MENTAL HEALTH; INCOMPETENCE AND INSANITY

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INTRODUCTION

The criminal justice system has always provided a mechanism to deal with the mentally ill. However, several factors have contributed to the increased emphasis on the mentally ill in the criminal justice system and the number of mentally ill encountered by a criminal law practitioner. Texas was once a national leader in providing funding for the institutionalization of those suffering from a mental illness. In 1969, locally-led mental health boards operated twenty-one mental health and mental retardation centers in sixteen counties across Texas, with state expenditures just shy of $4 million for community based mental health treatment centers.[1] The $4 million dollars spent in 1969 equates to $27,777,352.11 in 2018. However, beginning in the 1970's a movement towards deemphasizing institutional care led to decreased funding and the closure or reduction in services of many mental health care facilities throughout the state. Those individuals who would have previously been provided treatment in the expansive state mental health care system, are now funneled into the criminal justice system. Eight times as many mentally ill persons are admitted into prisons and jails today as mental hospitals.[2]

This influx of persons suffering from a mental illness into the criminal justice system necessitates the criminal law practitioner becoming more familiar with the law and procedure as they relate to mental health, incompetency and insanity. This paper is intended to provide an overview of provisions of the Texas Code of Criminal Procedure that deal with mental illness. This paper will deal with both Art. 46B (competency to stand trial) and 46C (insanity as a defense).

Art. 46C, not guilty by reason of insanity "NGRI", is included despite the fact that it is rarely urged as a defense. According to an eight-state study, the insanity defense is used in less than 1% of all court cases and, when used, has only a 26% success rate.[3] Therefore, the likelihood of a criminal practitioner encountering a case where factually or tactically the insanity defense will be asserted is much less than the likelihood of asserting a client is incompetent to stand trial.

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[1] The Texas Department of Mental Health and Mental Retardation 1969 Annual Report, Folder Mental Health and Mental Retardation, Gov. Preston Smith Records, Box 1994/120-3, Texas State Library and Archives Commission, Austin, TX.

[2] Levin, M. A. (n.d.). Mental Illness and the Texas Criminal Justice System. Texas Public Policy Foundation. Retrieved from https://www.texaspolicy.com/library/doclib/2009-05-PP15-mentalillness-ml.pdf.

[3] Schmalleger, Frank (2001). Criminal Justice: A Brief Introduction. Prentice Hall. ISBN 0-13-088729-3.

INSANITY AS A DEFENSE

Insanity is an affirmative defense under Section 8.01 of the Texas Penal Code. It is important to distinguish insanity as an "affirmative defense" from justification or necessity as a defense. Some defenses such as self-defense, duress or necessity are governed by the "confession and avoidance doctrine". The confession-and-avoidance doctrine requires appellant to first admit that he "engaged in the proscribed conduct" by admitting to all elements of the underlying offense, then claim that his commission of the offense is justified because of other facts. *See* Juarez v. State, 308 S.W.3d at 401–03 (discussing confession-and-avoidance doctrine with respect to affirmative defenses of necessity, self-defense, and Good–Samaritan defense). This is a product of the nature of the defense. "One cannot establish that an act is justified without first identifying, or admitting to the commission of, the predicate act." Maldonado v. State, 902 S.W.2d 708, 712 (Tex.App.-El Paso 1995, no pet.). In contrast, asserting the affirmative defense of insanity does not require that an accused admit the elements of the offense.

In theory, the insanity defense does not apply until and unless the state proves every element of the offense beyond a reasonable doubt. Once the state has fulfilled that burden, to prevail with the insanity defense, the defendant has to prove by a preponderance of the evidence that as a result of severe mental disease or defect, the defendant did not know that his conduct was wrong. Ruffin v. State, 270 S. W. 3d 586 (Tex.Crim. App.2008) and Lantrip v. State, 336 S.W. 3d 343 (Tex. App.-Texarkana 2011, no pet.).[4]

WHETHER DEFENDANT KNEW HIS CONDUCT WAS WRONG

For purposes of the insanity defense, knowing that conduct was wrong means knowing that the conduct was illegal. In Bigby v. State, 892 S.W. 2d 864 (Tex. Crim. App. 1994) several expert witnesses testified that the defendant knew his conduct was illegal but that he did not know that his conduct was morally wrong. The issue in Bigby was whether or not the defendant understands that society believed his conduct was wrong but that under his personal moral code his conduct was permissible. The Court found that because Bigby knew his conduct was illegal, he knew his conduct was wrong and could not prevail on the insanity defense.

In determining if the defendant knows his conduct is wrong, the trier of fact can look at a broad range of evidence occurring before, during and after the offense. Mendenhal v. State, 77 S.W. 3d 815 (Tex. Crim. App. 2002). There are a number of factors that can be considered to determine if the defendant knew his conduct was wrong. In Plough v. State 725 S.W. 2 494 (Tex. App. –

[4] The burden of proof is normally on the defendant to prove the insanity defense. The only exception is that if there is a prior unvacated adjudication of insanity the state must prove beyond a reasonable doubt the defendant was sane at the time of the offense. Manning v. State, 730 S.W. 2d 744 (Tex. Crim. App. 1987, en banc).

Corpus Christi 1987, no writ) the court listed factors that were evidence that defendant knew his actions were wrong. The defendant's attempts to conceal evidence, the fact that defendant cleaned his gun after the shooting and the fact that defendant stated that people may find his statements incredible were all evidence, according to the court, that he knew his conduct was wrong.

NOTICE OF INTENT TO RAISE INSANITY DEFENSE

Texas Code of Criminal Procedure Art. 46C.051 and 46C.052 mandates that a defendant file a notice with the court of the intent to raise the insanity defense at least 20 days before trial or at any pretrial hearing held before that 20 day period. If counsel misses the 20 day deadline, the court can still allow defense counsel to assert the defense of insanity if good cause is shown for failing to timely file the notice. Tex. Code Crim. Proc. Art. 46C.052. It has been held that counsel must request a continuance and/or a ruling on good cause. The court is under no obligation to sua sponte stop or delay the proceedings or forgive the failure to timely file the notice. Hill v. State, 320 S.W. 3d 901 (Tex. App. – Amarillo 2010 pet. ref'd).

EXPERT EVALUATION OF THE ACCUSED

Texas Code of Criminal Procedure Art. 46C.101 provides that the court may appoint one or more disinterested experts to evaluate the defendant. This can be done at the request of the defendant, the court on its own motion or at the request of the attorney for the state. The court is not required to appoint experts. This is critical to keep in mind. The burden is upon the defendant to prove by a preponderance of the evidence that the insanity defense is appropriate. The defendant can retain an expert of their own, and the court is required to provide reasonable opportunity to examine the defendant. Tex. Code. Crim. Proc. Art. 46C.107. However, if the defendant is indigent and cannot afford their own expert, counsel should request the appointment of an expert at the state's expense. The seminal case of Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087 (1984) dealt with the issue of the insanity defense. Under Ake the court is required to provide a competent psychiatrist to, "assist in the evaluation, preparation and presentation of his insanity defense". De Freece v. State, 848 S. W. 2d 150 (Tex. Crim. App. 1993, cert. den.)

Testimony from either a lay witness or expert witness can be offered on the issue of insanity. Either can be sufficient to raise the defense of insanity and require the trial court to grant a jury instruction on the issue of insanity. Pacheco v. State, 757 S.W.2d 729 (Tex. Crim. App. 1988, reh. den.). If evidence from any source raises a defensive issue, it must be included in the court's charge. Gibson v. State, 726 S.W.2d 129 (Tex. Crim. App. 1987). In Graham v. State, 566 S.W. 2d 941 (Tex. Crim. App. 1978, en banc, reh. den.) the defendant offered expert testimony on the issue of insanity and the state rebutted with the testimony of lay witnesses. The insanity defense

was denied and the defendant appealed. The court found that the trier of fact could accept lay testimony over expert testimony in reaching their decisions in the case.

Counsel should be aware that any statements made by the accused during the exam are admissible. In DeRusse v. State, 579 S.W.2d 224 (Tex. Crim. App. 1979) the Court was presented with the question of whether statements made by the defendant during a sanity evaluation were admissible at trial. The Court noted that there was no prohibition against the use of such statements in Art. 46.03 C.C.P.

ORDER COMPELLING EVALUATION

The court can order the defendant to submit to an evaluation by an expert of the state or one appointed at the request of the court. If a defendant is free on bond and refuses to be examined, the court can order him into custody for a period not to exceed 21 days for the evaluation. Tex. Code Crim. Proc. Art. 46C.104.

THRESHOLD TO PRESENT THE ISSUE OF INSANITY TO THE TRIER OF FACT

If evidence from any source raises the issue, the trial court must include an instruction in the jury charge. Nutter v. State, 93 S.W.3d 130 (Tex. App.-Houston [14th Dist.] 2001 no pet.). Plough v. State, 725 S.W.2d 494 (Tex. App.- Corpus Christi 1987, no pet.) held that the existence of a mental disease, alone, is not sufficient to establish legal insanity; rather, the accused must have been mentally ill at the time of the offense to the point that he did not know that his conduct was wrong. In short, to get an instruction on insanity, there must be evidence from either lay or expert witnesses that follows Texas Penal Code 8.01. Specifically, that at the time of the alleged conduct, the defendant did not know his conduct was wrong as a result of mental disease or defect.[5]

THE ISSUE OF INSANITY TO THE TRIER OF FACT

Texas Code of Criminal Procedure Art. 46C.153 sets forth the possible outcomes of a proceeding when the issue of insanity is raised. The trier of fact must determine: 1) that the state has proved all elements of the offense beyond a reasonable doubt and 2) whether by a preponderance of the evidence the defendant has shown that he was insane at the time of the commission of the offense.[6] Because the state is not relieved of their burden to prove the elements of the offense beyond a reasonable doubt, it appears that the defendant could request lesser included offenses based on the evidence presented at trial.

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[5] Recall that under Bigby v. State, 892 S.W. 2d 864 (Tex. Crim. App. 1994) "wrong" as interpreted by the Court of Criminal Appeals means "illegal" and not morally wrong.

[6] Tex. Code Crim. Proc. 46C.153 makes it clear that the defense of insanity is not an affirmative defense covered by the "confession and avoidance doctrine".

THE EFFECT OF NOT GUILTY BY REASON OF INSANITY

If a defendant is found not guilty by reason of insanity the court must determine whether the offense which the defendant was acquitted involved dangerous conduct. Specifically, the court must determine, and the record and judgment must reflect, whether the defendant's conduct: (1) caused serious bodily injury to another; (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. Tex. Code Crim. Proc. Art. 46C.157. If the court finds that the offense involved dangerous conduct the court retains jurisdiction of the defendant. The court is required to then commit the defendant to a maximum security unit of the Texas Department of State Health Services for no more than 30 days for an evaluation of his present mental condition. Tex. Code Crim. Proc. Art. 46C.251(a).

If the court finds that the offense did not involve dangerous conduct, the court shall determine whether there is evidence to support a finding of mental illness or intellectual disability. If the court finds there is evidence to support a finding of mental illness or intellectual disability, the court shall transfer the defendant to the appropriate court for civil commitment proceedings. If the defendant is not referred for civil commitment proceedings, the court shall release the defendant. Texas Code Crim. Proc. Art. 46C.201-46C.202.

DISPOSITION PHASE

A hearing to determine the proper disposition of the acquitted person must be held no more than 30 days after the date of acquittal. Texas Code Crim. Proc. Art. 46C.251(d). The disposition hearing process is involved to the degree it is beyond the scope of this paper. However, it is important to note that both the state and the defendant have a right to a jury trial regarding disposition hearings, renewal hearings, modification hearings and advance discharge hearings.

STANDARD OF REVIEW

When a court excludes evidence of insanity it is subject to abuse of discretion standard by the appellate court. Weatherred v. State, 15 S.W. 3d 540 (Tex. Crim. App. 2000). If testimony is excluded, counsel should make a proffer outside the presence of the jury to preserve appellate review. The court's denial of a jury instruction is subject to a harm analysis in that the appellate court must first determine that error occurred and that the error injured the rights of the defendant. Abdnor v. State, 871 S.W. 2d 726 (Tex. Crim. App. 1994, en banc). When evidence of insanity is presented to the trier of fact but the insanity defense is rejected, the appellate court reviews the decision to determine if the judgement is so against the great weight and preponderance of the evidence to be manifestly unjust. Meraz v. State, 785 S.W. 2d 146 (Tex. Crim. App. 1990, en banc, reh. den.)

INCOMPETENCY TO STAND TRIAL

Texas Code of Criminal Procedure Art. 46B.003(a) states that 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 factual understanding of the proceedings against the person. 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. Chapter 46B applies to all felony offenses and Class A & B misdemeanors. Unless competent, a defendant cannot knowingly waive his right to trial and enter a plea of guilty. Hall v. State, 808 S.W. 2d 282 (Tex. App.- Houston [1st. Dist] 1991, no writ). Pipken v. State, 671 S. W. 2d 626 (Tex. App.-Houston [1st Dist.] 1984 pet. ref'd) held that the issue of incompetency must be resolved before hearing a motion to revoke probation. In Bradford v. State, 172 S.W. 3d 1 (Tex. App.-Ft. Worth 2005, no pet.) the court held that it was reversible error to hear a motion to adjudicate guilt when the record did not reflect that the defendant had been restored to competency. Texas Code of Criminal Procedure Art. 26.03 states that no plea of guilty or nolo contendere shall be accepted unless it appears that the defendant is mentally competent to stand trial.

RAISING THE ISSUE OF INCOMPETENCY

The state, the defense or the court on its own motion can suggest that the defendant is incompetent to stand trial. Texas Code Crim. Proc. Art. 46B.004(a). The suggestion of incompetency can be raised orally or on written motion. The best practice is to raise the issue by written motion supported by affidavit setting out the facts upon which the suggestion of incompetency is based. The desired outcome of a suggestion of incompetency is an "informal inquiry" and a competency evaluation by a qualified expert. Simply filing a motion stating there, "may be an issue regarding competency" has been held insufficient.[7] A suggestion of incompetency must include, 1) an assertion that the defendant is not competent, 2) supported by evidence and 3) requesting an informal inquiry.[8]

ETHICAL CONSIDERATION IN COMPETENCY PROCEEDINGS

One of the most basic obligations of an attorney in a criminal matter is to maintain the confidentiality of information obtained from the client. Tex. Disciplinary R. Prof'l Conduct 1.05. In addition, an attorney representing an accused in a criminal matter is required to abide by his client's decisions on certain matters. Tex. Disciplinary R. Prof'l Conduct 1.02. However, in the context of competency proceedings, an attorney is often placed in a position that is in conflict with these basic tenants of representation. What does an attorney do when he believes his client

[7] McDaniel v. State, 98 S.W. 3d 704 (Tex. Crim. App. 2003)
[8] Id at 711.

to be incompetent, but his client insists that he is competent and instructs the attorney not to raise the issue of his alleged incompetence? What if the only evidence available to present to the court to raise the issue of incompetency are confidential statements made by defendant to the attorney? The decision on whether to proceed by a bench trial or jury trial is normally the exclusive decision of the defendant. Tex. Disciplinary R. Prof'l Conduct 1.02. Who elects judge or jury or agreed hearing when the attorney believes his client is not competent?

Attorneys have obligations to their clients as well as a duty as an officer of the court. In Nix v. Whiteside, 475 U.S. 157 (1986) the Court stated, "a lawyer's "overreaching duty" to advocate and advance the client's interests is limited by the lawyer's "equally solemn" responsibility and duty as an officer of the court". Id at 166-168. An attorney cannot make affirmative misrepresentations to the court and an attorney has an obligation of candor with the tribunal. Dealing with a client an attorney believes is incompetent pits an attorney's obligations to his client against his obligations to the court. To resolve the conflict in an attorney's obligations requires a close examination of the nature of competency proceedings in general. Incompetency proceedings are designed to insure that the system of criminal justice is fair and equitable. In Drope v. Missouri, 420 U.S. 162, 171, 43 L. Ed. 2d103, 95 S. Ct. 896 (1975) the Supreme Court held the due process right to a fair trial prevents the government from subjecting a person to trial whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with his counsel and to assist in preparing his defense. In representing a client in a competency matter, an attorney is therefore fulfilling his obligations as an officer of the court to protect the integrity of the criminal process.

The ABA in their criminal justice standards makes it clear that an attorney must raise the issue of incompetency when appropriate even if over the client's objection.[9] The ABA standards also seem to indicate that an attorney can violate attorney client privilege by making known to the "evaluator" specific facts that formed the basis of the motion.[10] However, the standard specifically states that an attorney "should not" divulge confidential communications.[11]

POSSIBLE OUTCOMES OF RAISING THE ISSUE OF INCOMPETENCY

If there is some evidence presented to the court that the defendant may be incompetent to stand trial, the court has two options. The court may order an informal inquiry to determine if there is enough evidence of incompetence to require a competency examination or order a competency exam without an informal inquiry. Because the burden is very low to require the court to order a competency exam, it is highly unlikely that a court would refuse to order a competency exam. At an informal inquiry, the court is required to determine whether there is some evidence, a

[9] ABA Criminal Justice Standards on Mental Health, Standard 7-4.3(c) (2016 supplanting the Third Edition (August 1984)
[10] Id at 7-4.3(d)
[11] Id at 7-4.3(f)

quantity more than none or a scintilla that may rationally lead to a conclusion of incompetence. Alcott v. State, 51 S.W. 3d 596, 600 (Tex. Crim. App. 2001). In determining whether there is some evidence to support a finding of incompetency, the court is required to consider only evidence tending to show incompetency, putting aside all competing indications of competency. Sisco v. State, 599 S.W.2d 607 (Tex. Crim. App. 1980). Because the burden is so low, it is unusual for the court to conduct an informal inquiry in lieu of simply ordering the competency exam once the issue is raised.

THE COURT ORDERED EXAMINATION

The court can order the examination of the defendant by one or more qualified and disinterested expert(s) to determine the issue of competency to stand trial. An expert appointed under the criminal incompetency statute is not appointed to aid one side or the other during the case but is, rather, the court's expert. Owens v. State (App. 6 Dist. 2014) 437 S.W.3d 584, petition for discretionary review filed, petition for discretionary review granted, reversed, reversed 473 S.W.3d 812, on remand 2016 WL 519678.[12] The court may appoint a psychiatrist or a psychologist who meets the detailed qualifications under Texas Code of Criminal Procedure 46B.022(a) and (b). The expert who is appointed can have access to the indictment or charging instrument, documents that support probable cause and previous mental health and treatment records of the defendant.

Texas Code of Criminal Procedure 46B.024 sets forth in detail the factors the appointed expert will consider in evaluating the defendant. Even though there are only two factors required to raise the issue of incompetency, a criminal practitioner should be aware of the specific areas of inquiry by the expert. The inquiry is divided into three general categories; capacity during criminal proceedings, current mental health diagnosis and medications. The specific content of the report generated by the expert is governed by Art. 46B.025.[13] It is important to note that pursuant to Texas Code of Criminal Procedure Art. 46B.086(f) statements made by the defendant to an examining physician under 46B.086 C.C.P. are not admissible at any criminal proceeding except a hearing on the defendant's competency. The only exception is when and if the defense opens the door by first introducing evidence of the contents of the defendant's statement.

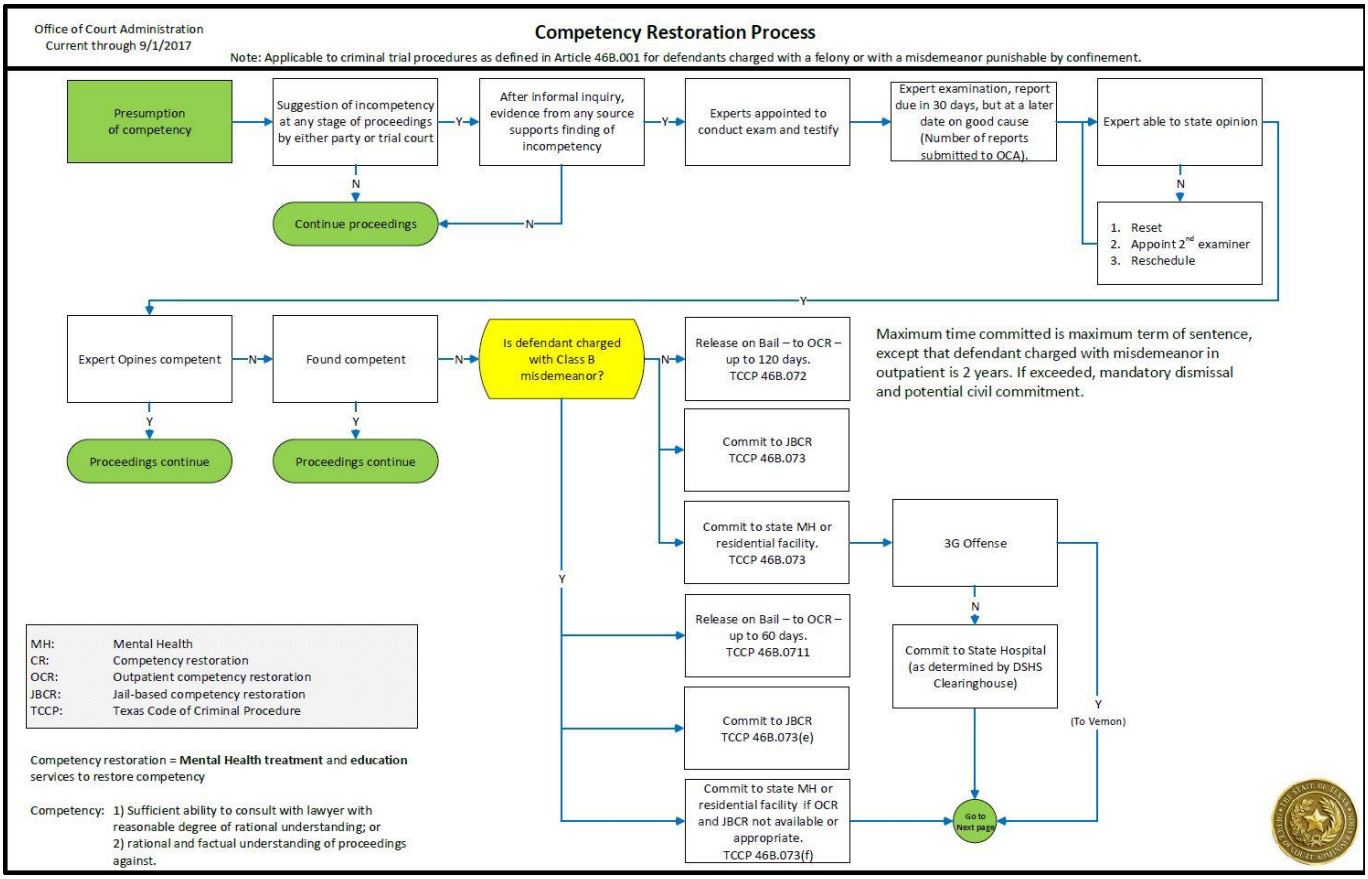
DISPOSITION ON THE ISSUE OF INCOMPETENCY

Once the expert report is filed with the court, the issue of incompetency can be resolved by an agreed incompetency hearing, a jury trial on the issue of incompetency or a bench trial on the

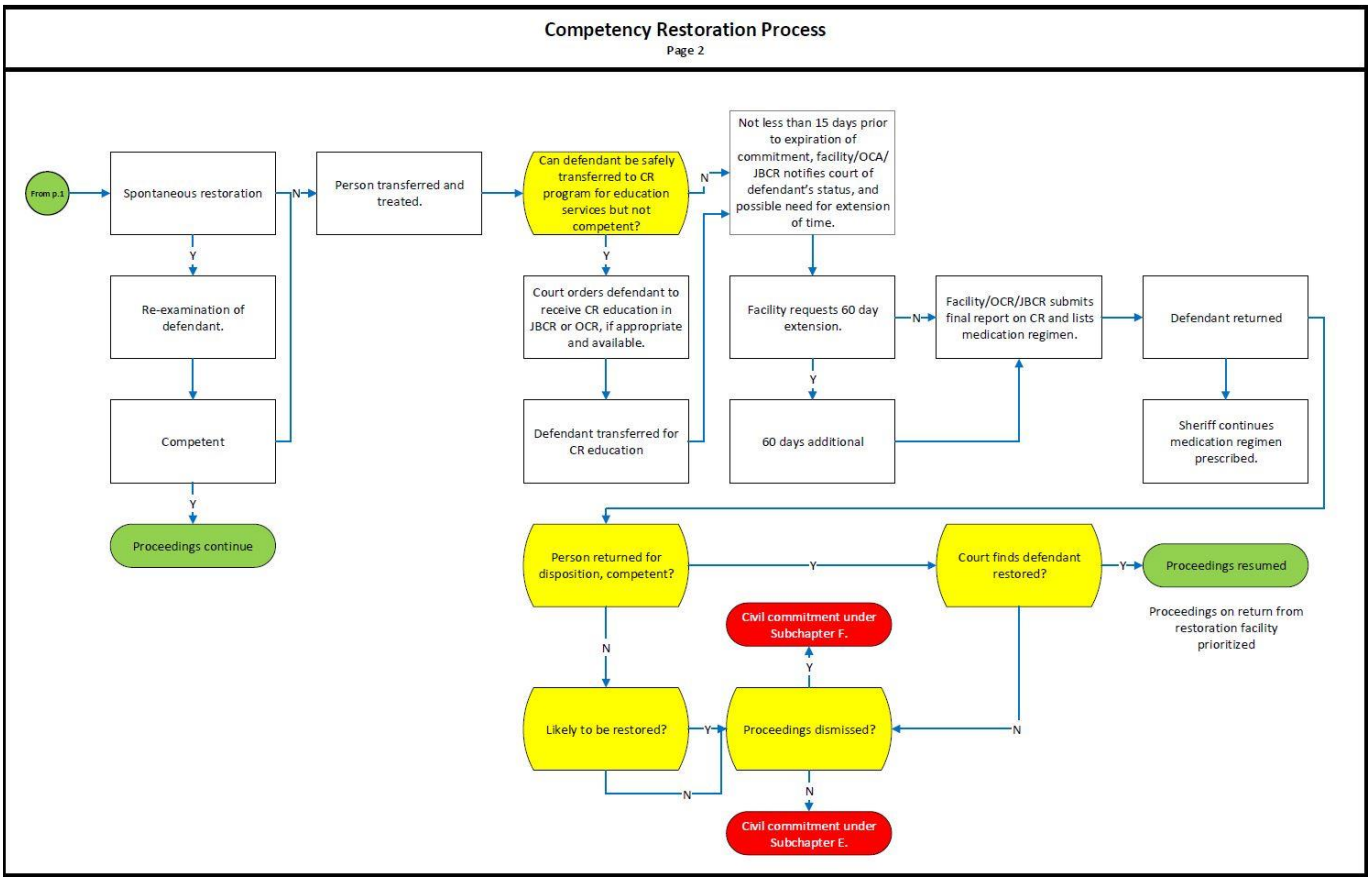
[12] Any objection to an expert should be centered on a due process violation alleging that the appointed expert is not "disinterested" or that the expert does not meet the statutory qualifications.

[13] The report of the expert on competency is due within 30 days after the date the expert was ordered to examine the defendant. However, the court can extend that time for good cause.

issue of incompetency.[14] While the threshold question under either an agreed hearing, jury trial or bench trial is whether or not the defendant is competent, there are additional inquiries that will affect the ultimate disposition of the case. The election of agreed hearing, jury trial or bench trial will determine who is the trier of fact, not only on the issue of competency, but potentially also on the other issues to be resolved which will govern the ultimate disposition of the case.[15] The complexity of the disposition process is illustrated by the charts below developed by the Texas Office of Court Administration.[16]



[14] Previous legislation required a jury trial in all cases even when the parties agreed the defendant was incompetent.
[15] These issues include whether it is likely competency will be restored in the foreseeable future and whether the incompetency is based on mental illness or intellectual disability. These issues will be discussed later in the paper.
[16] http://www.txcourts.gov/media/1438892/competency-restoration-process-sep2017.pdf



Once a criminal law practitioner is provided with an expert's report on the issue of competency, the decision to proceed to an agreed hearing, jury trial or bench trial will depend not only on the expert's findings on incompetency but also on the opinion on likelihood of being restored to competency in the future and whether or not the incompetency is a result of mental illness or intellectual disability and whether or not the attorney agrees with these opinions. An agreed hearing will concede that the attorney accepts the opinions of the expert in each of these areas and the resulting consequences in the disposition of the case. It is therefore critical that counsel understand the opinion of the expert(s) and the resulting impact on the case prior to an agreed hearing.

JURY TRIAL VS. BENCH TRIAL

If there is no election for a jury trial by the state, the defendant or if the court does not request a jury trial, the issue of incompetency will be tried before the bench. Tex. Code Crim. Pro. Art.

46B.051 (b).[17] Regarding the number of peremptory challenges, a competency hearing is civil in nature. White v. State, 591 S.W.2d 851 (Tex. Crim. App. 1979), rev'd on other grounds and Meraz v. State, 785 S.W.2d 146 (Tex. Crim. App. 1990). Rule 233 T.R.C.P. applies to peremptory challenges, allowing six per side in district court and three per side in county court. The Texas rules of evidence will apply regardless of whether trial is to the bench or a jury. Tex. Code Crim. Pro. Art. 46B.008. During a trial on competency, the guilt or innocence of the defendant is not at issue nor is the seriousness of the crime. Therefore, the state should not offer evidence or argument on either during a trial on competency. Callaway v. State, 594 S. W. 2d 440 (Tex. Crim. App. 1980). The burden of proof is on the party asserting the defendant is not competent to stand trial and must prove so by a preponderance of the evidence. Tex. Code Crim. Proc. Art. 46B.003(b). The jury's verdict on the issue of competency must be unanimous. Tex. Code Crim. Proc. Art.46B.052(b).

ISSUE(S) TO TRIER OF FACT

It is clear that the trier of fact must determine the issue of whether the defendant is competent to stand trial. This is true whether the trier of fact is the jury or the court.[18] However, there are two additional issues that require a finding to determine the disposition options available to the court. Each are discussed below, however, it is important to note that the code is not clear on the timing of these findings, who has the burden of proof on these issues and what is the appropriate burden of proof.

UNLIKELY TO BE RESTORED TO COMPETENCY IN THE FORESEEABLE FUTURE

Texas Code of Criminal Procedure Art. 46B.071(b) states that "[O]n 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 to Subchapter E or F; or (2) release the defendant on bail as permitted under Chapter 17". The code does not make clear, who makes the determination, who bears the burden on this issue and what is the appropriate burden of proof. However, for the practictioner it is important to note that a finding of incompetency coupled with a finding that the defendant is unlikely to be restored in the foreseeable future gives the court only two options in the disposition of the case. Either proceed to civil commitment under either subchapter E or F or release the defendant on bail. A finding on unlikely to be restored can be made upon the defendant's return to court following the initial placement as described in Texas Code of Criminal Procedure Art. 46B.084. Also, note that that in the chart developed by the Texas Office of Court Administration, the finding on unlikely to be restored occurs as the final

[17] Note that on the issue of competency, the default is a trial before the bench unless a jury trial is requested. This is in contrast with Tex. Code Crim. Proc Art. 1.13 that provides that in criminal matters trial it to a jury unless waived.
[18] Tex. Code Crim. Proc. Art. 46B.051 states that the judge shall make the appropriate finding and Tex. Code Crim. Proc. Art. 46B.052 states the jury verdict must answer that question.

step before dismissal or civil commitment. There is support for the proposition that a finding on unlikely to be restored at the initial competency hearing. First, the language regarding unlikely to be restored is found in the section immediately following the section on the incompetency trial. Second, the factors that the expert is required to consider as part of the initial examination include, "whether the identified condition has lasted or is expected to last continuously for at least one year".[19] In addition to being a factor to be considered by the expert, the expert report is also required to provide "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".[20] In representing a client in which competency is an issue, counsel should carefully review the expert's finding on restoration in the foreseeable future and incorporate it as appropriate into their strategy in what findings to seek at the initial determination of competency.

INITIAL PLACEMENT

Once the defendant is found incompetent to stand trial, the disposition and placement are determined by the trial court. The court's options range from outpatient to maximum security. All initial commitments are for a period not to exceed 120 days except misdemeanor inpatient commitments which are for a period not to exceed 60 days. See Articles 46B.072(b); 46B.073(b)(1) and (2) C.C.P. Public safety and the perceived dangerousness of a defendant guide the court's decision as to whether a defendant is committed to an inpatient or an outpatient setting.

TIME LIMITATIONS ON PLACEMENT AFTER FINDING OF INCOMPETENCE

The placement and the duration of the placement for a defendant who has been found incompetent are determined by the charges pending against the defendant. As stated previously, an initial placement is for 120 days if charged with a felony and 60 days if charged with a misdemeanor.[21] Regardless of whether a felony or misdemeanor the court can grant one extension of 60 days, if within 15 days of expiration the court is advised that the defendant has not obtained competency but is likely to be restored during the period of the extension.[22] The extension of time would be included in a report to the court which includes the pertinent opinions on the defendant's competency.[23] The report of the head of the facility (where defendant is being housed) is required 15 days before the expiration of the initial restoration period, regardless of whether an extension is being sought.

[19] Tex. Code. Crim. Proc. Art. 46B.024(3)
[20] Tex. Code. Crim. Proc. Art. 46B.024(b)(2)
[21] Tex. Code. Crim. Proc. Art. 46B.073(b)(1) and (2)
[22] Tex. Code. Crim. Proc. Art. 46B.080
[23] Tex. Code. Crim. Proc. Art. 46B.079

An additional limitation on the time period that a defendant can be detained is contained in Texas Code of Criminal Procedure Art. 46B.0095. This provision states that a defendant cannot be detained for restoration of competency for a cumulative period in excess of the maximum term provided by law for the offense for which defendant is charged. The period of detention includes all time in jail awaiting trial, time awaiting evaluation or placement and time detained in an impatient facility.[24] This limitation is especially relevant for misdemeanor defendants for whom the maximum punishment provided is either 180 days or 1 year.[25] Even if a misdemeanor defendant is in an outpatient setting, the maximum period of restoration is 2 years.[26]

PLACEMENT OPTIONS

The options for placement following a finding of incompetence are divided into three categories of offenses. The categories are, 1) those charged with a Class B misdemeanor; 2) those charged with a Class A misdemeanor or non-violent offense and non-deadly weapon felonies and 3) violent offenses felonies and/or deadly weapon felonies.[27] The placement options are very similar for the first two categories listed above.

For Class B and Class A misdemeanors or non-violent offense and non-deadly weapon felonies, the court can order defendant released on bail to outpatient competency restoration, commit the defendant to jail based competency restoration or commit to a state mental health or residential facility.[28] Counsel should investigate and be prepared to present to the court each of these options. In order to for the court to place the defendant in an outpatient competency restoration program the court must find that the defendant is not a danger to others and may be safely treated on an outpatient basis.[29] Defendants charged with "violent offense" felonies and/or deadly weapon felonies can only be placed at the maximum-security unit of a mental health facility.[30] This placement in a maximum-security facility is not limited to the Vernon State Hospital. The placement can also be any maximum security mental treatment facility operated by the United States or to the maximum-security section of a Veterans Affairs Hospital.[31]

RETURNING THE DEFENDANT TO COURT

Regardless of the placement for the defendant, the defendant must be returned to the committing court not later than the expiration of the period of restoration. The head of the facility or

[24] Tex. Code. Crim. Proc. Art. 46B.009
[25] Tex. Penal Code. § 12.21 and § 12.22
[26] Tex. Code Crim. Proc. Art. 46B.010
[27] "violent offense" is defined in Tex. Code. Crim. Proc. Art. 17.032.
[28] Tex. Code Crim. Proc. Art. 46B.0711, 46B.073(e) and 46B.073(f).
[29] Tex. Code Crim. Proc. Art. 46B.0711 and 46B.072
[30] Although included in the list of violent offenses in Tex. Code Crim. Proc. Art. 17.032, Class A assault family violence is excluded as an offense requiring placement in the maximum security unit of a mental health facility.
[31] Tex. Code Crim. Proc. Art. 46B.073(c)

outpatient provider is also required to provide a report to the court not later than 15 days before the period of restoration is set to expire. The report can either state, 1) the defendant is clinically ready and can be safely transferred to a competency restoration program for educational 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.[32] The court is required to provide notice to the attorney for the defendant and the state immediately upon receipt so that any objection to the report can be raised.

OPPORTUNITY TO CONTEST/OBJECT TO THE REPORT

The attorney for the defendant is required to meet and confer with the defendant to determine if there is any suggestion that the defendant has not regained competency within 3 days of being provided the report.[33] Despite the language in the statute that states the conference is to determine if counsel believes the defendant has not regained competency, the conference should obviously focus on whether counsel disagrees with any portion of the report. Any party can object to the contents of the report. This objection can be raised in open court or in writing and must be filed within 15 days of the court's receipt of the report.[34] If there is an objection from any party, the issues will be set for a hearing. Like the initial competency hearing, the default is for a trial before the bench, however any party or the court can request a jury trial.[35]

The trial following the defendant's return to court is focused on whether or not the defendant has regained competency. If it is determined that defendant is competent, criminal proceedings must be resumed within 14 days.[36] If it is determined that the defendant is incompetent, the only option of the court is to proceed to civil commitment under either Subchapter E or F.[37]

APPEAL AND STANDARD OF REVIEW

Art. 46B.011 C.C.P. provides that neither party is entitled to make an interlocutory appeal of a determination of competency or incompetency under Art. 46B.005 C.C.P. Direct appeal is not available until after final conviction. A competency hearing is ancillary to the main criminal proceeding and can be included as a point of error in an appeal of the trial on the merits. Jackson v. State, 548 S.W. 2d 685, 690(Tex. Crim. App. 1977).

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[32] Tex. Code Crim. Proc. Art. 46B.079(b)
[33] Tex. Code Crim. Proc. Art. 46B.084(a)(1). Upon showing of good cause the court can specify a later date for the conference.
[34] Tex. Code Crim. Proc. Art. 46B.084(a-1)(1)
[35] Tex. Code Crim. Proc. Art. 46B.084(b)
[36] Tex. Code Crim. Proc. Art. 46B.084(d)(1)
[37] Tex. Code Crim. Proc. Art. 46B.084(e)(f). Which provision of civil commitment controls depends on whether or not charges are dismissed.

An abuse of discretion standard is applied to the trial court's failure to conduct an informal inquiry. The appellate courts will not conduct de novo review. If the appellate court finds that the trial court abused its discretion by not conducting an inquiry hearing, it will remand the matter to the trial court with instructions to hold an inquiry hearing. Casey v. State, 924 S.W. 2d 946, 948-949 (Tex. Crim. App. 1996).

The standard of review applied to the jury's determination of the issue of competency is whether, considering all the evidence relevant to the issue, the judgment is so against the greater weight and preponderance of the evidence as to be manifestly unjust. Meraz v. State, 785 S.W. 2d 146, 155 (Tex. Crim. App. 1990).

CONCLUSION

The frequency of encountering defendants suffering from a mental health issue or intellectual disability will likely continue given the trend towards deinstitutionalization. As the general public gains a greater understanding of the prevalence of mental illness in our society, there is reason to believe that there could be greater acceptance of legal issues of not guilty by reason of insanity and competency. A thorough understanding of the procedure and case law for each is required to understand an attorney's obligation and to effectively use these tools to represent your clients.