicable, however.<sup>19</sup> Thereafter, in 2013 the legislature added a forced medication process to Chapter 592 of the Health & Safety Code for persons with intellectual or developmental disabilities who have medication needs. Article 46B.086 was amended to require a comparable two-step/two-court hearing process in those situations.

If the matter returns to the criminal court for an Article 46B.086 hearing, the due process protections set forth in the statute require that any order under the statute be limited to the administration of those psychoactive medications that have been prescribed by the treatment team and are a part of the defendant's individualized continuity of care plan. Moreover, before the court may issue an order for administration of the medications, the following procedural protections must be afforded:

- notice and a hearing;
- supporting testimony by two physicians; and
- findings supported by clear and convincing evidence that:
  - the prescribed medication is medically appropriate;
  - the prescribed medication is in the best medical interest of the defendant;
  - the prescribed medication does not present side effects that cause harm to the defendant that is greater than the medical benefits;
  - the state has a clear and compelling interest in the defendant attaining and maintaining competency to stand trial;
  - there is not any less invasive means of attaining and maintaining the defendant's competency; and
  - the prescribed medication will not unduly prejudice the defendant's rights or use of defensive theories at trial

These processes quite properly represent a heavy burden for the state. On the other hand, the fact that the statutory scheme requires the possibility of two hearings before two different courts can serve to discourage prosecutors from pursuing such orders at all. This is unfortunate if medication is appropriate and can restore the defendant's competency by treating the person's mental illness. The statutory approach represents an attempt both to comport with constitutional requirements and to help assure that the defendant's competency can be attained and maintained.

#### **AUTHORIZATION FOR JAIL-BASED COMPETENCY RESTORATION.**

The legislature first added Article 46B.090 in 2013 to authorize up to two pilot sites for jail-based competency restoration programs. Leading up to the 2017 legislative session, however, the state had never selected any pilot sites under the legislation. Accordingly, in 2017 as part of S.B. 1326, the legislature revisited this section to refine some of the previous staffing ratios. More significantly, the 2017 legislation also added Article 46B.091 to authorize jail-based competency restoration programs developed at the local level by one or more counties. This legislation was intended to help address the critical shortage of inpatient bed space at state forensic hospitals.

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<sup>19</sup> For an extensive discussion of the 2009 legislation, see *id.*



Additionally, the legislature in 2017 enacted S.B. 292 to create mental health matching grant funding for justice-involved individuals. Subsequently, communities including Lubbock, Fort Worth, Dallas, and Corpus Christi have developed jail-based competency restoration programs. As set forth below in the texts of Articles 46B.090 and 46B.091, the provisions include many very specific details about the programs and responsibilities for these programs.

**Art. 46B.090. Jail-Based Restoration of Competency Pilot Program.** (a) In this article, “department” means the Department of State Health Services.

(a-1) If the legislature appropriates to the department the funding necessary for the department to operate a jail-based restoration of competency pilot program as described by this article, the department shall develop and implement the pilot program in one or two counties in this state that choose to participate in the pilot program. In developing the pilot program, the department shall coordinate and allow for input from each participating county.

(b) The department shall contract with a provider of jail-based competency restoration services to provide services under the pilot program if the department develops a pilot program under this article.

(c) Not later than November 1, 2013, the commissioner of the department shall adopt rules as necessary to implement the pilot program. In adopting rules under this article, the commissioner shall specify the types of information the department must collect during the operation of the pilot program for use in evaluating the outcome of the pilot program.

(d) Repealed by Acts 2015, 84th Leg., R.S., Ch. 946 , Sec. 1.15(d), eff. September 1, 2015.

(e) Repealed by Acts 2015, 84th Leg., R.S., Ch. 946 , Sec. 1.15(d), eff. September 1, 2015.

(f) To contract with the department under Subsection (b), a provider of jail-based competency restoration services must demonstrate to the department that:

(1) the provider:

- (A) has previously provided jail-based competency restoration services for one or more years; or
- (B) is a local mental health authority that has previously provided competency restoration services;

(2) the provider’s jail-based competency restoration program:

- (A) uses a multidisciplinary treatment team to provide clinical treatment that is:
  - (i) directed toward the specific objective of restoring the defendant’s competency to stand trial; and
  - (ii) similar to the clinical treatment provided as part of a competency restoration program at an inpatient mental health facility;

- (B) employs or contracts for the services of at least one psychiatrist; and
  - (C) provides weekly treatment hours commensurate to the treatment hours provided as part of a competency restoration program at an inpatient mental health facility;
  - (3) the provider is certified by a nationwide nonprofit organization that accredits health care organizations and programs, such as the Joint Commission on Health Care Staffing Services, or the provider is a local mental health authority in good standing with the department; and
  - (4) the provider has a demonstrated history of successful jail-based competency restoration outcomes or, if the provider is a local mental health authority, a demonstrated history of successful competency restoration outcomes.
- (g) A contract under Subsection (b) must require the designated provider to collect and submit to the department the information specified by rules adopted under Subsection (c).
- (h) The designated provider shall enter into a contract with the participating county or counties. The contract must require the participating county or counties to:
- (1) ensure the safety of defendants who participate in the jail-based restoration of competency pilot program;
  - (2) designate a separate space in the jail for the provider to conduct the pilot program;
  - (3) provide the same basic care to the participants as is provided to other inmates of a jail; and
  - (4) supply clinically appropriate psychoactive medications to the mental health service provider for purposes of administering court-ordered medication to the participants in accordance with Article 46B.086 of this code and Section 574.106, Health and Safety Code.
- (i) The psychiatrist for the provider shall conduct at least two full psychiatric evaluations of the defendant during the period the defendant receives competency restoration services in the jail. The psychiatrist must conduct one evaluation not later than the 21st day and one evaluation not later than the 55th day after the date the defendant begins to participate in the pilot program. The psychiatrist shall submit to the court a report concerning each evaluation required under this subsection.
- (j) If at any time during a defendant's participation in the jail-based restoration of competency pilot program the psychiatrist for the provider determines that the defendant has attained competency to stand trial:
- (1) the psychiatrist for the provider shall promptly issue and send to the court a report demonstrating that fact; and

(2) the court shall consider that report as the report of an expert stating an opinion that the defendant has been restored to competency for purposes of Article 46B.0755(a) or (b).

(k) If at any time during a defendant's participation in the jail-based restoration of competency pilot program the psychiatrist for the provider determines that the defendant's competency to stand trial is unlikely to be restored in the foreseeable future:

(1) the psychiatrist for the provider shall promptly issue and send to the court a report demonstrating that fact; and

(2) the court shall:

(A) proceed under Subchapter E or F and order the transfer of the defendant, without unnecessary delay, to the first available facility that is appropriate for that defendant, as provided under Subchapter E or F, as applicable; or

(B) release the defendant on bail as permitted under Chapter 17.

(l) If the psychiatrist for the provider determines that a defendant ordered to participate in the pilot program has not been restored to competency by the end of the 60th day after the date the defendant began to receive services in the pilot program:

(1) for a defendant charged with a felony, the defendant shall be transferred, without unnecessary delay and for the remainder of the period prescribed by Article 46B.073(b), to the first available facility that is appropriate for that defendant as provided by Article 46B.073(c) or (d); and

(2) for a defendant charged with a misdemeanor, the court may:

(A) order a single extension under Article 46B.080 and the transfer of the defendant without unnecessary delay to the appropriate mental health facility or residential care facility as provided by Article 46B.073(d) for the remainder of the period under the extension;

(B) proceed under Subchapter E or F;

(C) release the defendant on bail as permitted under Chapter 17; or

(D) dismiss the charges in accordance with Article 46B.010.

(m) Unless otherwise provided by this article, the provisions of this chapter, including the maximum periods prescribed by Article 46B.0095, apply to a defendant receiving competency restoration services under the pilot program in the same manner as those provisions apply to any other defendant who is subject to proceedings under this chapter.

(n) If the department develops and implements a jail-based restoration of competency pilot program under this article, not later than December 1, 2018, the commissioner of the department shall submit a report concerning the pilot program to the presiding officers of the standing committees of the senate and house of representatives having primary jurisdiction over health and human services issues and over criminal justice issues. The report must include the

information collected by the department during the pilot program and the commissioner's evaluation of the outcome of the program as of the date the report is submitted.

**Art. 46B.091. Jail-Based Competency Restoration Program Implemented by County.** (a) In this article:

(1) "Commission" means the Health and Human Services Commission.

(2) "Executive commissioner" means the executive commissioner of the Health and Human Services Commission.

(b) A county or counties jointly may develop and implement a jail-based competency restoration program.

(c) A county that implements a program under this article shall contract with a provider of jail-based competency restoration services that is a local mental health authority or local behavioral health authority that is in good standing with the commission, which may include an authority that is in good standing with the commission and subcontracts with a provider of jail-based competency restoration services.

(d) A jail-based competency restoration program must:

(1) provide jail-based competency restoration services through the use of a multidisciplinary treatment team that are:

(A) directed toward the specific objective of restoring the defendant's competency to stand trial; and

(B) similar to other competency restoration programs;

(2) employ or contract for the services of at least one psychiatrist;

(3) provide jail-based competency restoration services through licensed or qualified mental health professionals;

(4) provide weekly competency restoration hours commensurate to the hours provided as part of a competency restoration program at an inpatient mental health facility;

(5) operate in the jail in a designated space that is separate from the space used for the general population of the jail;

(6) ensure coordination of general health care;

(7) provide mental health treatment and substance use disorder treatment to defendants, as necessary, for competency restoration; and

(8) supply clinically appropriate psychoactive medications for purposes of administering court-ordered medication to defendants as applicable and in accordance with Article 46B.086 of this code or Section 574.106, Health and Safety Code.

(e) The executive commissioner shall adopt rules as necessary for a county to develop and implement a program under this article. The commission shall, as part of the rulemaking process, establish contract monitoring and oversight requirements for a local mental health authority or local behavioral health

authority that contracts with a county to provide jail-based competency restoration services under this article. The contract monitoring and oversight requirements must be consistent with local mental health authority or local behavioral health authority performance contract monitoring and oversight requirements, as applicable.

(f) The commission may inspect on behalf of the state any aspect of a program implemented under this article.

(g) A psychiatrist or psychologist for the provider shall conduct at least two full psychiatric or psychological evaluations of the defendant during the period the defendant receives competency restoration services in the jail. The psychiatrist or psychologist must conduct one evaluation not later than the 21st day and one evaluation not later than the 55th day after the date the defendant is committed to the program. The psychiatrist or psychologist shall submit to the court a report concerning each evaluation required under this subsection.

(h) If at any time during a defendant's commitment to a program implemented under this article the psychiatrist or psychologist for the provider determines that the defendant has attained competency to stand trial:

- (1) the psychiatrist or psychologist for the provider shall promptly issue and send to the court a report demonstrating that fact; and
- (2) the court shall consider that report as the report of an expert stating an opinion that the defendant has been restored to competency for purposes of Article 46B.0755(a) or (b).

(i) If at any time during a defendant's commitment to a program implemented under this article the psychiatrist or psychologist for the provider determines that the defendant's competency to stand trial is unlikely to be restored in the foreseeable future:

- (1) the psychiatrist or psychologist for the provider shall promptly issue and send to the court a report demonstrating that fact; and
- (2) the court shall:
  - (A) proceed under Subchapter E or F and order the transfer of the defendant, without unnecessary delay, to the first available facility that is appropriate for that defendant, as provided under Subchapter E or F, as applicable; or
  - (B) release the defendant on bail as permitted under Chapter 17.

(j) If the psychiatrist or psychologist for the provider determines that a defendant committed to a program implemented under this article has not been restored to competency by the end of the 60th day after the date the defendant began to receive services in the program:

- (1) for a defendant charged with a felony, the defendant shall be transferred, without unnecessary delay and for the remainder of the period prescribed by Article 46B.073(b), to the first available facility that is appropriate for that defendant as provided by Article 46B.073(c) or (d); and

- (2) for a defendant charged with a misdemeanor, the court may:
- (A) order a single extension under Article 46B.080 and, notwithstanding Articles 46B.073(e) and (f), the transfer of the defendant without unnecessary delay to the appropriate mental health facility or residential care facility as provided by Article 46B.073(d) for the remainder of the period under the extension;
  - (B) proceed under Subchapter E or F;
  - (C) release the defendant on bail as permitted under Chapter 17; or
  - (D) dismiss the charges in accordance with Article 46B.010.

(k) Unless otherwise provided by this article, the provisions of this chapter, including the maximum periods prescribed by Article 46B.0095, apply to a defendant receiving competency restoration services, including competency restoration education services, under a program implemented under this article in the same manner as those provisions apply to any other defendant who is subject to proceedings under this chapter.

(l) This article does not affect the responsibility of a county to ensure the safety of a defendant who is committed to the program and to provide the same adequate care to the defendant as is provided to other inmates of the jail in which the defendant is located.

**DURATION OF JAIL-BASED COMPETENCY RESTORATION.** One unfortunate aspect of Article 46B.091 relates to the time frame for jail-based competency restoration. Under Article 46B.091(j), above, the maximum period for providing competency restoration services in the jail-based program is 60 days. This maximum is the case even though Article 46B.073(b) authorizes an initial commitment period of 120 days for felonies (along with a possible 60 day extension), and the possibility of a 60-day extension at the end of the 60-day commitment period for misdemeanor charges. The statute contemplates that if the defendant has not been restored by the end of the 60-day period of jail-based services, he or she will be immediately transferred “without unnecessary delay” to an inpatient facility for the remaining 60 days of the 120-day initial commitment period specified in Article 46B.073(b). A comparable provision in subsection 46B.091(j)(2) contemplates a similar immediate transfer in the case of an unrestored defendant who is facing misdemeanor charges to allow the 60-day extension to occur in an inpatient facility. The problem is, however, that given long waiting lists and backlogs at state inpatient facilities, immediate transfers simply do not happen. In such a case, the defendant might languish for a lengthy period of time following the initial 60 days of restoration services before the remaining 60 days of services might resume at the inpatient facility. Obviously, the individual’s “gains may be lost” with such delays. *See* Floyd L. Jennings, *supra* at <http://www.voiceforthedefenseonline.com/story/statutory-changes-regarding-mentally-ill-defendants>. It is to be hoped that defendants will be restored in the initial 60-day period or, at least, be willing to continue to take prescribed medications prior to the transfer. Finally, although the statute is not altogether clear, in this author’s view the 120-day commitment period clock (in the case of felonies) must stop at the end of the 60-day period for jail-based services, and then

resume when the defendant actually reaches the inpatient facility. Otherwise, the court's order of an initial 120-day competency restoration commitment could end up being negated by a lengthy wait for services following the initial 60 days in the jail-based program. (Note that there are parallel provisions in Article 46B.090(l). The same concerns apply.)

**ADDITIONAL PERIODS OF CIVIL COMMITMENT WHEN CHARGES REMAIN PENDING.** As noted above, per Article 46B.084(e), if a person's competency has not been attained or restored after the commitment process required by Subchapter D of Chapter 46B (the initial period of either 60 days or 120 days, and one possible 60-day extension), Subchapter E must be followed if the underlying criminal charges remain pending. Subchapter E represents the replacement for old section 6 of former Art. 46.02, and it begins with Article 46B.101. Amendments enacted in 2011 also require the court to apply Subchapter E in the event that charges remain pending and a determination has been made per Article 46B.071 (based on the examiner's report) that the defendant is both incompetent and unlikely to be restored to competency in the foreseeable future.

**Art. 46B.101. Applicability.** This subchapter applies to a defendant against whom a court is required to proceed under Article 46B.084(e) or according to the court's appropriate determination under Article 46B.071.

**CIVIL COMMITMENT HEARING – MENTAL ILLNESS.** If a defendant remains incompetent after the initial 60-day or 120-day restoration period and ensuing 60-day extension, or if there was a determination that the defendant's competency is not likely to be restored in the foreseeable future per Article 46B.071 and the criminal charges remain pending, Article 46B.102 requires the *criminal* court to conduct a *civil* commitment hearing. That is, the criminal court will preside over a process that is more typically conducted by a county court with probate jurisdiction.

**Art. 46B.102. Civil Commitment Hearing: Mental Illness.** (a) If it appears to the court that the defendant may be a person with mental illness, the court shall hold a hearing to determine whether the defendant should be court-ordered to mental health services under Subtitle C, Title 7, Health and Safety Code.

(b) Proceedings for commitment of the defendant to court-ordered mental health services are governed by Subtitle C, Title 7, Health and Safety Code, to the extent that Subtitle C applies and does not conflict with this chapter, except that the criminal court shall conduct the proceedings whether or not the criminal court is also the county court.

(c) If the court enters an order committing the defendant to a mental health facility, the defendant shall be:

- (1) treated in conformity with Subtitle C, Title 7, Health and Safety Code, except as otherwise provided by this chapter; and
- (2) released in conformity with Article 46B.107.

(d) In proceedings conducted under this subchapter for a defendant described by Subsection (a):

- (1) an application for court-ordered temporary or extended mental health services may not be required;
- (2) the provisions of Subtitle C, Title 7, Health and Safety Code, relating to notice of hearing do not apply; and
- (3) appeals from the criminal court proceedings are to the court of appeals as in the proceedings for court-ordered inpatient mental health services under Subtitle C, Title 7, Health and Safety Code.

Thus, Article 46B.102 directs the judge of the court presiding over the criminal case to make determinations concerning whether the incompetent defendant is experiencing symptoms of a mental illness and requires commitment for treatment for the mental illness at a mental health facility or outpatient treatment program. Specifically, Article 46B.102 requires the “criminal” court to make determinations regarding the defendant’s need for court-ordered mental health services in accordance with provisions of the Texas Health & Safety Code. (As a side note, Subtitle C, Title 7, Health & Safety Code, is sometimes referred to as the Texas Mental Health Code.) Accordingly, the judge presiding over the “criminal” court will make the decisions that a county judge or other court with probate jurisdiction would normally make in the civil commitment process. (Of course, it is possible that for certain offenses the county court will also be the court that has been presiding over the criminal matters.)

Although Article 46B.102 requires the criminal court to proceed generally in accordance with the provisions of the Texas Health & Safety Code, there are a few notable differences. For example, unlike the ordinary civil commitment proceeding, Subsection (d)(1) provides that there is generally no need for a formal application for court-ordered mental health services to be on file. Given that the criminal court already has jurisdiction over the matter, the application would tend to be superfluous. In addition, Subsection (d)(2) eliminates the Health & Safety Code’s notice of hearing provisions. Of course, the defendant will have received ample notice through the ongoing criminal process.

Given that the usual defendant with mental illness who faces a Subchapter E “extended commitment” hearing will typically have been hospitalized for either 120 or 180 days (assuming that a one-time 60-day extension has been granted), the criminal court will typically need to apply the extended, 12-month inpatient commitment provisions set forth in § 574.035, Texas Health & Safety Code, rather than the 45-day commitment rules that are delineated in § 574.034. Indeed, § 574.035(a)(4), Texas Health & Safety Code, provides that the 12-month inpatient commitment provisions apply if “the proposed patient has received court-ordered inpatient mental health services ... under Chapter 46B, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months.” Alternatively, the court can consider extended outpatient commitment if certain criteria are met, including that the defendant has received court-ordered inpatient mental health



services under Chapter 46B for at least 60 days during the preceding 12 months or court-ordered outpatient services under Chapter 46B during the preceding 60 days. *See id.* § 574.0355. (Legislation enacted in 2019 separated the inpatient procedures and standards from the outpatient procedures and standards. *See id.* §§ 574.035 and 574.0355.) A court may not order outpatient mental health services, however, if the pending criminal charges involve an act, attempt, or threat of serious bodily injury to another person. *Id.* § 564.0355(d). In addition, one of the requirements of extended commitments is that live medical testimony is required, and the court may not make its decision solely on the basis of the medical certificates. *See id.* § 574.031(d-2).

If the court is proceeding under Subchapter E because of a finding under Article 46B.071 that the defendant is both incompetent and not likely to be restored in the foreseeable future, then there will not be any initial commitment for competency restoration available under Subchapter D of Article 46B. Instead, the court must turn directly either to Subchapter E (if charges remain pending) or Subchapter F (if the charges are dropped). Accordingly, in such a case there typically will not have been the requisite inpatient hospitalization under Chapter 46B for 60 consecutive days in the preceding 12 months to be able to pursue an extended inpatient commitment under § 574.035. Similarly, it may be unlikely that the defendant will have received court-ordered inpatient mental health services for at least 60 days during the preceding 12 months or court-ordered outpatient services during the preceding 60 days, either of which is a prerequisite for considering an extended outpatient commitment under § 574.0355. Accordingly, the court must instead proceed with the process set forth in § 574.034 for an order for temporary inpatient mental health services (not to exceed 45 days, but the period can be up to 90 days if the judge finds the longer period to be necessary). Alternatively, in appropriate cases the court may consider ordering temporary outpatient services for the same time periods under § 574.0345 provided that the charges pending against the defendant do not involve an act, attempt, or threat of serious bodily injury to another person.

It is also theoretically possible – albeit very unusual – for the mental health treatment provider to return the defendant back to the court as not likely to attain competency within the foreseeable future *before* the defendant has been hospitalized for 60 days. Then, the Texas Health & Safety Code would also require the court to follow the 45-day (or 90-day) “temporary” commitment provisions. It will likely be a rare case, however, in which a treatment facility would halt efforts at trying to restore the defendant’s competency during the initial commitment period prior to the passage of 60 days.

We are also aware of many unfortunate situations in which defendants have been returned to the committing court, but have then languished in jail for so many months that § 574.035(a)(4)’s trigger (of at least 60 consecutive days of court-ordered hospitalization in the preceding 12 months pursuant to Chapter 46B) has lapsed. In such a case, the criminal court must then conduct civil commitment proceedings under either § 574.034 (inpatient) or § 574.0345 (outpatient), which permit court-ordered “temporary” mental health services (a 45-day or 90-day commitment).

The Health & Safety Code requires a jury for an extended 12-month commitment hearing unless the defendant or the defendant's attorney waives that right. *See* § 574.032(b), Texas Health & Safety Code. This jury requirement is in contrast to the provisions for the 45-day (or 90-day) commitment hearing in which no jury is required unless affirmatively sought by the defendant. *Id.* § 574.032(a). With regard to the ensuing hearing, the provisions governing a 12-month extended commitment proceeding *require* live expert testimony. *Id.* § 574.031(d-2). This requirement for live testimony is in contrast to the common practice in 45-day (or 90-day) commitment hearings in which live testimony is often waived and there are stipulations to the findings set forth in the experts' certificates of medical examination. *Id.* § 574.031(d-1). [Then, at the 12-month commitment hearing for inpatient services, if the jury or court finds that the defendant has a mental illness and meets one or more of the three commitment criteria – is likely to cause serious harm to (1) self or (2) others, or (3) is:

- (i) suffering severe and abnormal mental, emotional, or physical distress;
- (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and
- (iii) unable to make a rational and informed decision as to whether or not to submit to treatment –

then the court will typically commit the defendant to a mental health treatment facility for inpatient mental health care for a period not to exceed 12 months. *See id.* § 574.035(a). In these civil commitment proceedings, the state has the burden of proof, and the evidentiary standard is proof by “clear and convincing evidence.”]

Note that the criteria for an extended commitment for outpatient services differ from the criteria for an inpatient order. The criteria for an extended outpatient commitment do not include the prongs relating to the potential for serious harm to self or others; instead, the extended outpatient criteria put the focus on whether the individual, if not treated, will experience a deterioration of the ability to function independently and cannot live safely in the community without court-ordered outpatient mental health services. The full list of criteria is spelled out in § 574.0355, Texas Health & Safety Code. Moreover, an outpatient commitment is not authorized if the charges pending involve an act, attempt, or threat of serious bodily injury.

**CIVIL COMMITMENT HEARING – INTELLECTUAL DISABILITY.** Article 46B.103 is a provision that largely parallels Article 46B.102 and governs an ensuing civil commitment hearing for a persons with an intellectual disability when charges remain pending and the person remains incompetent to proceed or was determined to be unlikely to be restored in the foreseeable future. The legislature amended subsection (d) in 2007 specifically to limit the scope of the provision to pertain solely to commitments for intellectual disability services. It should also be noted that unlike the burden of proof for civil commitments for mental illness (“clear and convincing evidence”), the burden of proof in commitment proceedings for persons with intellectual disabilities is higher (“beyond a reasonable doubt”). *See* § 593.050(e), Texas Health & Safety Code. Consider also *Powell v. State*, 487 S.W.3d 768, 7 (Tex.

App. – Dallas 2016, *no pet.*) (holding that the appeals provision set forth in Article 46B.103(d)(3) does not extend to a trial court's order denying a request for a transfer from a residential care facility to a group home).

**Art. 46B.103. Commitment Hearing: Intellectual Disability.** (a) If it appears to the court that the defendant may be a person with an intellectual disability, the court shall hold a hearing to determine whether the defendant is a person with an intellectual disability.

(b) Proceedings for commitment of the defendant to a residential care facility are governed by Subtitle D, Title 7, Health and Safety Code, to the extent that Subtitle D applies and does not conflict with this chapter, except that the criminal court shall conduct the proceedings whether or not the criminal court is also a county court.

(c) If the court enters an order committing the defendant to a residential care facility, the defendant shall be:

- (1) treated and released in accordance with Subtitle D, Title 7, Health and Safety Code, except as otherwise provided by this chapter; and
- (2) released in conformity with Article 46B.107.

(d) In the proceedings conducted under this subchapter for a defendant described by subsection (a):

- (1) an application to have the defendant declared a person with an intellectual disability may not be required;
- (2) the provisions of Subtitle D, Title 7, Health and Safety Code, relating to notice of hearing do not apply; and
- (3) appeals from the criminal court proceedings are to the court of appeals as in the proceedings for commitment to a residential care facility under Subtitle D, Title 7, Health and Safety Code.

**PLACEMENT OF THE DEFENDANT FOR A CIVIL COMMITMENT – VIOLENT OFFENSES.** Assuming that the defendant has been found by the jury or court to meet the Texas Mental Health Code's inpatient commitment criteria, the next several statutes in Subchapter E describe the appropriate placement for the defendant. Article 46B.104 governs situations in which the defendant has been charged with any of an array of violent offenses. Legislation enacted in 2019 provides discretion to the Texas Health and Human Services Commission to make individualized determinations as to the appropriate facility placement, including the discretion to designate a maximum security unit, if deemed appropriate or necessary.

**Art. 46B.104. Civil Commitment Placement: Finding of Violence.** A defendant committed to a facility as a result of proceedings initiated under this chapter shall be committed to the facility designated by the commission if:

- (1) the defendant is charged with an offense listed in Article 17.032(a); or
- (2) the indictment charging the offense alleges an affirmative finding under Article 42A.054(c) or (d).

**STEP-DOWNS FROM THE MAXIMUM SECURITY UNIT.** For a defendant who is placed in a maximum security unit per Article 46B.104, the next statute, Article 46B.105, provides for the prospect of a “step-down” to a less secure unit or other state facility, or to a local authority. As under prior law, this provision also requires the Health and Human Services Commission to appoint and maintain a five-member review board to make determinations about whether a defendant committed to a maximum security unit is manifestly dangerous and should remain in the maximum security facility.

**Art. 46B.105. Transfer Following Civil Commitment Placement.** (a) Unless a defendant committed to a maximum security unit by the commission is determined to be manifestly dangerous by a review board established under Subsection (b), not later than the 60th day after the date the defendant arrives at the maximum security unit, the defendant shall be transferred to:

- (1) a unit of an inpatient mental health facility other than a maximum security unit;
- (2) a residential care facility; or
- (3) a program designated by a local mental health authority or a local intellectual and developmental disability authority.

(b) The executive commissioner shall appoint a review board of five members, including one psychiatrist licensed to practice medicine in this state and two persons who work directly with persons with mental illness or an intellectual disability, to determine whether the defendant is manifestly dangerous and, as a result of the danger the defendant presents, requires continued placement in a maximum security unit.

(c) The review board may not make a determination as to the defendant's need for treatment.

(d) A finding that the defendant is not manifestly dangerous is not a medical determination that the defendant no longer meets the criteria for involuntary civil commitment under Subtitle C or D, Title 7, Health and Safety Code.

(e) If the superintendent of the facility at which the maximum security unit is located disagrees with the determination, the matter shall be referred to the executive commissioner. The executive commissioner shall decide whether the defendant is manifestly dangerous.

This statute requires the review board to be composed of five members, at least one of whom must be a licensed psychiatrist and two who must work directly with persons with mental illness or intellectual disabilities. The review board is not to concern itself with treatment issues, but should decide only whether the persons who come before the board are so dangerous that they should remain in a maximum security unit. Accordingly, the statute specifies that a review board finding that a patient is not manifestly dangerous does not equate to a determination that the patient no longer meets civil commitment criteria. Instead, such a finding permits the agency to transfer the person to a less restrictive setting for further treatment.

Finally, Article 46B.105 includes an “appeal” provision regarding these determinations. If the superintendent of the mental health facility that houses the maximum security unit disagrees with the review board’s findings, the head of the agency must resolve the disagreement.

**PLACEMENT OF THE DEFENDANT FOR CIVIL COMMITMENT: NON-VIOLENT OFFENSES.** Assuming that the underlying criminal charges are not for any of the violent offenses set forth in the statutes cross-referenced by Article 46B.104, the next statute, Article 46B.106, requires that the commitment be to a facility designated by the Health and Human Services Commission or to an outpatient treatment program. The facility or program cannot refuse the placement on grounds that criminal charges remain pending.

**Art. 46B.106. Civil Commitment Placement: No Finding of Violence.** (a) A defendant committed to a facility as a result of the proceedings initiated under this chapter, other than a defendant described by Article 46B.104, shall be committed to:

- (1) a facility designated by the commission; or
- (2) an outpatient treatment program.

(b) A facility or outpatient treatment program may not refuse to accept a placement ordered under this article on the grounds that criminal charges against the defendant are pending.

**RELEASE OF THE DEFENDANT AFTER THE CIVIL COMMITMENT.** Article 46B.107 sets forth the process to be followed if the treatment facility or outpatient treatment program determines that the defendant no longer meets commitment criteria and should be released.

**Art. 46B.107. Release of Defendant after Civil Commitment.** (a) The release of a defendant committed under the commission, an outpatient treatment program, or another facility is subject to disapproval by the committing court if the court or the attorney representing the state has notified the head of the facility or outpatient treatment provider, as applicable, to which the defendant has been committed that a criminal charge remains pending against the defendant.

(b) If the head of the facility or outpatient treatment provider to which a defendant has been committed under this chapter determines that the defendant should be released from the facility, the head of the facility or outpatient treatment provider shall notify the committing court and the sheriff of the county from which the defendant was committed in writing of the release not later than the 14th day before the date on which the facility or outpatient treatment provider intends to release the defendant.

(c) The head of the facility or outpatient treatment provider shall provide with the notice a written statement that states an opinion as to whether the defendant to be released has attained competency to stand trial.

(d) The court shall, on receiving notice from the head of the facility or outpatient treatment provider of intent to release the defendant under Subsection (b), hold a hearing to determine whether release is appropriate under the applicable criteria in Subtitle C or D, Title 7, Health and Safety Code. The court may, on motion of the attorney representing the state or on its own motion, hold a hearing to determine whether release is appropriate under the applicable criteria in Subtitle C or D, Title 7, Health and Safety Code, regardless of whether the court receives notice that the head of a facility or outpatient treatment provider provides notice of intent to release the defendant under Subsection (b). The court may conduct the hearing:

(1) at the facility; or

(2) by means of an electronic broadcast system as provided by Article 46B.013.

(e) If the court determines that release is not appropriate, the court shall enter an order directing the head of the facility or outpatient treatment provider to not release the defendant.

(f) If an order is entered under Subsection (e), any subsequent proceeding to release the defendant is subject to this article.

As with a typical civil commitment ordered by a civil court with probate jurisdiction, once the defendant becomes a patient at a mental health facility or in an outpatient treatment program pursuant to Subchapter E, then the facility or provider – in general – has the authority to gauge whether the patient may be released earlier than the maximum period set forth in the court’s order. In addition, under the law governing a typical *civil* commitment, if the patient responds well to treatment and the hospital or other treatment provider determines that the commitment criteria are no longer met, the hospital must release the patient at that time. Article 46B.107 sets forth a few variations, however, for a defendant under a Chapter 46B civil commitment ordered by the criminal court when charges remain pending. First, subsection (a) makes the release from the facility or outpatient treatment program subject to the disapproval of the committing court if criminal charges remain pending. Plus, the facility or outpatient treatment provider must give the court and local sheriff at least two weeks’ notice prior to the date when the facility otherwise intends to release the patient. Art. 46B.107(b). Subsection (c) requires the head of the facility or outpatient treatment provider to include with the notice a written opinion as to whether – in the medical judgment of the treatment team – the defendant has attained competency to be tried. Indeed, if the person is doing well enough medically to no longer meet commitment criteria, there is a very good prospect that the treatment will have resulted in the person’s having attained competency to be tried.

Subsection (d) authorizes the court, on a motion by the prosecutor or on its own motion, to hold a further hearing under the Health & Safety Code to assess whether release is appropriate under the Health & Safety Code's commitment criteria or whether further commitment is necessary. Moreover, following 2019 amendments, the court may hold a hearing to determine whether release is appropriate on a motion by the state or its own motion, *regardless* of whether the facility or provider has provided notice of an intent to release the defendant. The statute also authorizes these hearings to take place at the facility or by interactive video transmission. Alternatively, the court can proceed under the next several articles to consider a re-determination of the defendant's competency to be tried.

**RE-DETERMINATION OF COMPETENCY.** Article 46B.108 authorizes the court at any time during the pending civil commitment under Subchapter E to determine whether the defendant's competency has been restored. Although this will likely occur most typically at the time the facility is of the view that the defendant is ready for release, the statute is very open-ended about the timing. Moreover, an inquiry into competency restoration may be made at any time during the period of the civil commitment at the request of the treatment provider, the defendant, defense counsel, the prosecutor, or the court. Note that this section is inapplicable to proceedings that follow upon the return of the defendant to court during or at the end of the initial criminal competency restoration commitment. Those procedures are covered by Article 46B.084, which was discussed above. For a case so holding, see *Timmons v. State*, 510 S.W.3d 713, 720 (Tex. App. – El Paso 2016, *no pet.*).

**Art. 46B.108. Redetermination of Competency.** (a) If criminal charges against a defendant found incompetent to stand trial have not been dismissed, the trial court at any time may determine whether the defendant has been restored to competency.

(b) An inquiry into restoration of competency under this subchapter may be made at the request of the head of the mental health facility, outpatient treatment provider, or residential care facility to which the defendant has been committed, the defendant, the attorney representing the defendant, or the attorney representing the state, or may be made on the court's own motion.

**REQUEST BY THE FACILITY HEAD OR OUTPATIENT TREATMENT PROVIDER.** Consistent with the foregoing article, Article 46B.109 authorizes the head of the treatment facility or outpatient treatment provider to request that the court make a determination that the defendant has been restored to competency.

**Art. 46B.109. Request by Head of Facility.** (a) The head of a facility or outpatient treatment provider to which a defendant has been committed as a result of a finding of incompetency to stand trial may request the court to determine that the defendant has been restored to competency.

(b) The head of the facility or outpatient treatment provider shall provide with the request a written statement that in their opinion the defendant is competent to stand trial.

In this regard, the facility head or outpatient treatment provider must provide a written opinion that the defendant has become competent to stand trial. This is, of course, not a legal conclusion, but the mental health service provider's opinion based – no doubt – on the medical expertise of the treatment team.

**DEFENDANT, DEFENSE COUNSEL, OR PROSECUTOR MAY ASSERT THAT COMPETENCY HAS BEEN RESTORED.** Article 46B.110 authorizes the defendant, defense counsel, or the prosecutor to file a motion seeking to have the court determine that the defendant's competency has been restored. Affidavits may be provided with the motion. A 2005 amendment specifically added defense attorneys as having the authority to make such motions.

**Art. 46B.110. Motion by Defendant, Attorney Representing Defendant, or Attorney Representing State.** (a) The defendant, the attorney representing the defendant, or the attorney representing the state may move that the court determine that the defendant has been restored to competency.  
(b) A motion for a determination of competency may be accompanied by affidavits supporting the moving party's assertion that the defendant is competent.

**APPOINTMENT OF INDEPENDENT QUALIFIED EXPERTS.** Article 46B.111 authorizes the court to appoint qualified experts to examine the defendant upon a request or motion seeking to determine whether the defendant's competency has been restored during or following the civil commitment period. The provisions of Subchapter B of Chapter 46B, discussed *supra*, govern the qualifications and requirements pertaining to such experts and their reports.

**Art. 46B.111. Appointment of Examiners.** On the filing of a request or motion to determine that the defendant has been restored to competency or on the court's decision on its own motion to inquire into restoration of competency, the court may appoint disinterested experts to examine the defendant in accordance with Subchapter B.

**AGREEMENT THAT THE DEFENDANT HAS ATTAINED COMPETENCY.** If the parties and the court all agree that the defendant has attained competency to be tried, the court is required to make such a finding and proceed with any further criminal proceedings.

**Art. 46B.112. Determination of Restoration with Agreement.** On the filing of a request or motion to determine that the defendant has been restored to competency or on the court's decision on its own motion to inquire into restoration of competency, the court shall find the defendant competent to stand trial and proceed in the same manner as if the defendant had been found restored to competency at a hearing if:

- (1) both parties agree that the defendant is competent to stand trial; and



(2) the court concurs.

**HEARING TO DETERMINE RESTORATION OR LACK THEREOF.** Absent an agreement, Article 46B.113 sets forth the requirements relating to the conducting of a hearing to determine whether the defendant's competency has been restored.

**Art. 46B.113. Determination of Restoration without Agreement.** (a) The court shall hold a hearing on a request by the head of a facility or outpatient treatment provider to which a defendant has been committed as a result of a finding of incompetency to stand trial to determine whether the defendant has been restored to competency.

(b) The court may hold a hearing on a motion to determine whether the defendant has been restored to competency or on the court's decision on its own motion to inquire into restoration of competency, and shall hold a hearing if a motion and any supporting material establish good reason to believe the defendant may have been restored to competency.

(c) If a court holds a hearing under this article, on the request of the counsel for either party or the motion of the court a jury shall make the competency determination. If the competency determination will be made by the court rather than a jury, the court may conduct the hearing:

(1) at the facility; or

(2) by means of an electronic broadcast system as provided by Article 46B.013.

(d) If the head of a facility or outpatient treatment provider to which the defendant was committed as a result of a finding of incompetency to stand trial has provided an opinion that the defendant has regained competency, competency is presumed at a hearing under this subchapter and continuing incompetency must be proved by a preponderance of the evidence.

(e) If the head of a facility or outpatient treatment provider has not provided an opinion described by Subsection (d), incompetency is presumed at a hearing under this subchapter and the defendant's competency must be proved by a preponderance of the evidence.

Subsection (a) mandates that the court hold a hearing on the issue of competency restoration upon a request by the facility head or outpatient treatment provider. By way of contrast, subsection (b) permits the court to hold a hearing on the issue of competency restoration if there has been a motion filed by counsel for a party or on the court's own motion, and *requires* the court to hold a hearing if the motion and any supporting material "establish good cause to believe" that the defendant has attained competency to be tried. In turn, subsection (c) requires a jury to be impaneled if requested by either party or desired by the court.

It has long been the law in Texas that when a person is found to be incompetent, is sent for competency restoration, and is *not* restored, then there has been an

“unvacated adjudication of incompetency” and the burden then shifts to the State to “prove the accused’s competency to stand trial beyond a reasonable doubt.” *Manning v. State*, 730 S.W. 744, 748 (Tex. Crim. App. 1987).

Under Article 46B.113 and in contrast to *Manning*, however, the legislature has more recently modified *Manning*, in part, and established specific guidance for Subchapter E commitments regarding the relevant burdens of proof when the facility head or outpatient treatment provider has either (1) opined that the defendant’s competency has been restored, or (2) has not provided an opinion that the defendant has regained competency. Correspondingly, per subsection (d), the defendant’s competency will be presumed at the hearing if the head of the facility or outpatient treatment provider has tendered an opinion that the defendant has regained (or attained) competency. In such a case, *incompetency* must be proven by a preponderance of the evidence. In contrast, if the facility head or outpatient treatment provider has not provided an opinion that the defendant has regained (or attained) competency, subsection (e) directs that the defendant’s *incompetency* will be presumed at the hearing, and *competency* must be established by a preponderance of the evidence. For more discussion of this issue, see *Morales v. State*, 450 S.W.3d 553, 559-60 (Tex. App. – Houston [14th Dist.] 2014, *pet. ref’d*).

So, what is left of *Manning*? First, Article 46B.113 addresses the burden of proof when the mental health services provider has (1) opined that the defendant’s competency has been restored, or (2) has not provided an opinion as to whether the defendant has regained competency. The statute does not, however, directly address a situation in which the facility head or outpatient treatment provider instead provides an opinion that the defendant’s competency has *not* been restored. Presumably, then, per *Manning* the State would be faced with proving competency beyond a reasonable doubt in such a case, although there are no reported cases on point. In addition, and more broadly, *Manning* is applicable in other situations such as when a defendant has been adjudicated as incompetent, is committed for competency restoration yet his or her competency is not restored (or who has been found unlikely to be restored in the foreseeable future), is released, but later is charged with a new crime. In such a situation, the defendant would be in a state of unvacated adjudication of incompetency and *Manning* would control. See Floyd L. Jennings, *Procedural Choke Points in 46B Competency Issues*, VOICE FOR THE DEFENSE ONLINE (March 12, 2016), available at <http://www.voiceforthedefenseonline.com/story/procedural-choke-points-46b-competency-issues>.

Finally, per subsection (c), if the hearing is before the court rather than a jury, the hearing may be conducted at the facility or by interactive video.

**TRANSPORTATION BACK TO THE COURT.** As in other subdivisions of Chapter 46B (and as under prior law), Article 46B.114 places the responsibility for timely transportation of the defendant from the treatment facility to the county of origin on the sheriff of the county in which the committing court is located. Additionally, the county bears responsibility for the attendant costs. The statute also takes into account that the hearing might be at the facility or by means of interactive video (thereby avoiding the need for transportation).

**Art. 46B.114. Transportation of Defendant to Court.** If the hearing is not conducted at the facility to which the defendant has been committed under this chapter or conducted by means of an electronic broadcast system as described by this subchapter, an order setting a hearing to determine whether the defendant has been restored to competency shall direct that, as soon as practicable but not earlier than 72 hours before the date the hearing is scheduled, the defendant be placed in the custody of the sheriff of the county in which the committing court is located or the sheriff's designee for transportation to the court. The sheriff or the sheriff's designee may not take custody of the defendant under this article until 72 hours before the date the hearing is scheduled.

**WHAT IF THE HEARING RESULTS IN A DETERMINATION OF COMPETENCY?** For purposes of ease of discussion, the next three sections of Subchapter E are taken out of order. Per Article 46B.116, should the hearing described in the foregoing sections result in a determination that the defendant has become competent to stand trial, not surprisingly the underlying criminal proceedings may be resumed.

**Art. 46B.116. Disposition on Determination of Competency**

If the defendant is found competent to stand trial, the proceedings on the criminal charge may proceed.

**WHAT IF THE HEARING RESULTS IN A DETERMINATION THAT THE DEFENDANT REMAINS INCOMPETENT?** Article 46B.117 addresses the disposition of the defendant should the hearing described in the foregoing sections result in a determination that the defendant remains incompetent to stand trial. If the defendant is still under an order of civil commitment, then the defendant must remain at the treatment facility (if the hearing was at the facility or conducted by interactive video). Otherwise, the sheriff's office must transport the individual back to the facility or program.

**Art. 46B.117. Disposition on Determination of Incompetency**

If a defendant under order of commitment to a facility or outpatient treatment program is found to not have been restored to competency to stand trial, the court shall remand the defendant pursuant to that order of commitment, and, if applicable, order the defendant placed in the custody of the sheriff or the sheriff's designee for transportation back to the facility.

As a side note, should a prosecutor's office be unsuccessful in a competency restoration hearing as described in the foregoing sections, it is certainly possible that the same official(s) can consider dismissing the underlying charges. This may be particularly true in a situation in which the time spent by the defendant in the

competency commitment process is approaching the typical sentence associated with the charged offense, when “timing out” would nonetheless be required.

In addition, should the restoration hearing result in a finding of continuing incompetency to be tried, one additional statute set forth in Subchapter E places some limits on when another attempt to determine competency can be undertaken.

**Art. 46B.115. Subsequent Redeterminations of Competency.** (a) If the court has made a determination that a defendant has not been restored to competency under this subchapter, a subsequent request or motion for a redetermination of competency filed before the 91st day after the date of that determination must:

- (1) explain why the person making the request or motion believes another inquiry into restoration is appropriate; and
- (2) provide support for the belief.

(b) The court may hold a hearing on a request or motion under this article only if the court first finds reason to believe the defendant's condition has materially changed since the prior determination that the defendant was not restored to competency.

(c) If the competency determination will be made by the court, the court may conduct the hearing at the facility to which the defendant has been committed under this chapter or may conduct the hearing by means of an electronic broadcast system as provided by Article 46B.013.

Article 46B.115 declares that if there has been a determination that the defendant still has not been restored to competency, then any further request or motion to, once more, seek a redetermination of the defendant's competency that is filed within 90 days of the prior determination must include both an explanation of why another inquiry is appropriate as well as support for that belief. Moreover, the court cannot hold a hearing on a motion filed within this 90-day window unless the court finds a reason to believe that the defendant's condition has changed materially since the prior hearing. Note that these strictures apply only to the first 90 days following the prior determination. There are no comparable limits for motions or requests made after that period. Comparable to other subsections, this article allows the hearing to be conducted at the facility or by interactive video.

**ADDITIONAL CIVIL COMMITMENT WHEN CHARGES HAVE BEEN DISMISSED.** As noted above, per Article 46B.084(f), if a person's competency has not been attained or restored after the initial commitment process required by Subchapter D of Chapter 46B, then Subchapter F is to be followed if the underlying criminal charges have been dismissed. Subchapter F represents the replacement for old section 7 of former Article 46.02 and includes only one statute, Article 46B.151. The court may also use this section if permitted by Article 46B.004(e), which is discussed above. The provision also applies in situations in which, per Article 46B.071, there has been a finding that the defendant's competency is not likely to be restored in the foreseeable future, and the charges have been dropped.

**Art. 46B.151. Court Determination Related to Civil Commitment.** (a) If a court is required by Article 46B.084(f) or by its appropriate determination under Article 46B.071 to proceed under this subchapter, or if the court is permitted by Article 46B.004(e) to proceed under this subchapter, the court shall determine whether there is evidence to support a finding that the defendant is either a person with mental illness or a person with an intellectual disability.

(b) If it appears to the court that there is evidence to support a finding of mental illness or an intellectual disability, the court shall enter an order transferring the defendant to the appropriate court for civil commitment proceedings and stating that all charges pending against the defendant in that court have been dismissed. The court may order the defendant:

(1) detained in jail or any other suitable place pending the prompt initiation and prosecution by the attorney for the state or other person designated by the court of appropriate civil proceedings to determine whether the defendant will be committed to a mental health facility or residential care facility; or

(2) placed in the care of a responsible person on satisfactory security being given for the defendant's proper care and protection.

(c) Notwithstanding Subsection (b), a defendant placed in a facility of the commission pending civil hearing under this article may be detained in that facility only with the consent of the head of the facility and pursuant to an order of protective custody issued under Subtitle C, Title 7, Health and Safety Code.

(d) If the court does not detain or place the defendant under Subsection (b), the court shall release the defendant.

Like Subchapter E, Subchapter F (Article 46B.151) raises the likely prospect of a civil commitment of the defendant. Unlike Subchapter E, however, Article 46B.151 does not require, nor even permit, the criminal court to conduct all of the commitment proceedings. Instead, once Article 46B.151 becomes applicable after dismissal of the charges, the "criminal" court must make an initial determination regarding whether there is evidence to support a finding that the defendant has a mental illness or is a person with an intellectual disability. With respect to defendants with mental illness, subsection (b) directs that if it appears to the court that there is evidence indicating mental illness, then the criminal court *must* transfer the defendant to the appropriate court for civil commitment proceedings.

Thus, Article 46B.151 generally requires the criminal court to transfer its responsibilities regarding the defendant to the constitutional county court or other court having probate jurisdiction. (This transfer would, of course, not be necessary if the constitutional county court was presiding over the criminal case and also has probate jurisdiction for that county.) The transfer order must also inform the appropriate court that all criminal charges against the defendant have been dismissed. Following a transfer the defendant must undergo civil commitment proceedings pursuant to the appropriate provisions of the Health & Safety Code, just as in any other *civil* case involving the possible imposition of court-ordered mental

health services. Also, it should be noted that under § 574.001(e), Tex. Health & Safety Code, an “order transferring a criminal defendant against whom all charges have been dismissed” pursuant to Subchapter F of Article 46B “serves as an application” for court-ordered mental health services under the Health & Safety Code. That is, no separate application is necessary.

Many defendants with mental illness who face a Subchapter F commitment hearing will have been hospitalized pursuant to Subchapter D for competency restoration for either 120 or 180 days (assuming that a one-time 60-day extension has been granted) before charges have been dismissed. In those cases, the county court (or statutory court with probate jurisdiction) will typically need to apply the extended, 12-month inpatient commitment provisions set forth in § 574.035, Texas Health & Safety Code, rather than the 45-day commitment rules that are delineated in § 574.034. Indeed, § 574.035(a)(4), Texas Health & Safety Code, provides that the 12-month inpatient commitment provisions apply if “the proposed patient has received court-ordered inpatient mental health services ... under Chapter 46B, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months.” Alternatively, the court can consider extended outpatient commitment if certain criteria are met, including that the defendant has received court-ordered inpatient mental health services under Chapter 46B for at least 60 days during the preceding 12 months or court-ordered outpatient services under Chapter 46B during the preceding 60 days. *See id.* §§ 574.0355. (Legislation enacted in 2019 separated the inpatient procedures and standards from the outpatient procedures and standards. *See id.* §§ 574.035 and 574.0355.)

If the county court (or statutory court with probate jurisdiction) is proceeding under Subchapter F because the charges were dismissed following a finding under Article 46B.071 that the defendant is both incompetent and not likely to be restored in the foreseeable future, then there will not have been any commitment for competency restoration under Subchapter D of Article 46B. The same would be true if the charges are dismissed early in the process and prior to any order for competency restoration. *See* Article 46B.004(e). Accordingly, in either type of case, there typically will not have been the requisite inpatient hospitalization under Chapter 46B for 60 consecutive days in the preceding 12 months to be able to pursue an extended inpatient commitment under § 574.035. Similarly, if the defendant has not received court-ordered inpatient mental health services for at least 60 days during the preceding 12 months or court-ordered outpatient services for the preceding 60 days, then the court may not consider an extended outpatient commitment under § 574.0355. In these situations, the court must instead proceed with the process set forth in § 574.034 for an order for temporary inpatient mental health services (not to exceed 45 days, but the period can be up to 90 days if the judge finds the longer period to be necessary). Alternatively, in appropriate cases the court may consider ordering temporary outpatient services for the same time periods under § 574.0345.

If the criminal court does not believe that evidence supports a finding that the defendant has a mental illness or is a person with an intellectual disability,

subsection (d) requires the court to release the defendant. This situation should arise only in the rarest of instances. For most cases it would be highly unlikely for the court to determine that there is no evidence to support a finding of mental illness or intellectual disability if there has just been a determination that the defendant is or remains incompetent to stand trial. If such a case arises, however, presumably such a release would not preclude the prosecutor from later reinstating criminal charges against the defendant unless the initial dismissal was with prejudice (precluding the filing of further charges). The policy choices made in dismissing the charges in the first instance, however, should typically militate against a later re-imposition of those same charges.

If the criminal court orders a defendant's transfer to the appropriate court for civil commitment proceedings, subsection (b) also permits the court to order that the defendant be held in jail or another "suitable place" pending the prompt conducting of the civil commitment proceeding. As a general proposition, the statute's continued use of the jail alternative is unfortunate.

Given that no criminal charges remain pending in these situations, the court should endeavor to exercise its considerable discretion to order that the person be detained in a more suitable place, such as a mental health facility designated by the local mental health authority. Indeed, once the criminal court has acted under Article 46B.151, the criminal court's jurisdiction ends. In addition, if the criminal court has dismissed the charges and elected to order the defendant detained in jail per Article 46B.151(b)(1), the probate court then has jurisdiction, and any further use of the jail as a holding facility during civil mental health or intellectual disability evaluations, etc., is significantly limited by Health & Safety Code § 574.027 and Local Gov't Code § 351.014. (And, although not directly on point, compare Health & Safety Code §§ 573.001(d)-(e) and 573.012(e)). Accordingly, once the criminal court's jurisdiction ends and the civil probate court's jurisdiction begins, the use of the jail should be severely restricted to no more than 2-3 business days to effectuate the transfer and transition to the appropriate mental health facility for further evaluation, etc., for purposes of the Health & Safety Code's commitment provisions.

Subsection (c) adds, however, that before any person is placed in a state mental health treatment facility, the head of the facility must grant permission, and there must be an order of protective custody (OPC) entered under the provisions of the Health & Safety Code. This subsection appears to give authority to the criminal court to issue an OPC in that situation as an adjunct to its power to order detention of the defendant in a suitable place pending the civil commitment proceedings. In addition, although subsection (c) discusses the need for an OPC for a state commission's facility, presumably a similar requirement should apply to an inpatient treatment facility operated by a local mental health authority.<sup>20</sup> Then, as one additional

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<sup>20</sup> The relevant provisions regarding the issuance of an OPC are located in the Health & Safety Code beginning at § 574.021. Practitioners have noted that this subsection can sometimes be problematic in that the OPC provisions require a probable cause hearing within 72 hours (under § 574.025, Health & Safety Code), but that the local mental health authority might not yet have accepted the patient. Some legislative fine-tuning is likely necessary in this regard.

alternative, subsection (b)(2) permits the court to release the defendant into the care of a responsible person (for example, a family member) pending the civil commitment proceedings – with satisfactory security having been given.

Unlike the requirements specified for persons committed under Subchapter E against whom criminal charges remain pending, Subchapter F does not require the treatment facility to provide notice regarding the discharge or release of patients who have been committed under Article 46B.151. Of course, this is not particularly surprising given that Subchapter F commitments arise *only* when criminal charges have been dismissed. If no criminal charges remain pending, then the criminal court and prosecutor have no need to be apprised of a patient's discharge. Because the statute is silent with respect to whether the dismissal of the criminal charges is with or without prejudice, however, occasions have arisen in which prosecutors have otherwise learned of a patient's discharge and re-instituted criminal proceedings. Certainly, any such about-face by a prosecutor is questionable from a policy perspective, particularly given that the state will have previously made the choice to dismiss the charges. However, if criminal charges are nonetheless reinstated, defense counsel or the court would again be able to consider raising a competency issue as part of the new proceedings.

**ANCILLARY PROVISIONS.** Subchapter G of Chapter 46B includes three ancillary provisions that relate to both Subchapter E and Subchapter F proceedings. These are set forth in Article 46B.171. This statute requires the court to order (1) that a transcript of all medical testimony from any of the prior hearings be prepared as quickly as possible, and (2) that copies of all the documents delineated in Article 46B.076 (discussed above) accompany the defendant to the treatment facility or outpatient treatment program for the commitments described in Subchapters E and F. This information should, of course, also include the transcript of the medical testimony described in subpart (1) of the order. All of this information should be of use to the treating physicians and mental health staff at the facility in preparing an individualized treatment plan. In addition, subsection (b) requires the facility or treatment provider to provide copies of its records to the defendant or defense attorney upon request by either the defendant or the defense attorney.

**Art. 46B.171. Transcripts and Other Records.** (a) The court shall order that: (1) a transcript of all medical testimony received in both the criminal proceedings and the civil commitment proceedings under Subchapter E or F be prepared as soon as possible by the court reporters; and (2) copies of documents listed in Article 46B.076 accompany the defendant to the mental health facility, outpatient treatment program, or residential care facility.

(b) On the request of the defendant or the attorney representing the defendant, a mental health facility, outpatient treatment program, or a residential care facility shall provide to the defendant or the attorney copies of the facility's records regarding the defendant.



## B. JUVENILES

The Texas Family Code was extensively revised in 1999 with respect to proceedings concerning children with mental illness or intellectual disabilities, and those revisions affected the terminology and the steps in handling the issue of a juvenile defendant's competency to stand trial. Further changes have been enacted thereafter.

It should be noted that the state authorities responsible for oversight of services for persons with mental illness and intellectual or developmental disabilities have shifted over the years as agencies have been consolidated and revamped. Many of the relevant statutes referenced (and some still reference) legacy agencies such as the former Texas Department of Mental Health and Mental Retardation, Texas Department of State Health Services, and Texas Department of Aging and Disability Services. These functions are now housed in the Texas Health and Human Services Commission. It has taken a number of legislative sessions, however, to update the language to remove references to the legacy agencies. Some court decisions also continue to reference the legacy agencies.

**CROSS REFERENCES TO HEALTH & SAFETY CODE.** The Texas Family Code includes a definition section creating a cross-reference to the definitions contained in the Health & Safety Code.

**Sec. 55.01. MEANING OF "HAVING A MENTAL ILLNESS."** For purposes of this chapter, a child who is described as having a mental illness means a child with a mental illness as defined by Section 571.003, Health and Safety Code.

Mental illness is defined in Section 571.003 of the Health & Safety Code as an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior.

As will be explained below, the Family Code also contains numerous references to the Health & Safety Code that incorporate procedural provisions of the Health & Safety Code for the purpose of governing commitment and related procedures involving children who are defendants in juvenile cases.

**JURISDICTIONAL MATTERS.** Section 55.02 of the Family Code provides broad jurisdiction to the juvenile court to initiate proceedings to order mental health or intellectual disability services for a child, or commitment of a child, should those proceedings become necessary in connection with the processing of a juvenile case.

**Sec. 55.02. MENTAL HEALTH AND INTELLECTUAL DISABILITY JURISDICTION.** For the purpose of initiating proceedings to order mental health or intellectual disability services for a child or for commitment of a child as provided by this

chapter, the juvenile court has jurisdiction of proceedings under Subtitle C or D, Title 7, Health and Safety Code.

The cross-referenced provisions in the Health & Safety Code provide for jurisdiction in proceedings for “court ordered mental health services” (commitment) under Subtitle C, which is often referred to as the Texas Mental Health Code, and commitment to an appropriate placement for persons with an intellectual disability under Subtitle D, which is the Persons with an Intellectual Disability Act. Thus, by virtue of Section 55.02 and its cross-reference to the Health & Safety Code, the juvenile court also has civil commitment jurisdiction.

**THE STANDARD FOR INCOMPETENCY TO STAND TRIAL FOR JUVENILES.** Section 55.31 of the Family Code addresses the matter of determining a juvenile defendant’s incompetency, designating it through use of the phrase “unfitness to proceed.”

**Sec. 55.31. UNFITNESS TO PROCEED DETERMINATION; EXAMINATION.** (a) A child alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision who as a result of mental illness or an intellectual disability lacks capacity to understand the proceedings in juvenile court or to assist in the child’s own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures.

Section 55.31(a) of the Family Code thus incorporates for Texas juvenile proceedings the incompetency determination standards of *Dusky v. United States*, 362 U.S. 402 (1960), *Drope v. Missouri*, 420 U.S. 162 (1975), and their progeny.

In *Dusky v. United States*, 362 U.S. 402 (1960), that the Supreme Court of the United States restated the historical rule that a person accused of a crime who is incompetent cannot be proceeded against while he or she remains incompetent, and stated that the trial court must determine (1) whether the defendant has a sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and (2) whether he or she has a rational as well as a factual understanding of the proceedings against him or her.

A juvenile defendant, like an adult accused of crime, must be sufficiently competent to understand the proceedings that are being conducted against him or her, and must be able to communicate with and assist legal counsel in his or her defense.

It should be noted, also, that although the matter of a defendant’s competency is ordinarily raised before trial both in criminal and in juvenile cases, the issue can also arise during the progress of the trial of the case, as the Supreme Court of the United States cautioned in *Drope v. Missouri*, 420 U.S. 162, at 181 (1975): “Even when a defendant is competent at the commencement of his trial, a trial court must always

be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.”

**RAISING THE INCOMPETENCY ISSUE.** Section 55.31(b) of the Family Code provides:

**Sec. 55.31(b).** On a motion by a party, the juvenile court shall determine whether probable cause exists to believe that a child who is alleged by petition or who is found to have engaged in delinquent conduct or conduct indicating a need for supervision is unfit to proceed as a result of mental illness or an intellectual disability. In making its determination, the court may:

- (1) consider the motion, supporting documents, professional statements of counsel, and witness testimony; and
- (2) make its own observation of the child.

Under Section 55.31(b), a party must raise the issue by motion to the court, and the issue is framed in terms of whether probable cause exists to believe that the child is “unfit to proceed as a result of mental illness or an intellectual disability.” Unfortunately, unlike the more flexible law for adults under Article 46B.004, Tex. Code of Criminal Procedure, “a juvenile court is only required to determine whether probable cause exists to believe a juvenile is unfit to proceed ... when a motion is made by a party. ... [A]lthough the juvenile court may make this determination on its own motion, it is not statutorily required to do so.” *In re H.C.*, 562 S.W.3d 30, 38 (Tex. App. – Texarkana 2018, *no pet.*) (finding no error when the juvenile court did not *sua sponte* order a psychiatric inquiry to assess unfitness to proceed).

**DETERMINATION OF THE ISSUE OF INCOMPETENCY.** As specified in Section 55.31(b) of the Family Code, in making its probable cause determination on the issue of incompetency, the court has the authority to consider the motion of the party raising the issue, any supporting documents, professional statements of counsel, and witness testimony, and the court’s own observation of the child. Section 55.31(c) of the Code provides:

**Sec. 55.31(c).** If the court determines that probable cause exists to believe that the child is unfit to proceed, the court shall temporarily stay the juvenile court proceedings and immediately order the child to be examined under Section 51.20. The information obtained from the examination must include expert opinion as to whether the child is unfit to proceed as a result of mental illness or an intellectual disability.

In turn, section 51.20 of the Family Code, to which Section 55.31(c) refers, provides the following:

**Sec. 51.20. PHYSICAL OR MENTAL EXAMINATION.** (a) At any stage of the proceedings under this title, including when a child is initially detained in a pre-

adjudication secure detention facility or a post-adjudication secure correctional facility, the juvenile court may, at its discretion or at the request of the child's parent or guardian, order a child who is referred to the juvenile court or who is alleged by a petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision to be examined by a disinterested expert, including a physician, psychiatrist, or psychologist, qualified by education and clinical training in mental health or mental retardation and experienced in forensic evaluation, to determine whether the child has a mental illness as defined by Section 571.003, Health and Safety Code, is a person with mental retardation as defined by Section 591.003, Health and Safety Code, or suffers from chemical dependency as defined by Section 464.001, Health and Safety Code. If the examination is to include a determination of the child's fitness to proceed, an expert may be appointed to conduct the examination only if the expert is qualified under Subchapter B, Chapter 46B, Code of Criminal Procedure, to examine a defendant in a criminal case, and the examination and the report resulting from an examination under this subsection must comply with the requirements under Subchapter B, Chapter 46B, Code of Criminal Procedure, for the examination and resulting report of a defendant in a criminal case.

(b) If, after conducting an examination of a child ordered under Subsection (a), and reviewing any other relevant information, there is reason to believe that the child has a mental illness or mental retardation or suffers from chemical dependency, the probation department shall refer the child to the local mental health or mental retardation authority or to another appropriate and legally authorized agency or provider for evaluation and services, unless the prosecuting attorney has filed a petition under Section 53.04.

(c) If, while a child is under deferred prosecution supervision or court-ordered probation, a qualified professional determines that the child has a mental illness or mental retardation or suffers from chemical dependency and the child is not currently receiving treatment services for the mental illness, mental retardation, or chemical dependency, the probation department shall refer the child to the local mental health or mental retardation authority or to another appropriate and legally authorized agency or provider for evaluation and services.

(d) A probation department shall report each referral of a child to a local mental health or mental retardation authority or another agency or provider made under Subsection (b) or (c) to the Texas Juvenile Justice Department in a format specified by the department.

(e) At any stage of the proceedings under this title, the juvenile court may order a child who has been referred to the juvenile court or who is alleged by the petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision to be subjected to a physical examination by a licensed physician.

Since 2004, this provision has required that experts and their reports must meet the qualifications and standards set forth in the adult competency statute, Article 46B, Texas Code of Criminal Procedure, which is discussed at length above. In turn, 2005 amendments added subsections (c), (d), and (e) to allow for referrals to the local mental health or intellectual disability authority for evaluation and treatment services. Legislation enacted in 2013 added references to chemical dependency treatment services. Inexplicably, legislation that included non-substantive clean-up amendments to many other sections of the Family Code and Code of Criminal Procedure in 2015 neglected to update Section 51.20 to change “mental retardation” to “intellectual disability.” Presumably, that correction will occur in a future legislative session, but the old, incorrect terminology is still included in the statute in late 2019.

Section 55.31(d) of the Family Code sets forth the court’s options upon receiving and considering the relevant information pertaining to the child’s fitness or lack of fitness to proceed:

**Sec. 55.31(d).** After considering all relevant information, including information obtained from an examination under Section 51.20, the court shall:

- (1) if the court determines that evidence exists to support a finding that the child is unfit to proceed, proceed under Section 55.32; or
- (2) if the court determines that evidence does not exist to support a finding that the child is unfit to proceed, dissolve the stay and continue the juvenile court proceedings.

**HEARING ON FITNESS TO PROCEED.** Under the provisions of Section 55.31(d), if the court determines that there is evidence to support a finding that the child is unfit to proceed, then the court must conduct a hearing on that issue, pursuant to the requirements of Section 55.32 of the Family Code, which provides:

**Sec. 55.32. HEARING ON ISSUE OF FITNESS TO PROCEED.** (a) If the juvenile court determines that evidence exists to support a finding that a child is unfit to proceed as a result of mental illness or an intellectual disability, the court shall set the case for a hearing on that issue.

(b) The issue of whether the child is unfit to proceed as a result of mental illness or an intellectual disability shall be determined at a hearing separate from any other hearing.

(c) The court shall determine the issue of whether the child is unfit to proceed unless the child or the attorney for the child demands a jury before the 10th day before the date of the hearing.

(d) Unfitness to proceed as a result of mental illness or an intellectual disability must be proved by a preponderance of the evidence.

(e) If the court or jury determines that the child is fit to proceed, the juvenile court shall continue with proceedings under this title as though no question of fitness to proceed had been raised.

(f) If the court or jury determines that the child is unfit to proceed as a result of mental illness or an intellectual disability, the court shall:

(1) stay the juvenile court proceedings for as long as that incapacity endures; and

(2) proceed under Section 55.33.

(g) The fact that the child is unfit to proceed as a result of mental illness or an intellectual disability does not preclude any legal objection to the juvenile court proceedings which is susceptible of fair determination prior to the adjudication hearing and without the personal participation of the child.

It is important to note several significant provisions of Section 55.32 regarding the hearing on the issue of fitness to proceed. First, the hearing on fitness to proceed must be held separate and apart from any other hearing, as required by Section 55.32(b).

Second, the child has a right to a jury trial on the issue of his or her unfitness to proceed, although a jury is not automatic and must be demanded by the child or the attorney for the child “before the 10th day before the date of the hearing,” under the provisions of Section 55.32(c). If the child or the child’s attorney opts not to demand a jury trial, then the issue of unfitness to proceed will be determined by the judge.

Third, the standard of proof is “preponderance of the evidence,” and the burden is on the party asserting the alleged unfitness to proceed, as set forth in Section 55.32(d).

As stated in Section 55.32(e) of the Family Code, if the court or jury determines that the child is competent (“fit to proceed”), then the juvenile court must continue with the juvenile proceedings “as though no question of fitness to proceed had been raised.”

This odd and inappropriate language about continuing with the juvenile proceedings “as though no question of fitness had been raised” may simply be an instance of redundancy in drafting on the part of the legislature. That is, if the child is found to be competent then the juvenile proceedings will of course continue, and there is no need for the redundant statement “as though no question of fitness had been raised.” But, the language of the statute notwithstanding, those proceedings cannot be continued as though the issue of competency had not been raised.

If the legislative intent is that this language should be taken literally, and the judge is being commanded to go on with the juvenile trial just as though the judge and all counsel had not been previously alerted in the proceedings to the possibility of incompetence on the part of the defendant, then not only is that command unrealistic and impossible of execution, but it also appears to ignore the clear warning of the United States Supreme Court in *Drope v. Missouri*, 420 U.S. 162, at 181 (1975): “Even when a defendant is competent at the commencement of his trial, a trial court

*must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competency to stand trial.”* (emphasis added).

The question of a defendant’s competence to stand trial is a continuous, ongoing matter, and is not something that can be finally determined once and for all at a single given moment. Due process considerations dictate that the issue of a defendant’s incompetence to stand trial, whether the defendant is a juvenile or an adult, must be raised, and if necessary revisited, at any stage of a trial in which there are circumstances suggesting that the defendant is incompetent, even if he or she was initially determined to be competent.

In contrast, if the court or jury determines that the child *is* incompetent to stand trial (“unfit to proceed as a result of mental illness or an intellectual disability”), then Section 55.32(f) requires the court to do two things: (1) the court must stay the juvenile court proceedings for as long as that incapacity endures; and (2) the court must “proceed under Section 55.33” of the Family Code.

**PROCEEDINGS FOLLOWING FINDING OF INCOMPETENCY.** The Family Code provides for substantially similar, but procedurally distinct, methods of handling cases involving a juvenile’s incompetency depending on whether the juvenile primarily has a mental illness or has an intellectual disability. These processes will be described below.

Section 55.33 of the Family Code sets forth the basic procedure to be followed by the court after a determination that a child is incompetent to stand trial:

**Sec. 55.33. PROCEEDINGS FOLLOWING FINDING OF UNFITNESS TO PROCEED.**

(a) If the juvenile court or jury determines under Section 55.32 that a child is unfit to proceed with the juvenile court proceedings for delinquent conduct, the court shall:

(1) if the unfitness to proceed is a result of mental illness or an intellectual disability:

(A) provided that the child meets the commitment criteria under Subtitle C or D, Title 7, Health and Safety Code, order the child placed with the Department of State Health Services or the Department of Aging and Disability Services, as appropriate, for a period of not more than 90 days, which order may not specify a shorter period, for placement in a facility designated by the department; or

(B) on application by the child’s parent, guardian, or guardian ad litem, order the child placed in a private psychiatric inpatient facility for a period of not more than 90 days, which order may not specify a shorter period, but only if the placement is agreed to in writing by the administrator of the facility; or

(2) if the unfitness to proceed is a result of mental illness and the court determines that the child may be adequately treated in an alternative

setting, order the child to receive treatment for mental illness on an outpatient basis for a period of not more than 90 days, which order may not specify a shorter period.

(b) If the court orders a child placed in a private psychiatric inpatient facility under Subsection (a)(1)(B), the state or a political subdivision of the state may be ordered to pay any costs associated with the child's placement, subject to an express appropriation of funds for the purpose.

The court has a variety of options under the foregoing provisions of Section 55.33. Pursuant to Section 55.33(a)(1)(A), if the child's unfitness to proceed is a result of mental illness or an intellectual disability, then the court's first option is to order the child placed in an appropriate facility as designated by the Texas Health and Human Services Commission for a period of up to 90 days, provided that the child meets the commitment criteria of Subtitle C (the Texas Mental Health Code) or Subtitle D (the Persons with an Intellectual Disability Act) of the Texas Health & Safety Code. (Unfortunately, this statute continues to use the names of defunct agencies, the Department of State Health Services and the Department of Aging and Disability Services.)

In the alternative, pursuant to Section 55.33(a)(1)(B), on application by the child's parent, guardian, or guardian ad litem, the court can order the child placed in a private psychiatric inpatient facility for 90 days, if the placement is agreed to in writing by the administrator of the private facility. If the court orders a child to be placed in a private psychiatric inpatient facility pursuant to Section 55.33(a)(1)(B), then the state or a political subdivision of the state may be ordered to pay any costs associated with the child's placement (subject to an express appropriation of funds for the purpose), under the authority of Section 55.33(b).

Under Section 55.33(a)(2), if the child's unfitness to proceed is a result of mental illness and the court determines that the child may be adequately treated in an alternative setting, then the court can order the child to receive treatment for the child's mental illness on an outpatient basis for a period of 90 days.

**TRANSPORTATION TO AND FROM FACILITY.** Section 55.34 of the Family Code provides for the appropriate necessary transportation of a child to and from the facility designated in a placement order under Section 55.33(a)(1).

**SUBSEQUENT REPORT REGARDING THE CHILD'S COMPETENCY.** Section 55.35 of the Family Code provides for the forwarding of relevant information pertaining to the child to the placement facility involved, and for the placement facility to submit a report back to the court, with a copy of the report to be provided to both the prosecuting attorney and the attorney for the child:

**Sec. 55.35. INFORMATION REQUIRED TO BE SENT TO FACILITY; REPORT TO COURT.** (a) If the juvenile court issues a placement order under Section 55.33(a), the court shall order the probation department to send copies of any



information in the possession of the department and relevant to the issue of the child's mental illness or intellectual disability to the public or private facility or outpatient center, as appropriate.

(b) Not later than the 75th day after the date the court issues a placement order under Section 55.33(a), the public or private facility or outpatient center, as appropriate, shall submit to the court a report that:

- (1) describes the treatment of the child provided by the facility or center; and
- (2) states the opinion of the director of the facility or center as to whether the child is fit or unfit to proceed.

(c) The court shall provide a copy of the report submitted under Subsection (b) to the prosecuting attorney and the attorney for the child.

**PROCEDURES IN RESPONSE TO THE COMPETENCY REPORT FROM THE PLACEMENT FACILITY.** Obviously, the placement facility may report either that the child is competent (fit to proceed) or that the child remains incompetent (not fit to proceed). Incompetency may be the result of mental illness, intellectual disability, or some combination of mental illness and an intellectual disability. Different procedures are provided by the Family Code with respect to each contingency, as follows: Section 55.36 (report of fitness to proceed, objection, and hearing on objection), Sections 55.37 through 55.39 (mental illness), and Sections 55.40 through 55.42 (intellectual disability).

**Sec. 55.36. REPORT THAT CHILD IS FIT TO PROCEED; HEARING ON OBJECTION.**

(a) If a report submitted under Section 55.35(b) states that the child is fit to proceed, the juvenile court shall find that the child is fit to proceed unless the child's attorney objects in writing or in open court not later than the second day after the date the attorney receives a copy of the report under Section 55.35(c).

(b) On objection by the child's attorney under Subsection (a), the juvenile court shall promptly hold a hearing to determine whether the child is fit to proceed, except that the hearing may be held after the date that the placement order issued under Section 55.33(a) expires. At the hearing, the court shall determine the issue of the fitness of the child to proceed unless the child or the child's attorney demands in writing a jury before the 10th day before the date of the hearing.

(c) If, after a hearing, the court or jury finds that the child is fit to proceed, the court shall dissolve the stay and continue the juvenile court proceedings as though a question of fitness to proceed had not been raised.

(d) If, after a hearing, the court or jury finds that the child is unfit to proceed, the court shall proceed under Section 55.37.

Under the foregoing provisions of Section 55.36 of the Family Code, if the report submitted by the placement facility states that the child is fit to proceed, the court must enter a finding to that effect unless the child's attorney makes a timely

objection either in writing or in open court. If there is an objection, then the court must promptly conduct a hearing to determine the issue, and the child has a right to a jury trial on the issue of competency if the child or the child's attorney makes a written demand for a jury before the 10th day before the date of the hearing.

If the result of the hearing is that the court or jury determines that the child is competent (fit to proceed), then the court must dissolve the stay previously entered and continue with the juvenile proceedings, "as though a question of fitness to proceed had not been raised."

As indicated above in discussing Section 55.32(e), because of due process considerations, the unfortunate and inappropriate language "as though a question of fitness to proceed had not be raised" cannot be taken literally since, as the Supreme Court of the United States cautioned in *Drope v. Missouri*, 420 U.S. 162, at 181 (1975), "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial" (emphasis added). Competence to stand trial is an ongoing matter. An issue of competency having been raised, the trial judge and counsel are certainly on notice about that matter, and should be alert to changes in the juvenile's condition which might render the juvenile incompetent.

If the result of the hearing is that either the court or jury determines that the child is not competent (not fit to proceed), then Section 55.36(d) states that "the court must proceed under the provisions of Section 55.37." Actually, however, Section 55.37 provides the procedures to be followed only if the child's unfitness to proceed is a result of *mental illness*. Section 55.40 provides the procedures to be followed if the child's unfitness to proceed is a result of *an intellectual disability*.

Therefore, if the result of the hearing is that the court or jury determines that the child is not fit to proceed, then the court must continue under either Section 55.37 or Section 55.40, as applicable, depending upon whether the child's lack of competence is the result of mental illness or is the result of an intellectual disability. The statute does not address the procedure to be followed if the incompetence (unfitness to proceed) is the result of a combination of both mental illness and intellectual disability (i.e., a dual diagnosis).

**COMMITMENT PROCEEDINGS FOR CHILDREN WITH MENTAL ILLNESS.** The Family Code provides for commitment proceedings for juveniles whose incompetency is the result of mental illness to be conducted either by the juvenile court or by an appropriate court to which the case can be referred by the juvenile court.

**Sec. 55.37. REPORT THAT CHILD IS UNFIT TO PROCEED AS A RESULT OF MENTAL ILLNESS; INITIATION OF COMMITMENT PROCEEDINGS.** If a report submitted under Section 55.35(b) states that a child is unfit to proceed as a result of mental illness and that the child meets the commitment criteria for

civil commitment under Subtitle C, Title 7, Health and Safety Code, the director of the public or private facility or outpatient center, as appropriate, shall submit to the court two certificates of medical examination for mental illness. On receipt of the certificates, the court shall:

- (1) initiate proceedings as provided by Section 55.38 in the juvenile court for commitment of the child under Subtitle C, Title 7, Health and Safety Code;
- or
- (2) refer the child's case as provided by Section 55.39 to the appropriate court for the initiation of proceedings in that court for commitment of the child under subtitle C, Title 7, Health and Safety Code.

Under the provisions of Section 55.37, the juvenile court has two options in response to a report that the child remains incompetent (unfit to proceed) and that the child meets the commitment criteria for civil commitment under Subtitle C, Title 7, Health & Safety Code. Both options involve initiating civil commitment proceedings.

Under the first option, the juvenile court can conduct commitment proceedings under Section 55.38 of the Family Code, and these commitment proceedings will remain before the juvenile court. Under the second option, the juvenile court can *refer* the child's case to an appropriate court under Section 55.39 of the Family Code, and the court to which the case is referred will initiate commitment proceedings.

Subtitle C, Title 7, of the Health & Safety Code is the Texas Mental Health Code, which includes provisions for "court ordered mental health services" (civil commitment) in Section 574.031 and subsequent sections.

**COMMITMENT PROCEEDINGS IN JUVENILE COURT FOR CHILDREN WITH MENTAL ILLNESS.** Section 55.38 of the Family Code specifies the procedure for commitment proceedings in the juvenile court with respect to a child whose incompetency is the result of mental illness:

**Sec. 55.38. COMMITMENT PROCEEDINGS IN JUVENILE COURT FOR MENTAL ILLNESS.** (a) If the juvenile court initiates commitment proceedings under Section 55.37(1), the prosecuting attorney may file with the juvenile court an application for court-ordered mental health services under Section 574.001, Health and Safety Code. The juvenile court shall:

- (1) set a date for a hearing and provide notice as required by Sections 574.005 and 574.006, Health and Safety Code; and
  - (2) conduct the hearing in accordance with Subchapter C, Chapter 574, Health and Safety Code.
- (b) After conducting a hearing under Subsection (a)(2), the juvenile court shall:
- (1) if the criteria under Section 574.034 or 574.0345, Health and Safety Code, are satisfied, order temporary mental health services; or

- (2) if the criteria under Section 574.035 or 574.0355, Health and Safety Code, are satisfied, order extended mental health services.

The effect of Section 55.38 of the Family code is to require the juvenile court to follow the commitment procedures and the commitment criteria set forth in the cited portions of the Health & Safety Code. Space limitations prohibit a detailed treatment of those provisions of the Health & Safety Code here, but they, and the cases interpreting them, will govern in juvenile court commitment proceedings under Section 55.38 of the Family Code. Those provisions provide alternatives of either inpatient or outpatient commitments.

**COMMITMENT PROCEEDINGS IN A COURT TO WHICH THE CASE IS REFERRED BY THE JUVENILE COURT FOR CHILDREN WITH MENTAL ILLNESS.** Section 55.39 of the Family Code specifies the procedures the juvenile court must follow in referring a child to an appropriate court for commitment proceedings when the child's incompetency is the result of mental illness:

**Sec. 55.39. REFERRAL FOR COMMITMENT PROCEEDINGS FOR MENTAL ILLNESS.** (a) If the juvenile court refers the child's case to an appropriate court for the initiation of commitment proceedings under Section 55.37(2), the juvenile court shall:

- (1) send all papers relating to the child's unfitness to proceed, including the verdict and judgment of the juvenile court finding the child unfit to proceed, to the clerk of the court to which the case is referred;
  - (2) send to the office of the appropriate county attorney, or if a county attorney is not available, to the office of the appropriate district attorney, copies of all papers sent to the clerk of the court under Subdivision (1); and
  - (3) if the child is in detention:
    - (A) order the child released from detention to the child's home or another appropriate place;
    - (B) order the child detained in an appropriate place other than a juvenile detention facility; or
    - (C) if an appropriate place to release or detain the child as described by Paragraph (A) or (B) is not available, order the child to remain in the juvenile detention facility subject to further detention orders of the court.
- (b) The papers sent to a court under Subsection (a)(1) constitute an application for mental health services under Section 574.001, Health and Safety Code.

Section 55.39(a) of the Family Code directs the juvenile court to forward all papers relating to the child's incompetency (unfitness to proceed) to the clerk of the court to which the case is being referred by the juvenile court, and to the appropriate county or district attorney, as applicable. Section 55.39(a) also directs the referring juvenile court to enter appropriate detention or release from detention orders.

Section 55.39(b) designates the sending of the papers as “an application for mental health services under Section 574.001, Health and Safety Code.” This provision is useful and efficient given that Section 574.001 of the Health & Safety Code would otherwise require the filing of “an application for court-ordered mental health services” as the procedural device for initiating commitment proceedings.

**COMMITMENT PROCEEDINGS FOR CHILDREN WITH AN INTELLECTUAL DISABILITY.** The Family Code provides that commitment proceedings for juveniles whose incompetency is the result of an intellectual disability be conducted either by the juvenile court or by an appropriate court to which the case can be referred by the juvenile court. The provisions are similar to those governing commitment of juveniles whose incompetency is the result of mental illness in that they incorporate by reference the relevant procedures of applicable portions of the Health & Safety Code pertaining to persons with an intellectual disability.

**Sec. 55.40. REPORT THAT CHILD IS UNFIT TO PROCEED AS A RESULT OF INTELLECTUAL DISABILITY.** If a report submitted under Section 55.35(b) states that a child is unfit to proceed as a result of an intellectual disability and that the child meets the commitment criteria for civil commitment under Subtitle D, Title 7, Health and Safety Code, the director of the residential care facility shall submit to the court an affidavit stating the conclusions reached as a result of the diagnosis. On receipt of the affidavit, the court shall:

- (1) initiate proceedings as provided by Section 55.41 in the juvenile court for commitment of the child under Subtitle D, Title 7, Health and Safety Code;
- or
- (2) refer the child’s case as provided by Section 55.42 to the appropriate court for the initiation of proceedings in that court for commitment of the child under Subtitle D, Title 7, Health and Safety Code.

Under Section 55.40, the juvenile court has two options in response to a report that the child remains incompetent (unfit to proceed) and also meets the commitment criteria for civil commitment under Subtitle D, Title 7, Health & Safety Code. Both options result in commitment proceedings.

Under the first option, the juvenile court can initiate commitment proceedings under Section 55.41 of the Family Code; those proceedings will be held in the juvenile court. Under the second option, the juvenile court can *refer* the child’s case to an appropriate court under Section 55.42 of the Family Code, and the court to which the case is referred will initiate commitment proceedings.

Subtitle D, Title 7, of the Health & Safety Code is the Persons with an Intellectual Disability Act, and contains provisions for “placement” (civil commitment) of persons with an intellectual disability in Section 593.041 and subsequent sections.

**COMMITMENT PROCEEDINGS IN JUVENILE COURT FOR CHILDREN WITH AN INTELLECTUAL DISABILITY.** Section 55.41 of the Family Code specifies the procedure for commitment proceedings in the juvenile court with respect to a child whose incompetency is the result of an intellectual disability:

**Sec. 55.41. COMMITMENT PROCEEDINGS IN JUVENILE COURT FOR CHILDREN WITH INTELLECTUAL DISABILITY.** (a) If the juvenile court initiates commitment proceedings under Section 55.40(1), the prosecuting attorney may file with the juvenile court an application for placement under Section 593.041, Health and Safety Code. The juvenile court shall:

- (1) set a date for a hearing and provide notice as required by sections 593.047 and 593.048, Health and Safety Code; and
- (2) conduct the hearing in accordance with Sections 593.049 – 593.056, Health and Safety Code.

(b) After conducting a hearing under Subsection (a)(2), the juvenile court may order commitment of the child to a residential care facility if the commitment criteria under Section 593.052, Health and Safety Code, are satisfied.

(c) On receipt of the court's order, the Department of Aging and Disability Services or the appropriate community center shall admit the child to a residential care facility.

The effect of Section 55.41 of the Family Code is to require the juvenile court to follow the commitment procedures and criteria set forth in the cited portions of the Health & Safety Code. Space limitations prohibit a detailed treatment of those provisions of the Health & Safety Code here, but they, and the cases interpreting them, will govern in juvenile court commitment proceedings under Section 55.41 of the Family Code.

**COMMITMENT PROCEEDINGS IN A COURT TO WHICH THE CASE IS REFERRED BY THE JUVENILE COURT FOR CHILDREN WITH AN INTELLECTUAL DISABILITY.** Section 55.42 of the Family Code specifies the procedures the juvenile court must follow in referring a child to an appropriate court for commitment proceedings when the child's incompetency is the result of an intellectual disability.

**Sec. 55.42. REFERRAL FOR COMMITMENT PROCEEDINGS FOR CHILDREN WITH INTELLECTUAL DISABILITY.** (a) If the juvenile court refers the child's case to an appropriate court for the initiation of commitment proceedings under Section 55.40(2), the juvenile court shall:

- (1) send all papers relating to the child's intellectual disability to the clerk of the court to which the case is referred;
- (2) send to the office of the appropriate county attorney or, if a county attorney is not available, to the office of the appropriate district attorney, copies of all papers sent to the clerk of the court under Subdivision (1); and

- (3) if the child is in detention:
- (A) order the child released from detention to the child's home or another appropriate place;
  - (B) order the child detained in an appropriate place other than a juvenile detention facility; or
  - (C) if an appropriate place to release or detain the child as described by Paragraph (A) or (B) is not available, order the child to remain in the juvenile detention facility subject to further detention orders of the court.
- (b) The papers sent to a court under Subsection (a)(1) constitute an application for placement under Section 593.041, Health and Safety Code.

Section 55.42 of the Family Code directs the juvenile court to forward all papers "relating to the child's intellectual disability" to the clerk of the court to which the case is referred. The corresponding provision in Section 55.39(a)(1) pertaining to commitment proceedings for a child with mental illness should be consulted regarding the papers that are to be transmitted. Section 55.39(a)(1) requires the juvenile court to forward all papers "relating to the child's unfitness to proceed, including the verdict and judgment of the juvenile court finding the child unfit to proceed" to the clerk of the court to which the case is referred. Apparently, through a legislative drafting oversight, comparable language describing "papers," such as the verdict and judgment of the juvenile court finding the child unfit to proceed, was omitted from Section 55.42(a)(1).

Presumably, however, in either situation – unfitness to proceed because of mental illness or unfitness because of an intellectual disability – the juvenile court will be expected to send all of the relevant papers in the case to the clerk of the appropriate court to which the case is being referred by the juvenile court.

Section 55.42(a)(2) of the Family Code requires the juvenile court also to send copies of all papers sent to the clerk of the court under Subdivision (1) to the office of the appropriate county attorney or district attorney, as applicable.

Section 55.42(b) designates the sending of the papers as "an application for placement [commitment] under Section 593.041, Health and Safety Code," given that Section 593.041 of the Health & Safety Code would otherwise require the filing of an application for an interdisciplinary team report and recommendation that the proposed client is in need of long-term placement in a residential care facility, as the procedural device for initiating "long-term placement" (commitment) proceedings for a person with an intellectual disability.

The requirement for an interdisciplinary team review, evaluation, and recommendation, referred to in Section 593.041 of the Health & Safety Code, is set forth in Section 593.013 of that Code. The term "interdisciplinary team" is defined as follows in Sec. 591.003(8) of the Health & Safety Code: "Interdisciplinary team" means a group of intellectual disability professionals and paraprofessionals who

assess the treatment, training, and habitation needs of a person with an intellectual disability and make recommendations for services for that person.”

**RESTORATION OF COMPETENCY.** Section 55.43 of the Family Code provides for a restoration of competency hearing with respect to a child who has been previously found incompetent (unfit to proceed) as a result of mental illness or an intellectual disability, but who was not ordered by a court to receive inpatient mental health services, committed by a court to a residential health care facility, ordered by a court to receive treatment on an outpatient basis, or was discharged or furloughed from a mental health facility or outpatient center before reaching 18 years of age.

**Sec. 55.43. RESTORATION HEARING.** (a) The prosecuting attorney may file with the juvenile court a motion for a restoration hearing concerning a child if:

(1) the child is found unfit to proceed as a result of mental illness or an intellectual disability; and

(2) the child:

(A) is not:

(i) ordered by a court to receive inpatient mental health services;

(ii) committed by a court to a residential care facility; or

(iii) ordered by a court to receive treatment on an outpatient basis;

or

(B) is discharged or currently on furlough from a mental health facility or outpatient center before the child reaches 18 years of age.

(b) At the restoration hearing, the court shall determine the issue of whether the child is fit to proceed.

(c) The restoration hearing shall be conducted without a jury.

(d) The issue of fitness to proceed must be proved by a preponderance of the evidence.

(e) If, after a hearing, the court finds that the child is fit to proceed, the court shall continue the juvenile court proceedings.

(f) If, after a hearing, the court finds that the child is unfit to proceed, the court shall dismiss the motion for restoration.

It is to be noted that under Section 55.43(c) of the Family Code, there is no right to a jury at the restoration hearing, and the restoration issue is decided by the juvenile court judge.

**TRANSFER TO CRIMINAL COURT ON THE INCOMPETENT CHILD'S 18TH BIRTHDAY.** Under the provisions of Section 55.44 of the Family Code, the juvenile court must transfer all pending proceedings from juvenile court to a criminal court upon the 18th birthday of a child for whom the juvenile court or a court to which the child's case was referred had ordered inpatient mental health services or residential care for persons with an intellectual disability, if the child was not discharged or furloughed from such a facility before reaching 18 years of age, and the child is alleged to have engaged in delinquent conduct that included a violation of a



penal law listed in Section 53.045 of the Family Code. In addition, the transfer requirement applies in that situation even if no adjudication concerning the alleged conduct has been made.

Section 53.045 of the Family Code is entitled “Violent or Habitual Offenders,” and cross-references the Texas Penal Code in listing a variety of serious offenses, including capital murder, murder, aggravated sexual assault, sexual assault, aggravated kidnapping, and aggravated robbery, among other offenses.

Section 55.44 of the Family Code pertaining to transfer to a criminal court states as follows:

**Sec. 55.44. TRANSFER TO CRIMINAL COURT ON 18TH BIRTHDAY OF CHILD.** (a)

The juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the 18th birthday of a child for whom the juvenile court or a court to which the child’s case is referred has ordered inpatient mental health services or residential care for persons with an intellectual disability if:

- (1) the child is not discharged or currently on furlough from the facility before reaching 18 years of age; and
- (2) the child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 and no adjudication concerning the alleged conduct has been made.

(b) The juvenile court shall send notification of the transfer of a child under Subsection (a) to the facility. The criminal court shall, before the 91<sup>st</sup> day after the date of the transfer, institute proceedings under Chapter 46B, Code of Criminal Procedure. If those or any subsequent proceedings result in a determination that the defendant is competent to stand trial, the defendant may not receive a punishment for the delinquent conduct described by Subsection (a)(2) that results in confinement for a period longer than the maximum period of confinement the defendant could have received if the defendant had been adjudicated for the delinquent conduct while still a child and within the jurisdiction of the juvenile court.

Section 55.45 of the Family Code sets forth the statutory standards of care for juveniles who are committed under court orders for mental health services, as well as requirements under certain specified circumstances governing application by administrators of residential care facilities for discharge or release of a child from the facility. With regard to a Constitutional right to treatment if a child has a mental illness or an intellectual disability, *see* Thomas S. Morgan & Harold C. Gaither, Jr., 29 Tex. Prac. Series § 323, *There is a Constitutional Right to Treatment If a Child is Mentally Retarded or Mentally Ill* (1999). The legislature added subsection (c) in 2007. Section 55.45 of the Family Code provides as follows:

**Sec. 55.45. STANDARDS OF CARE; NOTICE OF RELEASE OR FURLOUGH.** (a) If the juvenile court or a court to which the child's case is referred under Section 55.37(2) orders mental health services for the child, the child shall be cared for, treated, and released in accordance with Subtitle C, Title 7, Health and Safety Code, except that the administrator of a mental health facility shall notify, in writing, by certified mail, return receipt requested, the juvenile court that ordered mental health services or that referred the case to a court that ordered mental health services of the intent to discharge the child on or before the 10th day before the date of discharge.

(b) If the juvenile court or a court to which the child's case is referred under Section 55.40(2) orders the commitment of the child to a residential care facility, the child shall be cared for, treated, and released in accordance with Subtitle D, Title 7, Health and Safety Code, except that the administrator of the residential care facility shall notify, in writing, by certified mail, return receipt requested, the juvenile court that ordered commitment of the child or that referred the case to a court that ordered commitment of the child of the intent to discharge or furlough the child on or before the 20th day before the date of discharge or furlough.

(c) If the referred child, as described in Subsection (b), is alleged to have committed an offense listed in Article 42A.054, Code of Criminal Procedure, the administrator of the residential care facility shall apply, in writing, by certified mail, return receipt requested, to the juvenile court that ordered commitment of the child or that referred the case to a court that ordered commitment of the child and show good cause for any release of the child from the facility for more than 48 hours. Notice of this request must be provided to the prosecuting attorney responsible for the case. The prosecuting attorney, the juvenile, or the administrator may apply for a hearing on this application. If no one applies for a hearing, the trial court shall resolve the application on the written submission. The rules of evidence do not apply to this hearing. An appeal of the trial court's ruling on the application is not allowed. The release of a child described in this subsection without the express approval of the trial court is punishable by contempt.

**APPEAL.** Section 56.01(c) of the Family Code provides that, in general, an appeal may be taken by or on behalf of a child from an order entered under Chapter 55 by a juvenile court committing a child to a facility for treatment of the child's mental illness or services for a child's intellectual disability.

## C. DEATH PENALTY

**COMPETENCY TO BE EXECUTED.** The United States Supreme Court has held that the Eighth and Fourteenth Amendments to the Constitution prohibit a state from inflicting the death penalty on a person who is mentally incompetent. *See Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399 (1986). The Court in *Ford* recognized that even at early common law there was a “bar against executing a prisoner who has lost his sanity.” *Id.* at 406. The Court concluded, “Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment [proscribing cruel and unusual punishment].” *Id.* at 410. In *Panetti*, the Court added that a “prisoner’s *awareness* of the State’s rationale for an execution is not the same as a *rational understanding* of it. *Ford* does not foreclose inquiry into the latter.” *Panetti*, 551 U.S. at 959 (emphasis added). The Court further determined that the trial court should have considered the defendant’s contention “that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced.” *Id.* at 960.<sup>21</sup> *See also Madison v. Alabama*, 139 S.Ct. 718, 727-28 (2019) (holding that *Panetti* also applies to a situation in which the convicted defendant has no rational understanding of why the State is seeking execution due to dementia; reasoning that the “standard has no interest in establishing any precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension.”)

Article 46.05, Texas Code of Criminal Procedure, was enacted with the express purpose of codifying the United States Supreme Court’s holding that an inmate must be mentally competent to be executed. Article 46.05 sets forth detailed procedures for assessing and reviewing the inmate’s level of competency. The reader should bear in mind that the statute applies only to inmates who have been sentenced to be executed for committing capital crimes. The text of the statute provides as follows:

- Art. 46.05. Competency to be Executed.** (a) A person who is incompetent to be executed may not be executed.
- (b) The trial court retains jurisdiction over motions filed by or for a defendant under this article.
- (c) A motion filed under this article must identify the proceeding in which the defendant was convicted, give the date of the final judgment, set forth the fact

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<sup>21</sup> Any attorney or judge involved in a case involving a defendant’s lack of competency – to be tried, to proceed without legal counsel, or to be executed – should carefully read the full opinion in *Panetti*. It is appalling that the trial court allowed the defendant to represent himself and proceed to trial notwithstanding a long history of serious mental illness and bizarre behavior. For a thoughtful discussion of *Panetti*, see Richard J. Bonnie, Commentary, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257 (2007).

that an execution date has been set if the date has been set, and clearly set forth alleged facts in support of the assertion that the defendant is presently incompetent to be executed. The defendant shall attach affidavits, records, or other evidence supporting the defendant's allegations or shall state why those items are not attached. The defendant shall identify any previous proceedings in which the defendant challenged the defendant's competency in relation to the conviction and sentence in question, including any challenge to the defendant's competency to be executed, competency to stand trial, or sanity at the time of the offense. The motion must be verified by the oath of some person on the defendant's behalf.

(d) On receipt of a motion filed under this article, the trial court shall determine whether the defendant has raised a substantial doubt of the defendant's competency to be executed on the basis of:

- (1) the motion, any attached documents, and any responsive pleadings; and
- (2) if applicable, the presumption of competency under Subsection (e).

(e) If a defendant is determined to have previously filed a motion under this article, and has previously been determined to be competent to be executed, the previous adjudication creates a presumption of competency and the defendant is not entitled to a hearing on the subsequent motion filed under this article, unless the defendant makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to the defendant's competency to be executed at the time of filing the subsequent motion under this article.

(f) If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant using the standard described by Subsection (h) to determine whether the defendant is incompetent to be executed.

(g) If the trial court does not determine that the defendant has made a substantial showing of incompetency, the court shall deny the motion and may set an execution date as otherwise provided by law.

(h) A defendant is incompetent to be executed if the defendant does not understand:

- (1) that he or she is to be executed and that the execution is imminent; and
- (2) the reason he or she is being executed.

(i) Mental health experts who examine a defendant under this article shall provide within a time ordered by the trial court copies of their reports to the attorney representing the state, the attorney representing the defendant, and the court.

(j) By filing a motion under this article, the defendant waives any claim of privilege with respect to, and consents to the release of, all mental health and medical records relevant to whether the defendant is incompetent to be executed.

(k) The trial court shall determine whether, on the basis of reports provided under Subsection (i), the motion, any attached documents, and responsive pleadings, and any evidence introduced in the final competency hearing, the defendant has established by a preponderance of the evidence that the defendant is incompetent to be executed. If the court makes a finding that the defendant is not incompetent to be executed, the court may set an execution date as otherwise provided by law.

(l) Following the trial court's determination under Subsection (k) and on motion of a party, the clerk shall send immediately to the court of criminal appeals in accordance with Section 8(d), Article 11.071, the appropriate documents for that court's review and entry of a judgment of whether to adopt the trial court's order, findings, or recommendations issued under Subsection (g) or (k). The court of criminal appeals also shall determine whether any existing execution date should be withdrawn and a stay of execution issued while that court is conducting its review or, if a stay is not issued during the review, after entry of its judgment.

(l-1) Notwithstanding Subsection (l), the court of criminal appeals may not review any finding of the defendant's competency made by a trial court as a result of a motion filed under this article if the motion is filed on or after the 20th day before the defendant's scheduled execution date.

(m) If a stay of execution is issued by the court of criminal appeals, the trial court periodically shall order that the defendant be reexamined by mental health experts to determine whether the defendant is no longer incompetent to be executed.

(n) If the court of criminal appeals enters a judgment that a defendant is not incompetent to be executed, the court may withdraw any stay of execution issued under Subsection (l), and the trial court may set an execution date as otherwise provided by law.

Article 46.05 sets forth the process for the review of issues regarding an inmate's competency to be executed. In *Mays v. State*, 476 S.W.3d 454, 457 (Tex. Crim. App. 2015), the Court of Criminal Appeals construed several subsections of Article 46.05. The court observed that Article 46.05 "can be broken into two discrete stages. First, a defendant has a threshold burden to make a substantial showing of execution incompetency. Once this threshold burden has been satisfied, a defendant is entitled to further proceedings (the second stage) in accordance with Article 46.05" and due process requirements. *Id.* The court added that a "substantial showing" requires more than 'some evidence' of incompetency, but less than establishing incompetency by a preponderance of the evidence." *Id.* (omitting internal citations). In addition, in "making its ruling, the court must consider the defendant's competency motion, attached documents, any responsive pleadings, and whether there is a presumption of competency due to a previous filing under Article 46.05(d)." *Id.* at 458.

In *Mays* the trial court had determined that the defendant had not demonstrated a substantial showing that he was incompetent to be executed, and the defendant appealed. The Court of Criminal Appeals held that the issue of whether a defendant had presented a substantial showing of incompetency should be reviewed de novo; in the preliminary stage of an Article 46.05 proceeding, the trial “court is not permitted to weigh competing credible evidence of competency. Rather, it may consider only evidence of incompetency.” *Id.* at 460. *See also Druery v. State*, 412 S.W.2d 523, 534-35 (Tex. Court Crim. App. 2013) (discussing the legislative history of 2007 amendments to Article 46.05 and determining that the statute permits appeals by either party of substantial showing and competency determinations); *Wood v. Stephens*, 619 Fed. Appx. 304, 305-06 (5th Cir. 2015) (describing that after the Texas courts had denied the defendant the appointment of counsel and funding for a mental health expert to assist him with his claim that he was incompetent to be executed, the federal district court determined that due process requires the “appointment of counsel and for funding of a mental health expert in order to pursue his [the defendant’s] *Panetti* claim ...”); *Panetti v. Davis*, 863 F.3d 366, 374-76 (5th Cir. 2017) (finding the state’s application of Article 46.05 to have denied *Panetti* due process in an execution attempt subsequent to the Supreme Court’s decision, and determining that the federal district court had erred in denying the appointment of counsel and expert funding; observing that there was no “justification for denying *Panetti* funding for experts and other investigative resources”).

In *Battaglia v. State*, 537 S.W.3d 57, 81 (Tex. Crim. App. 2017), the Court of Criminal Appeals reviewed Article 46.05 in light of *Panetti*, *Ford*, and lower court opinions and held that a death row inmate:

is competent to be executed under Article 46.05 if he knows he is to be executed by the State, he knows the reason he is to be executed, he knows that the execution is imminent, and, despite any delusional beliefs or other mental illness he may have, and despite the fact that he may deny having committed the capital offense, he comprehends that there is a “causal link” between his capital offense and his imminent execution, beyond merely identifying the State’s articulated rationale for the execution.

Another issue that arises somewhat regularly in execution competence cases is whether the state can order a defendant on death row to be forcibly medicated as a means of not only treating the defendant’s mental illness, but also to restore the defendant’s competency – thereby allowing an execution to proceed. The United States Supreme Court has never resolved the question of whether such an order is constitutional. The lower courts are divided. For example, in *State v. Perry*, 610 So.2d 746 (La. 1992), the Louisiana Supreme Court held that the State of Louisiana could not forcibly medicate an incompetent death row prisoner against his will with anti-psychotic medications for the sole purpose of making him competent to be executed. In contrast to prisoner cases in which medication can be forcibly administered (after adequate due process) for purposes of *treatment*, the state in *Perry* wanted to medicate only to make the defendant competent enough to be executed. After the case was remanded to Louisiana by the United States Supreme Court for further

consideration, the Louisiana court ruled that the state's proposal to force medication was invalid as well as inhumane. (The court also applied the Louisiana state constitution.) On the other hand, consider *Singleton v. Norris*, 319 F.3d 1018 (8th Cir.), *cert. denied*, 124 S. Ct. 74 (2003), in which the Eighth Circuit rejected a death row defendant's request to halt an Arkansas prison's administration of involuntary medication that was apparently keeping him competent to be executed.

The Texas Court of Criminal Appeals addressed this issue in *Staley v. State*, 420 S.W.3d 785 (Tex. Crim. App. 2013). First, the court did not reach the question of whether a trial court's order of involuntary medication to restore a defendant's competency would violate the federal or state constitution. *Id.* at 801. Instead, the court rejected the trial court's medication order upon concluding that nothing in Article 46.05 authorizes a court to enter such a medication order (nor did any other statute or administrative regulation that authorizes involuntary medication for treatment purposes). *Id.* at 797-99. For a detailed discussion of the dubious constitutionality of forced medication orders for execution purposes, and the ethical dilemmas posed by the issue for both lawyers and doctors, see Brian D. Shannon and Victor R. Scarano, *Incompetency to Be Executed: Continuing Ethical Challenges & Time for a Change in Texas*, 45 Tex. Tech L. Rev. 420-51 (2013), available at <http://texastechlawreview.org/wp-content/uploads/Shannon-Scarano.PUBLISHED.pdf> (also proposing a legislative solution).

The Texas House passed H.B. 1936 during the 2019 legislative session that would have barred application of the death penalty to a person with severe mental illness who had active psychotic symptoms at the time of the crime that substantially impaired the person's capacity to act rationally or appreciate the nature, consequences, or wrongfulness of the person's conduct. In such a case, the bill would have required a sentence of life without parole, rather than the death penalty. The bill, however, died in the state senate and did not receive a hearing.

**EXECUTION OF A PERSON WITH AN INTELLECTUAL DISABILITY IS CRUEL AND UNUSUAL PUNISHMENT.** In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court of the United States held that the execution of a person with an intellectual disability (then called mental retardation) is an unconstitutionally cruel and unusual punishment.

In reaching its decision, the Court noted that as of that time eighteen states had enacted legislation that prohibits execution of persons with intellectual disabilities. The Court commented, "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.* at 315. The Court said:

Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crimes, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the

average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon.

*Id.* at 315-16. The Court concluded that the practice of executing offenders with mental retardation has become truly unusual and that a national consensus has developed against it, commenting further:

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

*Id.* at 317.

The Court expanded on the effect that an intellectual disability can have with respect to the procedural protections required in capital cases:

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

*Id.* at 318. Finally, the Court concluded:

Our independent evaluation of the issue reveals no reason to disagree with the judgment of “the legislatures that have recently addressed the matter” and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our “evolving standards of decency,” we therefore conclude that such punishment is excessive and that the Constitution “places



a substantive restriction on the State's power to take the life" of a mentally retarded offender.

*Id.* at 321. *See also Hall v. Florida*, 572 U.S. 701, 718-19 (2014) (holding that a state cannot refuse to consider other evidence of a person's intellectual disability even if the defendant has an IQ score greater than 70).

**NO TEXAS STATUTE TO DATE ON EXECUTION OF A PERSON WITH AN INTELLECTUAL DISABILITY.** Even though the *Atkins* case was decided by the United States Supreme Court in 2002, the Texas Legislature still has not enacted statutory provisions governing the standards and procedures to be followed in capital cases involving defendants with intellectual disabilities. Although state legislators have considered bills attempting to adopt guiding standards and procedures during several past legislative sessions, nothing has been enacted. In 2019, the Texas House passed H.B. 1139, which would have provided standards to guide courts in determining intellectual disabilities in capital cases. The bill would have been a substantial improvement to Texas law, but it died in the state senate.

**JUDICIAL GUIDELINES PROVIDED BY THE TEXAS COURT OF CRIMINAL APPEALS, IN THE ABSENCE OF STATUTORY GUIDELINES.** Given the failure of the Legislature to act, the Texas Court of Criminal Appeals adopted guidelines in 2004 in a case that raised *Atkins* claims, *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). The court identified the need to "provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims," and the Court set out the "judicial standards for courts considering those claims under article 11.071 [of the Texas Code of Criminal Procedure]." *Id.* at 5.

The Court commented in *Briseno*:

This Court does not, under normal circumstances, create law. We interpret and apply the law as written by the Texas Legislature or as announced by the United States Supreme Court. In *Atkins* the Supreme Court announced that there is a national consensus that those who suffer from mental retardation should be exempt from the death penalty, but it simultaneously left to the individual states the substantive and procedural mechanisms to implement that decision. The Texas legislature has not yet enacted legislation to carry out the *Atkins* mandate. Nonetheless, this Court must now deal with a significant number of pending habeas corpus applications claiming that the death row inmate suffers from mental retardation and thus is exempt from execution. Recognizing that 'justice delayed is justice denied' to the inmate, to the victims and their families, and to society at large, we must act during this legislative interregnum . . . . *Id.* at 4-5.

This was an unusual task for the Court of Criminal Appeals, and more properly should have been the concern of the Texas Legislature. But, with the state legislature not having acted on the matter (neither then nor now), and given the existence of

numerous pending cases awaiting resolution, the Court of Criminal Appeals decided that it had to act to fill the gap. The Court stated:

This Court has previously employed the definitions of ‘mental retardation’ set out by the American Association on Mental Retardation (AAMR), and that contained in section 591.003(13) of the Texas Health & Safety Code. Under the AAMR definition, mental retardation is a disability characterized by: (1) ‘significantly subaverage’ general intellectual functioning; (2) accompanied by ‘related’ limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18. As noted above, the definition under the Texas Health & Safety Code is similar: “‘mental retardation’ means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.” Until the Texas Legislature provides an alternate statutory definition of “mental retardation” for use in capital sentencing, we will follow the AAMR or section 591.003(13) criteria in addressing *Atkins* mental retardation claims.

*Id.* at 7-8. It is important to note that in *Briseno* the court utilized the ninth edition of the AAMR manual (AAMR-9) and set out seven factors for courts to focus on in weighing evidence of an intellectual disability. *See id.* at 8-9 (setting out factors).

**UNITED STATES SUPREME COURT REJECTS *BRISENO* FACTORS – TWICE.** In *Moore v. Texas*, 137 S.Ct. 1039 (2017), the United States Supreme Court determined that the Texas Court of Criminal Appeals’ reliance on the *Briseno* factors was flawed when it rejected a state habeas court’s recommendation concerning whether a death row defendant had an intellectual disability. In part, the Court held that the *Briseno* factors do not comport with current medical understanding. The state habeas court had relied on current medical standards in the 11th edition of the American Association on Intellectual and Developmental Disabilities, yet the Court of Criminal Appeals relied on *Briseno*, which as noted above focused on AAMR-9 standards. In addition, the Court in *Moore* observed that the *Briseno* factors were not based on any medical or judicial authority. In sum, the Court concluded that the Court of Criminal Appeals’ determination that the defendant’s IQ scores had established that the defendant was not intellectually disabled did not comport with *Hall v. Florida* (described above). Accordingly, the United States Supreme Court vacated the opinion by the Texas Court of Criminal Appeals and remanded the case.

A helpful way to consider the United States Supreme Court’s rationale in *Moore* is to examine the following comments by Texas Court of Criminal Appeals Judge Alcala in her dissenting opinion below:

[I]t is time for Texas to reevaluate the decade-old, judicially created standard in *Ex Parte Briseno* in light of a shift in the consensus of the medical community regarding what constitutes intellectual disability, and in light of the Supreme Court’s recent holding in *Hall v. Florida* indicating that courts

are required to consider that consensus in assessing intellectual disability claims (citing *Briseno* and *Hall v. Florida*, 134 S. Ct. 1986 (2014)).

*Ex Parte Moore*, 470 S.W.3d 481, 528 (Tex. Crim. App. 2015), *vacated by Moore v. Texas*, 136 S.Ct. 2407, Alcala, J., *dissenting*. Moreover, at the Supreme Court – even in dissent – Chief Justice Roberts observed that the *Briseno* factors were “an unacceptable method of enforcing the guarantee of *Atkins*.” *Moore*, 137 S.Ct. 1039, \_\_ (Roberts, Ch. J., *dissenting*).

After the case was remanded to the Texas Court of Criminal Appeals, that court reconsidered the matter—but reached the same conclusion that Moore was not a person with an intellectual disability. That decision was also appealed, and once again, the United States Supreme Court reversed the Court of Criminal Appeals. See *Moore v. Texas*, 139 S.Ct. 666, 667 (2019). In a *per curiam* opinion, the Court found that the Court of Criminal Appeals had largely repeated “the analysis we previously found wanting.” *Id.* at 670. The Court was also concerned that the Court of Criminal Appeals had again focused more on the defendant’s adaptive *strengths*, as opposed to his adaptive *deficits*. *Id.* In addition, the Court determined that notwithstanding the statement by the Court of Criminal Appeals that it would not employ the *Briseno* factors after the remand, “it seems to have used many of those factors in reaching its conclusion.” *Id.* at 671. In sum, the Court determined that “on the basis of the trial court record, Moore ha[d] shown he is a person with intellectual disability.” *Id.* at 672.

Given the two decisions by the United States Supreme Court in *Moore*, it is critical that the Texas Legislature step in and adopt – at long last – a set of procedures to implement *Atkins* and *Florida v. Hall* to guide our state courts in determining whether a person accused in a capital murder case has an intellectual disability or not. As noted above, legislative efforts in 2019 did not ultimately succeed despite a bill’s having passed in the Texas House. Many other states have found ways to enact such laws, and Texas should join the fold.

## V. INSANITY DEFENSE

Without doubt, the most discussed and most controversial statute involving alleged offenders with mental illness is the insanity defense. This Chapter will focus on (1) the existing defense as it currently applies to adult defendants, (2) the different defense for juveniles, and (3) various proposals for reform.

### A. ADULT DEFENDANTS

**TEXAS PENAL CODE.** The insanity defense is set forth in Section 8.01 of the Texas Penal Code:

**Sec. 8.01. Insanity.** (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.

(b) The term “mental disease or defect” does not include an abnormality manifested by repeated criminal or otherwise antisocial conduct.

**HISTORY OF THE INSANITY DEFENSE USED IN TEXAS.** The insanity defense set forth in Section 8.01 of the Texas Penal Code is, in essence, a variation on the old M’Naghten test, first promulgated in England in 1843. It is necessary to know something of the history of the M’Naghten test to appreciate how inconsistent it is with modern medical knowledge, and to understand why the present Texas insanity defense provided for in Section 8.01 of the Penal Code is inadequate and should be changed.

**M’NAGHTEN’S CASE.** The name of the test comes from *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843), in which a defendant named Daniel M’Naghten was prosecuted for the murder of the private secretary of Sir Robert Peel, the Prime Minister of England. M’Naghten had intended to kill Peel, but by mistake shot Peel’s private secretary instead. M’Naghten was acquitted on grounds of insanity, and the acquittal caused widespread public outrage. Queen Victoria was also concerned given that she and other members of the English royal family had been the targets of previous assassination attempts. Accordingly, she summoned the House of Lords to “take the opinion of the Judges on the law governing such cases.” *United States v. Freeman*, 357 F.2d 606, 617 (2d Cir. 1966). Responding to the Queen’s summons, the House of Lords conducted a general inquiry into the matter of the insanity defense, and asked the judges of the Queen’s Bench a series of questions regarding the standards that should be employed.

The insanity test that was actually used in the court’s instructions to the jury at Daniel M’Naghten’s trial had been influenced by the surprisingly enlightened work of Dr. Isaac Ray, who had been highly critical of the “right-wrong” test in his 1838 book entitled *MEDICAL JURISPRUDENCE OF INSANITY*. But in responding to the questions put to them by the House of Lords, the English judges in effect reversed the approach that had been used in M’Naghten’s trial, and adopted instead what has come to be

known as the M'Naghten test. It is still known by that name, even though the "M'Naghten test" (or "M'Naghten rule" as it is sometimes called) announced by the English judges was not the test used in the actual trial of Daniel M'Naghten's case.

American jurisdictions, including Texas, adopted the M'Naghten test from English law, although for a brief period from 1974 to 1983 Texas used a different, more appropriate, insanity test, as will be explained below.

**THE "RIGHT-WRONG" TEST AND ITS NARROW EXCLUSIVE FOCUS ON COGNITIVE CAPACITY.** The M'Naghten test is sometimes referred to as the "right-wrong" test because of its exclusive focus on whether the accused person knew the difference between right and wrong at the time of his or her alleged offense.

This exclusive focus on an accused person's cognitive capacity has been widely criticized by the courts, by psychiatrists and other mental health professionals, and by the legal profession. A serious mental illness may leave an individual's intellectual understanding and cognitive capacity relatively unimpaired, but can still affect the person's emotions and reason to such a degree that the individual cannot fully appreciate reality and sometimes cannot completely control his or her behavior in a rational manner.

That exclusive focus on cognitive capacity arose from the primitive psychological theories of the nineteenth century and earlier. It was a time in which "psychiatry was literally in the Dark Ages," when "[p]hrenologists believed that the human brain was divided into thirty-five separate areas, each with its own peculiar mental function," and unfortunately "by an accident of history, the rule of M'Naghten's case froze these concepts into the common law just at a time when they were becoming obsolete." *United States v. Freeman*, 357 F.2d 606, 616 (2d Cir. 1966).

As one court put it, "The vast absurdity of the application of the M'Naghten Rules in order to determine the sanity or insanity, the mental health or lack of it, of the defendant by securing the answer to a single question: Did the defendant know the difference between right and wrong, appears clearly when one surveys the array of symptomatology which the skilled psychiatrist employs in determining the mental condition of an individual." *United States v. Currens*, 290 F.2d 751, 766-67 (3d Cir. 1961). To ask merely whether a person knows right from wrong "is to ask a question irrelevant to the nature of his [or her] mental illness or to the degree of his [or her] criminal responsibility." *People v. Drew*, 583 P.2d 1318, 1322 (Cal. 1978).

Because the M'Naghten test restricts psychiatric testimony to the narrow area of a defendant's cognitive capacity, it frequently makes it difficult, if not impossible, for expert witnesses to place before the jury a complete picture of a defendant's mental illness. For this reason, the M'Naghten test fails to aid the criminal justice system in identifying many defendants who may suffer from psychotic symptoms of serious mental illness, and it often provides a defense only for persons who have serious cognitive impairment.

**ADOPTION BY TEXAS OF THE AMERICAN LAW INSTITUTE TEST.** In recognition of these shortcomings of the old narrow M’Naghten test, Texas expanded and modernized its insanity test when it adopted as part of the Texas Penal Code of 1973 a modified version of the insanity test that had been developed by the American Law Institute (ALI) as a part of the ALI’s 1962 Model Penal Code project.

The ALI test had previously been adopted by many other states and by most of the federal circuits. The ALI test takes into account the extent to which a serious mental illness may have impaired an individual’s ability to control his or her behavior.

Accordingly, the 1973 Texas enactment added a “volitional” prong to the Texas insanity defense consistent with the ALI recommendation. The volitional prong of the ALI test derived from courts’ dissatisfaction with the narrow inquiry under the M’Naghten standard and some states’ having developed and tinkered with the so-called “irresistible impulse” test. Professor Richard Bonnie of the University of Virginia and his colleagues have described the underlying theory supporting the volitional prong as follows:

It rests on the notion ... that the conviction of crime expresses a moral judgment about the defendant’s behavior. Moral judgments about people, the argument goes, are premised on the concept of free will. In general, behavior is the product of choice, and people who make bad choices are subject to moral condemnation. In cases where mental disease or defect robs people of the capacity to choose not to engage in criminal behavior, the argument concludes, it is inappropriate to condemn them morally and therefore inappropriate to convict them of a crime.

RICHARD J. BONNIE ET AL., *A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY* 16 (3d ed. 2008).

The 1973 Texas version of the test asked not only about knowledge of right and wrong, but asked also whether the individual, as a result of mental disease or defect, was incapable of conforming his or her conduct to the requirements of the law allegedly violated. Although the 1973 Texas insanity defense revisions were based largely on the ALI test, they differed in one significant respect. The short-lived Texas standard retained the narrow “did not know” language for the M’Naghten prong of the test, as opposed to the ALI’s recommended use of “appreciate the wrongfulness” verbiage. As the late Senator Ray Farabee observed, “The use of the term “know” in reference to whether conduct was wrong was ... more restrictive.” Ray Farabee & James L. Spearly, *The New Insanity Law in Texas: Reliable Testimony and Judicial Review of Release*, 24 S. TEX. L. REV. 671, 674 (1983). Thus, even while including a volitional component in 1973, the Texas Legislature opted not to use the term “appreciate” for the cognitive prong of the test, which could more broadly allow consideration of emotional and affective aspects of serious mental illnesses, as opposed to a more limited focus on cognitive or intellectual mental functioning. *Id.*

**THE HINCKLEY CASE AND REACTION TO IT.** The new Texas test worked well in practice, but in 1982 when John W. Hinckley, Jr., was acquitted on the basis of an insanity defense of shooting and wounding President Ronald Reagan and three other persons, there was a national outcry against the insanity defense similar to that of 1843 in England in response to M'Naghten's acquittal.

In 1983, responding to calls for "reform," Texas abandoned the important volitional element of its 1973 insanity test, and went back to the old nineteenth century M'Naghten test with its narrow, exclusive focus on cognition and its primitive understanding of the human mind. This remains the test for insanity that we have today in Texas for adults, as set forth in Section 8.01 of the Texas Penal Code.

The legislative sponsor of the 1983 Texas revisions, former Senator Ray Farabee, later wrote that over ninety percent of the residents in his senatorial district favored a restriction on the insanity defense in responding to polling following the Hinckley verdict. *Id.* at 671. Ironically, another contemporaneous case that had arisen in Senator Farabee's district had also influenced the powerful legislator. In a chilling forerunner of the later cases of Andrea Yates, Deanna Laney, and Dena Schlosser, which will be discussed *infra*, a young mother who had been diagnosed "as having experienced a post-partem [sic] psychosis" had "cut out her young daughter's heart in an effort to exorcise a devil which she thought possessed her child." *Id.* at 671-72. Following an insanity acquittal, the state hospital released the woman after less than two years of treatment without further required supervision. *Id.*

Given the 1983 enactment, Texas jettisoned the volitional component of the 1973 reforms and has instead employed the limited, inadequate "right-wrong" test for the last three-plus decades. It is unfortunate for our state that we have so narrowed our insanity defense to outmoded nineteenth century parameters that we inquire only about a defendant's knowledge that his or her acts were "wrong," rather than going on to inquire about whether the defendant appreciated the wrongfulness of the conduct or was capable of conforming his or her conduct to the law.

The extreme narrowness of the Texas test, and its inconsistent results, were illustrated by the later Texas cases of Andrea Yates, Deanna Laney, and Dena Schlosser, three women who killed or seriously injured their own children and who raised the insanity defense at their trials in Texas state courts.

There was little or no dispute among the experts involved in the Yates case that Ms. Yates was suffering from serious mental illness and was extremely delusional at the time she killed her five children by drowning, yet the jury in her initial trial rejected her insanity defense, and she was convicted and sentenced to prison. That conviction was later reversed and the case remanded for further proceedings. *Yates v. State*, 171 S.W.3d 215 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2005, pet. ref'd). In July 2006, a new jury in the retrial of Ms. Yates returned a verdict of not guilty by reason of insanity.

Similarly, all five of the medical experts in Ms. Laney's trial agreed that Ms. Laney was seriously mentally ill, delusional, and legally "insane" at the time she killed her children by stoning, and Ms. Laney was acquitted.

Dena Schlosser cut off the arms of her ten-month-old daughter while suffering from psychotic religious ideations. In Ms. Schlosser's case, a first jury deadlocked 10-2 on the insanity issue, but a second trial before a judge alone, and lasting about five minutes, resulted in a verdict of not guilty by reason of insanity.

It seems clear that all three of these women were clearly in need of custodial hospitalization and long-term psychiatric treatment, but under the initial jury verdicts in the cases only two of them would have received such treatment; one was initially sentenced to prison.

As I noted in a more detailed law review article:

These tragic cases, involving defendants with severe psychoses, illustrate that the Texas insanity defense bears no relationship to modern understandings of serious mental illness. Contrary to popular myth, the defense is rarely invoked and seldom successful. Notwithstanding the ultimate results in these three cases, the Texas test of insanity is so narrow that it is virtually meaningless.

Brian D. Shannon, *The Time is Right to Revise the Texas Insanity Defense: An Essay*, 39 TEX. TECH L. REV. 67, 69-70 (2006-07), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1829284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1829284).

It is often referenced that the insanity defense is pleaded in fewer than one percent of criminal cases and is raised successfully in about a quarter of those cases. Even that number is high, however, in that it includes those cases in which the state has not contested the issue.

An analysis of Section 8.01 of the Texas Penal Code will provide some insight into how our courts could reach such radically varying results in the cases of three women plainly suffering from serious mental illness and whose conduct was caused by and clearly attributable to such mental illness. It is also worth considering a more recent case in which a Texas jury rejected the insanity defense in the 2015 trial of Eddie Ray Routh, who was found guilty of murdering famed "American Sniper" Chris Kyle. National and state media remained fixated on this case for weeks. *See Routh v. State*, 516 S.W.3d 677 (Tex. App. – Eastland 2017, no pet.) (affirming conviction). Indeed, a review of caselaw interpreting the Texas insanity defense reveals a plethora of cases that reject defense challenges to jury determinations rejecting the insanity defense.

**ANALYSIS OF SECTION 8.01, TEXAS PENAL CODE.** Subsection (a) of Section 8.01 of the Texas Penal Code provides that it is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his or her conduct was wrong.



**AN AFFIRMATIVE DEFENSE.** As defined by Section 2.04 of the Texas Penal Code, an affirmative defense is one that the defendant must allege and prove by a preponderance of the evidence. Hence, a defendant desiring to use the insanity defense must both raise that issue and present evidence in support of it. The jury is instructed that the terminology “preponderance of the evidence” means the greater weight of the credible evidence.

**“SEVERE” MENTAL ILLNESS.** The term “severe” in Subsection 8.01 was an innovation in 1983, never before having been a part of the Texas insanity test or the M’Naghten test in other jurisdictions. The Texas Legislature added the term as part of the 1983 “reforms.” Congress also added the term “severe” to the M’Naghten test it enacted in 1984 for all federal courts. The federal insanity test is codified in 18 U.S.C. § 17(a).<sup>22</sup> The term “severe” is not defined in the Texas statute or in the federal statute, but presumably the legislative purpose was to ensure that minor disorders or personality defects will not provide a basis for a successful insanity defense.

The Texas Court of Criminal Appeals has commented that “[i]ntroducing [the term] ‘severe’ seems quite superfluous.” *Pacheco v. State*, 757 S.W. 2d 729, 735 n.7 (Tex. Crim. App. 1988). The Court reasoned, “[I]f as a *result* of mental disease or defect an accused does not know his conduct is wrong when he engages in it, then surely his mental disease or defect is severe.” *Id.*

With respect to the federal insanity test, one federal district court has stated that a trial court’s severity analysis “consists of more than locating the magical word ‘severe’ in the diagnosis.” *United States v. Rezaq*, 918 F. Supp. 463, 465 n.6 (D.D.C. 1996). The court continued, “Rather, section 17(a) contemplates a more thoroughgoing approach, in which a court reviews the diagnosis for overall indications of the severity of defendant’s mental disease or defect.” Further eschewing a “magical word” analysis, the court continued: “The mere presence of the word ‘severe’ in a diagnosis that suggests a mild condition will not constitute a defense under section 17(a). Similarly, the absence of the word ‘severe’ will not *necessarily* mean that the condition diagnosed does not meet the standards of section 17(a).” *Id.*

Another federal district court explained that: “The legislative history states that the term ‘severe’ was added to the term ‘mental disease or defect’ specifically to exclude antisocial personality ‘tendencies’ from the purview of the insanity defense.” *United States v. Henley*, 8 F. Supp. 2d 503, 506 (E.D.N.C. 1998). The court added: “The concept of severity was added to emphasize that non-psychotic behavior disorders or neuroses such as an ‘inadequate personality,’ ‘immature personality,’ or a pattern of ‘antisocial tendencies’ do not constitute the defense.” *Id.* at 506-507.

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<sup>22</sup> The federal test for insanity provides: “It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.” 18 U.S.C. § 17(a).

It is to be expected that there will be further Texas and federal court decisions dealing with the meaning of the term “severe” in the context of the insanity defenses provided by Texas and federal law.

**EXCLUSIVE, NARROW FOCUS ON COGNITION.** As indicated in the discussion above, for the defense to be successful, the jury must be convinced by a preponderance of the evidence that the defendant, because of severe mental disease or defect, did not know that his or her conduct was wrong. Cognition is the narrow exclusive test, regardless of whether a defendant’s mental illness impairs the ability to control one’s conduct, and no matter how serious the defendant’s mental illness may be.

**LEGAL WRONG.** Although the point is not without some difficulty under the applicable decisions of the Texas courts, the “wrong” referred to in the statute appears to mean *legal* wrong. That is, the question is whether the defendant knew that his or her conduct was legally wrong as opposed to being morally wrong.

In the case of *Bigby v. State of Texas*, 892 S.W.2d 864, 878 (Tex. Crim. App. 1994), the Court of Criminal Appeals noted that “[s]everal expert witnesses testified appellant knew his conduct was illegal, however, these experts contended that appellant did not know the act was ‘morally’ wrong,” the contention being that “appellant believed that regardless of society’s views about this illegal act and his understanding it was illegal, under his ‘moral’ code it was permissible.” The court then stated:

This focus upon appellant’s morality is misplaced. The question of insanity should focus on whether a defendant understood the nature and quality of his action and whether it was an act he ought to do. *Zimmerman v. State*, 85 Tex. Cr. R. 630, 215 S.W. 101, 105 (1919) (on rehearing). By accepting and acknowledging his action was “illegal” by societal standards, he understood that others believed his conduct was “wrong.”

*Id.* at 878.

It would appear, then, under the court’s language and analysis in *Bigby*, that a defendant who knows that his or her action was illegal by societal standards – in other words, a defendant who knows that the act is *legally* wrong, that the act is *prohibited by law* – will be viewed as having understood that others believed his or her conduct was wrong, and therefore such a defendant knows that his or her conduct is “wrong” within the meaning of Section 8.01(a) of the Texas Penal Code. See *Reyna v. State of Texas*, 116 S.W. 3d 362, 368 (Tex. App.—El Paso 2003, no pet.).

The Texas Court of Criminal Appeals subsequently re-affirmed the *Bigby* analysis. In *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008), the court stated the following:

Under Texas law, “wrong” in this context means “illegal.” Thus, the question for deciding insanity is this: Does the defendant factually know that society considers this conduct against the law, even though the defendant, due to his mental disease or defect, may think that the conduct is morally justified?

Other cases have applied the same kind of analysis, examining the evidence of the record in order to determine whether the defendant engaged in behavior (such as efforts to avoid detection and arrest, concealing incriminatory evidence, attempting to avoid leaving fingerprints, and the like) indicating that he or she knew that his or her conduct was illegal. See *McAfee v. State*, 467 S.W.3d 622, 636 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2015, no pet.), *Dashield v. State of Texas*, 110 S.W.3d 111, 115 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, pet. ref’d); *Love v. State of Texas*, 909 S.W. 2d 930, 943 (Tex. App.—El Paso 1995, pet. ref’d); *Plough v. State of Texas*, 725 S.W. 2d 494, 500 (Tex. App.—Corpus Christi 1987, no pet.).

The result is that it is extremely challenging for defense counsel to prevail on an insanity defense in Texas when the issue is contested, given that very few defendants, even those who are seriously mentally ill and unable to control their behavior, are unable to know that their conduct is prohibited by law. And, if a defendant knows that his or her conduct is prohibited by law, then he or she is legally “sane” under Texas criminal law. Consequently, many defendants who are in need of long-term psychiatric treatment are nonetheless convicted and imprisoned, are possibly provided appropriate psychiatric treatment while incarcerated, and eventually released into the community.

It should be noted, of course, that there are indeed occasional exceptions to the general rule about the futility of using the insanity defense in Texas, as illustrated by the Andrea Yates, Deanna Laney, and Dena Schlosser cases that are discussed in detail in Subchapter VI-C, *infra*. Another case worthy of mention is the unreported decision in *Lopez v. State*, 2007 Tex. App. LEXIS 7183 (Tex. App.—Corpus Christi 2007, pet. ref’d.). In *Lopez*, the Corpus Christi Court of Appeals, in considering testimony by a psychiatrist that the defendant, because of his severe mental illness, did not know that what he was doing was wrong or illegal, decided that the evidence did not support the jury’s rejection of the defendant’s insanity defense. The court accordingly reversed the judgment of conviction. *Id.* at \*35, \*43-44. The *Lopez* case is an interesting example of a Texas appellate court carefully examining extensive detailed testimony about a defendant’s mental illness, and then reaching a conclusion different from that of the convicting jury, but such a result is very rare. It should also be noted that the court, in *Lopez*, understood the term “wrong” in Section 8.01 as meaning *legal wrong*, and the court cited the *Bigby* case for that proposition.

**ABNORMALITY MANIFESTED BY ANTISOCIAL CONDUCT EXCLUDED.** Subsection 8.01(b) provides that the term “mental disease or defect” does not include an abnormality manifested by repeated criminal or otherwise antisocial conduct. The purpose of Subsection (b) was to “exclude psychopaths from the insanity defense for fear that recidivists would qualify if they could be characterized as psychopaths.” Seth S. Searcy III & James R. Patterson, Practice

Commentary, TEX. PENAL CODE ANN. § 8.01, at 179, 181 (Vernon 1974). Of course, as Searcy and Patterson pointed out in their practice commentary, “no psychopath manifests his psychopathy solely by repeated criminal conduct and ... [such persons] invariably show some other symptom.” *Id.*

**PROCEDURE FOLLOWED IN ADMINISTERING THE INSANITY TEST IN TEXAS.** Although Section 8.01 of the Texas Penal Code sets forth the insanity defense for purposes of Texas criminal law, another collection of statutes in Chapter 46C of the Texas Code of Criminal Procedure describe the procedures that are to be observed in cases in which the insanity defense is in issue. These procedural provisions were re-codified in 2005, with several amendments having been enacted thereafter.

It should be noted at the outset that, as explained in my more detailed law review article on the Texas insanity defense, the 2005 statute re-codified the procedures, but not the substantive standard for insanity:

During the 2005 legislative session, the Texas Legislature enacted Senate Bill 837, which constituted a substantial overhaul of the procedures relating to the insanity defense in Texas. S.B. 837 repealed former Texas Code of Criminal Procedure Article 46.03 and replaced it with new Chapter 46C. The changes in the law are effective for any offense committed on or after September 1, 2005, the effective date of the Act. S.B. 837 did not include any changes to the substantive test for insanity in Texas but instead focused on procedure. Brian D. Shannon, *The Time is Right to Revise the Texas Insanity Defense: An Essay*, 39 Tex. Tech L. Rev. 67, 76 (2006-07).

Brian D. Shannon, *The Time is Right to Revise the Texas Insanity Defense: An Essay*, 39 TEX. TECH L. REV. 67, 69-70 (2006-07), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1829284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1829284).

That article also noted the following:

S.B. 837 largely re-codified former Article 46.03 of the Texas Code of Criminal Procedure, yet also made important changes. For example, the new Chapter 46C now includes training and qualification requirements for experts that mirror those mandated for experts who conduct evaluations of a defendant’s competency to stand trial. Chapter 46C also has changed the deadline by when a defendant must give notice that an insanity defense will be pursued.

*Id.* at 79. We turn now to an analysis of the major provisions of Chapter 46C, Texas Penal Code.

**DEFINITIONS.** Article 46C.001, Texas Code of Criminal Procedure, provides definitions of various terms, including “Commission” in Article 46C.001(1), which means the Texas Health and Human Services Commission. Article 46C.001(3) defines “mental illness” as having “the meaning assigned by Section 571.003, Texas Health & Safety Code,” and Article 46C.001(4) defines “mental retardation” as

having the meaning assigned by Chapter 591, Texas Health & Safety Code. Legislation enacted in 2015 updated the term “mental retardation” in Chapter 591 and replaced it with the term “intellectual disability.” The legislature, however, has not yet made a corresponding change in Article 46.001. Presumably, this was an oversight that will be corrected in a future legislative session.

**Art. 46C.001. Definitions.** In this chapter:

- (1) “Commission” means the Health and Human Services Commission.
- (2) “Executive commissioner” means the executive commissioner of the Health and Human Services Commission.
- (3) “Mental illness” has the meaning assigned by Section 571.003, Health and Safety Code.
- (4) “Mental retardation” has the meaning assigned by Section 591.003, Health and Safety Code.
- (5) “Residential care facility” has the meaning assigned by Section 591.003, Health and Safety Code.

**SUBMISSION OF THE INSANITY DEFENSE.** The insanity defense will be submitted to the jury only if it is supported by competent evidence. As noted previously, it is the defendant’s obligation to give notice of his or her intent to raise the insanity defense, to raise the issue properly, and support it with adequate evidence at trial.

Article 46C.051 specifically requires notice of intent to raise the insanity defense:

**Art. 46C.051. Notice of Intent to Raise Insanity Defense.** (a) A defendant planning to offer evidence of the insanity defense must file with the court a notice of the defendant’s intention to offer that evidence.

(b) The notice must:

- (1) contain a certification that a copy of the notice has been served on the attorney representing the state; and
- (2) be filed at least 20 days before the date the case is set for trial, except as described by Subsection (c).

(c) If before the 20-day period the court sets a pretrial hearing, the defendant shall give notice at the hearing.

Article 46C.051 delineates the rules relating to the timing for the required notice. As I stated in my related law review article:

Under former article 46.03, to raise the insanity defense, a defendant had to provide notice of intent at least ten days prior to the date set for trial, at any pretrial hearing set before that ten-day window, or at the time the defendant raised an issue of incompetency to stand trial if the issue was pursued. This latter timing requirement did not make a great deal of sense. An evaluation of a defendant’s competency to stand trial will often take place

early in the criminal process. Defense counsel, however, might often be unprepared to form a judgment about whether to pursue an insanity defense until after reviewing experts' reports of mental health evaluations regarding competency to stand trial or legal insanity. S.B. 837 removed this aspect of the former law and now requires notice either at least twenty days before the date set for trial or at the time of a pretrial hearing if set earlier than the twenty-day window.

Brian D. Shannon, *supra*, at 79 (citations omitted).

**EFFECT OF FAILURE TO GIVE NOTICE.** Article 46C.052 sets forth the consequences of a defendant's failure to give proper notice of intent to raise the insanity defense. The statute includes an exception for good cause, but the trial court has substantial discretion in determining good cause.

**Art. 46C.052. Effect of Failure to Give Notice.** Unless notice is timely filed under Article 46C.051, evidence on the insanity defense is not admissible unless the court finds that good cause exists for failure to give notice.

**APPOINTMENT OF EXPERTS.** Article 46C contains extensive detailed provisions regarding the appointment of experts to examine a defendant, sets forth the qualifications required for such experts, and delineates the requirements pertaining to the written reports of the experts, as well as provisions concerning the examination of the defendant. These were intended to mirror the provisions regarding experts set forth in the 2003 revisions to Chapter 46B pertaining to competency evaluations (discussed in detail in Subchapter IV-A, *supra*). Unfortunately, however, the qualifications set forth in Article 46C.102 did not completely track those from Chapter 46B, and when the expert qualifications under Chapter 46B were amended in 2011, there were no corresponding amendments to Article 46C.102. Corrective amendments were introduced during the 2013 legislative session, but the bill never reached the House floor. That legislation would have removed the "experience" requirement in subsection (2)(B)(ii) and made the qualifications for experts who conduct insanity evaluations to be the same as those set forth in Chapter 46B for competency evaluations. It is to be hoped that this oversight in Article 46C.102 can be corrected in a future legislative session, but it has not yet occurred.

Note also that at least one court has held that the expert qualifications provisions apply only to court-appointed experts. According to that decision, an expert hired by the state need not meet the qualifications set forth in Article 46C.102. *See Pham v. State*, 463 S.W.3d 660, 670 (Tex. App. – Amarillo 2015, *pet. ref'd*). The *Pham* court also observed that the Article 46C.102 qualifications requirements would not have to apply to "an expert of the defendant's own choice." *Id.* at 668. One would hope, however, that prosecutors and defense counsel would nonetheless want to hire experts who meet the statutory minimums. Moreover, even if the Amarillo Court of Appeals were correct in its statutory interpretation in *Pham*, a trial court should give much less weight to any expert who does not meet the statutory requirements and

should strongly consider excluding that expert's testimony under Rule 702 of the Texas Rules of Evidence. Finally, for a case involving serious issues that arose when a court utilized an expert who did not qualify under the comparable expert provisions of Chapter 46B, consider *Owens v. State*, 437 S.W.3d 584, 588 (Tex. App. – Texarkana 2014), *rev'd*, 473 S.W.3d 812, 816-18 (Tex. Crim. App. 2015) (recognizing error but finding error to be harmless).

Article 46C.103 also permits a court to appoint the same disinterested expert to examine the defendant for both competency and insanity. If, however, the expert determines that the defendant is not competent to stand trial, the expert must stop his or her evaluation and not proceed to examine the defendant on issues regarding insanity. Once the expert concludes that the defendant is incompetent, any further questions and answers regarding the defendant's mental state at the time of the acts leading to the criminal charges would be inherently unreliable and suspect. In such a case, the expert should file the report on incompetency, but must not file any report (or continue the examination) regarding insanity. Legislation was introduced during the 2013 session that would have required separate experts for competency and insanity in all cases, but that bill was not enacted.

**Art. 46C.101. Appointment of Experts.** (a) If notice of intention to raise the insanity defense is filed under Article 46C.051, the court may, on its own motion or motion by the defendant, the defendant's counsel, or the attorney representing the state, appoint one or more disinterested experts to:

- (1) examine the defendant with regard to the insanity defense; and
- (2) testify as to the issue of insanity at any trial or hearing involving that issue.

(b) The court shall advise an expert appointed under this article of the facts and circumstances of the offense with which the defendant is charged and the elements of the insanity defense.

**Art. 46C.102. Experts: Qualifications.** (a) The court may appoint qualified psychiatrists or psychologists as experts under this chapter. To qualify for appointment under this subchapter as an expert, a psychiatrist or psychologist must:

- (1) as appropriate, be a physician licensed in this state or be a psychologist licensed in this state who has a doctoral degree in psychology; and
- (2) have the following certification or experience or training:
  - (A) as appropriate, certification by:
    - (i) the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or
    - (ii) the American Board of Professional Psychology in forensic psychology; or
  - (B) experience or training consisting of:

(i) at least 24 hours of specialized forensic training relating to incompetence or insanity evaluations;

(ii) at least five years of experience in performing criminal forensic evaluations for courts; and

(iii) eight or more hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment and documented with the court.

(b) In addition to meeting qualifications required by Subsection (a), to be appointed as an expert a psychiatrist or psychologist must have completed six hours of required continuing education in courses in forensic psychiatry or psychology, as appropriate, in the 24 months preceding the appointment.

(c) A court may appoint as an expert a psychiatrist or psychologist who does not meet the requirements of Subsections (a) and (b) only if exigent circumstances require the court to base the appointment on professional training or experience of the expert that directly provides the expert with a specialized expertise to examine the defendant that would not ordinarily be possessed by a psychiatrist or psychologist who meets the requirements of Subsections (a) and (b).

**Art. 46C.103. Competency to Stand Trial: Concurrent Appointment.** (a) An expert appointed under this subchapter to examine the defendant with regard to the insanity defense also may be appointed by the court to examine the defendant with regard to the defendant's competency to stand trial under Chapter 46B, if the expert files with the court separate written reports concerning the defendant's competency to stand trial and the insanity defense.

(b) Notwithstanding Subsection (a), an expert may not examine the defendant for purposes of determining the defendant's sanity and may not file a report regarding the defendant's sanity if in the opinion of the expert the defendant is incompetent to proceed.

**Art. 46C.104. Order Compelling Defendant to Submit to Examination.** (a) For the purposes described by this chapter, the court may order any defendant to submit to examination, including a defendant who is free on bail. If the defendant fails or refuses to submit to examination, the court may order the defendant to custody for examination for a reasonable period not to exceed 21 days. Custody ordered by the court under this subsection may include custody at a facility operated by the commission.

(b) If a defendant who has been ordered to a facility operated by the commission for examination remains in the facility for a period that exceeds 21 days, the head of that facility shall cause the defendant to be immediately transported to the committing court and placed in the custody of the sheriff of the county in which the committing court is located. That county shall



reimburse the facility for the mileage and per diem expenses of the personnel required to transport the defendant, calculated in accordance with the state travel rules in effect at that time.

(c) The court may not order a defendant to a facility operated by the commission for examination without the consent of the head of that facility.

**Art. 46C.105. Reports Submitted by Experts.** (a) A written report of the examination shall be submitted to the court not later than the 30th day after the date of the order of examination. The court shall provide copies of the report to the defense counsel and the attorney representing the state.

(b) The report must include a description of the procedures used in the examination and the examiner's observations and findings pertaining to the insanity defense.

(c) The examiner shall submit a separate report stating the examiner's observations and findings concerning:

(1) whether the defendant is presently a person with a mental illness and requires court-ordered mental health services under Subtitle C, Title 7, Health and Safety Code; or

(2) whether the defendant is presently a person with mental retardation.

**Art. 46C.106. Compensation of Expert.** (a) The appointed experts shall be paid by the county in which the indictment was returned or information was filed.

(b) The county in which the indictment was returned or information was filed shall reimburse a facility operated by the commission that accepts a defendant for examination under this subchapter for expenses incurred that are determined by the department to be reasonably necessary and incidental to the proper examination of the defendant.

**EXAMINATION BY AN EXPERT OF THE DEFENDANT'S CHOICE.** Article 46C.107 provides that if a defendant wants to be examined by his or her own expert, the court must provide the expert with a reasonable opportunity to conduct the examination. Defense counsel will typically endeavor to hire one or more experts.

**Art. 46C.107. Examination by Expert of Defendant's Choice.** If a defendant wishes to be examined by an expert of the defendant's own choice, the court on timely request shall provide the examiner with reasonable opportunity to examine the defendant.

**DETERMINATION OF THE ISSUE OF DEFENDANT'S LEGAL SANITY.** The provisions of Article 46C.151 through 46C.153 set forth rules for determination at trial of the issue of a defendant's sanity:

**Art. 46C.151. Determination of Sanity Issue by Jury.** (a) In a case tried to a jury, the issue of the defendant's sanity shall be submitted to the jury only if the issue is supported by competent evidence. The jury shall determine the issue.

(b) If the issue of the defendant's sanity is submitted to the jury, the jury shall determine and specify in the verdict whether the defendant is guilty, not guilty, or not guilty by reason of insanity.

**Art. 46C.152. Determination of Sanity Issue by Judge.** (a) If a jury trial is waived and if the issue is supported by competent evidence, the judge as trier of fact shall determine the issue of the defendant's sanity.

(b) The parties may, with the consent of the judge, agree to have the judge determine the issue of the defendant's sanity on the basis of introduced or stipulated competent evidence, or both.

(c) If the judge determines the issue of the defendant's sanity, the judge shall enter a finding of guilty, not guilty, or not guilty by reason of insanity.

**Art. 46C.153. General Provisions Relating to Determination of Sanity Issue by Judge or Jury.** (a) The judge or jury shall determine that a defendant is not guilty by reason of insanity if:

(1) the prosecution has established beyond a reasonable doubt that the alleged conduct constituting the offense was committed; and

(2) the defense has established by a preponderance of the evidence that the defendant was insane at the time of the alleged conduct.

(b) The parties may, with the consent of the judge, agree to both:

(1) dismissal of the indictment or information on the ground that the defendant was insane; and

(2) entry of a judgment of dismissal due to the defendant's insanity.

(c) An entry of judgment under Subsection (b)(2) has the same effect as a judgment stating that the defendant has been found not guilty by reason of insanity.

**JURORS PROHIBITED FROM KNOWING CONSEQUENCES OF VERDICT.** Article 46C.154 continues the prior absurd and unjust practice of prohibiting the court and the attorneys from informing a juror or prospective juror of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned:

**Art. 46C.154. Informing Jury Regarding Consequences of Acquittal.** The court, the attorney representing the state, or the attorney for the defendant may not inform a juror or a prospective juror of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned.

The absurdity, and injustice, of this provision is that the jurors will probably not know about the extensive statutory provisions regarding the mandatory procedures to be followed by the court upon the acquittal of a defendant by reason of insanity, including provisions to protect the safety of the community. Indeed, jurors may thus believe – quite wrongly – that a defendant acquitted by reason of insanity is free to walk out of the courthouse at the end of the trial. That is, jurors may believe, erroneously, that they are confronted by only two options: (1) conviction of the defendant and sentencing him or her to prison in order to protect the community; or, (2) acquittal of the defendant by reason of insanity, in which case – as they often might believe – the defendant will be immediately freed at the conclusion of the trial.

It is perhaps reasonable to conclude that the Texas Legislature *intended* this result – that Texas jurors are to be required to function *in ignorance* to this extent – but it is nevertheless an unjust and unfair result, and it gives an improper advantage to the prosecution in seeking to win verdicts of guilty.

Jurors ought to know and understand that if they acquit a defendant by reason of insanity, the acquitted defendant will be under the control of the court as provided in the applicable statutory provisions requiring further evaluation of the defendant and insuring adequate protection of the community. The Texas Court of Criminal Appeals has held, however, that this provision does not deny fundamental fairness to the defendant. *Robison v. State*, 888 S.W. 2d 473, 477 (Tex. Crim. App. 1994), *cert. denied*, 515 U.S. 1162 (1995) (holding that there was no constitutional infirmity and citing *Zwack v. State*, 757 S.W.2d 66, 69 (Tex. App.—Houston [14th Dist.] 1988, *pet. ref'd*), which held the same).

The constitutionality of Article 46C.154 should be tested in the courts by relying on the authority and reasoning of the United States Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994) and *Shafer v. North Carolina*, 532 U.S. 36, 51 (2001), in which the Court held that a defendant in a capital case where future dangerousness is an issue has a due process right to have the jury informed that under a life sentence there is no possibility of parole. In our view, the state should not be allowed to set up a “false dilemma” of the kind described by the Supreme Court in the *Simmons* case, in which jurors could believe erroneously that a defendant will be immediately released after a finding of not guilty by reason of insanity, yet at the same time the state by statute prevents the jurors from being told that such a thing cannot happen under the applicable law.

Legislation has been introduced in several legislative sessions to amend Article 46C.154 to require the jury to be informed of likely consequences of a finding of not guilty by reason of insanity. For example, unsuccessful bills filed in both 2013 and 2015 would have required courts to provide a jury instruction in substantially the following form:

A jury during its deliberations must never consider or speculate concerning matters relating to the consequences of its verdict. However, because of the lack of common knowledge regarding the consequences of a verdict of “not

guilty by reason of insanity,” I charge you that if you render this verdict there will be hearings as to the defendant’s present mental condition and, where appropriate, involuntary commitment proceedings.

It is to be hoped that comparable legislation will be enacted in the future. Interestingly, the American Bar Association’s 2016 Criminal Justice Standards on Mental Health include the following in Standard 7-6.8:

Upon motion of either party, the court may instruct the jury as to the dispositional consequences of a verdict of not guilty by reason of mental nonresponsibility [insanity].

See ABA Criminal Justice Standards on Mental Health, at 49 (Aug. 8, 2016), *available at* [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/mental\\_health\\_standards\\_2016.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf).

**JUDGMENT OPTIONS.** Article 46C.156 provides for the judgment options in a case in which the insanity defense is raised.

**Art. 46C.156. Judgment.** (a) In each case in which the insanity defense is raised, the judgment must reflect whether the defendant was found guilty, not guilty, or not guilty by reason of insanity.

(b) If the defendant was found not guilty by reason of insanity, the judgment must specify the offense of which the defendant was found not guilty.

(c) If the defendant was found not guilty by reason of insanity, the judgment must reflect the finding made under Article 46C.157.

**ACQUITTAL THROUGH VERDICT OF NOT GUILTY BY REASON OF INSANITY.** Article 46C.155 provides that, except with respect to the expunction of criminal records as governed by Chapter 55 of the Code of Criminal Procedure, a defendant who is found not guilty by reason of insanity stands acquitted of the offense charged and may not be considered a person charged with an offense.

**Art. 46C.155. Findings of Not Guilty by Reason of Insanity Considered Acquittal.** (a) Except as provided by Subsection (b), a defendant who is found not guilty by reason of insanity stands acquitted of the offense charged and may not be considered a person charged with an offense.

(b) A defendant who is found not guilty by reason of insanity is not considered to be acquitted for purposes of Chapter 55.

**INSANITY DEFENSE UNIQUE; DEFENDANT NOT AUTOMATICALLY RELEASED WHEN ACQUITTED.** The insanity defense is unique among the various defenses to crime in that an acquittal by reason of insanity typically does not mean that the defendant is immediately set free. In fact, that is usually not the result of an insanity acquittal.

All jurisdictions, including Texas, have provisions for determining whether a defendant acquitted by reason of insanity is dangerous to others and is in need of psychiatric treatment. And, all jurisdictions allow detention of the acquitted person, if necessary, to make the necessary determinations and provide the needed treatment. For example, John W. Hinckley, Jr., has remained under court supervision and was held for decades in detention in a public psychiatric hospital in Washington, D.C., following his acquittal in 1982 by reason of insanity. In Texas, these matters are governed by the provisions of Article 46C.251 through 46C.270. We turn now to an outline of those provisions.

**DETERMINATION REGARDING DANGEROUS CONDUCT OF AN ACQUITTED PERSON.** One of the most important determinations a court must make in this situation is whether the conduct of the defendant involved an act, attempt, or threat of serious bodily injury to another person. The answer to that critical question determines, in significant part, how the defendant's status will be handled following his or her acquittal by reason of insanity.

**Art. 46C.157. Determination Regarding Dangerous Conduct of Acquitted Person.** If a defendant is found not guilty by reason of insanity, the court immediately shall determine whether the offense of which the person was acquitted involved conduct that:

- (1) caused serious bodily injury to another person;
- (2) placed another person in imminent danger of serious bodily injury; or
- (3) consisted of a threat of serious bodily injury to another person through the use of a deadly weapon.

**CONTINUING JURISDICTION OF DANGEROUS ACQUITTED PERSON.** This is one of the provisions that jurors should be made aware of prior to their deliberations during the guilt or innocence stage of a trial in which the insanity defense has been raised so that they will not be victims of a "false dilemma," as described by the Supreme Court of the United States in *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994); they may believe, erroneously, that the only two options under Texas law are a finding of guilt and prison time for the defendant, or a finding of not guilty by reason of insanity resulting, possibly, in the acquitted defendant's immediate freedom. But, current jurors in Texas may not be told about this matter due to the dubious provisions of Article 46C.154. As described above, this matter should be tested in the courts as a denial of due process of law. In any event, the continuing jurisdiction rules under Article 46C.158 are set forth below. Importantly, the 2005 re-codification provided the court with greater supervisory authority under Chapter 46C over persons acquitted by reason of an NGRI finding than under prior law.

**Art. 46C.158. Continuing Jurisdiction of Dangerous Acquitted Person.** If the court finds that the offense of which the person was acquitted involved conduct that caused serious bodily injury to another person, placed another person in

imminent danger of serious bodily injury, or consisted of a threat of serious bodily injury to another person through the use of a deadly weapon, the court retains jurisdiction over the acquitted person until either:

(1) the court discharges the person and terminates its jurisdiction under Article 46C.268; or

(2) the cumulative total period of institutionalization and outpatient or community-based treatment and supervision under the court's jurisdiction equals the maximum term provided by law for the offense of which the person was acquitted by reason of insanity and the court's jurisdiction is automatically terminated under Article 46C.269.

#### **OPTIONS AVAILABLE REGARDING A NONDANGEROUS ACQUITTED PERSON.**

**Art. 46C.159. Proceedings Regarding Nondangerous Acquitted Person.** If the court finds that the offense of which the person was acquitted did not involve conduct that caused serious bodily injury to another person, placed another person in imminent danger of serious bodily injury, or consisted of a threat of serious bodily injury to another person through the use of a deadly weapon, the court shall proceed under Subchapter E.

#### **DETENTION PENDING FURTHER PROCEEDINGS.**

**Art. 46C.160. Detention Pending Further Proceedings.** (a) On a determination by the judge or jury that the defendant is not guilty by reason of insanity, pending further proceedings under this chapter, the court may order the defendant detained in jail or any other suitable place for a period not to exceed 14 days.

(b) The court may order a defendant detained in a facility of the commission under this article only with the consent of the head of the facility.

#### **DETAILS OF PROCEDURE FOLLOWING ACQUITTAL BY REASON OF INSANITY WHEN THERE WAS NO FINDING OF DANGEROUS CONDUCT.**

Articles 46C.201 and 46C.202 describe the procedures to be followed when there has been an acquittal by reason of insanity and there was **no** finding of dangerous conduct.

**Art. 46C.201. Disposition: Nondangerous Conduct.** (a) If the court determines that the offense of which the person was acquitted did not involve conduct that caused serious bodily injury to another person, placed another person in imminent danger of serious bodily injury, or consisted of a threat of serious bodily injury to another person through the use of a deadly weapon, the court shall determine whether there is evidence to support a finding that the person is a person with a mental illness or with mental retardation.

(b) If the court determines that there is evidence to support a finding of mental illness or mental retardation, the court shall enter an order transferring the person to the appropriate court for civil commitment proceedings to determine whether the person should receive court-ordered mental health services under Subtitle C, Title 7, Health and Safety Code, or be committed to a residential care facility to receive mental retardation services under Subtitle D, Title 7, Health and Safety Code. The court may also order the person:

(1) detained in jail or any other suitable place pending the prompt initiation and prosecution of appropriate civil proceedings by the attorney representing the state or other person designated by the court; or

(2) placed in the care of a responsible person on satisfactory security being given for the acquitted person's proper care and protection.

**Art. 46C.202. Detention or Release.** (a) Notwithstanding Article 46C.201(b), a person placed in a commission facility pending civil hearing as described by that subsection may be detained only with the consent of the head of the facility and under an Order of Protective Custody issued under Subtitle C or D, Title 7, Health and Safety Code.

(b) If the court does not detain or place the person under Article 46C.201(b), the court shall release the person.

#### **DETAILS OF PROCEDURE AFTER ACQUITTAL BY REASON OF INSANITY WHERE THERE IS A FINDING OF DANGEROUS CONDUCT.**

Articles 46C.251 through 46C.270 set forth extensive details of the procedures to be followed after acquittal of a defendant by reason of insanity when there is a finding of dangerous conduct. As I observed in my more detailed article,

Importantly, the revamped statute provides greater guidance to the court than under prior law with regard to the court's ability to order mental health treatment for the acquitted individual. The statute gives the court sweeping power to order that the individual obtain inpatient hospitalization in a state facility, community-based treatment, or outpatient treatment, and the flexibility to order a step-down to an outpatient commitment after a period of inpatient treatment. This type of order would be appropriate once an acquitted person with serious mental illness has been stabilized and is not viewed as posing a threat to society. The statute authorizes the court to require a comprehensive treatment plan and gives the court authority to revoke the outpatient approach if the acquitted person fails to comply with the prescribed treatment regimen. On the whole, the re-codified statute provides substantial direction to the court in overseeing the follow-up treatment and supervision of an individual found NGRI.

Brian D. Shannon, *supra*, at 80 (citations omitted). Then, in 2019 the Legislature made further amendments to these sections to give the Health and Human Services Commission greater discretion in determining when and whether the NGRI

acquittée should be committed to a maximum security unit or to a non-maximum security unit.

**Art. 46C.251. Commitment for Evaluation and Treatment; Report.** (a) The court shall order the acquitted person to be committed for evaluation of the person's present mental condition and for treatment to the facility designated by the commission. The period of commitment under this article may not exceed 30 days.

(b) The court shall order that:

(1) a transcript of all medical testimony received in the criminal proceeding be prepared as soon as possible by the court reporter and the transcript be forwarded to the facility to which the acquitted person is committed; and

(2) the following information be forwarded to the facility and to the commission:

(A) the complete name, race, and gender of the person;

(B) any known identifying number of the person, including social security number, driver's license number, or state identification number;

(C) the person's date of birth; and

(D) the offense of which the person was found not guilty by reason of insanity and a statement of the facts and circumstances surrounding the alleged offense.

(c) The court shall order that a report be filed with the court under Article 46C.252.

(d) To determine the proper disposition of the acquitted person, the court shall hold a hearing on disposition not later than the 30th day after the date of acquittal.

**Art. 46C.252. Report After Evaluation.** (a) The report ordered under Article 46C.251 must be filed with the court as soon as practicable before the hearing on disposition but not later than the fourth day before that hearing.

(b) The report in general terms must describe and explain the procedure, techniques, and tests used in the examination of the person.

(c) The report must address:

(1) whether the acquitted person has a mental illness or mental retardation and, if so, whether the mental illness or mental retardation is severe;

(2) whether as a result of any severe mental illness or mental retardation the acquitted person is likely to cause serious harm to another;

(3) whether as a result of any impairment the acquitted person is subject to commitment under Subtitle C or D, Title 7, Health and Safety Code;

(4) prospective treatment and supervision options, if any for the acquitted person; and



(5) whether any required treatment and supervision can be safely and effectively provided as outpatient or community-based treatment and supervision.

**Art. 46C.253. Hearing on Disposition.** (a) The hearing on disposition shall be conducted in the same manner as a hearing on an application for involuntary commitment under Subtitle C or D, Title 7, Health and Safety Code, except that the use of a jury is governed by Article 46C.255.

(b) At the hearing, the court shall address:

(1) whether the person acquitted by reason of insanity has a severe mental illness or mental retardation;

(2) whether as a result of any mental illness or mental retardation the person is likely to cause serious harm to another; and

(3) whether appropriate treatment and supervision for any mental illness or mental retardation rendering the person dangerous to another can be safely and effectively provided as outpatient or community-based treatment and supervision.

(c) The court shall order the acquitted person committed for inpatient treatment or residential care under Article 46C.256 if the grounds required for that order are established.

(d) The court shall order the acquitted person to receive outpatient or community-based treatment and supervision under Article 46C.257 if the grounds required for that order are established.

(e) The court shall order the acquitted person transferred to an appropriate court for proceedings under Subtitle C or D, Title 7, Health and Safety Code, if the state fails to establish the grounds required for an order under Article 46C.256 or 46C.257 but the evidence provides a reasonable basis for believing the acquitted person is a proper subject for those proceedings.

(f) The court shall order the acquitted person discharged and immediately released if the evidence fails to establish that disposition under Subsection (c), (d), or (e) is appropriate.

**Art. 46C.254. Effect of Stabilization on Treatment Regimen.** If an acquitted person is stabilized on a treatment regimen, including medication and other treatment modalities, rendering the person no longer likely to cause serious harm to another, inpatient treatment or residential care may be found necessary to protect the safety of others only if:

(1) the person would become likely to cause serious harm to another if the person fails to follow the treatment regimen on an Order to Receive Outpatient or Community-Based Treatment and Supervision; and

(2) under an Order to Receive Outpatient or Community-Based Treatment and Supervision either:

(A) the person is likely to fail to comply with an available regimen of outpatient or community-based treatment, as determined by the person's

insight into the need for medication, the number, severity, and controllability of side effects, the availability of support and treatment programs for the person from community members, and other appropriate considerations; or

(B) a regimen of outpatient or community-based treatment will not be available to the person.

**Art. 46C.255. Trial by Jury.** (a) The following proceedings under this chapter must be before the court, and the underlying matter determined by the court, unless the acquitted person or the state requests a jury trial or the court on its own motion sets the matter for jury trial:

(1) a hearing under Article 46C.253;

(2) a proceeding for renewal of an order under Article 46C.261;

(3) a proceeding on a request for modification or revocation of an order under Article 46C.266; and

(4) a proceeding seeking discharge of an acquitted person under Article 46C.268.

(b) The following proceedings may not be held before a jury:

(1) a proceeding to determine outpatient or community-based treatment and supervision under Article 46C.262; or

(2) a proceeding to determine modification or revocation of outpatient or community-based treatment and supervision under Article 46C.267.

(c) If a hearing is held before a jury and the jury determines that the person has a mental illness or mental retardation and is likely to cause serious harm to another, the court shall determine whether inpatient treatment or residential care is necessary to protect the safety of others.

**Art. 46C.256. Order of commitment to Inpatient Treatment or Residential Care.** (a) The court shall order the acquitted person committed to a mental hospital or other appropriate facility for inpatient treatment or residential care if the state establishes by clear and convincing evidence that:

(1) the person has a severe mental illness or mental retardation;

(2) the person, as a result of that mental illness or mental retardation, is likely to cause serious bodily injury to another if the person is not provided with treatment and supervision; and

(3) inpatient treatment or residential care is necessary to protect the safety of others.

(b) In determining whether inpatient treatment or residential care has been proved necessary, the court shall consider whether the evidence shows both that:

(1) an adequate regimen of outpatient or community-based treatment will be available to the person; and

(2) the person will follow that regimen.

(c) The order of commitment to inpatient treatment or residential care expires on the 181st day following the date the order is issued but is subject to renewal as provided by Article 46C.261.

**Art. 46C.257. Order to Receive Outpatient or Community-Based Treatment and Supervision.** Art. (a) The court shall order the acquitted person to receive outpatient or community-based treatment and supervision if:

(1) the state establishes by clear and convincing evidence that the person:

- (A) has a severe mental illness or mental retardation; and
- (B) as a result of that mental illness or mental retardation is likely to cause serious bodily injury to another if the person is not provided with treatment and supervision; and

(2) the state fails to establish by clear and convincing evidence that inpatient treatment or residential care is necessary to protect the safety of others.

(b) The order of commitment to outpatient or community-based treatment and supervision expires on the first anniversary of the date the order is issued but is subject to renewal as provided by Article 46C.261.

**Art. 46C.258. Responsibility of Inpatient or Residential Care Facility.** (a) The head of the facility to which an acquitted person is committed has, during the commitment period, a continuing responsibility to determine:

(1) whether the acquitted person continues to have a severe mental illness or mental retardation and is likely to cause serious harm to another because of any severe mental illness or mental retardation; and

(2) if so, whether treatment and supervision cannot be safely and effectively provided as outpatient or community-based treatment and supervision.

(b) The head of the facility must notify the committing court and seek modification of the order of commitment if the head of the facility determines that an acquitted person no longer has a severe mental illness or mental retardation, is no longer likely to cause serious harm to another, or that treatment and supervision can be safely and effectively provided as outpatient or community-based treatment and supervision.

(c) Not later than the 60th day before the date of expiration of the order, the head of the facility shall transmit to the committing court a psychological evaluation of the acquitted person, a certificate of medical examination of the person, and any recommendation for further treatment of the person. The committing court shall make the documents available to the attorneys representing the state and the acquitted person.

**Art. 46C.259. Status of Committed Person.** If an acquitted person is committed under this subchapter, the person's status as a patient or resident is governed by Subtitle C or D, Title 7, Health and Safety Code, except that:

- (1) transfer to a nonsecure unit is governed by Article 46C.260;
- (2) modification of the order to direct outpatient or community-based treatment and supervision is governed by Article 46C.262; and
- (3) discharge is governed by Article 46C.268.

**Art. 46C.260. Transfer of Committed Person to Non-Maximum Security Facility.** (a) A person committed to a facility under this subchapter shall be committed to a facility designated by the commission.

(b) A person committed under this subchapter shall be transferred to the designated facility immediately on the entry of the order of commitment.

(c) Unless a person committed to a maximum security unit is determined to be manifestly dangerous by a review board under this article, not later than the 60th day following the date of the person's arrival at the maximum security unit the person shall be transferred to a non-maximum security unit of a facility designated by the commission.

(d) The executive commissioner shall appoint a review board of five members, including one psychiatrist licensed to practice medicine in this state and two persons who work directly with persons with mental illnesses or with mental retardation, to determine whether the person is manifestly dangerous and, as a result of the danger the person presents, requires continued placement in a maximum security unit.

(e) If the head of the facility at which the maximum security unit is located disagrees with the determination, then the matter shall be referred to the executive commissioner. The executive commissioner shall decide whether the person is manifestly dangerous.

Extensive administrative regulations further govern the review board and transfers as contemplated by the foregoing sections. *See* 25 Tex. Admin. Code Subchapter G, *available at*

[https://texreg.sos.state.tx.us/public/readtac\\$ext.ViewTAC?tac\\_view=5&ti=25&pt=1&ch=415&sch=G&rl=Y](https://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=25&pt=1&ch=415&sch=G&rl=Y) (last visited June 14, 2019).

**Art. 46C.261. Renewal of Orders for Inpatient Commitment or Outpatient or Community-Based Treatment and Supervision.** (a) A court that orders an acquitted person committed to inpatient treatment or orders outpatient or community-based treatment and supervision annually shall determine whether to renew the order.

(b) Not later than the 30th day before the date an order is scheduled to expire, the institution to which a person is committed, the person responsible for providing outpatient or community-based treatment and supervision, or the attorney representing the state may file a request that the order be renewed. The request must explain in detail the reasons why the person requests renewal under this article. A request to renew an order committing the person to

inpatient treatment must also explain in detail why outpatient or community-based treatment and supervision is not appropriate.

(c) The request for renewal must be accompanied by a certificate of medical examination for mental illness signed by a physician who examined the person during the 30-day period preceding the date on which the request is filed.

(d) On the filing of a request for renewal under this article, the court shall:

- (1) set the matter for a hearing; and
- (2) appoint an attorney to represent the person.

(e) The court shall act on the request for renewal before the order expires.

(f) If a hearing is held, the person may be transferred from the facility to which the acquitted person was committed to a jail for purposes of participating in the hearing only if necessary but not earlier than 72 hours before the hearing begins. If the order is renewed, the person shall be transferred back to the facility immediately on renewal of the order.

(g) If no objection is made, the court may admit into evidence the certificate of medical examination for mental illness. Admitted certificates constitute competent medical or psychiatric testimony, and the court may make its findings solely from the certificate and the detailed request for renewal.

(h) A court shall renew the order only if the court finds that the party who requested the renewal has established by clear and convincing evidence that continued mandatory supervision and treatment are appropriate. A renewed order authorizes continued inpatient commitment or outpatient or community-based treatment and supervision for not more than one year.

(i) The court, on application for renewal of an order for inpatient or residential care services, may modify the order to provide for outpatient or community-based treatment and supervision if the court finds the acquitted person has established by a preponderance of the evidence that treatment and supervision can be safely and effectively provided as outpatient or community-based treatment and supervision.

For a case involving the procedures required by Article 46C.261 for renewals, consider *In re Mental Health & Mental Retardation Auth. of Harris County*, 01-12-00564-CR, 2012 WL 5878006, at \*2 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (unpublished) (denying mandamus relief to Harris County MHMRA). The community mental health authority, Harris County MHMRA, had been providing community-based services to an NGRI acquittee under a court order for outpatient services. The order was renewed a day before the prior order would have expired, following a hearing in the preceding two days. *Id.* Harris County MHMRA had objected because no party had timely filed a request for renewal under Article 46C.261(b). The court ordered renewal, and Harris County MHMRA's later mandamus action was denied by the court of appeals, having found no abuse of discretion by the trial court.

For renewals of inpatient commitment, the statutory standards must, of course, be satisfied. For an interesting opinion on this issue, consider *Harrison v. State*, 09-14-00099-CV, 2014 Tex. App. LEXIS 11899 (Tex. App. – Beaumont 2014). Harrison had been found NGRI in the death of his mother in 1994. The trial court had annually renewed Harrison’s inpatient commitments. However, Harrison successfully challenged the 2014 renewal, contending that outpatient commitment was appropriate. Applying the former law (given that Harrison had been convicted in 1994), the court of appeals determined that there was insufficient evidence “to support the trial court’s finding that outpatient supervision ... [was] not appropriate for Harrison.” *Id.* at \*23. In a later, related opinion, the Beaumont Court of Appeals also determined that the Beaumont trial court had erred when it ordered an outpatient commitment in Houston because Houston MHMRA was “not within the region in which the committing court is located and the trial court did not obtain MHMRA’s consent before designating it ...” *Mental Health Mental Retardation Auth. v. Harrison*, No. 09-15-00235-CV, 2015 Tex. App. Lexis 11101, \*11 (Tex. App. – Beaumont 2015) (applying former law given that the homicide had occurred in 1994). For the current statutory provisions relating to such orders, including the requirement for consent by the services provider, see Article 46C.264 below.

In addition, under the former law, renewal hearings were conducted under the Texas Mental Health Code’s provisions for extended civil commitments, and the court could not make its findings based solely from the certificates of medical examination. See *Martin v. State*, No. 14-14-00730-CV, 2015 Tex. App. LEXIS 9973, at \*6 (Tex. App. – Houston [14th Dist.] 2015, no pet.) (applying former law to a renewal hearing of an NGRI acquittee whose trial took place in 2002, and requiring findings supported by competent medical or psychiatric testimony taken at the hearing per Tex. Health & Safety Code § 574.035(g)).

In contrast, for cases taking place after the 2005 enactment of Chapter 46C, Article 46C.261(g) allows trial courts to make findings based solely on the recent certificate of medical examination provided “no objection is made” to its admission. For another case applying the former law’s provisions, see *In re L.A.T.*, No. 05-15-00043-CV, 2015 Tex. App. LEXIS 8030 (Tex. App. – Dallas 2015, no pet.) (reversing trial court’s order renewing outpatient treatment order where the state’s sole witness, a psychiatrist, testified that the acquittee had a diagnosis of schizoaffective disorder, but was asymptomatic). Finally, consider *Truong v. State*, \_\_ S.W.3d \_\_, No. 01-16-00390-CR, 2019 Tex. App. LEXIS 1517 (Tex. App. – Houston [1st Dist.] 2019, no pet.) (finding an insufficiency of evidence challenge to a May 2016 recommitment order to be moot when the trial court had entered another recommitment order in May 2017 based on new evidence, followed by another recommitment order following an additional hearing in May 2018; the court reasoned that given the further hearings and orders, Article 46C.270(c)’s provision that an appeal “may not be considered moot solely due to the expiration of an order on which the appeal is based” was not controlling).

**Art. 46C.262. Court-Ordered Outpatient or Community-Based Treatment and Supervision after Inpatient Commitment.**

(a) An acquitted person, the head of the facility to which the acquitted person is committed, or the attorney representing the state may request that the court modify an order for inpatient treatment or residential care to order outpatient or community-based treatment and supervision.

(b) The court shall hold a hearing on a request made by the head of the facility to which the acquitted person is committed. A hearing under this subsection must be held not later than the 14th day after the date of the request.

(c) If a request is made by an acquitted person or the attorney representing the state, the court must act on the request not later than the 14th day after the date of the request. A hearing under this subsection is at the discretion of the court, except that the court shall hold a hearing if the request and any accompanying material provide a basis for believing modification of the order may be appropriate.

(d) If a request is made by an acquitted person not later than the 90th day after the date of a hearing on a previous request, the court is not required to act on the request except on the expiration of the order or on the expiration of the 90-day period following the date of the hearing on the previous request.

(e) The court shall rule on the request during or as soon as practicable after any hearing on the request but not later than the 14th day after the date of the request.

(f) The court shall modify the commitment order to direct outpatient or community-based treatment and supervision if at the hearing the acquitted person establishes by a preponderance of the evidence that treatment and supervision can be safely and effectively provided as outpatient or community-based treatment and supervision.

**Art. 46C.263. Court-Ordered Outpatient or Community-Based Treatment and Supervision.**

(a) The court may order an acquitted person to participate in an outpatient or community-based regimen of treatment and supervision:

- (1) as an initial matter under Article 46C.253;
- (2) on renewal of an order of commitment under Article 46C.261; or
- (3) after a period of inpatient treatment or residential care under Article 46C.262.

(b) An acquitted person may be ordered to participate in an outpatient or community-based regimen of treatment and supervision only if:

- (1) the court receives and approves an outpatient or community-based treatment plan that comprehensively provides for or community-based treatment and supervision; and

(2) the court finds that the outpatient or community-based treatment and supervision provided for by the plan will be available to and provided to the acquitted person.

(c) The order may require the person to participate in a prescribed regimen of medical, psychiatric, or psychological care or treatment, and the regimen may include treatment with psychoactive medication.

(d) The court may order that supervision of the acquitted person be provided by the appropriate community supervision and corrections department or the facility administrator of a community center that provides mental health or mental retardation services.

(e) The court may order the acquitted person to participate in a supervision program funded by the Texas Correctional Office on Offenders with Medical or Mental Impairments.

(f) An order under this article must identify the person responsible for administering an ordered regimen of outpatient or community-based treatment and supervision.

(g) In determining whether an acquitted person should be ordered to receive outpatient or community-based treatment and supervision rather than inpatient care or residential treatment, the court shall have as its primary concern the protection of society.

**Art. 46C.264. Location of Court-Ordered Outpatient or Community-Based Treatment and Supervision.** (a) The court may order the outpatient or community-based treatment and supervision to be provided in any appropriate county where the necessary resources are available.

(b) This article does not supersede any requirement under the other provisions of this subchapter to obtain the consent of a treatment and supervision provider to administer the court-ordered outpatient or community-based treatment and supervision.

**Art. 46C.265. Supervisory Responsibility for Outpatient or Community-Based Treatment and Supervision.** (a) The person responsible for administering a regimen of outpatient or community-based treatment and supervision shall:

(1) monitor the condition of the acquitted person; and

(2) determine whether the acquitted person is complying with the regimen of treatment and supervision.

(b) The person responsible for administering a regimen of outpatient or community-based treatment and supervision shall notify the court ordering that treatment and supervision and the attorney representing the state if the person:

(1) fails to comply with the regimen; and

(2) becomes likely to cause serious harm to another.



**Art. 46C.266. Modification or Revocation of Order for Outpatient or Community-Based Treatment and Supervision.** (a) The court, on its own motion or the motion of any interested person and after notice to the acquitted person and a hearing, may modify or revoke court-ordered outpatient or community-based treatment and supervision.

(b) At the hearing, the court without a jury shall determine whether the state has established clear and convincing evidence that:

(1) the acquitted person failed to comply with the regimen in a manner or under circumstances indicating the person will become likely to cause serious harm to another if the person is provided continued outpatient or community-based treatment and supervision; or

(2) the acquitted person has become likely to cause serious harm to another if provided continued outpatient or community-based treatment and supervision.

(c) On a determination under Subsection (b), the court may take any appropriate action, including:

(1) revoking court-ordered outpatient or community-based treatment and supervision and ordering the person committed for inpatient or residential care; or

(2) imposing additional or more stringent terms on continued outpatient or community-based treatment.

(d) An acquitted person who is the subject of a proceeding under this article is entitled to representation by counsel in the proceeding.

(e) The court shall set a date for a hearing under this article that is not later than the seventh day after the applicable motion was filed. The court may grant one or more continuances of the hearing on the motion of a party or of the court and for good cause shown.

**Art. 46C.267. Detention Pending Proceedings to Modify or Revoke Order for Outpatient or Community-Based Treatment and Supervision.** (a) The state or the head of the facility or other person responsible for administering a regimen of outpatient or community-based treatment and supervision may file a sworn application with the court for the detention of an acquitted person receiving court-ordered outpatient or community-based treatment and supervision. The application must state that the person meets the criteria of Article 46C.266 and provide a detailed explanation of that statement.

(b) If the court determines that the application establishes probable cause to believe the order for outpatient or community-based treatment and supervision should be revoked, the court shall issue an order to an on-duty peace officer authorizing the acquitted person to be taken into custody and brought before the court.

(c) An acquitted person taken into custody under an order of detention shall be brought before the court without unnecessary delay.

(d) When an acquitted person is brought before the court, the court shall determine whether there is probable cause to believe that the order for outpatient or community-based treatment and supervision should be revoked. On a finding that probable cause for revocation exists, the court shall order the person held in protective custody pending a determination of whether the order should be revoked.

(e) An acquitted person may be detained under an order for protective custody for a period not to exceed 72 hours, excluding Saturdays, Sundays, legal holidays, and the period prescribed by Section 574.025(b), Health and Safety Code, for an extreme emergency.

(f) This subchapter does not affect the power of a peace officer to take an acquitted person into custody under Section 573.001, Health and Safety Code.

**Art. 46C.268. Advance Discharge of Acquitted Person and Termination of Jurisdiction.** (a) An acquitted person, the head of the facility to which the acquitted person is committed, the person responsible for providing the outpatient or community-based treatment and supervision, or the state may request that the court discharge an acquitted person from inpatient commitment or outpatient or community-based treatment and supervision.

(b) Not later than the 14th day after the date of the request, the court shall hold a hearing on a request made by the head of the facility to which the acquitted person is committed or the person responsible for providing the outpatient or community-based treatment and supervision.

(c) If a request is made by an acquitted person, the court must act on the request not later than the 14th day after the date of the request. A hearing under this subsection is at the discretion of the court, except that the court shall hold a hearing if the request and any accompanying material indicate that modification of the order may be appropriate.

(d) If a request is made by an acquitted person not later than the 90th day after the date of a hearing on a previous request, the court is not required to act on the request except on the expiration of the order or on the expiration of the 90-day period following the date of the hearing on the previous request.

(e) The court shall rule on the request during or shortly after any hearing that is held and in any case not later than the 14th day after the date of the request.

(f) The court shall discharge the acquitted person from all court-ordered commitment and treatment and supervision and terminate the court's jurisdiction over the person if the court finds that the acquitted person has established by a preponderance of the evidence that:

(1) the acquitted person does not have a severe mental illness or mental retardation; or

(2) the acquitted person is not likely to cause serious harm to another because of any severe mental illness or mental retardation.

**Art. 46C.269. Termination of Court's Jurisdiction.** (a) The jurisdiction of the court over a person covered by this subchapter automatically terminates on the date when the cumulative total period of institutionalization and outpatient or community-based treatment and supervision imposed under this subchapter equals the maximum term of imprisonment provided by law for the offense of which the person was acquitted by reason of insanity.

(b) On the termination of the court's jurisdiction under this article, the person must be discharged from any inpatient treatment or residential care or outpatient or community-based treatment and supervision ordered under this subchapter.

(c) An inpatient or residential care facility to which a person has been committed under this subchapter or a person responsible for administering a regimen of outpatient or community-based treatment and supervision under this subchapter must notify the court not later than the 30th day before the court's jurisdiction over the person ends under this article.

(d) This subchapter does not affect whether a person may be ordered to receive care or treatment under Subtitle C or D, Title 7, Health and Safety Code.

**Art. 46C.270. Appeals.** (a) An acquitted person may appeal a judgment reflecting an acquittal by reason of insanity on the basis of the following:

- (1) a finding that the acquitted person committed the offense; or
- (2) a finding that the offense on which the prosecution was based involved conduct that:

- (A) caused serious bodily injury to another person;
- (B) placed another person in imminent danger of serious bodily injury;

or

(C) consisted of a threat of serious bodily injury to another person through the use of a deadly weapon.

(b) Either the acquitted person or the state may appeal from:

- (1) an Order of Commitment to Inpatient Treatment or Residential Care entered under Article 46C.256;
- (2) an Order to Receive Outpatient or Community-Based Treatment and Supervision entered under Article 46C.257 or 46C.262;
- (3) an order renewing or refusing to renew an Order for Inpatient Commitment or Outpatient or Community-Based Treatment and Supervision entered under Article 46C.261;
- (4) an order modifying or revoking an Order for Outpatient or Community-Based Treatment and Supervision entered under Article 46C.266 or refusing a request to modify or revoke that order; or

- (5) an order discharging an acquitted person under Article 46C.268 or denying a request for discharge of an acquitted person.
- (c) An appeal under this subchapter may not be considered moot solely due to the expiration of an order on which the appeal is based.

**COLLECTION AND MAINTENANCE OF DATA REGARDING PERSONS ACQUITTED BY REASON OF INSANITY.** Section 533.0095 of the Texas Health & Safety Code provides for the collection and maintenance of data concerning persons who are acquitted by reason of insanity. This statute was added as part of the 2005 re-codification of Chapter 46C, and it was the subject of minor technical amendments in 2015. It also directs the Health and Human Services Commission to provide an annual report to the legislature that both identifies NGRI acquittees and provides information about their civil commitments.

**Sec. 533.0095, Texas Health & Safety Code. Collection and Maintenance of Information Regarding Persons Found Not Guilty by Reason of Insanity.** (a) The executive commissioner by rule shall require the department to collect information and maintain current records regarding a person found not guilty of an offense by reason of insanity under Chapter 46C, Code of Criminal Procedure, who is:

(1) ordered by a court to receive inpatient mental health services under Chapter 574 or under Chapter 46C, Code of Criminal Procedure; or

(2) ordered by a court to receive outpatient or community-based treatment and supervision.

(b) Information maintained by the department under this section must include the name and address of any facility to which the person is committed, the length of the person's commitment to the facility, and any post-release outcome.

(c) The department shall file annually with the presiding officer of each house of the legislature a written report containing the name of each person described by Subsection (a), the name and address of any facility to which the person is committed, the length of the person's commitment to the facility, and any post-release outcome.

**RESTRICTIONS ON THE ADMINISTRATION OF PSYCHOACTIVE MEDICATION.** Section 576.025 of the Texas Health & Safety Code sets forth restrictions on administering psychoactive medication to a patient receiving either voluntary or involuntary mental health services who *refuses* the prescribed medication. It cross-references provisions relating to the procedures for court-ordered administration of medication which were discussed, *supra*, in Subchapter IV-A relating to competency.

**Sec. 576.025, Texas Health & Safety Code.** (a) A person may not administer a psychoactive medication to a patient receiving voluntary or involuntary mental health services who refuses the administration unless:

- (1) the patient is having a medication-related emergency;
- (2) the patient is younger than 16 years of age and the patient's parent, managing conservator, or guardian consents to the administration on behalf of the patient;
- (3) the refusing patient's representative authorized by law to consent on behalf of the patient has consented to the administration;
- (4) the administration of the medication regardless of the patient's refusal is authorized by an order issued under Section 574.106; or
- (5) the patient is receiving court-ordered mental health services authorized by an order issued under:
  - (A) Chapter 46B or 46C Code of Criminal Procedure; or
  - (B) Chapter 55, Family Code.

**MAXIMUM PERIOD OF COMMITMENT CANNOT EXCEED MAXIMUM TERM PROVIDED BY LAW FOR CRIME.** Article 46C.002 provides that a person acquitted by reason of insanity cannot be committed either to a state hospital or other inpatient or residential facility under Subchapter F for a cumulative period of time that exceeds the maximum term provided by law for the crime for which the acquitted person was tried. Upon the expiration of that maximum term, only through civil commitment proceedings can the person be further confined in a state hospital or other inpatient or residential care facility or ordered to receive outpatient or community-based treatment and supervision.

**Art. 46C.002. Maximum Period of Commitment Determined by Maximum Term for Offense.** (a) A person acquitted by reason of insanity may not be committed to a mental hospital or other inpatient or residential care facility or ordered to receive outpatient or community-based treatment and supervision under Subchapter F for a cumulative period that exceeds the maximum term provided by law for the offense for which the acquitted person was tried.  
(b) On expiration of that maximum term, the acquitted person may be further confined in a mental hospital or other inpatient or residential care facility or ordered to receive outpatient or community-based treatment and supervision only under civil commitment proceedings.

**CONCLUSION.** The provisions of the applicable law discussed above regarding the insanity defense in Texas are designed to protect both the public and the individual who has been acquitted by reason of insanity by requiring an immediate and appropriate evaluation of the individual following his or her acquittal.

As these provisions clearly delineate, a distinction is made between those acquitted defendants whose conduct did *not* involve an act, attempt, or threat of

serious bodily injury to another person, and those acquitted defendants whose conduct *did* involve such an act, attempt, or threat. Appropriate processing is provided for persons in both categories, and the goal is to provide whatever appropriate treatment is needed by the acquitted person, as determined by a careful evaluation of his or her individual condition, and at the same time to protect the general public. Amendments in 2019 granted greater discretion to the Health and Human Services Commission to make determinations about the proper facility for the NGRI acquittee's placement for evaluation and treatment. *See* Articles 46C.251(a) and 46C.260. In addition, the 2005 re-codification of old Article 46.03 into Chapter 46C provided the courts with much greater supervisory authority over the civil commitments for those few individuals who are determined to be NGRI.

Now that Chapter 46C has been in place for almost fifteen years, some further legislative fine-tuning is warranted. Although 2019 legislation has given greater discretion to the Health and Human Services Commission to determine the appropriate facility for placing an NGRI acquittee, other gaps remain. We have already noted above the unfortunate, and likely unintentional, differences in the qualifications for experts under this Chapter as opposed to those required under Chapter 46B. In addition, there are a few other gaps. Legislation was introduced during the 2013 legislative session that would have made a number of amendments to Chapter 46C. These included authorizing a treatment provider to be able to appeal trial court orders for services under the Chapter, more specific provisions regarding the responsibilities of a community-based treatment provider, a directive to courts to order an NGRI acquittee into the least restrictive treatment setting as appropriate, a provision authorizing an NGRI acquittee to waive attendance at certain hearings or to participate via videoconference or teleconference, and to prescribe certain delineated duties for an attorney representing a defendant in a criminal trial involving the insanity defense. *See* H.B. 3774, 83rd Tex. Leg., Reg. Session (2013). Although the bill included many thoughtful improvements to Chapter 46C, it was never set for a hearing during the 2013 legislative session, and nothing similar has been enacted to date.

**DIMINISHED CAPACITY.** The only affirmative defense under Texas law relating to mental illness or impaired mental capacity is the statutorily prescribed insanity defense. There is no statutory, separate affirmative defense of “diminished capacity” or “diminished responsibility.” The Texas courts, however, nonetheless permit the introduction of relevant evidence to negate the *mens rea* element of a charged crime – and this includes the ability to introduce evidence of an accused's history of mental illness. The Texas Court of Criminal Appeals so held in *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005). In *Jackson* the court relied, in part, on the trial judge's discretion in a murder case under Article 38.36(a), Texas Code of Criminal Procedure, to admit all relevant facts and circumstances showing the condition of the accused's mind at the time of the offense, subject to objections under Texas Rule of Evidence 403. *Id.*

The Court of Criminal Appeals re-affirmed its holding in *Jackson* in its 2008 decision in *Ruffin v. State*, 270 S.W.3d 586, 596-97 (Tex. Crim. App. 2008) (ruling

that the holding in *Jackson* is not limited to murder prosecutions). In *Ruffin*, the defendant was charged with first degree aggravated assault for shooting at ten police officers. *Id.* at 587. As part of his defense, “[h]e contended that he was suffering from severe delusions and believed he was shooting at Muslims, not police officers. He intended to shoot, but not at a public servant.” *Id.* The trial court disallowed testimony from a psychologist about the defendant’s mental illness and delusions. The Court of Criminal Appeals reversed the conviction, reasoning that the evidence was clearly relevant with regard to the element of *mens rea* (i.e., whether he intended to shoot at police officers “or whether, because of a mental disease and the delusions that he suffered as a result of that disease, he believed that he was shooting at Muslims or some other figment of his mind”). *Id.* at 596. For a thoughtful discussion of *Jackson*, *Ruffin*, and diminished capacity in Texas, see Patrick S. Metzger, *Death and Texas: The Unevolved Model of Decency*, 90 Neb. L. Rev. 240, 251-57 (2011).

In *Ruffin*, the Court of Criminal Appeals indicated that there could be limits on the admissibility of such mental state evidence:

Of course, such evidence may, in a particular case, be excluded under other evidentiary rules, such as Rules 403 or 703-705, if the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice, if the expert is insufficiently qualified, or if the testimony is insufficiently relevant or reliable .... Such evidence may also be excluded if it does not truly negate the required *mens rea*.

*Ruffin*, 270 S.W.3d, at 595-96. On remand in *Ruffin*, the Waco Court of Appeals conducted a Rule 403 assessment to weigh the probative versus prejudicial value of the proffered mental state testimony. *Ruffin v. State*, 2009 Tex. App. LEXIS 7485 (Tex. App. – Waco 2009) (unpublished). The court of appeals determined that the testimony of the psychologist “would place the evidence of Ruffin’s mental state in the proper context and allow the jury to properly evaluate the probative force of the evidence. The evidence goes to the heart of the main issue in the case: whether Ruffin committed the charged offense.” *Id.* at \*8.

Several cases decided since *Ruffin* are worthy of consideration and reveal that the diminished capacity theory is quite narrow. In *Mays v. State*, 318 S.W.3d 368 (2010), *cert. denied*, 562 U.S. 1274 (2011), the defendant was convicted of capital murder for the shooting death of a sheriff’s deputy. On appeal, the defendant urged that the trial court had erred in not providing a jury instruction to the effect that evidence of mental illness could be considered in determining whether the defendant had acted intentionally or knowingly. *Id.* at 380. The defendant argued that his mental illness kept him from knowingly or intentionally killing at the time he pulled the trigger. *Id.* In distinguishing the facts from *Ruffin*, the court determined that his “mental-illness evidence explained his actions and demonstrated his motive for killing the deputies – paranoia, suspicion, and distrust of the officers. It did not rebut the culpable mental state of ‘intentional or knowing’ conduct ....” *Id.* at 380-81. Instead, the testimony showed that after shooting the first victim, the defendant

“shouted, ‘I got one. Where’s the other one?’ before he shot another deputy in the head.” *Id.* at 380.

The Tyler Court of Appeals followed *Mays* in *Zorn v. State*, 315 S.W.3d 616, 625 (Tex. App. – Tyler 2010, no pet.). In *Zorn*, the defendant was convicted of manslaughter after striking a pedestrian with her car while driving with a blood alcohol level of 0.20. *Id.* at 619. Relying on *Ruffin*, the defense proffered evidence that the defendant “was paranoid, that she is ‘different’ when she is out of her comfort zone, and that she had stress in her life at the time of the wreck.” *Id.* at 624. The court reasoned that this testimony was not directly “germane to the question of whether Appellant understood the risk she created. Her testimony is not that Appellant suffered from a delusion that caused her to fail to apprehend that she was driving or intoxicated ... [nor did it] show or tend to show that Appellant could not understand the risks her actions created.” *Id.* at 625. Although her lowered ability to navigate stressful situations might have explained why she was drinking or why she was in a hurry, it did not negate the *mens rea* of recklessness “or to show that she could not appreciate the risk her conduct created.” *Id.*

In *Woods v. State*, 306 S.W.3d 905, 906 (Tex. App. – Beaumont 2010, no pet.), the defendant was convicted of aggravated assault of a public servant and for use of a motor vehicle as a deadly weapon. After clocking Woods driving 111 m.p.h. in a 65-m.p.h. zone, a trooper and several deputies pursued Woods’ vehicle. Eventually, Woods’ car struck one of the deputy’s patrol car several times and injured the deputy. *Id.* at 907. At trial, the court sustained objections to Woods’ proffer of certain evidence of mental illness. Lay evidence was allowed to show that she was on medication, that she was very depressed the day before the events in question, that she was behaving erratically, that she was unclothed at the time of the arrest, and that she behaved strangely after the collision, on the way to jail, and at her “book-in at the jail.” *Id.* at 909. The trial court, however, excluded testimony of a social worker who had seen Woods three days before, had observed that Woods was very manic and psychotic, and had recommended her hospitalization. *Id.* Although the court of appeals grudgingly acknowledged that these facts tended “to make it slightly more probable that Woods was suffering from some sort of mental illness three days earlier,” there was no “causal link between her mental illness and the conduct at the time of the offense.” *Id.* The court concluded that the excluded evidence was not as probative on the issue of intent as was the excluded psychologist’s testimony in *Ruffin*. The court reasoned that even assuming Woods was in a psychotic state when she hit the deputy’s vehicle, the excluded evidence did not explain why her psychotic state affected her ability to perceive that the victim was a public servant or that she was so delusional she was unaware she was crashing into his vehicle. *Id.*

Finally, consider *Davis v. State*, 313 S.W.3d 317 (Tex. Crim. App. – 2010), in which Davis was convicted of capital murder. At trial, the defense attempted to introduce psychiatric testimony about his substance abuse and the effect it had on him. *Id.* at 327. “He sought to use this testimony to negate the *mens rea* of the underlying offense of burglary.” *Id.* On appeal, the defense contended that the proffered psychiatric testimony would have shown that the defendant “did not



intentionally commit burglary because he believed that he had permission to be in” the victim’s apartment. *Id.* at 328. But, at trial, defense counsel had contended that the psychiatrist’s testimony would have dealt with an inability to form intent because of the effects of cocaine and crack cocaine use. Because the testimony related to effects from drug abuse, the trial court excluded the evidence. *Id.* The Court of Criminal Appeals affirmed and distinguished the case from *Ruffin*. In contrast to mental illness evidence that is potentially admissible to negate *mens rea*, the court reasoned that drug abuse evidence is governed by Texas Penal Code § 8.04(a), which precludes voluntary intoxication from being a defense. Following *Ramos v. State*, 547 S.W.2d 33, 33-34 (Tex. Crim. App. 1977), the *Davis* court determined that the voluntary intoxication statute prohibits “any attempt to use intoxication to rebut or disprove a defendant’s *mens rea*.” *Davis*, 313 S.W.3d at 328-29.

## B. JUVENILES

**INSANITY DEFENSE FOR JUVENILES.** Because different statutory provisions govern alleged criminal offenses committed by juveniles, it is appropriate to review the insanity defense applicable to juveniles, as set forth in Section 55.51 of the Texas Family Code.

The insanity defense for juveniles in Texas is not designated as an “insanity defense” in the Family Code. Instead, Section 55.51, containing the provisions for the defense, is entitled “Lack of Responsibility for Conduct as a Result of Mental Illness or Intellectual Disability,” and Section 55.51 provides not only the elements of the defense itself but also some of the procedural steps to be followed in determining the issues involved.

**Sec. 55.51. LACK OF RESPONSIBILITY FOR CONDUCT AS A RESULT OF MENTAL ILLNESS OR INTELLECTUAL DISABILITY.** (a) A child alleged by petition to have engaged in delinquent conduct or conduct indicating a need for supervision is not responsible for the conduct if at the time of the conduct, as a result of mental illness or an intellectual disability, the child lacks substantial capacity either to appreciate the wrongfulness of the child’s conduct or to conform the child’s conduct to the requirements of law.

(b) On a motion by a party in which it is alleged that a child may not be responsible as a result of mental illness or an intellectual disability for the child’s conduct, the court shall order the child to be examined under Section 51.20. The information obtained from the examinations must include expert opinion as to whether the child is not responsible for the child’s conduct as a result of mental illness or an intellectual disability.

(c) The issue of whether the child is not responsible for the child’s conduct as a result of mental illness or an intellectual disability shall be tried to the court or jury in the adjudication hearing.

(d) Lack of responsibility for conduct as a result of mental illness or an intellectual disability must be proved by a preponderance of the evidence.

(e) In its findings or verdict the court or jury must state whether the child is not responsible for the child's conduct as a result of mental illness or an intellectual disability.

(f) If the court or jury finds the child is not responsible for the child's conduct as a result of mental illness or an intellectual disability, the court shall proceed under Section 55.52.

(g) A child found to be not responsible for the child's conduct as a result of mental illness or an intellectual disability shall not be subject to proceedings under this title with respect to such conduct, other than proceedings under Section 55.52.

**DIFFERENT FROM THE INSANITY DEFENSE FOR ADULTS IN THE TEXAS PENAL CODE.** Section 55.51 of the Texas Family Code makes available to juveniles the kind of insanity defense that Texas formerly provided for adults from 1974 to 1983 (when the insanity test was "reformed" by being changed back to the old nineteenth century M'Naghten "right-wrong" test which, as described above, is narrowly based on a defendant's cognitive capacity).

Basically, the Texas formulation of the juvenile insanity defense is consistent with the insanity test developed by the American Law Institute (ALI) in its 1962 Model Penal Code, as slightly modified and updated. Thus, it differs from, and in this author's view is better than, the inadequate insanity defense for adults provided by Section 8.01 of the Texas Penal Code.

**ELEMENTS OF THE TEST.** The Family Code insanity test for juveniles in Section 55.51 provides that a child (a person who is ten years of age or older and under 17 years of age) is not responsible for delinquent conduct or conduct indicating a need for supervision if at the time of the conduct, as a result of mental illness or an intellectual disability, he or she lacks substantial capacity either (1) to appreciate the wrongfulness of his or her conduct, or (2) to conform his or her conduct to the requirements of the law.

**VOLITIONAL ELEMENT RETAINED; INTELLECTUAL DISABILITY INCLUDED.** The volitional element has been retained in the Family Code's insanity defense (unlike in the Texas Penal Code applicable to adults from which it has been eliminated).

Also, under the Family Code's insanity test for juveniles, the legislature has amended and modernized the statute's original language to incorporate the terms "mental illness" and "intellectual disability" as the bases for a finding of lack of responsibility, unlike under the Texas Penal Code's insanity test for adults, which still uses the antiquated phrase "severe mental disease or defect." In fact, the legislature again updated this section in 2015 to replace the term "mental retardation" with "intellectual disability."

This contrast between the Texas Family Code and Texas Penal Code results in an anomalous situation in our state – a juvenile defendant will enjoy the benefit of an appropriate, modern insanity test, while an adult defendant has available only the inadequate, old nineteenth century M’Naghten “right-wrong” test with all of its deficiencies discussed previously.

In addition, it appears that a juvenile offender whose case is transferred to a criminal court (under the provisions of Section 54.02 of the Texas Family Code) will lose the substantial protections of the Family Code insanity test and be relegated to the inadequate old nineteenth century M’Naghten test set forth in the Penal Code.

It is fortunate indeed, of course, that the Texas Family Code has retained the better test, but it is to be hoped that the Texas Legislature will one day restore the volitional element of that test to the Texas Penal Code, so that the adult insanity defense will again be the same one that was originally contained in the 1973 version of the Texas Penal Code. Other possible alternatives are discussed in Subchapter C of this Chapter. Moreover, even for the cognitive prong of the juvenile test, the legislature has used the word “appreciate” rather than “know,” which potentially provides for a broader degree of expert testimony regarding the individual’s cognitive abilities at the time of the acts charged.

**DISPOSITION FOLLOWING ACQUITTAL BY REASON OF INSANITY (LACK OF RESPONSIBILITY FOR CONDUCT).** As in the case of adult criminal defendants, a lawyer’s success in employing the insanity defense does not necessarily mean that the juvenile defendant will or should be immediately set free. The Family Code contains provisions for determining whether a juvenile defendant acquitted by reason of insanity (found to be not responsible for his or her conduct) is in need of psychiatric treatment.

**Sec. 55.52. PROCEEDINGS FOLLOWING FINDING OF LACK OF RESPONSIBILITY FOR CONDUCT.** (a) If the court or jury finds that a child is not responsible for the child’s conduct under Section 55.51, the court shall:

(1) if the lack of responsibility is a result of mental illness or an intellectual disability:

(A) provided that the child meets the commitment criteria under Subtitle C or D, Title 7, Health and Safety Code, order the child placed with the Department of State Health Services or the Department of Aging and Disability Services, as appropriate, for a period of not more than 90 days, which order may not specify a shorter period, for placement in a facility designated by the department; or

(B) on application by the child’s parent, guardian, or guardian ad litem, order the child placed in a private psychiatric inpatient facility for a period of not more than 90 days, which order may not specify a shorter period, but only if the placement is agreed to in writing by the administrator of the facility; or

(2) if the child's lack of responsibility is a result of mental illness and the court determines that the child may be adequately treated in an alternative setting, order the child to receive treatment on an outpatient basis for a period of not more than 90 days, which order may not specify a shorter period.

(b) If the court orders a child placed in a private psychiatric inpatient facility under Subsection (a)(1)(B), the state or a political subdivision of the state may be ordered to pay any costs associated with the child's placement, subject to an express appropriation of funds for the purpose.

**INFORMATION TO BE PROVIDED TO FACILITY; REPORT TO THE COURT.** If the juvenile court issues a placement order under Section 55.52(a), then Section 55.54(a) of the Family Code requires the juvenile court to order the probation department to send copies of any information in the possession of the department and relevant to the issue of the child's mental illness or intellectual disability, to the public or private facility or outpatient center, as appropriate.

Section 55.54(b) of the Family Code requires that not later than the 75th day after the date the court issues a placement order under Section 55.52(a), the public or private facility or outpatient center, as appropriate, must submit to the court a report that (1) describes the child's treatment provided by the facility or center, and (2) states the opinion of the director of the facility or center as to whether the child has a mental illness or an intellectual disability. The court must send a copy of the report to the prosecuting attorney and the attorney for the child.

**REPORT THAT CHILD DOES NOT HAVE A MENTAL ILLNESS OR AN INTELLECTUAL DISABILITY.** Under the provisions of Section 55.55 of the Family Code, if a report submitted under Section 55.54(b) states that a child does not have a mental illness or an intellectual disability, then the juvenile court must discharge the child unless: (1) an adjudication hearing was conducted concerning the child's conduct that included a violation of a penal law listed in Section 53.045(a) of the Family Code and a petition was approved by a grand jury under Section 53.045; and (2) the prosecuting attorney objects in writing not later than the second day after the date the attorney receives a copy of the report under Section 55.54(c).

Section 53.045 of the Family Code, referred to above, relates to so-called habitual (delinquent) felony conduct and cross-references the Texas Penal Code in listing a variety of serious offenses, including capital murder, murder, aggravated sexual assault, sexual assault, aggravated kidnapping, and aggravated robbery, among other offenses.

The language about a "petition" being "approved" by a grand jury under Section 53.045, of the Family Code, referred to above, means the procedure by which a petition alleging delinquent conduct can be referred by the prosecuting attorney to the grand jury if the petition alleges that the child engaged in delinquent conduct that constitutes habitual felony conduct or that included violation of any of the

offenses listed in Section 53.045. Under the provisions of Section 53.045(b), a grand jury may “approve” the petition by a vote of nine members of the grand jury, in the same manner that the grand jury votes on the presentment of an indictment.

The significance of “approval” of the petition is that if the court or jury finds that the child engaged in delinquent conduct that included violation of one or more of the offenses listed in Section 53.045, and if the petition was “approved” by the grand jury, then under the provisions of Section 54.04(d)(3), the court may sentence the child to commitment in the Texas Juvenile Justice Department with a possible transfer to the Texas Department of Criminal Justice for a term of up to 40 years, depending upon the seriousness of the crimes involved.

**OBJECTION OF THE PROSECUTING ATTORNEY TO DISCHARGE; HEARING.** On objection to discharge by the prosecuting attorney under Section 55.55(a), the juvenile court is required by Section 55.55(b) to hold a hearing without a jury to determine whether the child has a mental illness or an intellectual disability and to determine whether the child meets the commitment criteria for civil commitment under Subtitle C (the Mental Health Code) or Subtitle D (the Persons with an Intellectual Disability Act), Title 7, of the Texas Health & Safety Code. At the hearing, by the provisions of Section 55.55(c), the burden is on the state to prove by clear and convincing evidence that the child has a mental illness or an intellectual disability and that the child meets the appropriate criteria for civil commitment under the Texas Health & Safety Code.

Section 55.55(d) provides that if the court finds the child does not have a mental illness or an intellectual disability and finds that the child does not meet the civil commitment standards of the Health & Safety Code, then the court must discharge the child. But if the court finds that the child does have a mental illness or an intellectual disability and meets the civil commitment criteria referred to above, then under Section 55.55(e) the court must issue an appropriate commitment order.

**REPORT THAT CHILD HAS A MENTAL ILLNESS OR AN INTELLECTUAL DISABILITY; PROCEEDINGS FOR COMMITMENT.** If the report submitted under Section 55.54(b) of the Family Code states that the child has a mental illness or an intellectual disability, then the juvenile court itself must initiate commitment proceedings under the provisions of Sections 55.56 and 55.57 (as to mental illness) or Sections 55.59 and 55.60 (as to intellectual disability), or must refer the case to an appropriate court for the initiation of commitment proceedings under the provisions of Section 55.58 (as to mental illness) or Section 55.61 (as to intellectual disability).

Sections 55.56 through 55.61 contain detailed, specific provisions for conducting the commitment proceedings for mental illness or intellectual disability, as applicable, and include cross-references to the applicable commitment criteria and procedural provisions of the Texas Health & Safety Code.

Section 55.02 of the Family Code gives the juvenile court jurisdiction of commitment proceedings under the Texas Health & Safety Code for the purposes of ordering mental health or intellectual disability services for a child or for commitment of a child as provided in the Family Code. The juvenile court has the option of conducting the commitment proceedings itself, or referring the case to an appropriate court for commitment proceedings to be conducted under the applicable provisions of the Texas Health & Safety Code.

**APPEAL.** Section 56.01(c) of the Family Code provides that an appeal may be taken by or on behalf of a child from an order entered under Chapter 55 by a juvenile court committing a child to a facility for treatment of a mental illness or services for an intellectual disability. Appeals from commitment orders entered by appropriate courts other than the juvenile court may be taken under the provisions of Section 574.070 of the Texas Health & Safety Code (for cases involving mental illness) and Section 593.056 of the Texas Health & Safety Code (for cases involving intellectual disability).

**CONCLUSION.** As with the provisions of the Texas Code of Criminal Procedure regarding adult offenders who are acquitted by reason of insanity, the provisions of the Texas Family Code pertaining to the insanity defense for juvenile offenders are designed to protect both the public and the child who has been acquitted by reason of insanity. Appropriate procedures have been created to accomplish the goal of providing whatever treatment may be needed by the acquitted child, as determined by a thorough evaluation of his or her individual condition, and at the same time to protect the general public.

### C. IDEAS FOR REFORM<sup>23</sup>

The public often seems to pay little attention to criminal justice issues involving persons with mental illness until a person with mental illness is charged with committing a notorious crime. Without doubt, the 2015 trial of Eddie Ray Routh, who was found guilty of murdering famed “American Sniper” Chris Kyle, and the three Texas cases a little over a decade earlier involving Andrea Yates, Deanna Laney, and Dena Schlosser are prime examples. Indeed, more than thirty-five years after John Hinckley’s insanity acquittal following his attempt to assassinate former President Reagan, these high-profile cases should cause us to re-examine the proper formulation and moral underpinnings of the insanity defense.

What is the impact of limiting the insanity test as Texas has done for many years? Andrea Yates, who had a long family history of serious mental illness, had twice previously attempted suicide and had been treated intermittently for her own

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<sup>23</sup> Much of this section is excerpted and drawn from an article that one of this book’s original co-authors published in 2007. See Brian D. Shannon, *The Time is Right to Revise the Texas Insanity Defense: An Essay*, 39 TEX. TECH L. REV. 67 (2006-07). That article was actually an expansion on comparable material that both authors prepared and included in a similar subsection in the third and fourth editions of this book.

mental illness. During her first trial in 2002, one psychiatrist identified her as “grossly psychotic” and another as one of the most ill individuals that she had ever treated. Charles Krauthammer, *Not Guilty, Insane*, WASHINGTON POST, Mar. 15, 2002, at A23. Through the symptoms and manifestations of her psychosis, Ms. Yates apparently felt compelled to kill her children to “save” them from some delusional belief of overwhelming evil. *Id.* See also *Yates v. State*, 171 S.W.3d 215, 216-18 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d) (providing a detailed description of Yates’ psychiatric history and long battle with serious mental illness). At the conclusion of the first trial, the jury rejected Yates’ insanity plea. The court of appeals reversed that conviction, however, because the state’s expert witness, Dr. Park Dietz, had provided false testimony that Ms. Yates’ actions in killing her children were “remarkably similar” to the plot of a “Law & Order” television episode, when “there was no ‘Law & Order’ television show with such a plot.” *Id.* at 221-22. Thereafter, in July 2006 a new jury in the re-trial of Andrea Yates returned a verdict of not guilty by reason of insanity. Unlike with the first jury, which had been “death-qualified” in the initial 2002 capital murder trial, the death penalty was off the table in the re-trial. For a further analysis of the case and an excellent discussion of both preparing and cross-examining expert witnesses in insanity defense cases, see George Parnham, *Beyond the Andrea Yates Verdict: Mental Health and the Law*, 49 TEX. TECH L. REV. 847 (2017) (Mr. Parnham represented Andrea Yates in her murder trials.)

In April 2004, after the first Yates trial but before the second trial, a Tyler jury found Deanna Laney not guilty by reason of insanity after her trial that stemmed from her having bludgeoned her three sons with rocks in May 2003, killing two of the boys and causing profound brain damage to the youngest. See Lee Hancock, *Driven by a Voice*, Dallas Morning News, Apr. 18, 2004, at H1 (Laney claimed to have “beaten her three boys with stones on orders from God.”). Then, in February 2006, a jury deadlocked 10-2 on the issue of insanity after the first trial of Dena Schlosser, who had cut off the arms of her ten-month old daughter while suffering from psychotic religious ideations. Jennifer Emily, *Plano Mom's Trial is Ended; Mistrial Declared After 1 Juror Says He Won't Change Mind on Guilt*, Dallas Morning News, Feb. 26, 2006, at A1. After several months of “religious delusions and hallucinations, ... she grabbed the largest knife in the kitchen and severed Maggie’s arms at the shoulders.” Jennifer Emily & Kim Horner, *Series of Failures Doomed Baby: It Was No Secret that Dena Schlosser Suffered from Postpartum Psychosis, So Why Wasn't Maggie Saved?*, DALLAS MORNING NEWS, Mar. 19, 2006, at 1A. A second trial, before the judge and lasting approximately five minutes, ended in a verdict of not guilty by reason of insanity. Jennifer Emily, *Schlosser Case Ends with Insanity Ruling*, DALLAS MORNING NEWS, Apr. 8, 2006, at A1.

All three of these women were seriously mentally ill. Both Yates and Laney were “devout home-schooling moms” with substantial delusions about God and religion. See Lee Hancock, *supra*. Similarly, Schlosser “experienced religious delusions and hallucinations.” Jennifer Emily & Kim Horner, *supra*. Of course, the legal test for insanity in Texas is very different from and much narrower than a medical diagnosis of a serious mental illness coupled with conduct stemming from delusional beliefs.

Given that all three of these cases eventually ended in findings of not guilty by reason of insanity, the reader might ask whether there really is any need to consider changes to the Texas insanity defense. Perhaps it is indeed working as it is intended. But, consider some of the underlying circumstances in these three cases. In the Andrea Yates case, the verdict of not guilty by reason of insanity was not returned until after two trials and more than five years following the underlying tragic deaths. In the Deanna Laney case, all five of the medical experts – even the State’s witnesses – agreed that Ms. Laney met the Texas test for legal insanity. And, in between the first and second trials of Dena Schlosser, doctors discovered an inoperable brain tumor in addition to her mental illness diagnosis.

As is more typical, the jury in the 2015 trial of former Marine Eddie Ray Routh rejected Routh’s insanity defense in connection with Routh’s killing of “American Sniper” Chris Kyle and another victim. Routh had been “hospitalized multiple times for psychiatric treatment and was prescribed medication for schizophrenia. He spoke of pig-human hybrids and the apocalypse and was described by Kyle himself as ‘straight-up nuts.’” *Experts: Insanity Case as in “American Sniper” Hard to Win*, Chicago Tribune (Feb. 25, 2015), available at <http://www.chicagotribune.com/news/nationworld/chi-american-sniper-trial-20150225-story.html>. See *Routh v. State*, 516 S.W.3d 677 (Tex. App. – Eastland 2017, no pet.) (affirming conviction). Indeed, a perusal of the cases annotated under the adult insanity defense, Tex. Penal Code Ann. § 8.01, reveals a long list of cases affirming jury rejections of proffered insanity defense claims. *But see* Ryan Autullo, *In Rare Ruling, Kendrix White Found Not Guilty by Reason of Insanity*, Austin Statesman (Dec. 11, 2018), available at <https://www.statesman.com/news/20181211/in-rare-ruling-kendrex-white-found-not-guilty-by-reason-of-insanity> (discussing outcome of bench trial resulting in a verdict of NGRI for White who had fatally stabbed a University of Texas student and wounded three others).

These tragic cases involving defendants with severe psychoses have served to illustrate that the Texas insanity defense often bears no apparent relationship to modern understandings about serious mental illness. Contrary to popular myth and despite the occasional NGRI finding, the defense is rarely invoked and seldom successful when the state contests it vigorously. Indeed notwithstanding the ultimate results in the cases involving the three aforementioned Texas women, the Texas test, with its principal focus on the defendant’s knowledge of “right” versus “wrong,” is so narrow that it is often meaningless. In the “American Sniper” trial, the defendant had answered affirmatively to the following question posed by an investigator the night of his arrest: “You know what you did today is wrong, right?” Terence McCoy, *Trial of “American Sniper” Chris Kyle’s Killer: Why the Insanity Defense Failed*, Washington Post (Feb. 25, 2015), available at <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/25/trial-of-american-sniper-chris-kyles-killer-why-the-insanity-defense-failed/>.

Our law’s narrowly structured focus on an accused person’s cognitive capacity should be reconsidered and revised. Acute symptoms of an untreated serious mental illness may leave an individual’s intellectual understanding and cognitive capacity relatively unimpaired, but can still affect the person’s emotions and reason to such a



degree that the individual cannot completely or willfully comprehend the situation or control his or her behavior. Moreover, because the confines of the Texas version of the M’Naghten test can also restrict psychiatric testimony to the narrow area of a defendant’s cognitive capacity, the limited “right-wrong” test frequently makes it difficult or impossible for expert witnesses to place before the jury a complete picture of the acute symptoms of a defendant’s mental illness. As George Parnham has observed,

Unfortunately, the jury is neither given a definition of the word “know,” nor instructed on what “wrong” means. As a result, forensic experts are able to testify that the defendant may be suffering from a severe mental disease but may still “know” that what she was doing was “wrong.”

George Parnham, *supra*, 49 TEX. TECH L. REV., at 858-59.

Hence, the M’Naghten test can fail to aid the criminal justice system in identifying many defendants who are experiencing acute symptoms of serious mental illness. In this subsection, we will raise and analyze several alternative options that would – if enacted – serve to modernize the Texas insanity defense to make it better comport with modern medical science and be a more useful tool in the Texas criminal justice system. Plus, a more modern or appropriate test for insanity would provide meaningful guidance to prosecutors in ascertaining whether to pursue a conviction in a particular case or, instead, be more amenable to agreeing to an insanity finding with the corresponding likelihood of long-term, secure hospitalization to protect the public.

**REPLACING “KNOW” WITH “APPRECIATE” TO BE CONSISTENT WITH THE FEDERAL STANDARD.** There are various ways to reform the Texas insanity test. For example, the legislature could greatly improve the current law simply by amending current Section 8.01 by substituting the term “appreciate” for “know” to be more consistent with federal law.<sup>24</sup> A number of other states take this approach, as well. The term “appreciate” better reflects that the concept of cognition includes various layers of mental recognition beyond simple “knowledge.” Employment of the term has been “construed to permit inquiry into a broader range of mental functions, including perceptual distortion, errors in reasoning, and affective impairments, than were comprehended under the older focus on ‘knowing’ right from wrong.” PAUL S. APPELBAUM, *ALMOST A REVOLUTION* 168 (Oxford 1994). Similarly, the American Psychiatric Association has expressed the view that such a standard “is one which the American Psychiatric Association believes does permit relevant psychiatric testimony to be brought to bear on the great majority of cases where criminal responsibility is at issue.” American Psychiatric Association, *The Insanity Defense; Position Statement*, at 6 (Dec. 1982). The American Bar Association also recommends use of the word “appreciate.” See ABA Criminal Justice Standards on Mental Health, at 47 (Aug. 8, 2016), *available at*

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<sup>24</sup> Under federal law, it is a defense to a crime if “at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.” 18 U.S.C. § 17(a).

[https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/mental\\_health\\_standards\\_2016.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf).

Accordingly, the following sets forth a possible narrow amendment to the current Texas insanity defense for adult offenders to replace the term “know” with “appreciate”:

**Sec. 8.01. Insanity.** (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not appreciate ~~know~~ that his conduct was wrong.

Professor George Dix of the University of Texas School of Law has advocated a further variation on this approach. He not only recommends replacing “know” with “appreciate,” but also has urged that the term “wrong” “be defined as either legally wrong or morally wrong.” George E. Dix, *Texas Must Refine Insanity Standard*, SAN ANTONIO EXPRESS-NEWS, Dec. 4, 2005, at 5H. This latter revision of Texas law would serve to trump the Texas case law discussed above in which the courts have narrowly held that “wrong” for purposes of Texas law is limited to *legal* wrongs. As Professor Dix has argued, “This change would not make insanity cases like Yates’ simple ones. But it would tell juries they must not reject defendants’ claims of insanity simply because the defendants retained some minimal ability to intellectually understand that their conduct was against the law.” *Id.* Making this revision to the statute would also provide prosecutors with greater leeway in making a determination as to whether to push for a conviction or agree that a defendant is legally insane if the facts warrant. For example, prosecutors pursued a conviction for capital murder against Dena Schlosser after she cut the arms off of her infant daughter while having psychotic hallucinations relating to her mental illness. Following the court’s final determination that Dena Schlosser was not guilty by reason of insanity – after the initial trial ended in a hung jury, Professor Dix commented that it was “unfortunate that the law is not clear enough to make Ms. Schlosser’s insanity evident to the state so that a trial would not be needed.” *See* Jennifer Emily, *supra*. Professor Dix further observed, “Had the law made clear that she was insane if – as a result of her impairment – she did not appreciate that cutting off her infant’s arms was morally wrong, I don’t see how a prosecutor could have justified pressing for trial.” *Id.*

A change from “know” to “appreciate” – coupled with the Dix proposal – would represent a substantial improvement over current law. It would recognize that the concept of cognition is not limited to a person’s simple awareness of surrounding circumstances, and that the concept of wrongfulness includes a moral component. In fact, during the 2007 legislative session, a bill would have made these very changes. As passed by the House Committee, H.B. 2795 would have provided the following:

**Sec. 8.01. Insanity.** (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not appreciate ~~know~~ that the actor’s ~~his~~ conduct was legally or morally wrong.

The bill passed out of committee but died in the final days of the 2007 session when much of the focus of the House was on the challenge to the then-Speaker's leadership. During the House Criminal Jurisprudence Committee's hearing on the bill, the committee heard favorable testimony from George Parnham (Andrea Yates's attorney) and two of the jurors from Yates's trials. Similar bills have been filed in subsequent legislative sessions (up through and including 2015), but none of the bills have made it beyond the committee stage. Indeed, prior to the 2013 session, there were negotiations between key prosecutors and defense attorneys to agree to this new standard in exchange for changing the burden of proof to "clear and convincing evidence," as under the federal test, but nothing was enacted. There were no further bills filed in this regard in either 2017 or 2019.

**RESTORING A NARROW VOLITIONAL PRONG TO THE TEXAS TEST FOR ADULT OFFENDERS AND CHANGING THE TERM "KNOW" TO "APPRECIATE."** Another possibility is to restore a volitional component for adult offenders as it was established under both former law and to mirror the approach that is set forth in the Texas Family Code for juveniles. Despite the nationwide rush to abandon the volitional prong following the Hinckley verdict, some concerns were raised along the way. The ABA, for example, in its commentary to an earlier version of its Criminal Justice Mental Health Standards acknowledged that its position was not based on empirical investigation; the ABA emphasized that its preference for a narrow insanity test was not based on any findings that there had been any systematic abuse of the ALI standard. AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1 cmt. at 342 (1989). Similarly, Professor Michael Perlin has asserted that the volitional prong was abandoned "without any consideration of the empirical studies then widely available as to the impact or wisdom of such a change." He concluded that the elimination of the volitional prong would most likely exclude defendants with treatable, mental illnesses of biologic origin. MICHAEL L. PERLIN, LAW & MENTAL DISABILITY 574 (1994).

Advocacy groups that support appropriate treatment for persons with mental illness have called for restoration of a two-prong insanity standard to include a volitional component. For example, at the national level, NAMI supports the use of the two-pronged ALI test, and has advocated the following:

Standards for determining whether someone meets the criteria for insanity should be based on the current scientific knowledge about mental illness. For example, these standards should take into consideration not just the person's understanding of the crime, but also the impact that symptoms of their mental illness, such as delusions or hallucinations, may have had on their actions.

NAMI Public Policy Platform 72-73, available at [https://www.nami.org/getattachment/Learn-More/Mental-Health-Public-Policy/Public-Policy-Platform-December-2016-\(1\).pdf](https://www.nami.org/getattachment/Learn-More/Mental-Health-Public-Policy/Public-Policy-Platform-December-2016-(1).pdf), and NAMI, *Insanity Defense*, <http://www.nami.org/Learn-More/Mental-Health-Public-Policy/Insanity-Defense>. Mental Health America also supports utilization of the ALI test with its cognitive and volitional tests. See Mental Health America, Position Statement 57: In Support

of the Insanity Defense, available at <http://www.mentalhealthamerica.net/positions/insanity-defense>.

Even Professor Richard Bonnie in his influential articulation of grounds for eliminating the volitional prong, acknowledged that “[t]he volitional inquiry probably would be manageable if the insanity defense were permitted only in cases involving psychotic disorders.” Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983). The situations in Yates, Laney, Schlosser, and Routh underscore that sentiment. It is time to make the Texas insanity defense more consistent with modern medicine. Psychiatric diagnostics have improved dramatically since the era of the Hinckley trial. Today we know far more about the medical aspects and neurobiological bases of serious mental illnesses and their symptoms and treatment than thirty-five years ago. And, diagnostics are only going to improve. Future assessments and diagnoses will unquestionably incorporate neurobiological findings for the array of serious mental illnesses and major psychoses, and functional brain imaging will play an increasingly important role. Thus, the lack of a volitional component, particularly in situations in which the defendant was experiencing acute symptoms of a serious neurobiological mental illness at the time of the criminal activity, is inconsistent with and anathema to the moral foundation of an insanity defense as it pertains to criminal responsibility.

What approach should the Texas Legislature consider adopting? One possibility is simply to amend the Penal Code to track the language of the current insanity defense for juveniles set forth in the Family Code. That would result in a restoration of an ALI standard to include both a cognitive test and a volitional prong. It would also serve to use more modern terms like “mental illness” and “intellectual disability” as opposed to the current employment of the antiquated and stigmatizing language, “mental disease or defect.”

A less sweeping alternative would be to enact an approach that adds a volitional alternative, but only for persons with diagnosable serious mental illnesses. This alternative would clearly and appropriately exclude other types of situations with volitional components such as compulsive gambling or certain sexual offenses. In addition, the legislature could couple these changes with the modifications described in the foregoing subsection. Accordingly, the following sets forth a possible amendment to the current Texas insanity defense for adult offenders to add a narrowly cabined volitional prong and to replace the term “know”:

**Sec. 8.01. Insanity.** (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor,

(1) as a result of mental illness or an intellectual disability ~~severe mental disease or defect~~, did not appreciate know that the actor’s his conduct was legally or morally wrong, or

(2) lacked substantial capacity to conform the actor’s conduct with the requirements of the law because the actor was experiencing active psychotic symptoms of a serious mental illness such as schizophrenia, bipolar disorder,

schizoaffective disorder, or other major psychotic disorder diagnosed through accepted scientific criteria.

(b) The terms “mental illness” and “intellectual disability” do ~~“mental disease or defect”~~ does not include an abnormality manifested by repeated criminal or otherwise antisocial conduct.

**INFORMING JURORS.** In addition to the foregoing proposals, other revisions merit consideration. The legislature should amend Texas law to authorize the court to provide a dispositional instruction to jurors regarding the consequences of an insanity verdict. As discussed above, under Texas law the jury may not be informed of the potential consequences of a finding of not guilty by reason of insanity. Specifically, Article 46C.154 of the Texas Code of Criminal Procedure provides the following:

The court, the attorney representing the state, or the attorney for the defendant may not inform a juror or a prospective juror of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned.

Thus, Article 46C.154 prohibits the court and the attorneys from informing jurors or prospective jurors of the consequences to the defendant if they return a verdict of not guilty by reason of insanity. The ostensible purpose of this provision is to prevent the jurors, if possible, from being influenced in their deliberations by the consequences to the defendant of their decision. Although courts have held that this provision does not deny fundamental fairness to the defendant, this provision is extremely troubling. *See, e.g., Zwack v. State*, 757 S.W.2d 66, 69 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1988, pet. ref'd); *Robison v. State*, 888 S.W. 2d 473, 477 (Tex. Crim. App. 1994), *cert. denied*, 515 U.S. 1162 (1995) (citing *Zwack* and holding that there was no constitutional infirmity); *Shannon v. United States*, 512 U.S. 573, 575 (1994) (federal insanity law does not require trial court to instruct the jury on the consequences of an insanity determination). However, if we trust our juries sufficiently to make determinations as serious as making findings to support the imposition of the death penalty, why not trust them with the knowledge that secure hospitalization is the likely result when a person is found not guilty by reason of insanity?

Even though information regarding the likely consequences of an insanity acquittal is irrelevant to the central question of a person’s mental state at the time of the offense in question, guidance of this nature is necessary for a jury to make a knowledgeable and informed decision about the insanity defense. A typical juror is likely acting under the incorrect impression that a person who is acquitted on the basis of insanity will immediately walk free from the courtroom, as would a person who is otherwise acquitted. No doubt there is a lack of awareness on the part of most jurors that lengthy hospitalization is a likely result in Texas in most cases in which the insanity defense has been invoked.<sup>25</sup> [Moreover, despite a tremendous growth in

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<sup>25</sup> Although the Deanna Laney jury ultimately found Ms. Laney not guilty by reason of insanity, the jurors “wrestled for hours over some jurors’ fears that Ms. Laney ‘was gonna walk’ if they returned an insanity verdict. The jury’s foreman later said legislators could help

knowledge and awareness over the last fifteen to twenty years regarding serious mental illnesses, the range and depth of psychoses, new varieties of successful treatments, and the dangers of non-treatment, there are still many myths about mental illness and a substantial amount of stigma.] The Texas Court of Criminal Appeals has observed that “[t]he rationale *for* providing such an instruction [regarding the consequences of an insanity acquittal] is persuasive, that is, such an instruction prevents confusion by jurors and prevents jurors from finding an individual guilty where the clear weight of the evidence indicates the defendant was insane at the time of the commission of the offense.” *Robison v. State*, 888 S.W.2d at 477 (emphasis added). In *Robison* the court rejected a constitutional challenge to the statutory bar on informing jurors of the likely consequences of an insanity acquittal, determining that it was a “policy decision” that must “be left to the Legislature where they have spoken on such matters.” *Id.*

Advocacy groups have urged that the law should be changed to allow jurors to be better informed. For example, NAMI leaders have stressed the following:

NAMI believes that juries should be informed as [to] the consequences of each verdict as they apply specifically to defendants with mental illness. Jurors should understand that a verdict “not guilty by reason of mental illness” does not result in the defendant being immediately released to once again pose a danger to society.

NAMI, <http://www.nami.org/Learn-More/Mental-Health-Public-Policy/Insanity-Defense>.

The ABA’s 2016 Criminal Justice Standards on Mental Health 7-6.8 provides the following: “Upon motion of either party, the court may instruct the jury as to the dispositional consequences of a verdict of not guilty by reason of mental nonresponsibility [insanity].” *See* ABA Criminal Justice Standards on Mental Health, at 49 (Aug. 8, 2016), *supra*. In its 1989 analysis to an earlier version of the Standards, the ABA reasoned that a “court should instruct the jury as to the dispositional consequences of a verdict of not guilty by reason of mental nonresponsibility [insanity].” ABA STANDARDS, *supra* at 381, § 7-6.8. Although recognizing the arguments previously made in Texas and other jurisdictions asserting that to inform juries about the consequences of an insanity verdict “may distort the decisionmaking process” and potentially lead to compromise verdicts, the ABA has consistently taken a contrary view. The ABA expressed concern that “jurors who are not informed about dispositional consequences will speculate about the practical results of a nonresponsibility verdict and, in ignorance of reality, will convict persons who are not criminally responsible in order to protect society.” *Id.* The ABA concluded that an instruction was “the most sensible approach given the potential for prejudice otherwise,” and observed the following:

Particularly in cases in which defendants are charged with violent crimes (which is usually the case if the nonresponsibility issue is tried to a jury, as

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by allowing jurors to ‘know the consequences’ of such a verdict and giving clear definitions to help lay people understand the law.” Lee Hancock, *supra*.

opposed to a judge), juries need to be told about the effect of a finding of mental nonresponsibility [insanity] if the possibility of a serious injustice is to be avoided. The fear of compromise verdicts is misplaced. Jurors frequently are given instructions about lesser-included offenses which theoretically could as easily soften jury decisions but do not seem to do so in practice. *Id.*

Accordingly, regardless of the nature of any change to the substantive standard for insanity, the Texas Legislature could amend Article 46C.154 in the following manner:

The court ~~shall instruct the jury on, the attorney representing the state, or the attorney for the defendant may not inform a juror or a prospective juror~~ of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned.

This is a policy matter that is readily susceptible to this simple fix.

In fact, in multiple legislative sessions, reforms such as the foregoing were introduced, but to no avail. During the 2013 and 2015 legislative sessions, the following amendments to Article 46C.154 were proposed (but not enacted):

The court ~~shall provide instruction to the jury to inform the jury, the attorney representing the state, or the attorney for the defendant may not inform a juror or a prospective juror~~ of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned, in substantially the following form:

“A jury during its deliberations must never consider or speculate concerning matters relating to the consequences of its verdict. However, because of the lack of common knowledge regarding the consequences of a verdict of ‘not guilty by reason of insanity,’ I charge you that if you render this verdict there will be hearings as to the defendant’s present mental condition and, where appropriate, involuntary commitment proceedings.”

This effort should be undertaken once more in a future legislative session. There is no reason to continue the current practice of “hiding the ball.” Why should we deliberately continue to obfuscate matters for the jury? Jurors should not have to guess or speculate about the potential for treatment or whether the individual will continue to be detained in a secure hospital setting. Even though that information is admittedly irrelevant to the central question of a person’s mental state at the time of the offense in question, the information is necessary for a jury to make a knowledgeable and informed decision about the insanity defense. The typical juror is likely acting under the impression that a person who is acquitted on the basis of insanity will immediately walk free from the courtroom, as would a person who is otherwise acquitted. No doubt there is lack of awareness on the part of most jurors

that lengthy hospitalization is a likely result in Texas and elsewhere in most cases in which the insanity defense has been invoked.

**THE OREGON APPROACH.** Another intriguing formulation of the insanity defense that merits a close look is the approach that has been codified in Oregon. The Oregon insanity defense is essentially the ALI two-pronged model, with both cognitive and volitional tests, but with a significant twist. Instead of identifying the prospective verdict as “not guilty by reason of insanity,” the Oregon law styles the defense and potential jury verdict as “guilty except for insanity.” Or. Rev. Stat. § 161.295. Specifically, the Oregon statute provides:

- (1) A person is guilty except for insanity if, as a result of a qualifying mental disorder at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law.
- (2) As used in [this statute] ..., the term “qualifying mental disorder” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor does the term include any abnormality constituting solely a personality disorder.

In turn, Or. Admin. Reg. 859-010-0005, further defines “Qualifying Mental Disorder,” as follows:

- (11) “Qualifying Mental Disorder” (formerly “Mental disease or defect”) means: (a) a developmental or intellectual disability, traumatic brain injury, brain damage or other biological dysfunction that is associated with distress or disability causing symptoms or impairment in at least one important area of an individual's functioning and is defined in the current Diagnostic and Statistical Manual of Mental Disorders (DSM 5) of the American Psychiatric Association; or (b) any diagnosis of a psychiatric condition which is a significant behavioral or psychological syndrome or pattern that is associated with distress or disability causing symptoms or impairment in at least one important area of an individual's functioning and is defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM 5) of the American Psychiatric Association.
- (c) “Qualifying Mental Disorder,” described in subsections (a) and (b), excluding those conditions described in subsection (d) includes:
  - (A) A disorder in a state of remission which could with reasonable medical probability occasionally become active; or
  - (B) A disorder that could become active as a result of a non-qualifying mental disorder.
- (d) “Non-Qualifying Mental Disorder” is defined as a mental disorder in which the condition is:
  - (A) A diagnosis solely constituting the ingestion of substances (e.g., chemicals or alcohol), including but not limited to alcohol-induced psychosis; (B) An abnormality manifested solely by repeated criminal or otherwise antisocial conduct; or



(C) An abnormality constituting a personality disorder.

There are significant differences between the Oregon statute and a typical insanity defense provision (or comparable statute). The most obvious, of course, relates to nomenclature. Given the long history of misinformation and ignorance about both the insanity defense and serious mental illness, there may be a greater willingness on the part of jurors (and legislators) to embrace a verdict that includes the word “guilty” in contrast to “not guilty” for conduct that would ordinarily result in culpability. Moreover, the Oregon statute is not a “guilty but mentally ill” law, which requires incarceration as with any other criminal conviction. Instead, persons who are found “guilty except for insanity” under Oregon law are placed under the jurisdiction of the state’s Psychiatric Security Review Board (PSRB), and generally are placed at the Oregon State Hospital for treatment and later supervised, conditional release. Or. Rev. Stat. § 161.327.

Accordingly, the statutory structure in Oregon requires long-term treatment and supervision of the affected individuals through a hospital system, and not the state’s prison system. In addition, once a defendant in Oregon has been found “guilty except for insanity,” the person is placed under the jurisdiction of the state’s PSRB for hospitalization or conditional release for the maximum period for which the individual could have been sentenced upon a finding of “guilty.”

Although the Oregon statutes are somewhat extensive, the focus of the Oregon PSRB is to oversee both inpatient secure hospitalization and potential reintegration into society. As described by the PSRB’s website,

The Psychiatric Security Review Board was originally established in 1977 to supervise those individuals who successfully asserted the insanity defense to a criminal charge. Recognizing that individuals diagnosed with a persistent mental illness have different rehabilitative needs than convicted defendants, this State has invested in a robust mental health system specifically designed for this population. With public safety as its primary focus, the Board has an exceptional record of reintegrating clients into the community with a 6 year average 0.46% adult recidivism rate.

<http://www.oregon.gov/prb/pages/index.aspx>.

Over the years, other studies have similarly revealed “a low criminal recidivism rate for insanity acquittees on conditional release” under the Oregon PSRB system. See Grant H. Morris, *Placed in Purgatory: Conditional Release of Insanity Acquittes*, 39 Ariz. L. Rev. 1061, 1071 (1997) (summarizing several studies) (also observing that conditional release was revoked in Oregon “most frequently when patients did not comply with their treatment program or violated some other condition of their conditional release plan, suffered a deterioration in mental condition, or exhibited signs of dangerousness”). Dr. Paul Appelbaum observed that the Oregon PSRB “is the most extensively studied posttrial [sic] reform model” and that “the close follow-up and the ability to rehospitalize acquittees rapidly that characterize the Oregon

system appear to have had a substantial positive effect.” PAUL S. APPELBAUM, *supra*, at 186.

Fifteen years ago, and prior to the 2005 legislative session, the Texas Senate Jurisprudence Committee conducted a review of the Texas insanity defense and considered the prospect of a “guilty, but insane” verdict as a possible replacement for the current standard. Several states have enacted statutes that either replace the “insanity defense” with a GBMI verdict, or add a GBMI alternative. These GBMI statutes, *unlike* the Oregon approach, function virtually identically to “guilty” verdicts and result in incarceration. An individual found GBMI can be sentenced to life in prison or even to death. Indeed, “GBMI laws have been widely criticized by legal and psychiatric groups ranging from the American Bar Association to the American Psychiatric Association.” Lee Hancock, *By Reason of Insanity*, DALLAS MORNING NEWS, April 25, 2004, at H1. As Dr. Howard Zonona, a noted psychiatrist from Yale who was the long-time medical director of the American Academy of Psychiatry and the Law, once observed, “GBMI is a farce in that it is no different from a guilty verdict. It doesn’t offer any specific treatment. It doesn’t offer anything different from going to jail and getting whatever any other prisoner would get.” *Id.* Thus, a verdict of GBMI is not functionally any different from a “guilty” verdict and does not guarantee any psychiatric treatment. Accordingly, it is good that the Texas Senate committee rejected the use of a GBMI verdict, but unfortunate that the very different Oregon approach drew little attention.

In addition, because the Texas insanity defense is so extremely narrow, for all practical purposes we already have a variation of a GBMI verdict. That is, our defense is quite narrow and rarely successful when contested. In cases in which the issue is *aggressively contested* by the prosecution, there is an extremely limited chance of a defendant’s successfully invoking the insanity defense. There are exceptions, of course, such as in the Yates, Laney, and Schlosser cases. Yet, in those cases the facts regarding the defendant’s underlying conduct and acute symptoms of mental illness have tended to be extreme. For example, and as described above, in the Laney case all five medical experts – even those hired by the prosecution – agreed that she met the standard for legal insanity. Both the Yates and the Schlosser cases, despite their horrific facts, required two trials each. Aside from such rare cases, the typical situation in Texas in which the insanity defense is “successful” is when the prosecution makes a determination not to contest the plea or provides only token opposition.

**SUMMARY.** Regardless of the array of possible reforms discussed above, the Texas Legislature should consider enacting revisions to the Texas insanity defense for adult offenders to better comport our law with the medical understanding of the typical symptoms of untreated serious mental illness. I am not advocating a “get out of jail free” approach, but rather the use of secure hospitalization and treatment alternatives for these defendants following a criminal proceeding that involves appropriate and modern legal and medical standards.

Separate and apart from the issues surrounding the criminal justice aspects of the insanity defense, we must continue to focus on improving our mental health treatment system. Think of the tragedies, including the horrific American Sniper, Yates, Laney, and Schlosser cases, in which serious human consequences might have been avoided had there been proper, timely, adequate, and ongoing treatment for the defendants' mental illnesses. Indeed, today we *know* that serious mental illnesses are generally treatable, particularly with the array of modern and newer generation medications that are available. We should be striving to make current and appropriate treatments available for such neurobiological diseases and assure continuity of care. If we as a society continue to neglect, fail to prioritize, and underfund the needs of our at-risk citizens with serious mental illnesses, however, the criminal justice system will continue to be overburdened with persons who might have been successfully treated in the community prior to any overlap with criminality. Although the insanity defense can be and should be improved, the overall need for it can be lessened with early diagnoses and appropriate treatment for persons with serious mental illnesses.

## VI. POST-CONVICTION ISSUES

As described above, the Texas insanity defense for adults is quite narrow. Moreover, competency proceedings generally merely postpone criminal proceedings, rather than preclude them. Consequently, many thousands of Texans with serious mental illness are convicted of crimes and incarcerated. Of course, notwithstanding any criminal conviction, an offender with a mental illness will continue to have the need for proper medical and psychiatric treatment following the criminal proceedings. In addition, some convicted offenders will be stricken or diagnosed with mental illness for the first time after their criminal convictions. These offenders will also have treatment needs for their mental illness. Several different possibilities exist under Texas law with regard to mental health treatment after a conviction for an offender with mental illness.

### A. COMMUNITY SUPERVISION

Texas law allows criminal courts to place certain defendants on “community supervision.” During the 2015 legislative session, former Article 42.12, Texas Code of Criminal Procedure, which had previously governed community supervision, was recodified as Chapter 42A, Texas Code of Criminal Procedure. This was intended to be a non-substantive revision. This non-substantive revision took effect on January 1, 2017.

Following the early 2017 recodification, Article 42A.001(1) defines “community supervision” as follows:

“Community supervision” means the placement of a defendant by a court under a continuum of programs and sanctions, **with conditions imposed by the court** for a specified period during which:

- (A) criminal proceedings are **deferred without an adjudication of guilt; or**
- (B) **a sentence** of imprisonment or confinement, imprisonment and fine, or confinement and fine, **is probated and the imposition of sentence is suspended in whole or in part.**

TEX. CODE CRIM. PROC. ANN. Art. 42A.001(1) (emphasis added). Thus, the statute governs both the prospect of deferred adjudication and the possibility of probation, and it recognizes that the court may impose conditions.

In turn, certain provisions of Chapter 42A relating to community supervision have special significance for offenders with mental illness. For example, with respect to deferred adjudication, Article 42A.101(a) provides that, except for certain offenses,

if in the judge’s opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or nolo contendere, hearing the evidence, and finding that it substantiates the defendant’s guilt,

defer further proceedings without entering an adjudication of guilt and place the defendant on deferred adjudication community supervision.

TEX. CODE CRIM. PROC. ANN. Art. 42A.101(a).

More significantly, however, for offenders with mental illness, Article 42A.104(a) allows a judge to:

require any reasonable **condition** of deferred adjudication community supervision that a judge could impose on a defendant placed on community supervision for a conviction that was probated and suspended, including: ... (2) **mental health treatment under Article 42A.506.**

TEX. CODE CRIM. PROC. ANN. Art. 42A.104(a) (emphasis added). Accordingly, Chapter 42A permits a court to defer an offender's adjudication of guilt upon a guilty plea or plea of nolo contendere (no contest), yet condition the use of community supervision on the defendant's obtaining mental health treatment.

If the judge opts to grant a deferral of adjudication, the period of community supervision can be for up to ten years for most felonies and a maximum of two years for misdemeanors (although these limits can be extended in certain circumstances). Significantly, at the successful conclusion of the period of community supervision, the judge must dismiss the criminal charges. Additionally, the judge has the discretion to end the period of community supervision and dismiss the charges at an earlier time. Except in certain narrow situations (such as a later conviction for a comparable offense), ultimate dismissals resulting from deferred adjudication and the requisite community supervision are not deemed to be criminal convictions under the law. Accordingly, in most cases the criminal offender's criminal record is effectively purged upon the successful completion of all community supervision.

Thus, the potential advantages stemming from a deferred adjudication should provide a strong incentive for compliance with any specified mental health treatment conditions. Moreover, the courts should take advantage of the specific authorization contained in Article 42A.104(a), Texas Code of Criminal Procedure, allowing them to make mental health treatment a condition of deferred adjudication in appropriate cases. This statutory authority could result in diverting many offenders with mental illness into appropriate treatment settings. The possibility of mental health treatment conditions should be a key factor in plea negotiations involving offenders with mental illness, and serve as a primary tool for mental health courts and mental health public or private defenders.

Of course, under the Code of Criminal Procedure, a judge is not limited to granting community supervision only in cases in which adjudication has been deferred following a guilty plea or plea of nolo contendere. Community supervision is also available in connection with the probating or suspending of an offender's sentence after a conviction, a guilty plea, or a nolo plea for many offenses. (If a jury has convicted the offender, the jury may also recommend community supervision in

lieu of confinement in many situations.) Community supervision as part of the suspending or probating of a sentence does not clear the offender's record, unlike cases involving a deferral of adjudication, in which the offender's criminal record can be purged following successful completion of the required period of community supervision. Nonetheless, community supervision will often be a desirable alternative to incarceration. Importantly, just as in cases involving deferred adjudication, the Code of Criminal Procedure specifically grants authority to judges to require certain offenders with mental illness to submit to outpatient or inpatient mental health treatment as a condition of community supervision stemming from probated or suspended sentences. TEX. CODE CRIM. PROC. ANN. Art. 42A.506.

The statutory language authorizing mental health treatment conditions now codified in Article 42A.506, Texas Code of Criminal Procedure, was first enacted in 1993 and was modified in 1997 (to extend the section to offenders with intellectual disabilities). The statute represented a significant attempt by the Texas Legislature to divert many offenders with mental illness out of the prison and jail system. It specifically authorizes a court to impose mental health treatment conditions on the placing of a defendant on community supervision – whether as part of deferring an adjudication or probating a sentence. The statute includes the following parameters:

**Art. 42A.506. Community Supervision for Defendant with Mental Impairment.** If the judge places a defendant on community supervision and the defendant is determined to be a person with mental illness or a person with an intellectual disability, as provided by Article 16.22 or Chapter 46B or in a psychological evaluation conducted under Article 42A.253(a)(6), the judge may require the defendant **as a condition of community supervision to submit to outpatient or inpatient mental health or intellectual disability treatment** if:

- (1) the defendant's:
  - (A) mental impairment is chronic in nature; or
  - (B) ability to function independently will continue to deteriorate if the defendant does not receive mental health or intellectual disability services; and
- (2) the judge determines, in consultation with a local mental health or intellectual disability services provider, that mental health or intellectual disability services, as appropriate, are available for the defendant through:
  - (A) the Department of State Health Services or the Department of Aging and Disability Services under Section 534.053, Health and Safety Code;
  - or
  - (B) another mental health or intellectual disability services provider.

TEX. CODE CRIM. PROC. ANN. Art. 42A.506 (emphasis added).

Thus, with regard to persons with mental illness, before a court may impose a mental health treatment condition as part of placing a defendant on community supervision, in general an appropriate mental health expert must have assessed the

offender pursuant under Article 16.22 or conducted a competency evaluation under Chapter 46B (described in detail in Chapters III and IV above). And, of course, the defendant must be competent before the court may exercise its discretion to grant community supervision and imposed mental health treatment conditions. Moreover, the court must find either that the defendant's mental illness is chronic in nature or that his or her ability to function independently will continue to deteriorate without proper treatment. Finally, the statute requires the judge to take steps to ensure that appropriate outpatient or inpatient mental health services are available either through a state facility or through another provider. In turn, § 534.053(c), Texas Health & Safety Code, requires the Health and Human Services Commission, to the extent that resources are available, to "ensure that services listed in this section are available for defendants required to submit to mental health treatment under Article 17.032, 42A.104, or 42A.506, Code of Criminal Procedure." TEX. HEALTH & SAFETY CODE ANN. § 534.053(c).

If an offender has a mental illness and the criteria in Article 42A.506 are otherwise met, the court should give strong consideration to exercising its authority to condition the offender's community supervision on obtaining mental health treatment. The primary purpose behind this statute is to divert many offenders with mental illness out of the criminal justice system and to place them in more appropriate treatment settings – particularly for nonviolent crimes. The legislative intent will be thwarted if courts decline to exercise the authority granted to them.

Article 42A.506 also grants the court flexibility to require either inpatient or outpatient treatment for the offender's mental illness. Accordingly, the court should take steps to explore the appropriate treatment setting in consultation with the local mental health authority. Moreover, given that other sections of Chapter 42A authorize the court to modify the conditions placed on an offender's community supervision, the court retains the flexibility to amend the provisions of the mental health treatment conditions. For example, if the court initially mandates an inpatient treatment condition, the symptoms of the offender's mental illness could (and likely will) improve considerably in a relatively short time. Consequently, the court should then modify the earlier order to require outpatient treatment from that point forward. Treatment results will no doubt vary, and judges should recognize that these statutes afford a great deal of flexibility to tailor appropriate conditions of treatment for offenders with mental illness. In addition, the statute requires consultation with the local mental health authority. It is critical that these communications take place. Defense attorneys and prosecutors can and should help facilitate this dialogue. Moreover, counties should give strong consideration to providing payment to the mental health authority to fund the services, particularly if inadequate state funding has been made available to the mental health authority for such purposes, which is often the case. Placing these defendants on a waitlist for mental health services because of a lack of available resources is not an appropriate action for these individuals.

Chapter 42A does not authorize a court to grant community supervision for all offenses. As described above, these statutes invest judges with substantial discretion

regarding the determination of whether an offender may be placed on community supervision. Accordingly, an offender does not have a “right” to community supervision, and the granting of community supervision is not automatic. In addition, the statutes include other specific limitations on the granting of community supervision. For example, Article 42A.102 disallows a court from granting deferred adjudication community supervision for several crimes in which the offender was intoxicated. TEX. CODE CRIM. PROC. ANN. Art. 42A.102(b)(1)(A). (By way of example, these excluded offenses include driving while intoxicated with a child passenger, with a commercial license, or with a blood alcohol level over 0.15, as well as the inflicting of serious bodily injury or death during the course of an offender’s intoxicated driving, boating, or flying.) Although community supervision via deferred adjudication is not available for certain of these intoxication offenses, other provisions of Chapter 42A *permit* community supervision with respect to those offenses as part of a probated or suspended sentence in appropriate cases. Other than a handful of statutory exceptions, however, the principal limitation on a judge’s ability to grant community supervision through deferral of adjudication is the judge’s duty to determine that community supervision is in the best interest of society and the defendant. For many offenders diagnosed with mental illness, both society and the defendant could be well served by community supervision conditioned on a mental health treatment requirement.

In contrast to the narrow range of statutory exceptions to the granting of community supervision through deferred adjudication, Chapter 42A sets forth a larger array of exceptions to the employment of community supervision as part of suspending or probating an offender’s sentence. First, Article 42A.054 specifically precludes a judge from granting community supervision through the suspension or probation of a sentence for several serious crimes. These offenses include murder, capital murder, indecency with a child, human trafficking, aggravated kidnapping, sexual assault, aggravated sexual assault, aggravated robbery, and several other felonies including those in which the offender either used or exhibited a deadly weapon. TEX. CODE CRIM. PROC. ANN. Art. 42A.054. It is worth noting that this list of serious crimes set forth in Article 42A.054, for which community supervision through a probated or suspended sentence is not available, is somewhat comparable to the list of “violent offenses” delineated in Article 17.032, Texas Code of Criminal Procedure; under that provision a magistrate may not release an alleged offender with mental illness on a personal bond conditioned on mental health treatment (as described in Chapter III above). In this regard, both statutes are consistent in carving out certain offenses as a means of providing protection to the public.

In addition to the specific excluded offenses identified in Article 42A.054, Subsection (c)(1) of Article 42A.053 provides that an offender is ineligible for community supervision, as an adjunct to a suspended or probated sentence, if the sentence involved exceeds ten years of imprisonment. TEX. CODE CRIM. PROC. ANN. Art. 42A.053(c)(1). Similarly, Article 42A.056 bars a jury from recommending community supervision if the jury’s sentence exceeds ten years or for other delineated offenses. TEX. CODE CRIM. PROC. ANN. Art. 42A.056(1).



Another section of Article 42A – Subchapter L – delineates the rules for community supervision for offenders convicted of state jail felonies. Of significance for offenders with mental illness who have been convicted of state jail felonies, Article 42A.554 permits a judge to “impose any condition of community supervision on a defendant that the judge could impose on a defendant placed on supervision for” other offenses. TEX. CODE CRIM. PROC. ANN. Art. 42A.554(a). Thus, just as for other offenses discussed above, the judge may condition a state jail felony offender’s community supervision on his or her obtaining inpatient or outpatient mental health treatment (provided the offender has a mental illness). Given that community supervision is available for state jail felony offenses, judges should give strong consideration to employing the mental health treatment condition as part of the community supervision for appropriate jail felony offenders diagnosed with mental illness. The court must, of course, coordinate with the local mental health authority before doing so.

Undoubtedly, the 1993 criminal justice reform legislation now codified in Chapter 42A included a bold effort by the legislature to grapple with the difficult issues relating to criminal offenders who have serious mental illness. Now, many years later, courts should generally be willing to place these offenders on community supervision in appropriate cases, particularly given that the law has long authorized the imposition of mental health treatment conditions on the grant of community supervision in appropriate cases. Moreover, this authority dovetails nicely with more recent initiatives to establish pre-adjudication mental health courts.

**Plea Bargains and Competency.** As anyone generally familiar with the criminal justice system will acknowledge, the vast majority of criminal convictions are typically the result of bargained-for guilty pleas or pleas of *nolo contendere*. [Legislation enacted and fine-tuned a number of times since 1993 that authorizes and encourages courts to divert offenders with mental illness into inpatient or outpatient mental health treatment should enhance the prospects for negotiated pleas in such cases.]

One important matter should not be forgotten in cases involving such guilty pleas, however. As part of the general requirement that a defendant be competent to understand the proceedings against him or her, that defendant must also be sufficiently competent to comprehend the import of a guilty plea. If the alleged offender is so mentally ill as not to be currently competent, any guilty plea at that time would be suspect – even if the plea resulted in community supervision with a mental health treatment condition. Thus, for example, defense counsel, the prosecution, and the court should take steps to assure that the defendant is currently competent if an alleged offender with mental illness opts to plead guilty as part of attempting to secure community supervision through a deferred adjudication. Of course, an offender with mental illness might be sufficiently stable to be competent for purposes of understanding the import of a guilty plea, yet still have ongoing mental health treatment needs. Given that the court must generally require an examination of the offender by a mental health expert before imposing a mental health treatment condition as part of the offender’s community supervision, the

mental health expert may well have also evaluated the offender's competency. Indeed, a typical method of examination authorized by Article 42A.506 as a precursor to the imposition of any mental health treatment condition is an expert's evaluation under the provisions of the criminal competency statutes (Chapter 46B, Texas Code of Criminal Procedure, which is discussed in Chapter IV above).

## **B. PRISON OR JAIL MENTAL HEALTH CARE**

**MENTAL HEALTH TREATMENT IN PRISON OR JAIL.** If a convicted offender with mental illness is not granted or does not otherwise qualify for community supervision as described above, mental health treatment after conviction is administered through the auspices of the prison system or through programs provided by local jails.

**TEXAS PRISON SYSTEM HEALTH SERVICES POLICY MANUAL.** The Texas prison system, the official name of which is the Correctional Institutions Division of the Texas Department of Criminal Justice, provides mental health care on an inpatient basis under applicable provisions of its Correctional Managed Health Care Policy Manual.

Discussion of the numerous extensive and detailed provisions of the Manual is beyond the scope of this guide book. Even so, it is important to know that the mental health treatment administered by the Texas prison system to convicted offenders is provided consistent with the provisions of that Manual. Links to the various subsections of the Manual are available for viewing and download at [https://www.tdcj.state.tx.us/divisions/cmhc/cmhc\\_policy\\_manual.html](https://www.tdcj.state.tx.us/divisions/cmhc/cmhc_policy_manual.html).

The Manual covers the broad array of health services provided to inmates by the Texas prison system, including topics such as initial mental health appraisals and evaluations and access to the care provided through the prison system's mental health services.

The Manual also deals with the referral of offenders to specialized treatment of various kinds, including psychiatric inpatient or crisis management, and covers consent for admission to inpatient psychiatric care; informed consent to mental health treatment; the right to refuse treatment or services; release of information regarding mental health services; and forensic information pertaining to mental health services.

The treatment provisions of the Manual cover a wide variety of topics, including treatment planning, the prescribing of psychoactive drugs, psychiatric crisis management, use of restraints with mental health patients, psychiatric inpatient seclusion, compelled psychoactive medication for mental illness, and suicide prevention. Other parts of the Manual cover topics such as outpatient sheltered housing, inpatient mental health discharge processes, and various matters related to documentation of mental health services provided by the prison system.

**TEXAS CORRECTIONAL OFFICE ON OFFENDERS WITH MEDICAL OR MENTAL IMPAIRMENTS.** Chapter 614 of the Health & Safety Code pertains to the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI), once known as the Texas Council on Offenders with Mental Impairments. The powers and duties of TCOOMMI are set forth in Section 614.007, Health & Safety Code, and include responsibility for determining the status of offenders with mental impairments in the state criminal justice system, identifying needed services for offenders with mental impairments, overseeing related tasks associated with monitoring, assisting with the evaluation and implementation of various aspects of programs, disseminating information about these programs, and developing pilot projects.

As set forth in the applicable part of these statutes, Section 614.013, Health & Safety Code, gives TCOOMMI the authority and responsibility to coordinate and monitor the development and implementation of memoranda of understanding establishing the respective responsibilities of the Texas Department of Criminal Justice, the Health and Human Services Commission, the Department of Public Safety, representatives of local mental health or intellectual and developmental disability authorities, and the directors of community supervision and corrections departments. These agencies are responsible for instituting and maintaining a continuity of care and service program for offenders with mental impairments in the criminal justice system.

Some of TCOOMMI's responsibilities were discussed in several of the foregoing chapters. For example, the legislature has assigned responsibility to TCOOMMI to develop standard forms in electronic format for experts to use for competency examination reports and for assessment reports required by Article 16.22. *See* TEX. HEALTH & SAFETY CODE ANN. § 614.0032(b)-(c).

### **C. COMPLETION OF THE CRIMINAL SENTENCE**

Just as a mentally ill offender's mental health treatment needs do not end upon a conviction, treatment will likely continue to be necessary once the offender completes the requisite prison term or is granted parole. Issues, including legal challenges, have arisen concerning the need for continuity of care for offenders with mental illness upon the conclusion of their incarceration. [Similar to the need for proper discharge planning when an individual is released from a state or community mental hospital to a community-based outpatient setting, offenders with mental illness often require assistance in securing mental health treatment opportunities upon release from the prison system.] We have seen a substantial increase in activity in this area of the criminal justice system over the last three decades, and a few such initiatives are described below.

**Medically Recommended Intensive Supervision.** Section 508.146, Texas Government Code, provides the following, in part:

(a) An inmate other than an inmate who is serving a sentence of death or life without parole may be released on medically recommended intensive supervision on a date designated by a parole panel described by Subsection (e), except that an inmate with an instant offense that is an offense described in Article 42A.054, Code of Criminal Procedure, or an inmate who has a reportable conviction or adjudication under Chapter 62, Code of Criminal Procedure, may only be considered if a medical condition of terminal illness or long-term care has been diagnosed by a physician, if:

(1) the Texas Correctional Office on Offenders with Medical or Mental Impairments, in cooperation with the Correctional Managed Health Care Committee, identifies the inmate as being:

(A) a person who is elderly or terminally ill, **a person with mental illness**, an intellectual disability, or a physical disability, or a person who has a condition requiring long-term care, if the inmate is an inmate with an instant offense that is described in Article 42A.054, Code of Criminal Procedure; or

(B) in a persistent vegetative state or being a person with an organic brain syndrome with significant to total mobility impairment, if the inmate is an inmate who has a reportable conviction or adjudication under Chapter 62, Code of Criminal Procedure; and

(2) the parole panel determines that, based on the inmate's condition and a medical evaluation, the inmate does not constitute a threat to public safety; and

(3) the Texas Correctional Office on Offenders with Medical or Mental Impairments, in cooperation with the pardons and paroles division, has prepared for the inmate a medically recommended intensive supervision plan that requires the inmate to submit to electronic monitoring, places the inmate on super-intensive supervision, or otherwise ensures appropriate supervision of the inmate.

(b) An inmate may be released on medically recommended intensive supervision only if the inmate's medically recommended intensive supervision plan under Subsection (a)(3) is approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments.

(c) The parole panel shall require as a condition of release under Subsection (a) that the releasee remain under the care of a physician and in a medically suitable placement. At least once each calendar quarter, the Texas Correctional Office on Offenders with Medical or Mental Impairments shall report to the parole panel on the releasee's medical and placement status. On the basis of the report, the parole panel may modify conditions of release and impose any condition on the releasee that a panel could impose on a releasee released under Section 508.145, including a condition that the releasee reside in a halfway house or community residential facility.

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TEX. GOV'T CODE ANN. § 508.146(a)-(c) (emphasis added).

This statute, which was first enacted in 1991 and subsequently amended in part, authorizes the possibility of an early release from incarceration for many crimes for certain inmates with mental illness (or other medical conditions delineated in the act), but subject to intensive medical supervision. Prior to 2001 amendments, the statute referred to such supervised release as “special needs parole.” Before an inmate is released with the appropriate medical supervision, the parole panel must determine that the inmate with mental illness does not pose a threat to public safety. Also, the medical supervision plan must be coordinated with TCOOMMI. That Office has traditionally focused its resources toward those with the most serious medical problems.

**Parole, in General.** In addition to the intensive medical supervision provisions described above, another statute grants authority to parole panels to impose mental health treatment conditions in appropriate cases for offenders with mental illness who are being released on parole. Section 508.221, Texas Government Code, provides that “[a] parole panel **may impose as a condition of parole or mandatory supervision any condition that a court may impose on a defendant placed on community supervision under Chapter 42A**, Code of Criminal Procedure ....” As described in Subchapter VI-A above, Chapter 42A authorizes courts to impose mental health treatment conditions as part of community supervision for offenders with mental impairments. Of particular significance for offenders with mental illness who have completed their sentences and are eligible for parole, the legislature has granted those same powers to the Board of Pardons and Parole.

**Continuity of Care.** In 1993, the Texas Legislature first enacted legislation relating to the continuity of care for offenders with mental illness (as well as inmates with other special needs) upon release from the prison system. With respect to offenders with mental illness, the legislation has directed the Texas Department of Criminal Justice, the Department of Public Safety, the Health and Human Services Commission, and various community mental health centers to “adopt a memorandum of understanding that establishes their respective responsibilities to institute a continuity of care and service program for offenders with mental impairments in the criminal justice system.” TEX. HEALTH & SAFETY CODE ANN. § 614.013(a).

The legislation further requires these agencies to establish methods for (1) identifying offenders with mental impairments in the criminal justice system, (2) developing interagency policies, rules, standards, and procedures for coordinating care for such persons and exchanging information, and (3) identifying necessary services for offenders with mental impairments to return to the community successfully. In addition, a comparable statute calls for similar memoranda of understanding to be implemented by TCOOMMI, the Commission on Law Enforcement, the Department of Public Safety, and the Commission on Jail Standards. TEX. HEALTH & SAFETY CODE ANN. § 614.016. These memoranda of understanding (MOUs) have been adopted and updated over the years since initial enactment. Similarly, Health & Safety Code § 614.013 requires comparable MOUs

relating to continuity of care and services in local communities with regard to offenders with mental impairments in the criminal justice system.

TCOOMMI, which is a part of TDCJ's Reentry and Integration Division, has also operated and funded various community-based programs. One of these, which is of particular relevance to this subchapter, is a "continuity of care" program. That program is intended to identify offenders in state jails or prisons with mental illness (or other special needs) who need post-release aftercare treatment. As one of the agency's early reports to the legislature stated, "By identifying offenders who are in need of aftercare treatment prior to their release, the offenders' chances for a more successful re-entry into the community are improved. This is particularly true for offenders who have a history of non-compliance due to mental health issues." TEX. COUNCIL ON OFFENDERS WITH MENTAL IMPAIRMENTS BIENNIAL REP. 20 (2003). TCOOMMI served over 42,000 offenders with their continuity of care efforts in FY 2018. *See* 2019 TEX. CORRECTIONAL OFFICE ON OFFENDERS WITH MEDICAL OR MENTAL IMPAIRMENTS BIENNIAL REP. 7 (2019), *available at* [https://www.tdcj.texas.gov/documents/rid/TCOOMMI\\_Biennial\\_Report\\_2019.pdf](https://www.tdcj.texas.gov/documents/rid/TCOOMMI_Biennial_Report_2019.pdf).

As noted above, upon completion of a prison or jail sentence, mental health treatment conditions can be imposed as part of an offender's parole (for an offender with mental illness). TCOMMI, in turn, has endeavored to contract with local mental health authorities for continuity of care services to be provided in the communities upon release. Texas has been a leader in developing a continuity of care program specifically designed for offenders with special needs. And, the process is continually being re-examined and improved. For example, the agency revamped its procedures beginning in 2006 in an effort to reach inmates who were not showing up for post-release appointments for treatment once discharged after their prison or state jail terms have expired. This led to recommendations for better sharing of assessments and diagnostic information prior to parole. *See* TEX. CORRECTIONAL OFFICE ON OFFENDERS WITH MEDICAL AND MENTAL IMPAIRMENTS BIENNIAL REP. 16-17, 37 (2007), [http://www.tdcj.state.tx.us/documents/rid/TCOOMMI\\_Biennial\\_Report\\_2007.pdf](http://www.tdcj.state.tx.us/documents/rid/TCOOMMI_Biennial_Report_2007.pdf). Improved interagency communication and information sharing is particularly important, even critical, if an offender's parole includes mental health treatment conditions.

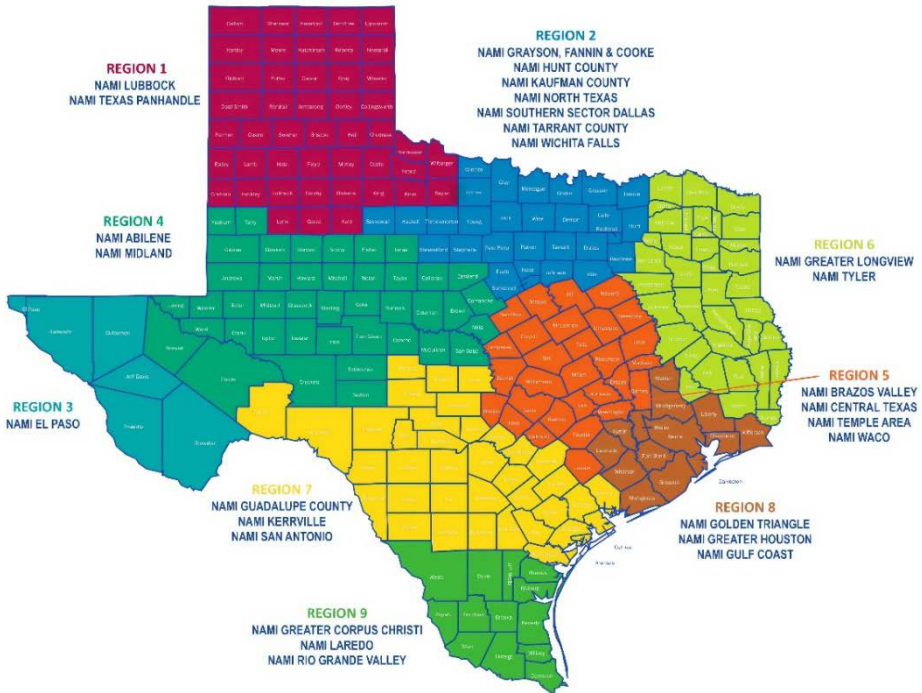
Tremendous strides have been made in recent years as TCOOMMI has enhanced its continuity of care programs and further refined the coordination efforts between agencies who provide services or have contacts with offenders with mental illness. For further background, see the following links to two more recent biennial reports by the Office:

- (1) [https://www.tdcj.texas.gov/documents/rid/TCOOMMI\\_Biennial\\_Report\\_2017.pdf](https://www.tdcj.texas.gov/documents/rid/TCOOMMI_Biennial_Report_2017.pdf), and
- (2) [https://www.tdcj.texas.gov/documents/rid/TCOOMMI\\_Biennial\\_Report\\_2019.pdf](https://www.tdcj.texas.gov/documents/rid/TCOOMMI_Biennial_Report_2019.pdf).

The state, however, should not lose the initiative and must endeavor to reduce the prospects of future criminal activity by continuing to ensure that the mental health treatment needs of former offenders with mental illness are addressed upon discharge or parole from prison or jail.



# Appendix I







### **About the Author**

Brian Shannon is a Paul W. Horn Professor at the Texas Tech University School of Law, where he has been a member of the faculty since 1988. He earned his J.D. in 1982 from the University of Texas, graduating first in his class, and received a B.S. in Mathematics from Angelo State in 1979. He formerly practiced in the Office of the General Counsel to the Secretary of the Air Force at the Pentagon, and at an Austin law firm.

Shannon serves on the Texas Judicial Commission on Mental Health, and previously served four terms on the Texas Governor's Committee on People with Disabilities and as chair of the State Bar of Texas Disability Issues Committee. He also serves on the board for StarCare Specialty Health Care System and is a past chair. Shannon also was an appointee on the Legislative Task Force that re-wrote the state's criminal competency statutes. He is a past President of the Lubbock Area Bar Association, and serves as Texas Tech's Faculty Athletics Representative to the NCAA and Big 12 Conference. In that role, he served three terms as the president of 1A FAR (an organization of the faculty athletics representatives from the across the nation). Shannon also served on the NCAA's Division I governing Council and is the immediate past Chair of the Division I Legislative Committee.

Shannon is the author or co-author of several books and numerous articles, including five previous editions of *Texas Criminal Procedure & the Offender with Mental Illness: An Analysis & Guide*.



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