



# A Practical Guide to Competency

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# The Law

- Competency pertains to the capacity of a criminal defendant to proceed with criminal adjudication. A criminal defendant may not be subjected to trial if he or she lacks the capacity to understand the proceedings against him or her, to consult with counsel, and to assist in preparing a defense. *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975)
- 46B of the Code of Criminal Procedure governs competency proceedings applicable to defendants charged with a felony or misdemeanor punishable by confinement.
- Chapter 574 Texas Health and Safety Code governs competency issues that are not based on a criminal case.
- Many times, you will have to consult both 46B and Chapter 574 when you have a pending criminal matter though as 46B points to the Health and Safety Code in certain situations.



# Competency, Insanity & Mental Health

- Competency – Goes to the defendants' current mental state and ability to stand trial. Governed by 46B of the Code of Criminal Procedure.
- Insanity - Goes to the defendant's mental state at the time of the offense. Governed by 46C of the Code of Criminal Procedure. You must be determined to be competent to be evaluated for insanity.
- Mental health/illness – Relates to a person's impairment of thoughts. Can have competency and/or insanity issues that stem from the mental health diagnosis or may just a mental health diagnosis by itself.



# Definition of Incompetency

- A person is incompetent to stand trial if the person does not have:
  - sufficient present ability to consult with the person's lawyer with a rational degree of understanding;
  - or
  - A rational as well as factual understanding of the proceedings against the person.

Tex. Code Crim Proc. Art 46B.003(a)



# Practical Pointers

- A person is presumed competent to stand trial unless he or she proves otherwise. Tex. Code Crim Proc. Art 46B.003(b)
- The defendant has the burden of proving incompetency. Owens v. State 473 S.W. 3<sup>rd</sup> 812 (Tex. Crim. App. 2015).(\*note burden may shift later in the process depending on the fact pattern)
- Competency is fluid – it can change daily.
- An incompetent evaluation is only valid 30 days from the date of the examination.
- A competent evaluation does not expire.



# Practical Pointers (continued)

- If it is believed that the defendant has, or may have, IDD, then the type of competency exam given to the defendant must be validated on a subject population that also has IDD.
- An indictment is needed on a felony criminal case to raise the issue of competency.
- Any party can raise competency issues, including the court.
- **THINK OUTSIDE THE BOX BEFORE PROCEEDING!** Do you need the defendant to be restored? Do you have a compelling interest to prosecute?
  - Tex. Code Crim Proc. Art 16.22(c)(5)
    - Bond conditions
    - Civil Outpatient program under Chapter 574 Health and Safety Code
    - Stabilization in the jail
    - Dismissal with linkage to services in the community (possibly misdemeanors or non-violent offenses)



# Appointment of Experts

- On determination that evidence exists to support a finding of incompetency the court shall appoint one or more experts to:
  1. Examine the defendant and report to the court on the issue of competency and
  2. Testify as to the issue of competency at any trial or hearing involving that issue
- Unless good cause is shown, the expert is required to provide the report not later than the 30<sup>th</sup> day after the date on which the expert was ordered to examine the defendant and prepare the report.
- An expert involved in the treatment of the defendant may not be appointed to examine the defendant.



# What experts must consider

(Tex. Code Crim Proc. Art 46B.024)

- 1.) The capacity of the defendant during criminal proceedings to:
  - Rationally understand the charges against the defendant and the potential consequences of the pending criminal proceedings;
  - Disclose to counsel pertinent facts, events, and states of mind;
  - Engage in a reasoned choice of legal strategies and options;
  - Understand the adversarial nature of criminal proceedings;
  - Exhibit appropriate courtroom behavior; and
  - Testify;





## What experts must consider (continued)

- 2.) As supported by current indications and the defendant's personal history, whether the defendant:
  - Is a person with mental illness;
  - or
  - Is a person with intellectual disability;
- 3.) Whether the identified condition has lasted or is expected to last continuously for a least a year;



# What experts must consider (continued)

- 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:
  - Whether the medication is necessary to maintain the defendant's competency;  
and
  - The effect, if any, of the medication on the defendant's appearance, demeanor, or ability to participate in the proceedings.



# Maximum Restoration Periods

## (Tex. Code Crim Proc. Art 46B.0095)

A defendant may not, under Subchapter D or E or any other provision of this chapter be:

- Committed to a mental hospital, inpatient or residential facility or jail-based program,
- Or ordered to participate in an outpatient competency restoration program,
- Or Subjected to a combination of all of the above for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried.
- If a defendant is charged with a misdemeanor and has been ordered only to participate outpatient competency restoration or treatment program then the maximum period of restoration is two years
- Also see:
  - Time Credits (Tex. Code Crim Proc. Art 46B.009) &
  - Mandatory Dismissal of Misdemeanor Charges (Tex. Code Crim Proc. Art 46B.010)



# Agreed Incompetency

- Parties may agree defendant is incompetent to stand trial. If agreed, the court shall proceed in the same manner as if a jury had been impaneled and had found the defendant incompetent to stand trial.



# Contested Competency

- If the issue of competency is contested, there can be a trial by court or trial by jury.
- It is a trial by court unless a jury is requested by either party or motion of the court.
- If a jury is requested, then that jury shall make the determination of incompetency.
- The verdict must be unanimous.
- If a jury finds the defendant competent, the court shall continue to the trial on the merits.
- The jury for competency is a different jury than any jury for guilt or innocence.



# Overall view of Commitments

- Initial restoration period (may only have one)
- Possible 60-day automatic extension (may only have one)
- One of the following:
  - 46B.102 commitment for Mental Illness (can be renewed until maximum restoration period reached)
    - 1<sup>st</sup> extension with live testimony
    - All other subsequent extensions with certificates
  - Or 46B.103 long term IDD commitment



# 46B.102 Mental Illness

- If it appears to the criminal court that the defendant may be a person with MI, the court shall hold a hearing to determine whether the defendant should be court-ordered to mental health services under Subtitle C, Title 7 of the Texas Health and Safety Code. The judge of the criminal court will preside over and make the determinations that a county judge or other court with probate jurisdiction would normally make in the civil commitment process.
- Proceedings for commitment of the defendant to court-ordered mental health services are governed by Subtitle C, Title 7 of the Texas Health and Safety Code (to the extent that subtitle applies and does not conflict with Chapter 46B), except that the criminal court is the court conducting the proceedings.

**-2021-2022 JCMH Bench Book**



# Example Questions for live testimony on inpatient extended mental health services commitment (HSC 574.035)

- Dr. \_\_\_\_\_, have you had a chance to review both reports in front of you?
- Does the defendant meet criteria for extended court ordered inpatient mental health services in that they are mentally ill?
- As a result of said mental illness, are they likely to cause harm to themselves or others?
- As a result of said mental illness, are they suffering severe and abnormal mental, emotional, or physical distress?
- Are they experiencing substantial mental or physical deterioration of their ability to function independently?
- Is that deterioration exhibited by their inability to provide for their basic needs, including food, clothing, health, or safety for reasons not due to indigence?
- Are they unable to make a rational and informed decision as to whether to submit to treatment?
- Do you expect this condition to last longer than 90 days?
- Has the defendant received court ordered inpatient mental health services for at least 60 consecutive days in the preceding 12 months?
- Anything further you would like to add?
- **\*If the answer to #8 is yes then the extension is 12 months. If the answer to #8 is no, then the extension is for 45 up to 90 days.**





# 46B.103 Intellectual Disability

- If it appears to the court that the defendant may be a person with an ID, the court shall hold a hearing to determine whether the defendant is a person with an ID. The judge of the criminal court will preside over and make the determinations that a county judge or other court with probate jurisdiction would normally make in the civil commitment process
- Proceedings for commitment of the defendant to a residential care facility are governed by Subtitle D, Title 7 of the Texas Health and Safety Code (to the extent that Subtitle D applies and does not conflict with Chapter 46B), except that the criminal court shall conduct the proceedings whether or not the criminal court is also a county court.
- The burden of proof in commitment proceedings for persons with intellectual disabilities is beyond a reasonable doubt.
- If the court enters an order committing the defendant to a residential care facility, the defendant shall be:
  - treated and released in accordance with Subtitle D, Title 7 of the Texas Health and Safety Code, except as otherwise provided by Chapter 46B; and
  - released in conformity with article 46B.107.



# Subchapter F (civil commitment – charges dismissed)

- Determination of mental illness or ID
- Dismiss and civil commitment so case is transferred to Civil Court for Proceedings (Appendix has sample form)
- If civil court finds patient meets criteria for civil commitment
  - Local Mental Health authority finds bed at local area hospital.
  - Defendant transported from jail to hospital.
  - Once no longer danger to themselves or others is released from hospital
  - and linked with services through a plan from hospital and local mental health authority.
- If civil court finds patient DOES NOT meet criteria for civil commitment
  - Defendant should be released from custody.



# Important Note:

- Even if you are out of time on forensic commitments, Subchapter F is still an option.
- You can also dismiss outright at any time after finding of incompetence. Tex. Code Crim Proc. Art 46B.004(e).
  - Look at defendants who have been in the hospital for a while and see if they have stabilized enough to possibly be looked at or evaluated for outpatient competency restoration or dismissal to MH services in the community.



### General Hearing Procedures

- 1) Before a Subchapter E hearing may be held, there must be on file with the court at least two CMEs for mental illness completed by different physicians, each of whom has examined the defendant in the past 30 days. [Tex. Health & Safety Code § 574.009.](#)
  - 1) The CME for mental illness must be sworn to, dated, signed by the examining physician and contain certain information. [Tex. Health & Safety Code § 574.011.](#)
  - 2) The hearing should be held in a physical setting that is not likely to have a harmful effect on the defendant. [Tex. Health & Safety Code § 574.031\(a\).](#)
  - 3) The defendant is entitled to be present at the hearing, unless the defendant or the defendant's attorney waive that right. [Tex. Health & Safety Code § 574.031\(c\).](#)
  - 4) The hearing must be open to the public unless otherwise requested by the defendant and good cause is shown for closing the hearing. [Tex. Health & Safety Code § 574.031\(d\).](#)
  - 5) The Texas Rules of Evidence apply unless inconsistent with Subtitle C, Title 7 of the Texas Health and Safety Code. [Tex. Health & Safety Code § 574.031\(e\).](#)
  - 6) The court may consider the testimony of a nonphysician mental health professional in addition to medical or psychiatric testimony. [Tex. Health & Safety Code § 574.031\(f\).](#)
  - 7) The hearing is on the record, and the state must prove each element of the applicable criteria by clear and convincing evidence. [Tex. Health & Safety Code § 574.031\(g\).](#)
  - 8) Whether the hearing is before the court or the jury depends on the type of mental health services (temporary or extended) and whether the right to a jury, if applicable, has been waived. [Tex. Health & Safety Code § 574.032.](#)
  - 9) The criteria for mental health services are found in sections 574.034 (temporary inpatient), 574.0345 (temporary outpatient), 574.035 (extended inpatient), and 574.0355 (extended outpatient) of the Texas Health and Safety Code.
  - 10) If the court orders outpatient mental health services, the judge must designate a person responsible for those services. That person must submit a general program of treatment to the court. [Tex. Health & Safety Code § 574.037.](#)
  - 11) The court must direct the court clerk to issue to the person authorized to transport the defendant two writs of commitment requiring the person to take custody of and transport the defendant to the designated mental health facility. [Tex. Health & Safety Code § 574.046.](#)
  - 12) A certified transcript must be prepared and sent to the designated facility. [Tex. Health & Safety Code § 574.047.](#)
  - 13) An acknowledgement of delivery of the defendant must be provided by the facility administrator and a copy filed with the clerk of the committing court.



# Competency Restored

- Redetermination of competency is available on the request on any party, the court or the head of the state hospital, program or outpatient competency restoration program
- If parties agree then the court restores the defendant's competency without a hearing. Then the case proceeds in criminal court.
- If any party disagrees then a hearing can be held, and experts may be appointed.

Note: competency is presumed if the head of a facility presents a report, and that presumption must be overcome by a preponderance of the evidence



# Diversion options????

- Now that the case has been restored, might the defendant be eligible and stable enough to participate in a diversion program that your county offers? Often, these programs can be a step down from inpatient while ensuring the defendant continues engagement with MH services.



# Hospital Waitlist

One reason to constantly review and consider whether there is a compelling interest to prosecute is that the hospital waitlist currently has 2500+ defendants on it and the wait times are upwards of 1-2 years depending on the offense. Thus, if there is not a compelling interest to prosecute then it is wrong to put a defendant through the competency restoration system resulting in a mentally ill defendant essentially being punished for being mentally ill.

An excellent resource discussing competency and the compelling interest to prosecute is the Competency Restoration Tool Kit recently released by the Texas Health and Human Services Commission.