



# CMHLP Class 4: Competency Restoration

Kristi Taylor, J.D.

Alyse Ferguson, J.D.

**TWO-YEAR WAITLIST**



**INEFFICIENCIES**

**BELIEF THAT COMPETENCY  
RESTORATION IS TREATMENT**

**INCARCERATION OF  
PEOPLE WITH MENTAL ILLNESS**

**DEINSTITUTIONALIZATION**

# Competency Restoration in Texas

More than 1900 people are currently on Texas' forensic waitlist

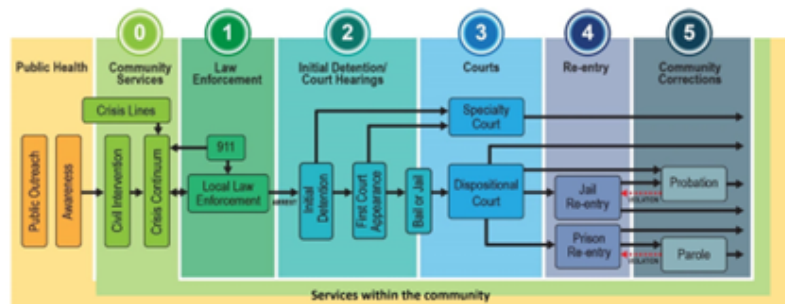
Nearly 70% State Hospital Beds in Texas are currently utilized by forensic patients

Over the past 20 years, Texas has seen a 38% increase in rates of people found incompetent to stand trial



# TEXAS COUNTY MENTAL HEALTH LAW PLAN

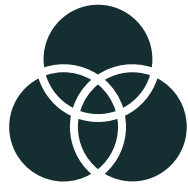
## Checklist



## Big Picture Themes from the JCMH County Mental Health Law Plan regarding Competency Restoration

- Divert when possible.
- Use Specialty Courts.
- Reserve Competency Restoration for cases where the State has a strong interest in prosecution.
- Consider Alternative to State Hospital if Competency Restoration is Necessary.
- Create and Use Efficient Court Polices for People who Receive Inpatient Competency Restoration Services.

# Eliminate the Wait: Best Practices in Competency Restoration



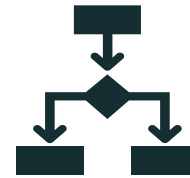
## Alternatives to Inpatient Competency Restoration Services

Outpatient Competency Restoration and Jail-based Competency Restoration services are designed for people with MI who are found incompetent to stand trial and are court-ordered to participate in competency restoration treatment. **These options should be considered in lieu of inpatient competency restoration services when possible.**



## Active Waitlist Monitoring

Jail administrators, jail medical staff, local mental health/behavioral health authorities, the courts, and state hospitals should **work together to actively monitor people on CCP 46B commitments.**



## Court Policies and Procedures

**Efficient court policies** such as a single point-of-contact between the court and the state hospital; an efficient process for communicating between courts and state hospitals; coordination for medication



## Education and Awareness

Competency evaluation orders are often tied to a **well-intended, but inaccurate, understanding of competency restoration services.** Promoting education of CR and the IST process can help ensure that all Texans receive care at the right time and place, and that CR is reserved for only appropriate cases.

# Goals of Eliminate the Wait

## CHALLENGES

People with MH and/or IDD are arrested when diversion is appropriate and possible.

Belief that competency restoration is treatment, however, it is often just stabilization and rote memorization of legal procedures.

Inefficiencies and delays in the evaluation and restoration of individuals.

## SOLUTIONS

Develop a state action plan and legislative proposals.

Develop tailored resources and provide targeted TA to communities across Texas.

Enhance accountability and create standard processes across the continuum of stakeholders.



# Criminal Competency

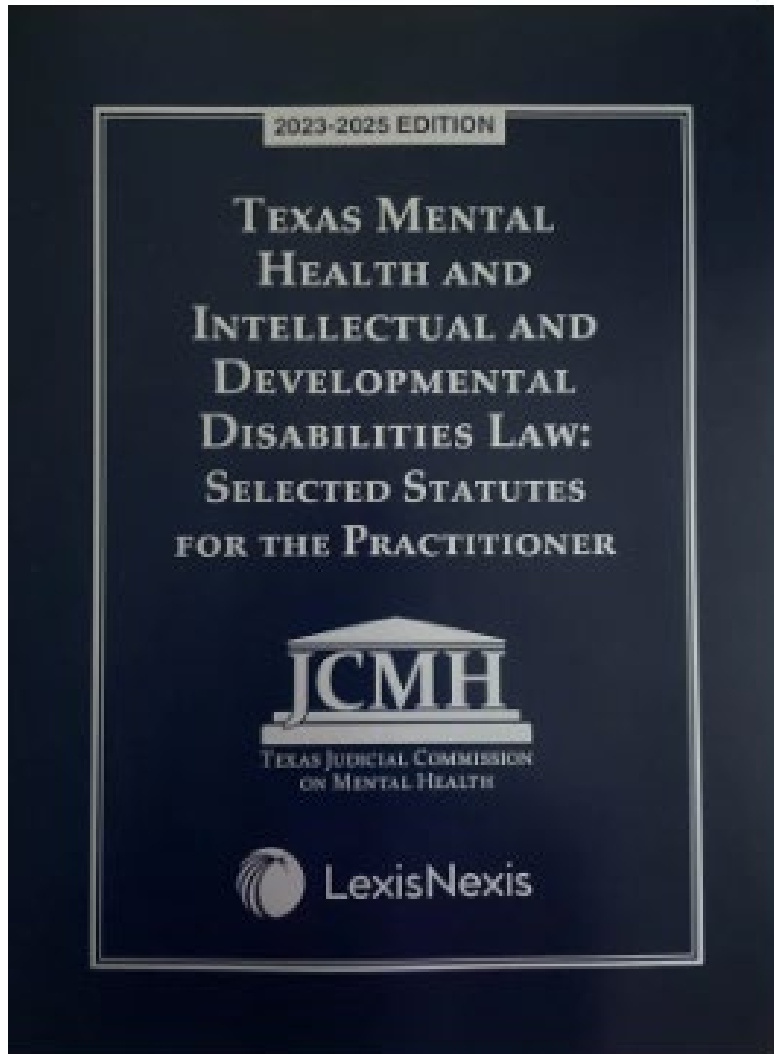
## The Dusky Standard & CCP Ch. 46B

Defendant must have present ability to consult with attorney,

AND

Defendant must have a rational and factual understanding of the proceedings





## Competency Restoration Law in Texas

Under Texas CCP Chapter 46B, the court must *stay* an individual's criminal proceeding if the court determines there is evidence to support a finding of incompetency to stand trial -- that the person is not able to consult with their attorney with a reasonable degree of rational understanding and lacks a rational and factual understanding of the legal proceedings (46B – incompetency).



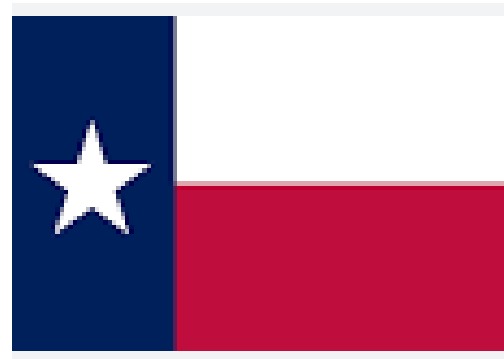
# Competency Restoration Process

- Criminal Charge (Felony or Misdemeanor Punishable by Confinement)
- Competency Issues Raised by Any Party or Court Suggestion
- Informal Inquiry by the Court
- Examination of Defendant
- Findings:
  - ❖ Competent to Stand Trial
  - ❖ Incompetent to Stand Trial, Restorable in the Foreseeable Future
  - ❖ Incompetent to Stand Trial, Not Restorable in the Foreseeable Future

# Texas Legislative History of CCP 46B

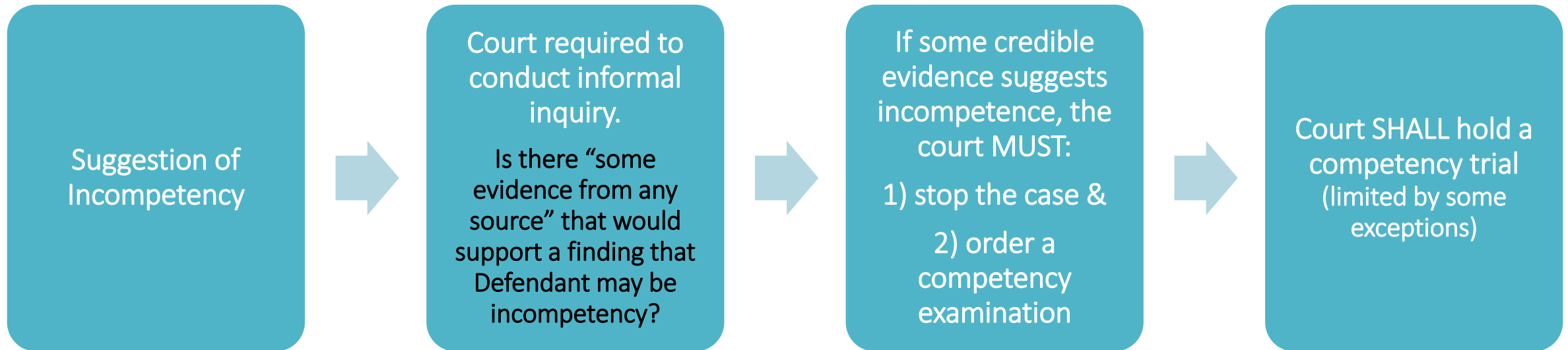
In 2003, there was a very intentional lowering of the threshold, to a *suggestion*, from the overly restrictive “bona fide doubt” approach, which was far too limiting and inconsistently applied.

The language used in CCP 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.



# Once the issue is raised with a *suggestion* . . .

*Tex. Code Crim. Pro. art. 46B.004 & 46B.005*



**the law is set up to move forward along the competency route.**

# Competency Evaluation Should be Reserved for Cases where the State has a Strong Interest in Prosecution

- Do our judges reserve CR for cases the State has a strong interest in prosecuting?
- Does our county have open collaboration among partners about the common misunderstandings about CR?
- Does my county educate on when treatment instead of CRS may be effective?
- Does my county have a process to provide appropriate MH services and a treatment plan in lieu of CRS?

# Future Legislative Proposals

When a defendant is found IST and is charged with a with a class B misdemeanor or a nonviolent misdemeanor and has not been convicted in the previous two years of an offense that resulted in bodily injury to another person, then the default procedure would be to order outpatient competency restoration (OCR) services.

If there is no OCR available, either because the community does not have OCR or the defendant cannot be placed in an OCR program within 14 days of the Judge's order, then the matter would be set for a referral to civil commitment under Code of Criminal Procedure 46B subchapter F—*Civil Commitment Charges Dismissed*.

# Different Strategies for Different People

Start with the person with mental illness or IDD.  
What is the least-restrictive, appropriate setting?



**1. Some people do not need a locked facility.**



**2. Others may initially need a locked facility but might be able to stabilize in custody.**



**3. Some people will need a locked facility throughout their case.**

# The Court has a Duty to Determine if the Examiner is Qualified

Appointment of attorney prior to evaluation  
Psychologists or Psychiatrists who are:

- Board certified in forensics, or
- 24 hours of specialized training/8 of these in the last 12 months
- Pitfalls – *Cannot be the* treating doctor



# If Examiner Finds the Defendant Incompetent to Proceed

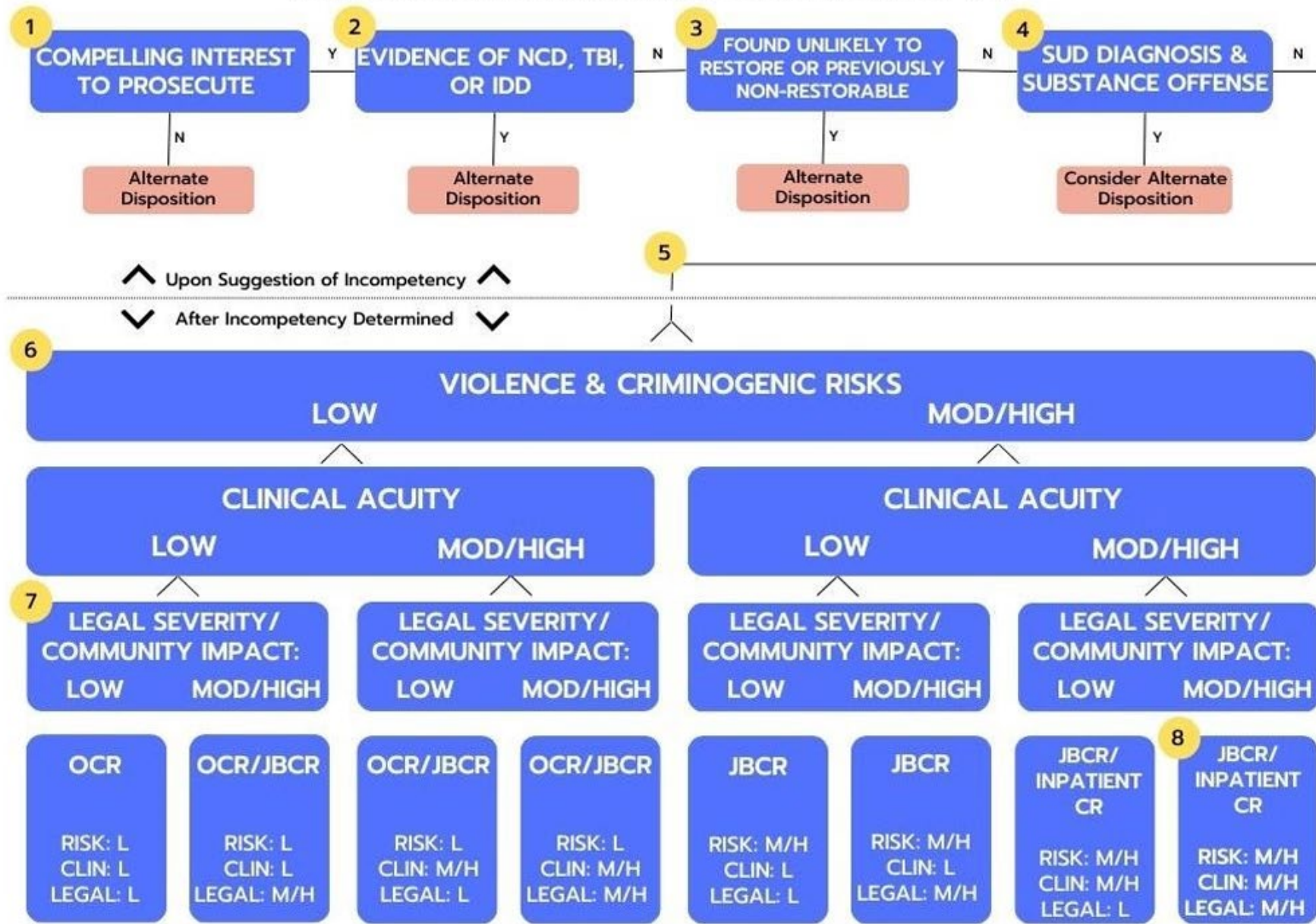
## Judges Should Ensure that the Competency Evaluation Includes:

- 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 on the factors listed in the Areas of Competency set forth above;
- An estimate of the period needed to restore the defendant's competency;
- Whether the defendant is likely to be restored to competency in the period permitted under Subchapter D of Chapter 46B, Texas Code of Criminal Procedure, including any possible 60-day extension; and
- Prospective treatment options, if any, appropriate for the defendant.

# Best Practice: Consider Alternatives to State Hospital if CR is Necessary

- Does my county educate partners that CRS are not comprehensive MH treatment, but rather minimal treatment and mostly legal education?
- Does my county have a policy regarding CRS for misdemeanor cases?
- Do we consider treatment & diversion alternatives first?
- Are we using CR as a last resort when alternatives are unavailable or inappropriate?

## Appendix B. Competency Restoration Decision-Tree



# Best Practice: Consider Alternatives to State Hospital if CR is Necessary

- Do our judges actively consider OCR or JBCR instead of inpatient CR?
- Are OCR/JBCR available locally?
- What can I do to create one or both locally?
- Can we use nearby OCR/JBCR?
- Is education available on when OCR/JBCR is appropriate?
- Is the contact information for an OCR/JBCR consultation readily accessible?

# Outpatient Competency Restoration

Inpatient default (*strict criteria + resources*)

46B.072

Subject to conditions reasonably related to ensuring public safety and the effectiveness of the defendant's treatment

if the court determines that:

- a defendant is **not a danger to others**, and
- may be safely treated on an outpatient basis** and
- an appropriate outpatient competency restoration program is available**

Then the court may release a felony / shall release class A misd, if:

the court receives and approves a **comprehensive plan** that:

- provides for the treatment of the defendant for purposes of competency restoration; and
- 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.



## Benefits of Outpatient Competency Restoration

- Cost is significantly less than the state forensic hospitals
- Potential for shorter stays
- Frees up space on the waitlist for forensic hospital beds, and can help with civil commitment bed availability

# Best Practice: Monitor the Waitlist

Upon indication of restoration, have I approved funding for a re-evaluation to see if the person is still incompetent?

Does my county have regular status meetings for all 46B cases?

Does the meeting explore alternatives or diversions for each person as they await transport to SH?

Does the meeting provide status updates for people currently receiving CRS at the SH or other location?



# Best Practice: Use Efficient Court Policies Related to Competency Restoration

- Is there one point-of-contact, via email, between the Court and the SH?
- Does my county send an annual letter to the SH notifying them of the point-of-contact person and their information?
- Have we established an efficient email process for communication with the SH?
- Do I consult with my LMHA if I am having trouble communicating with the SH?

# Best Practice: Efficient Court Policies Related to Competency Restoration



Does my Court coordinate with the probate court to have med proceedings and start med orders immediately while the person awaits transport to SH?



If the person stabilizes on meds, have I ordered a re-eval or check for evidence of immediate restoration under 46B.0755?



Do I schedule status conferences while the person is at the SH?



Do I urge the Defense and Prosecutor to keep working on the case while the person is at the SH?

# Best Practice: Use Efficient Court Processes Related to Competency Restoration

- Do I coordinate bench warrants and transport of multiple persons to and from the SH?
- Do I set cases quickly upon the person's return from SH?
- Does my court set cases preferentially when a person has been restored and returned to my county?
- Is my policy of preferential settings written and available for lawyers to know and abide by the procedures?

	<b>Felonies</b>	<b>Class A</b>	<b>Class B</b>	<b>Class C</b>
<b>Inpatient</b>	<b>120 days</b> + ONE possible 60-day extension	<b>60 days</b> + ONE possible 60-day extension	<b>60 days</b> + ONE possible 60-day extension	<b>Not Allowed</b>
<b>Jail-based (JBCR)</b>	<b>120 days</b> + ONE possible 60-day extension	<b>60 days</b> + ONE possible 60-day extension	<b>60 days</b> + ONE possible 60-day extension	<b>Not Allowed</b>
<b>Outpatient (OCR)</b>	<b>120 days</b> + ONE possible 60-day extension	<b>120 days</b> + ONE possible 60-day extension	<b>60 days</b> + ONE possible 60-day extension	<b>Not Allowed</b>

Best Practice:  
**Know the  
Time Frames**

Have

Have a system for tracking the days!

Know

Know the consequences for action & next steps if the defendant is not restored within the maximum time frames

Be  
aware

Be aware of the possibility of “timing out”

Best Practice:  
**Know the  
Time Frames**

# Priority of Competency Cases

Art. 32A.01, Code of Crim. Proc.,

Priority over other criminal or civil matters to criminal trials for defendants who have been restored.

1st

- Trial of a Criminal Action where an alleged victim is younger than 14

2nd

- Trial where defendant has been determined to be restored to competency under 46B.084

3rd

- All Criminal Trials

# What if the Defendant is Unrestored?

Subchapter E – charges remain pending

46B.102 – civil commitment/mental illness

Required application of MH Code by criminal court

Temporary (i.e. 45 –or 90– days)

Extended (up to 1 year)



# Court-ordered Medication

Convolutated statutes/processes

The Texas two-step:

1) First, H&S Code 574.106

Under a court with mental-health jurisdiction

2) Second, in the criminal court using 46B.086

46B.086 applies to an individual, who, after a hearing held under Section 574.106, Health and Safety Code, if applicable, has been found NOT to meet the criteria prescribed by Sections 574.106(a) and (a-1), Health and Safety Code, for court-ordered administration of psychoactive medications.



# Two situations to use COMs

## Under Civil Commitment

Client is under a court order to receive inpatient MH services; or

Is in custody awaiting trial in a criminal proceeding and was ordered to receive inpatient MH services in the 6 months preceding a hearing under this code.(CCP 46B)

Health and Safety Code 574.106 (MH) or 592.156 (IDD)



## Under 46B

D has been found incompetent; and

D is either:

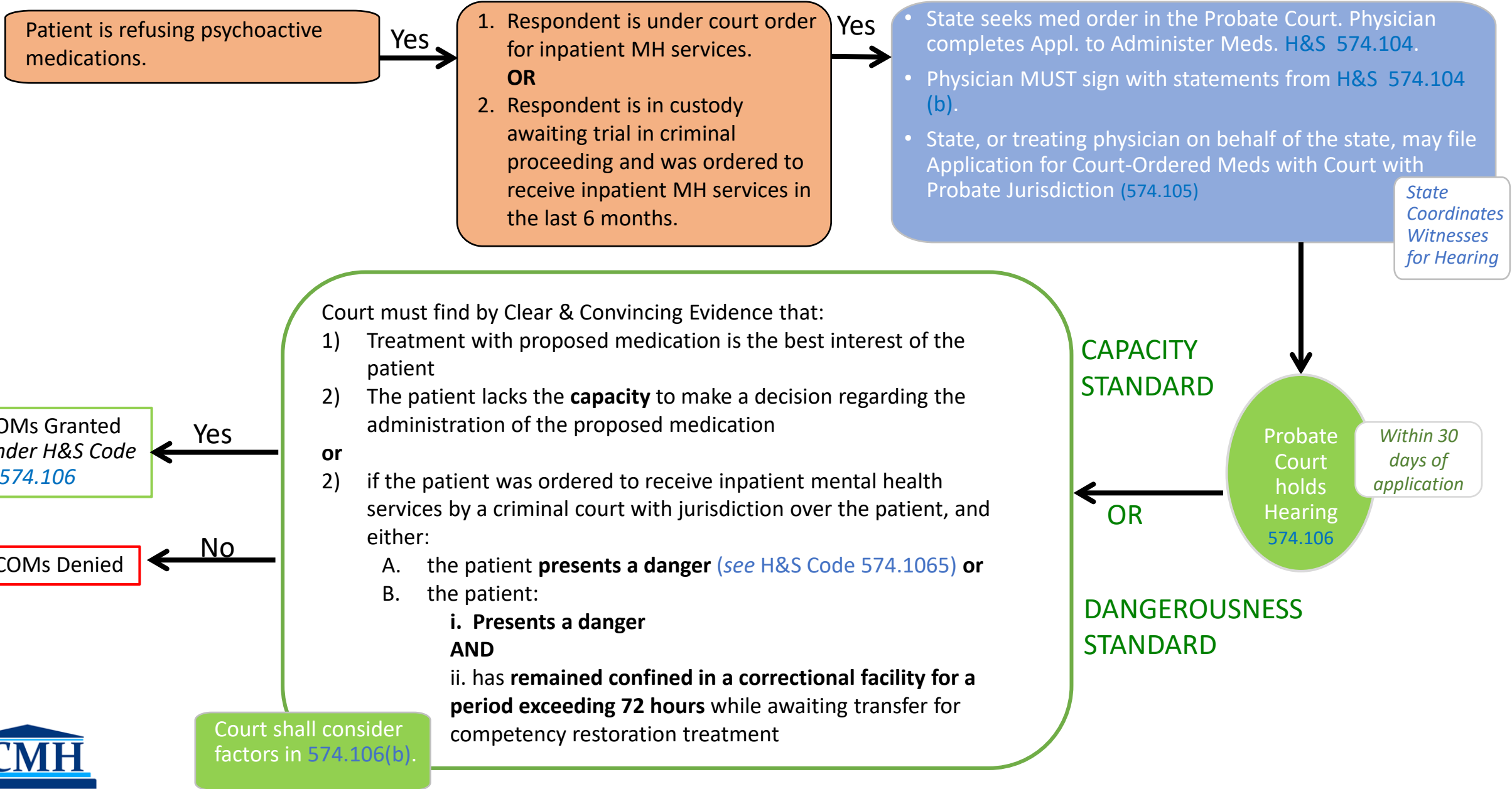
- a. In jail waiting to go to Competency Restoration Services (CRS) (inpatient, residential, or OCR);
- b. Committed to inpatient, residential, or JBCR for CRS;
- c. Out on bond for OCR; or
- d. In jail after returning from CRS.

Psychoactive meds required by Doctor or D's continuity of care plan.

D refusing to take meds.

CCP 46B.086

# Civil Court-ordered Medication (COM) Process



# 46B Defendant: Court-ordered Medication (COM) Process

1. D found incompetent; and
2. D is either:
  - In jail waiting to go to Competency Restoration Services (CRS) (inpatient, residential, or outpatient);
  - Committed to inpatient, residential, or JBCR for CRS;
  - Out on bond for OCR; or
  - In jail after returning from CRS.
3. Psychoactive meds required by Dr. or D's continuity of care plan.
4. D refusing to take meds.

- State must first seek med order in the Probate Court (even in criminal/competency cases).
- Jailer, LMHA, or Physician completes Appl. to Administer Meds.
- Physician MUST sign with statements from H&S 574.104 (b).

State, or treating physician on behalf of the state, may file Application for Court-Ordered Meds with Court with Probate Jurisdiction (574.105)

CAUSE NO. \_\_\_\_\_ IN THE \_\_\_\_\_ COURT OF THE STATE OF TEXAS FOR THE BEST INTEREST AND PROTECTION OF \_\_\_\_\_ COUNTY, TEXAS

APPLICATION FOR ORDER TO ADMINISTER PSYCHOACTIVE MEDICATION (H&S 574.105)

Texas Health & Safety Code §174.105, unless as ordered by the administration of psychoactive medication.

MD D.O. ("Applicant"), files this Application, pursuant to Texas Health & Safety Code §174.105, seeking an order to authorize the administration of psychoactive medication.

Patent is subject to an order, dated \_\_\_\_\_, 202\_\_ for court-ordered inpatient mental health services issued under (article text):

Chapter 48B (Incompetency to Stand Trial) Code of Criminal Procedure.

Chapter 46C (Not Guilty by Reason of Insanity) Code of Criminal Procedure.

Chapter 51, Family Code.

II. Applicant has diagnosed the Patient with the following condition(s): \_\_\_\_\_

III. A list of medications within each class is determined by the Texas Department of State Health Services, is attached hereto as Exhibit "A". Each medication the Applicant wants the court to compel the Patient to take is designated by an "X". The proposed method for administering the medication is: \_\_\_\_\_

IV. \_\_\_\_\_ is the customary method for administering the medication(s).

V. This is not the customary method for administering the medication(s). The reason for using non-customary methods is: \_\_\_\_\_

State Coordinates Witnesses for Hearing

Probate Court holds Hearing 574.106

COMs Granted under H&S Code § 574.106

Within 30 days of application

- Transmit the Order to:
- Jail Med. Provider
  - LMHA, &
  - Defendant

COMs Denied

Director of Facility or Program Provider shall notify the Criminal Court of Defendant's Continued refusal to take medications

By end of next business day following D's refusal

CAUSE NO. \_\_\_\_\_ IN THE \_\_\_\_\_ COURT OF THE STATE OF TEXAS FOR THE BEST INTEREST AND PROTECTION OF \_\_\_\_\_ COUNTY, TEXAS

ORDER AUTHORIZING THE ADMINISTRATION OF PSYCHOACTIVE MEDICATION, FORFEIT

On this the \_\_\_\_\_ day of \_\_\_\_\_, 202\_\_, came to be heard an Application for Order to Authorize Psychiatric Medication on the above named and styled case, alleging that \_\_\_\_\_ hereinafter called "Patient", is subject to an Order of Commitment for Restraints to Competency under Chapter 48B of the Criminal Code of Procedure, signed on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ in Case Number \_\_\_\_\_, Attorney's Name, Attorney representing the patient, and the Attorney for the State, associated thereto, and all matters of fact and law were submitted to the Court, and the Court finds as follows:

That on file with the Court in this cause is a verified Application for Order to Authorize the Administration of Psychiatric Medication by the patient's physician, Dr. MD, who has examined the Patient and that the physician thereunto states the opinion and the detailed basis that the patient is in need of psychotropic medication but lacks the capacity to make a decision regarding administration of said medication and it is in patient's best interest to have psychotropic medication.

That all necessary notices and copies of the Application have been served as required by law and that all of the terms and provisions of the Texas Mental Health Code have been complied with and

That after considering all of the evidence, including the Application and the expert, competent medical or psychiatric testimony of Dr. \_\_\_\_\_ M.D., the Court finds by clear and convincing evidence after the hearing:

1. That the patient lacks the capacity to make a decision regarding administering of said medication and that treatment with the proposed medication is in the best interest of the patient and that the same shall be ordered.

(General) The following absence of patient is determined to have capacity to refuse medication:

2. The Court finds that the patient was ordered to receive psychiatric mental health services by a criminal court with jurisdiction over the patient and that treatment with the proposed medication is in the best interest of the patient and either:

(A) the patient presents a danger to the patient or others or the patient mental health facility in which the patient is being treated as a result of a mental disorder or mental defect as determined under section 574.105; or

The State may now file Motion in Criminal Court to Compel Meds under CCP 46B.086

Not later than the 15<sup>th</sup> day after the Order Denying COMs from Probate Court (unless D in OCR)

Criminal Court notifies the State and Defense Attorney of the D's refusal to take meds.

Criminal Court holds Hearing

Requires testimony of 2 physicians: i. treating Dr. & ii. uninvolved Dr.

COMs Granted under 46B

COMs Denied

No Court Ordered Meds Allowed

Transmit the Order to:

- Jail Med. Provider
- LMHA, &
- Defendant

CAUSE NO. \_\_\_\_\_ IN THE \_\_\_\_\_ COURT OF THE STATE OF TEXAS FOR THE BEST INTEREST AND PROTECTION OF \_\_\_\_\_ COUNTY, TEXAS

ORDER ON STATE'S MOTION TO COMPEL INVOLUNTARY ADMINISTRATION OF COURT ORDERED MEDICATION PURSUANT TO 46B.086

On this the \_\_\_\_\_ day of \_\_\_\_\_, 202\_\_, came on to be considered the State's Motion to Compel Involuntary Administration of Court-Ordered Medication in the above-referenced cause pursuant to Article 46B.086 of the Texas Code of Criminal Procedure, after Defendant \_\_\_\_\_ having been previously found incompetent.

In accordance with the Texas Code of Criminal Procedure Article 46B.086, upon the submission and consideration of the requisite physicians' testimony, the Court finds the following 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 exist; and

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

II. Pursuant to these findings shown by clear and convincing evidence, it is hereby ORDERED, ADJUDGED, AND DECREED that the program and/or treatment provider or his designee at \_\_\_\_\_ or whichever appropriate facility of the State Hospital Section that the Defendant patient may be transferred, is authorized to administer the following classes of court-ordered medication, by reasonable force if necessary, as provided by Article 46B.086 of the Texas Code of Criminal Procedure:

- Antipsychotics;
- Antidepressants;
- Anxiolytics;
- Anticholinergic/antihypertensives;
- Mood stabilizers;
- Mono-amine oxidase inhibitors;

Jail Medical determines whether to forcibly administer medication

Jail Medical determines whether to forcibly administer medication

# COMs Hearings

## PROBATE COURT CRITERIA FOR COMS § 574.106

Court finds by Clear & Convincing Evidence that:

- 1) the patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment with the proposed medication is in the best interest of the patient; **or**
- 2) if the patient was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient, that treatment with the proposed medication is in the best interest of the patient and either:
  - A. the patient presents a danger to the patient or others in the inpatient mental health facility in which the patient is being treated as a result of a mental disorder or mental defect; **or**
  - B. the patient:
    - i. has remained confined in a correctional facility for a period exceeding 72 hours while awaiting transfer for competency restoration treatment; **and**
    - ii. presents a danger to the patient or others in the correctional facility as a result of a mental disorder or mental defect

## CRIMINAL COURT CRITERIA FOR COMS § 46B.086

Court finds by Clear & 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.



**180  
DAYS**

Presentation

## Medication Orders

Note: After a restoration, a medication order will remain in effect for 180 days following the defendant's return to court to await the criminal proceedings.

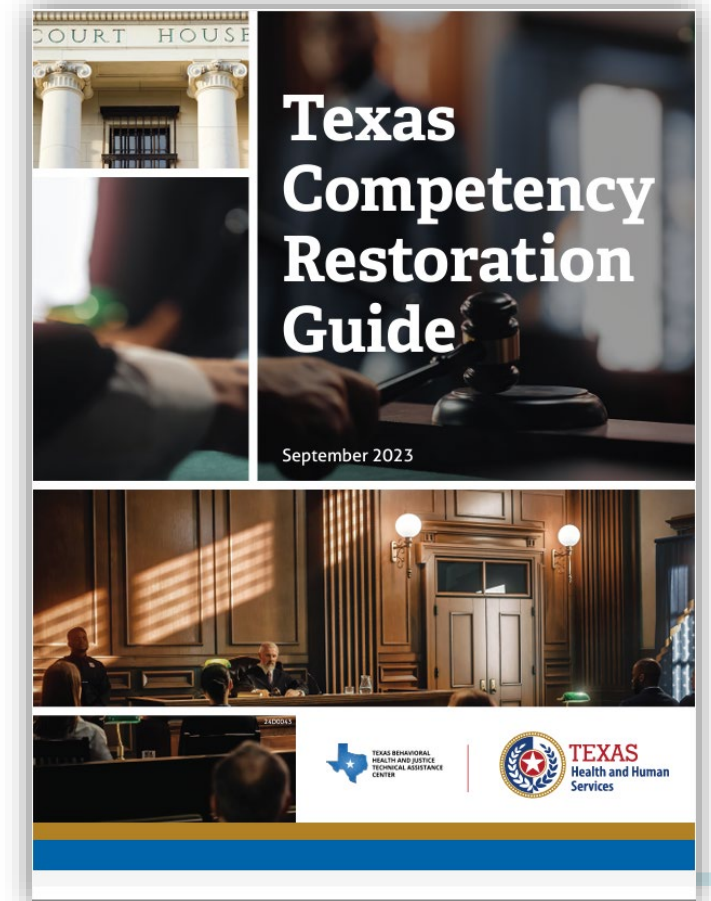
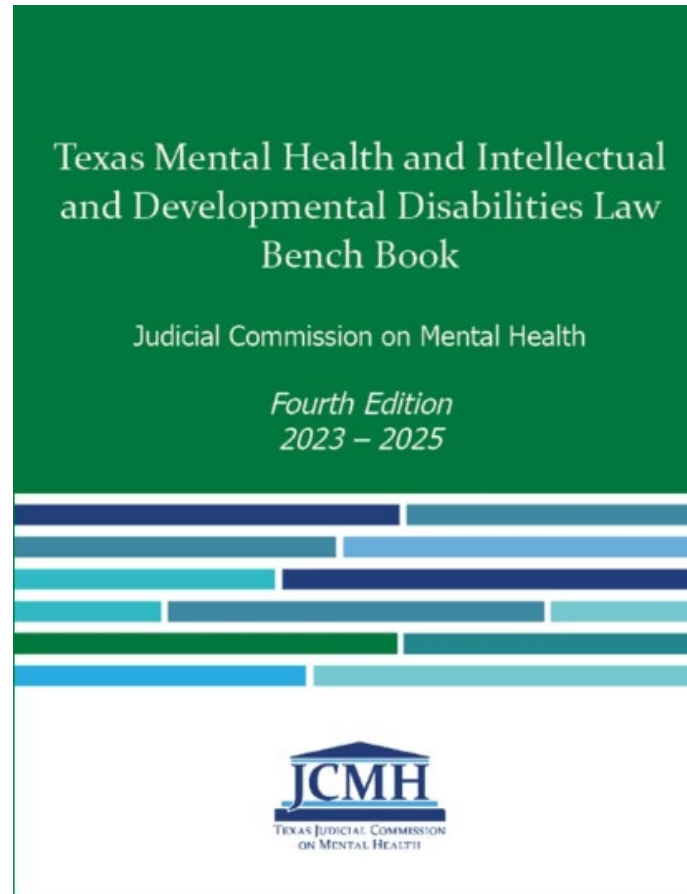
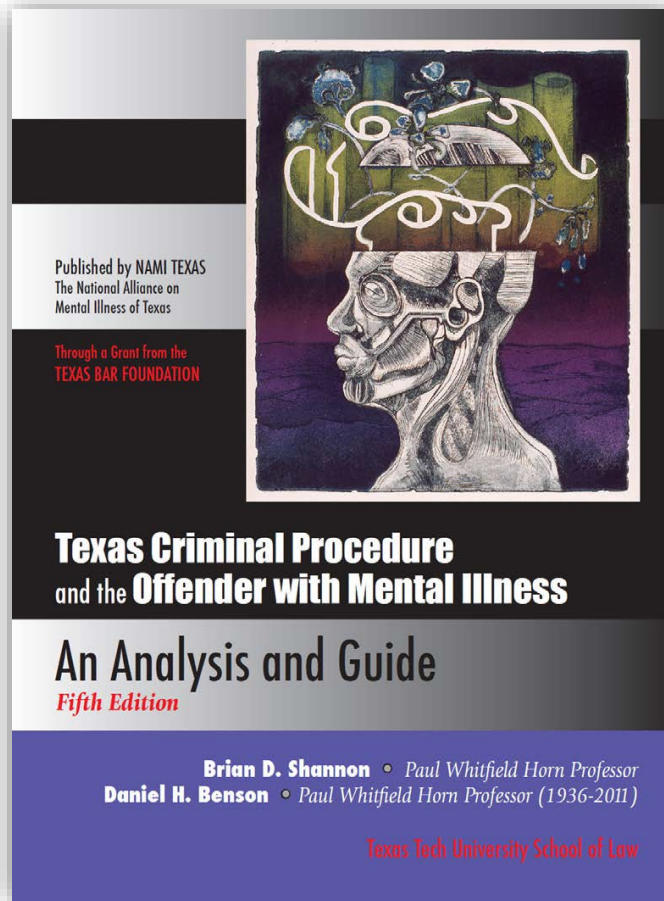
These are complicated processes and procedures

Many prosecutors, judges, and defense counsel are not intensely familiar with the intricacies

## Challenges for the Court & Counsel



# Resources



**Thank You!**