



# Options for Defendants Who are Unlikely to be Restored to Competency in the Future

Nelda T. Cacciotti  
Assistant Criminal District Attorney,  
Mental Health Unit Chief  
Tarrant County

JCMH Summer Webinar Series  
August 15, 2024



- An estimated 34% of Texas inmates have a mental health disorder
- Over 1,900 defendants in Texas waiting for a state hospital bed
- Others are in limbo because they were determined not restorable
- Defendants are languishing in jail without appropriate treatment at a high cost to counties

HHSC Data (3/27/24)

[mmhpi.org/topics/policy-research/smart-justice-texas-needs-more-effective-alternatives-than-jail-to-treat-mentally-ill](https://mmhpi.org/topics/policy-research/smart-justice-texas-needs-more-effective-alternatives-than-jail-to-treat-mentally-ill)

# DIVERSION IS ALWAYS AN OPTION

CCP 16.22(c)(5) allows a court to release a defendant on bail while charges are pending and enter an order transferring defendant to an appropriate court for court-ordered outpatient MH services under Ch. 574, H&S Code

- Offense cannot involve an act, attempt or threat of SBI
- State must file an application for court-ordered outpatient services
- On State's motion, court may dismiss the charges, if court determines defendant complied with outpatient treatment
- On State's motion, court shall proceed under CCP Ch. 16 (Commitment or Discharge) or trial, if court determines defendant failed to comply with treatment

# DIVERSION IS ALWAYS AN OPTION

CCP 46B.004(e) allows a court to dismiss charges upon State's motion at any time during the proceedings under CCP 46B after the issue of defendant's incompetency is first raised

- Court may proceed under CCP 46B, Subchapter F: civil commitment, charges dismissed or discharge defendant

# SUGGESTION OF INCOMPETENCY

LOW THRESHOLD REQUIREMENT  
FOR INFORMAL INQUIRY

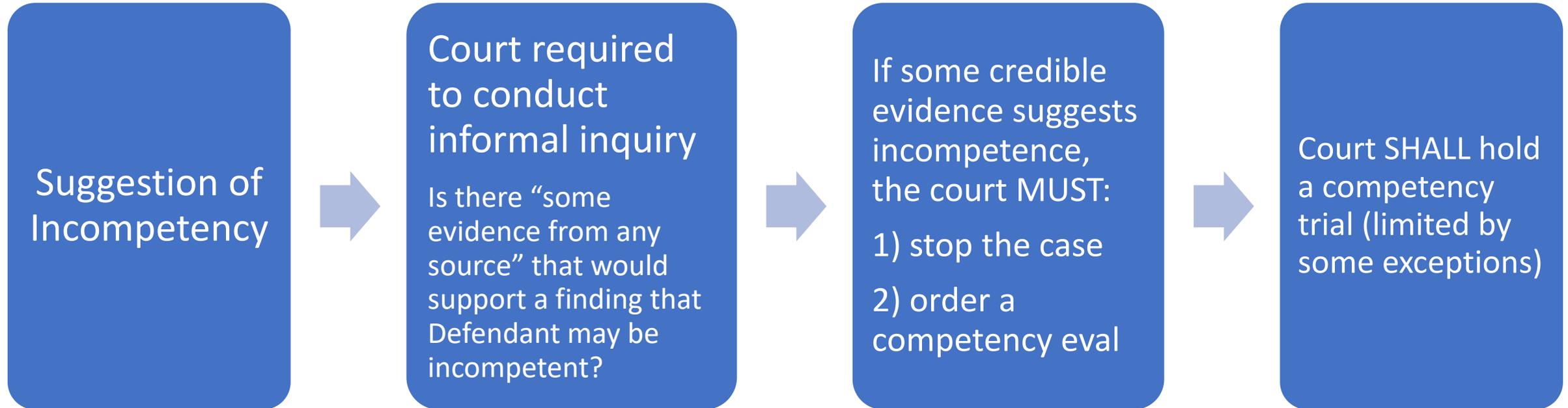


A **suggestion** of IST is the threshold requirement for an informal inquiry

- Suggestion from **any** credible source
- Further evidentiary showing **not** required
- “Bona fide doubt” by the court **not** required
- Evidence may be based on observation alone

Art. 46B.004(c-1)

# ONCE THE ISSUE IS RAISED WITH A *SUGGESTION*



# EXPERT OPINION

Incompetent and ...

- **Likely** to be restored within the foreseeable future
- **Unlikely** to be restored within the foreseeable future
- Will likely **not ever** be restored

# INCOMPETENT AND LIKELY TO BE RESTORED

Court determines duration and place of commitment pursuant to CCP 46B.071, 46B.0711, 46B.072 or 46B.073:

- Outpatient
- Jail-based
- State Hospital





WHAT IS COMPETENCY RESTORATION,  
REALLY?



# LEGAL DEFINITION

"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

CCP 46B.001(3)

# COMPETENCY RESTORATION EDUCATION: WHAT DOES IT LOOK LIKE?



Individuals appropriate for basic competency restoration services may demonstrate the following:

- Confusion about simple legal concepts
- Problems naming charges or potential penalties
- Unrealistic appraisal of outcomes
- Inability to state the correct reason why they are in jail or the hospital
- Significant psychiatric symptoms
- Behavioral issues
- Cognitive difficulties or intellectual disability

# COMPETENCY RESTORATION EDUCATION: WHAT DOES IT LOOK LIKE?



## **THE JUDGE**

- The judge is the person who oversees the trial
- They sit in front of the courtroom and wear a black robe
- They tell each person in the courtroom when it is their turn to talk
- They make sure legal rules are followed and the trial is fair
- If the jury decides you are guilty, the judge may decide your punishment, if you choose

# THE GOAL OF COMPETENCY RESTORATION

Competency  
restoration  
services are  
**NOT**  
comprehensive  
mental health  
treatment

The goal of CRS is to stabilize defendant's mental illness symptoms and provide legal education so that criminal proceedings can resume. CRS are not designed to be an avenue for ongoing treatment nor are they a substitute for comprehensive mental health treatment

INCOMPETENT AND  
UNLIKELY TO RESTORE IN THE  
FORESEEABLE FUTURE

---

Legal Options

# REASONS WHY SOMEONE MAY NOT RESTORE

- Neurocognitive disorders (dementia, TBI, etc.)
- Intellectual or developmental disability
- Severity of illness
- Treatment resistant
- Prolonged substance use
- Medical issues interfering with restoration

# STATE'S INTEREST

OFFENSE

COMMUNITY AND  
VICTIM SAFETY  
CONCERNS

EXPERT OPINION

BEHAVIORS

# INCOMPETENT AND UNLIKELY TO BE RESTORED IN THE FORESEEABLE FUTURE

Can pursue a civil commitment with charges pending under CCP 46B, Subchapter E (a “.102” or “.103” order)

- Unlikely to restore within the foreseeable future OR failed to restore during initial commitment
- Must meet civil commitment criteria in H&S Code, Ch. 574 (MI) or Ch. 593 (ID)

State considerations –

- If defendant is:
  - a community / victim safety concern,
  - potentially restorable, and
- State has an interest in prosecuting

# NOT LIKELY TO BE RESTORED

Different than not likely to be restored in the foreseeable future

- Foreseeable future is talking about the initial restoration period described in 46B.071, 46B.072, or 46B.073
- With a longer time in restoration services, the Defendant may restore

Non-restorable is an opinion that extended treatment and education in competency material will not help achieve competency

- Alternative dispositions should be considered
- More on this later...

# SUBCHAPTER E

## CIVIL COMMITMENT: CHARGES PENDING

---

- Is there evidence to support a finding of mental illness or intellectual disability?
- Criminal court proceeds with civil commitment proceedings under H&S Code Ch. 574 (MI) or Ch. 593 (IDD)
- Criminal Court maintains jurisdiction



# HEALTH & SAFETY CODE BASICS: CH. 574 (MI)

## ▶ Temporary Inpatient

- (1) the proposed patient is a person with mental illness; and
- (2) as a result of that mental illness the proposed patient:
  - (A) is likely to cause serious harm to the proposed patient;
  - (B) is likely to cause serious harm to others; or
  - (C) 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.

## ▶ Extended Inpatient

### ***Everything Above PLUS***

- (3) the proposed patient's condition is expected to continue for more than 90 days; and
- (4) the proposed patient has received court-ordered inpatient mental health services under this subtitle or under CCP 46B for at least 60 consecutive days during the preceding 12 months.

# HEALTH & SAFETY CODE BASICS: CH. 593 (ID)

## Long-term Placement:

- (1) the proposed resident is a person with intellectual disability; and
- (2) because of that intellectual disability the proposed resident:
  - (A) represents a substantial risk of physical impairment or injury to self or others; or
  - (B) is unable to provide for and is not providing for their most basic personal needs;
  - (C) cannot be adequately and appropriately habilitated in an available, less restrictive setting, and
  - (D) the facility provides habilitative services, care, training and treatment appropriate to their needs.

# HEALTH & SAFETY CODE BASICS

- Temporary Inpatient [Health & Safety Code sec. 574.034](#)
- Temporary Outpatient [Health & Safety Code sec. 574.0345](#)
- Extended Inpatient [Health & Safety Code sec. 574.035](#)
- Extended Outpatient [Health & Safety Code sec. 574.0355](#)
- Long-term Placement in a Residential Care Facility [Health & Safety Code sec. 593.052](#)

# INCOMPETENT AND TIMED OUT

---

Legal Options

# MAX PERIOD OF COMMITMENT FOR CRS CALCULATION



CCP 46B.0095

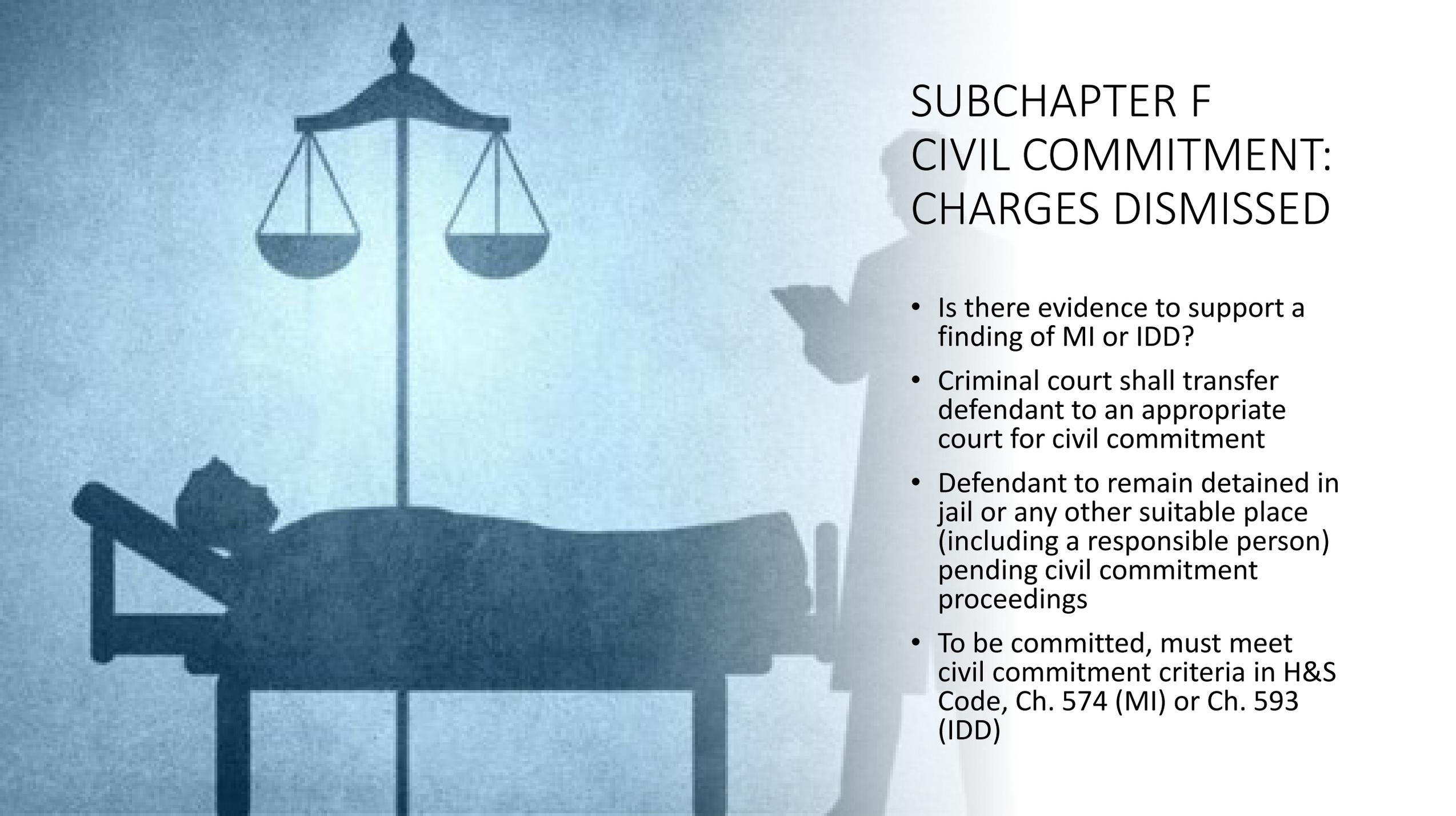
\*Does not include enhancements due to prior convictions. *Ex Parte Reinke*, 370 S.W.3d 387 (Tex. Crim. App. 2012)

# TIMING OUT

## Involvement by the Criminal Court Expires



Remember that the total time a defendant can spend in incompetency proceedings is limited. *See* section 8.7.2.5 above. Under Chapter 46B, a defendant generally may not be criminally committed (regardless of the facility or program) for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried. This maximum term includes all time the defendant was held in jail before they were determined incompetent to stand trial. **If the defendant is still in need of commitment for mental health treatment after the maximum restoration period expires, that can only happen through civil commitment proceedings.** The criminal court can no longer be involved. 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 proceedings conducted under Subtitle C (Texas Mental Health Code) or D (Persons with Intellectual Disability Act), Title 7 of the Texas Health and Safety Code, by a court with probate jurisdiction. [Tex. Code Crim. Proc. art. 46B.0095.](#)

The background features a light blue gradient. On the left, there is a dark silhouette of a person lying in a bed. In the center, a scale of justice is depicted with two pans hanging from a central beam. On the right, a dark silhouette of a person stands, holding an open book or document.

## SUBCHAPTER F CIVIL COMMITMENT: CHARGES DISMISSED

- Is there evidence to support a finding of MI or IDD?
- Criminal court shall transfer defendant to an appropriate court for civil commitment
- Defendant to remain detained in jail or any other suitable place (including a responsible person) pending civil commitment proceedings
- To be committed, must meet civil commitment criteria in H&S Code, Ch. 574 (MI) or Ch. 593 (IDD)

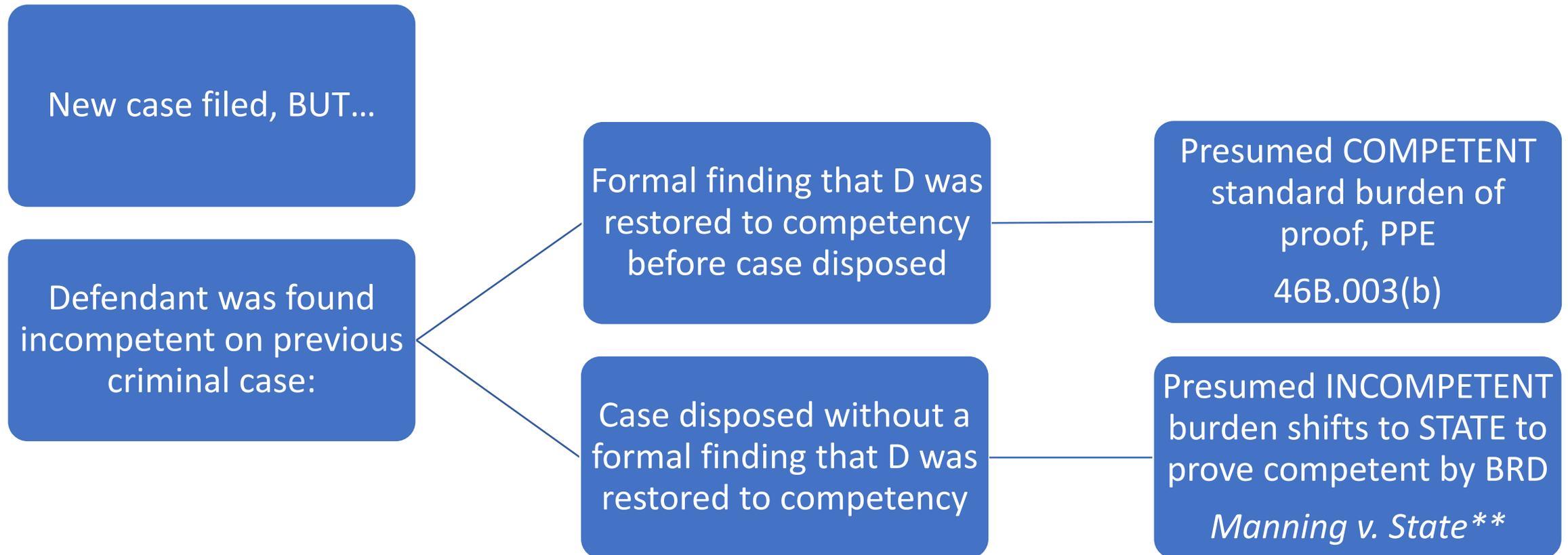
# CIVIL COMMITMENT WITH CHARGES DISMISSED

Can be pursued when defendant is:

- Timed out/likely to time out,
- not likely to restore (either w/in foreseeable future or at all),
- failed to restore during initial commitment,
- any point after issue of incompetency is first raised,
- exhibiting behaviors that indicate they meet civil commitment criteria
- State is willing to dismiss

\* Criminal court transfers jurisdiction

# COMPETENCY PRESUMPTIONS



\*\**Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987)

INCOMPETENT AND  
NOT RESTORABLE BUT ALSO  
NOT CIVILLY COMMITTABLE

---

Legal Options

# CHALLENGING POPULATION

---

High utilizers

---

Symptomatic; refractory disorder

---

Don't meet civil commitment criteria

---

Refuse to engage; not med compliant

---

Pending serious charge(s)

---

Self medicating

---

Little to no supports; homeless



# COLLABORATION IS KEY

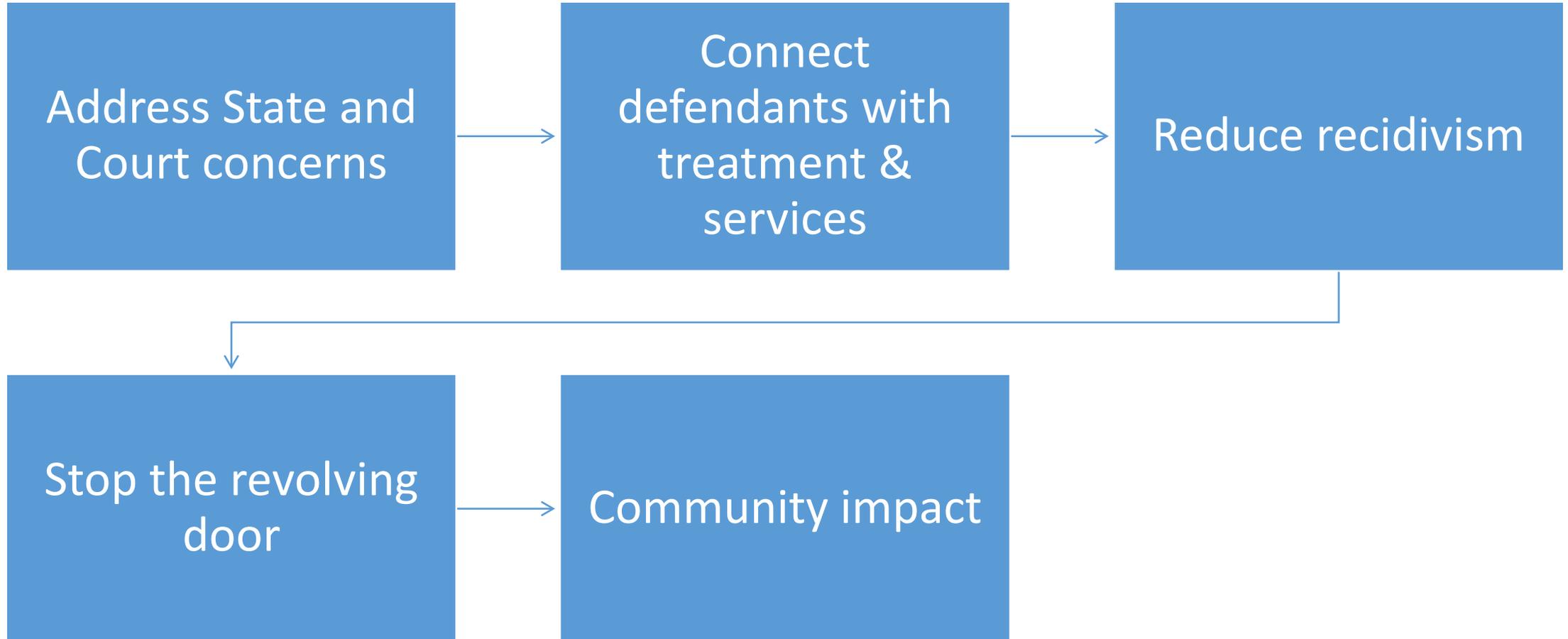
- “Staff” the cases with LMHA/LIDDA – available community MH/ID resources and services or other agencies e.g., TCOOMMI
- Communication among parties & court
- Release instructions



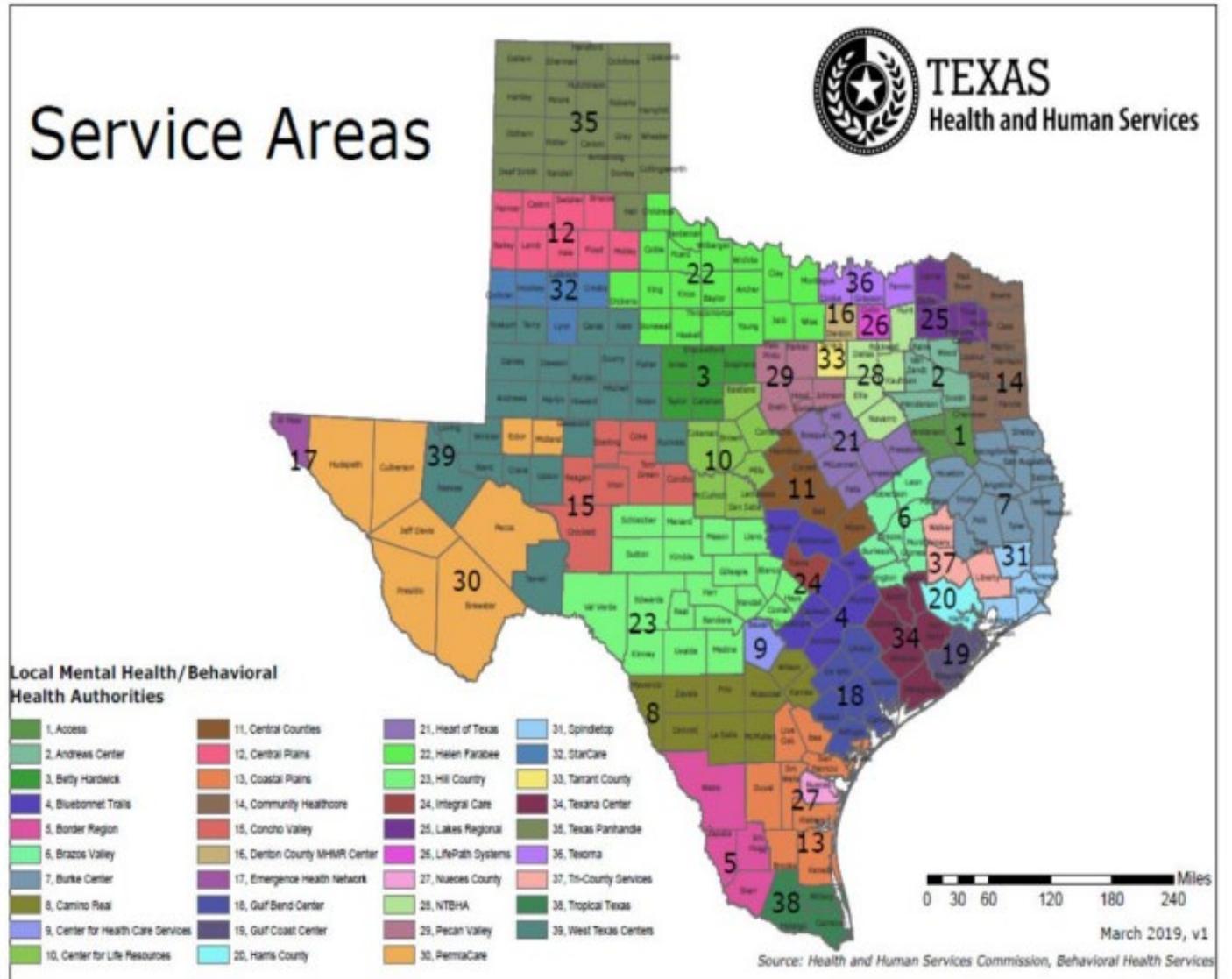
# ALTERNATE DISPOSITIONS

- Dismiss with/without a release plan
- Release on bond with treatment conditions; may dismiss later
- Transfer to a Jail Diversion Center, if available
- Long term care placement
  - Nursing home or assisted living facility
  - Memory care facility
- Warm hand-off to LMHA/LIDDA

# OBJECTIVES



# GET FAMILIAR WITH YOUR COMMUNITY- BASED RESOURCES



# QUESTIONS?

Nelda T. Cacciotti

Assist. Crim. District Attorney – Mental Health Chief

Tarrant County Criminal District Attorney's Office

817-212-7135

[ntcacciotti@tarrantcountytexas.gov](mailto:ntcacciotti@tarrantcountytexas.gov)