TEXAS MENTAL HEALTH LEGISLATIVE REFORM: SIGNIFICANT ACHIEVEMENTS WITH MORE TO COME*

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I. INTRODUCTION

Texas, like other states, has seen significant numbers of persons with serious mental illness or intellectual or developmental disabilities (IDD) cycle through our jails and prisons. Indeed, "[a]dults with untreated mental health and/or substance use disorders are eight times more likely to be incarcerated, often due to lack of access to appropriate crisis services and ongoing care."[1] Moreover, persons with mental illness or IDD "are greatly overrepresented in the criminal justice system compared to their prevalence in the general population."[2] As the Texas Judicial Commission on Mental Health has observed, "[n]early 25[%] of the inmate population in Texas has a mental health need."[3] Moreover, and unfortunately, the two largest mental health facilities in Texas are within the Harris County and Dallas County jails.[4]

The Texas Legislature, as well as the Texas Supreme Court and Court of Criminal Appeals, have taken notice in recent years. This Article will discuss recent legislative and judicial initiatives, as well as focus on next steps. In particular, Section II of this Article will analyze several key legislative enactments intended to address some of these issues from the last two regular legislative sessions.[5] In turn, Section III will discuss the creation of the Texas Judicial Commission on Mental Health.[6] Finally, Section IV will highlight additional legislative proposals that are likely to come before the legislature in 2021.[7]

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1. MEADOWS MENTAL HEALTH POL'Y INST., *Smart Justice*, https://www.texasstateofmind.org/focus/smart-justice/ (last visited Nov. 14, 2020).

2. TEX. JUD. COMM'N ON MENTAL HEALTH, TEXAS MENTAL HEALTH AND INTELLECTUAL AND DEVELOPMENTAL DISABILITIES LAW BENCH BOOK 2 (2d ed. 2019–2020) [hereinafter BENCH BOOK], http://texasjcmh.gov/media/1738/jcmh-bench-book-2nd-edition-digital-version.pdf (last visited Nov. 14, 2020). The Author was a Commission member who provided input and advised Judicial Commission staff regarding the content of the Bench Book. *Id.*

3. *Id.*

4. Editorial, *The Largest Mental-Health Facility in Texas Shouldn't Be a Jail*, DAL. MORNING NEWS (Feb. 17, 2019), https://www.dallasnews.com/opinion/editorials/2019/02/17/largest-mental-health-facility-texas-shouldnt-jail. For an extended discussion of the large prevalence of persons with mental illness in the criminal justice system in Texas and a summary of some of the reasons why, see BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS: AN ANALYSIS AND GUIDE 7–11 (NAMI-Texas 6th ed. 2019) [hereinafter SHANNON GUIDE], https://3394qh4fg22b3jpwm94480xg-wpengine.netdna-ssl.com/wp-content/uploads/sites/12/2019/10/Shannon-6th-Edition-Oct-2019-for-NAMI-Texas-website.pdf (last visited Nov. 14, 2020).

5. *See infra* notes 8–183 and accompanying text (discussing 2017 and 2019 legislation).

6. *See infra* notes 184–213 and accompanying text (discussing the formation of the new state Commission).

7. *See infra* notes 214–299 and accompanying text (describing likely upcoming legislative proposals).

II. 2017 AND 2019 LEGISLATIVE SUCCESSES

The Texas Legislature enacted important mental health legislation during both the 2017 and 2019 legislative sessions. This Section will discuss highlights of these key bills from both 2017 and 2019, along with some significant funding mechanisms.

A. 2017 Highlights

There were two important statutory enactments in 2017 pertaining to persons with mental illness or IDD and the criminal justice system: Senate Bill (S.B.) 1326[8] and S.B. 1849.[9] This Subsection will discuss highlights of those two bills.

1. S.B. 1326

The first of these significant pieces of legislation was S.B. 1326.[10] That Bill focused on early screening in the jail for detainees suspected of having a mental illness or being a person with IDD, revisions to the criminal competency statutes, and other reforms.[11]

S.B. 1326 was, in significant part, a result of preliminary work by the Texas Judicial Council's Mental Health Committee.[12] Prior to the 2017 legislative session, the Committee made a number of recommendations for legislative changes relating to persons with mental illness in the criminal justice system.[13] In particular, the Committee recommended improvements to legislation related to jail intake screening protocols, competency restoration, and jail diversion.[14]

In addition, and separate from the work of the Judicial Council's Mental Health Committee, the Texas House Select Committee on Mental Health delivered a sweeping report to the Texas Legislature prior to the 2017 legislative session.[15] Former Texas House Speaker Joe Strauss had formed

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8. Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 2, 2017 Tex. Gen. Laws 3183.
9. Sandra Bland Act, 85th Leg., R.S., ch. 950, § 2.01, 2017 Tex. Gen. Laws 3801.
10. Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 2, 2017 Tex. Gen. Laws 3183.
11. *Id.*
12. *See* TEX. JUD. COUNCIL, *Mental Health Committee Report & Recommendations*, at 1–3 (Oct. 2016) [hereinafter *Mental Health Committee Report*], https://www.txcourts.gov/media/1436230/report-and-recommendations-of-tjc-mental-health-committee-final-w-cover.pdf (indicating that the Committee "was created to study and make recommendations regarding improvements to the administration of justice for those suffering from or affected by mental illness" and that the Committee had focused on making legislative recommendations prior to the 2017 legislative session).
13. *See id.* at 4–9 (setting forth legislative recommendations).
14. *Id.* at 4–7.
15. TEX. HOUSE SELECT COMM. ON MENTAL HEALTH, *Interim Report to the 85th Texas Legislature* (Dec. 2016) [hereinafter *Interim Report*], https://house.texas.gov/_media/pdf/committees/reports/84interim/Mental-Health-Select-Committee-Interim-Report-2016.pdf.

the Committee "to take a wide-ranging look at the state's behavioral health system."[16] Among its numerous recommendations, the Select Committee urged the legislature to "[r]eview requirements for competency restoration and the potential for diversion of nonviolent offenders and restoration in jail and outside of jail settings."[17]

Among its provisions, S.B. 1326 amended Article 16.22 of the Texas Code of Criminal Procedure, which relates to identification and screening of persons in jail who are suspected of having a mental illness or IDD.[18] Article 16.22, which was first enacted in 1993, has long required "sheriffs to notify magistrates if there is cause to believe [that] a defendant in custody" has a mental illness.[19] Unfortunately, the statute had been underutilized over the years. S.B. 1326 "revised the process of collecting information about an arrestee who may have mental illness."[20] Article 16.22 "requires a sheriff or municipal jailer to provide notice to a magistrate within [twelve] hours of receiving credible information that may establish reasonable cause to believe that a defendant has a mental illness or is a person with [IDD]."[21] S.B. 1326 expanded the reach of Article 16.22 to include both sheriffs and municipal jailers.[22] To emphasize the need for a prompt screening, the Bill also reduced the period for providing such notice to a magistrate from the prior requirement of seventy-two hours to twelve hours.[23] To encourage uniformity and ease of use, S.B. 1326 also specified that sheriffs and municipal jailers must use a standardized form created by the Texas Correctional Office on Offenders with Medical or Mental Impairments.[24] Then, as amended by the 2017 Bill, once the magistrate receives the written or electronic report, the magistrate must conduct the proceedings set forth in Articles 16.22 and 17.032.[25]

One of the key purposes of Article 16.22 is "to require a quick, early evaluation report for a defendant suspected of having a mental illness or a

16. Press Release, Office of Speaker Joe Strauss, *House Will Take Comprehensive Look at Mental Health Care* (Nov. 9, 2015), http://www.house.state.tx.us/news/press-releases/?id=5741.

17. *Interim Report*, *supra* note 15, at 72.

18. TEX. CODE CRIM. PROC. ANN. art. 16.22.

19. *See Mental Health Committee Report*, *supra* note 12, at 4 (discussing Article 16.22 in the context of "identifying a need for mental health treatment . . . as part of the intake process at local jails"). For a detailed analysis of Article 16.22, see SHANNON GUIDE, *supra* note 4, at 29–33.

20. BENCH BOOK, *supra* note 2, at 12.

21. SHANNON GUIDE, *supra* note 4, at 29 (emphasis omitted).

22. Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 2, 2017 Tex. Gen. Laws 3183 (adding municipal jailers).

23. *Id.* As further amended, the notice must now include "information regarding the defendant's behavior immediately before, during, and after the defendant's arrest." *Id.* at 3184.

24. *Id.* at 3184–85. A copy of the form is available online. *See* Texas Correctional Office on Offenders with Medical or Mental Impairments, *Collection of Information Form for Mental Illness and Intellectual Disability*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/documents/rid/SB_1326.pdf (last visited Nov. 14, 2020) (setting forth fillable form).

25. *See* Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 2, 2017 Tex. Gen. Laws 3183 (adding TEX. CODE CRIM. PROC. ANN. art. 15.17(a-1)).

developmental disability (or to locate the results of a comparable report if one has been conducted within the previous year's time)."[26] This evaluation is not an examination to determine competency to stand trial, nor is it intended to be a full mental health assessment.[27] Instead, subsection (b-1) requires the designated expert to report on "observations and findings" related to the following three, specified areas:

> (1) whether the defendant is a person who has a mental illness or is a person with an intellectual disability;
> (2) whether there is clinical evidence to support a belief that the defendant may be incompetent to stand trial and should undergo a complete competency examination under Subchapter B, Chapter 46B; and
> (3) any appropriate or recommended treatment or service.[28]

In other words, a key aspect of the statute is to ensure that there will be prompt screenings of jail detainees for mental illness or developmental disabilities. In addition to reducing the time limit for a sheriff to report such information to a magistrate to twelve hours, S.B. 1326 included two additional changes that were intended to encourage prompt reviews.[29] First, if a defendant does not cooperate with the collection of information about his or her mental status, "the magistrate may order the defendant to submit to an examination."[30] S.B. 1326 amended Article 16.22(a)(3) to permit this examination to take place in the "jail or in another place [deemed] . . . appropriate by the local mental health authority or local [IDD] authority" within seventy-two hours.[31] Under prior law, the examination had to take place at a mental health facility, and it did not need to be completed for twenty-one days.[32] This amendment greatly reduces the time for these examinations. Similarly, given an additional amendment included in S.B. 1326, "[a]fter the expert's [screening] interview with the defendant, a report must be provided to the magistrate within [ninety-six] hours of the date of the order if the defendant is in custody, or within [thirty] days if the defendant is not then in custody."[33] Under prior law, these reports to magistrates were

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26. SHANNON GUIDE, *supra* note 4, at 30.

27. *Id.* Moreover, "the legislature removed the term 'assessment' from the statute in 2019 amendments." *Id.*; *see infra* notes 145–150 and accompanying text (discussing 2019 legislative changes).

28. CRIM. PROC. art. 16.22(b-1) (footnote omitted). With regard to the second prong, note that a court may not order a full competency examination unless there are charges pending against the defendant. *Id.* art. 46B.002.

29. *See supra* note 23 and accompanying text (discussing the reduction in reporting time).

30. CRIM. PROC. art. 16.22(a)(3).

31. *See* Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 2, 2017 Tex. Gen. Laws 3183 (emphasis omitted) (amending CRIM. PROC. art. 16.22(a)(3)).

32. *Id.*

33. SHANNON GUIDE, *supra* note 4, at 29.

not due for thirty days, regardless of whether the defendant was in custody or not.[34]

Once a magistrate receives a report concluding that a defendant has mental illness or a developmental disability, one available option is for the magistrate to give "consideration to the defendant's release on personal bond (for nonviolent offenses), coupled with court-ordered treatment conditions."[35] Article 17.032 of the Code of Criminal Procedure has long provided this diversion option in the case of nonviolent charges.[36] As stated by the Author in a previous publication: "Indeed, Article 17.032 generally requires magistrates to release certain alleged offenders with mental illness or intellectual disabilities on personal bond pending further criminal proceedings unless good cause is shown otherwise."[37] The release on personal bond, however, should generally be coupled with an order for accompanying mental health treatment conditions.[38]

Prior to the 2017 legislative session, the Judicial Council's Mental Health Committee recommended potentially amending Article 17.032 "to increase flexibility regarding bond availability and conditions for mentally ill, non-violent defendants."[39] Thereafter, S.B. 1326 amended Article 17.032 in several ways.[40] First, the Bill narrowed the scope of violent offenses for which the personal bond statute is unavailable by revising the exclusion for assault charges.[41] As amended, only assault charges involving family violence are now disqualifying, whereas previously any assault charges precluded release on personal bond.[42] In addition, S.B. 1326 added a requirement that a magistrate, prior to releasing a defendant with mental illness or a developmental disability, must find:

> [A]fter considering all the circumstances, a pretrial risk assessment, if applicable, and any other credible information provided by the attorney representing the state or the defendant, that release on personal bond would

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34. *See* Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 2, 2017 Tex. Gen. Laws 3183, 3184 (amending CRIM. PROC. art. 16.22(b)). Note that one of the recommendations for further amendments to Article 16.22 is to eliminate the screening interview requirement for defendants who are no longer in jail custody. *See infra* notes 225–229 and accompanying text (discussing legislative proposal for 2021).

35. SHANNON GUIDE, *supra* note 4, at 31. *See* CRIM. PROC. art. 16.22(c)(1) (permitting the magistrate to conduct "any appropriate proceedings related to the defendant's release on personal bond under Article 17.032").

36. CRIM. PROC. art. 17.032. For the Author's detailed discussion of the origins, history, and scope of Article 17.032, see SHANNON GUIDE, *supra* note 4, at 36–39.

37. SHANNON GUIDE, *supra* note 4, at 36 (emphasis omitted). A court's release of a detainee on personal bond means "there is no requirement for sureties or other security (no bail)." *Id.*

38. *See* CRIM. PROC. art. 17.032(c) (requiring treatment conditions "unless good cause is shown").

39. *Mental Health Committee Report*, *supra* note 12, at 4.

40. Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 3, 2017 Tex. Gen. Laws 3183, 3185 (amending CRIM. PROC. art. 17.032).

41. *See id.* (amending CRIM. PROC. art. 17.032(a)(6)).

42. *Id.* Note that a charge of aggravated assault remains as part of the list of disqualifying violent offenses. CRIM. PROC. art. 17.032(a)(8).

> reasonably ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense.[43]

In addition to amending these screening and division provisions, S.B. 1326 also made significant changes to the state's statutes regarding competency to stand trial.[44] As this Author has described elsewhere, these "amendments were intended to create more options to inpatient commitments, particularly given the long waitlists and waiting time to access available state hospital beds for inpatient competency restoration."[45] For example, S.B. 1326 added Article 46B.091 to the Code of Criminal Procedure to expand the potential use by counties for jail-based competency restoration.[46] Additionally, S.B. 1326 added Article 46B.0711 to encourage the use of bail and outpatient competency restoration for defendants facing Class B misdemeanor charges.[47] As amended, the statutory structure for competency restoration now contemplates options for outpatient, jail-based, or inpatient competency restoration services for defendants who are determined to be restorable.[48]

S.B. 1326 succeeded in creating a statutory framework to encourage criminal courts to explore and utilize options for competency restoration services via either an outpatient program or an appropriate jail-based program.[49] As amended, Article 46B.071 delineates "a roadmap to guide the courts and practitioners as to the next steps under Chapter 46B upon an initial determination that the defendant is incompetent" and likely to be restored to competency.[50] However, for this statutory structure to be successful in lessening the state's reliance on inpatient forensic hospitalizations and to encourage more treatment in local communities, the state must provide the funding to develop an infrastructure of widely available outpatient and jail-based programs. At present "[t]here is limited availability of outpatient

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43. *See* Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 3, 2017 Tex. Gen. Laws 3183, 3186 (emphasis omitted) (adding CRIM. PROC. art. 17.032(b)(5)).

44. *See id.* §§ 5–30, at 3186–97 (amending various provisions of Chapter 46B, Texas Code of Criminal Procedure).

45. SHANNON GUIDE, *supra* note 4, at 75.

46. *See* Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 30, 2017 Tex. Gen. Laws 3183, 3197 (adding CRIM. PROC. art. 46B.091).

47. *See id.* § 11, at 3188 (adding CRIM. PROC. art. 46B.0711).

48. *See* SHANNON GUIDE, *supra* note 4, at 75 (describing statutory options). For a detailed discussion of various alternatives to inpatient forensic hospitalization for competency restoration, see Brian D. Shannon, *Competency, Ethics, and Morality*, 49 TEX. TECH L. REV. 861, 873–89 (2017) (describing recommendations and alternatives). This 2017 article was based on the Author's presentation at the 2016 *Texas Tech Law Review* and *Administrative Law Journal* Mental Health Law Symposium.

49. *See* Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 10, 2017 Tex. Gen. Laws 3183, 3188 (amending CRIM. PROC. art. 46B.071(a)).

50. *See* SHANNON GUIDE, *supra* note 4, at 74 (discussing Article 46B.071(a) and contrasting it against Article 46B.071(b) pertaining to defendants who are "unlikely to be restored in the foreseeable future").

competency restoration . . . programs in Texas."[51] There are even fewer jail-based competency programs.[52] Although the legislature addressed the funding need, in part, with novel new matching grant programs enacted in 2017, much more funding is still needed.[53]

Finally, one additional statutory change in S.B. 1326 is worthy of mention. Prior to the 2017 legislative session, one recommendation made by the Judicial Council's Mental Health Committee was to address "the effects of trial delays after competency restoration has occurred."[54] As previously observed, "[t]he lack of timely adjudications of defendants upon their return to the county jails following competency restoration services has been a recurring problem across Texas."[55] Article 46B.084 includes tight timelines for the court to proceed upon a defendant's return from receiving competency restoration services.[56] Prompt action is important to ensure that a criminal defendant with mental illness whose competency has been restored does not decompensate after a return to the county.[57] To underscore the need for prompt adjudication of the defendant's case upon return to the court, S.B. 1326 amended Article 32A.01 of the Code of Criminal Procedure relating to "speedy trial[s]" by adding a new subsection that generally requires "the trial of a criminal action against a defendant who has been determined to be

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51. *See* BENCH BOOK, *supra* note 2, at 136 n.110 (listing also the thirteen existing outpatient competency restoration programs across Texas as of November 2019). For a critical and thoughtful analysis of the increased emphasis on outpatient competency restoration programs under S.B. 1326, see Floyd L. Jennings, *Statutory Changes Regarding Mentally Ill Defendants*, 46 VOICE FOR THE DEF. 22, 24–25 (Nov. 2017), https://www.voiceforthedefenseonline.com/newsletters/2017/Nov2017.pdf. Dr. Jennings has expressed concerns about the success of outpatient programs regarding issues such as the availability of housing for defendants, self-management of prescribed medications for defendants with mental illness, and challenges pertaining to transportation for appointments with the outpatient treatment services provider. Jennings, *supra* at 24–25. He also recognized that "the availability of outpatient competency restoration programs is limited in the state." *Id.* at 25.

52. *See* BENCH BOOK, *supra* note 2, at 136 (identifying that there were only five programs as of November 2019—in Dallas County, Lubbock County, Nueces County, Midland County, and Tarrant County). Given the requirements for these programs, this limited number is none too surprising. *See id.* As described in the Bench Book, "Article 46B.091 requires counties seeking to operate a jail-based program to do so in a designated space that is separate from the space used for the general population of the jail and to provide services similar to other competency restoration programs (among other requirements)." *See id.* (referencing CRIM. PROC. art. 46B.091).

53. For a discussion of the 2017 matching grant legislation, see *infra* notes 77–94 and accompanying text.

54. *Mental Health Committee Report*, *supra* note 12, at 7.

55. *See* SHANNON GUIDE, *supra* note 4, at 95 (discussing the deadlines set forth in Article 46B.084, which requires "the court to make a prompt determination regarding the defendant's competency to stand trial upon the person's return to the court following the commitment") (emphasis omitted).

56. CRIM. PROC. art. 46B.084.

57. *See* SHANNON GUIDE, *supra* note 4, at 96 (observing that there is "a very real concern that when . . . time elapses after a defendant is transported back to the county from the treatment facility and prior to the resumption of criminal proceedings, it is not unusual for the defendant — while once viewed as competent by the treating physicians — to deteriorate in medical condition").

restored to competency under Article 46B.084 . . . *be given preference over other matters before the court*, whether civil or criminal."[58]

2. S.B. 1849

The second significant mental health enactment during the 2017 legislative session was S.B. 1849, the Sandra Bland Act.[59] The new law sought to address, in part, "the circumstances that led to the death of Sandra Bland, a black woman found dead" in the Waller County Jail, only "days after being arrested during a routine traffic stop."[60] Her 2015 suicide while in the "rural Texas jail drew outrage across the nation."[61] Although the initial 2017 legislative effort was intended "to address racial profiling during traffic stops, ban police from stopping drivers on traffic violations as a pretext to investigate other potential crimes, limit police searches of vehicles, and address other jail and policing reforms," during the legislative process "most of the sweeping provisions related to policing [were] stripped out."[62] As finally passed, however, the Act included important mental health law reforms "like diverting inmates with mental health and substance abuse issues into treatment."[63] Although a portion of the Act mirrored provisions included in S.B. 1326 regarding early identification of jail detainees with mental illness or developmental disabilities,[64] the Act went further in addressing mental health issues in state jails.

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58. *See* SHANNON GUIDE, *supra* note 4, at 52; Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 4, 2017 Tex. Gen. Laws 3183, 3186 (emphasis added) (adding CRIM. PROC. art. 32A.01(c)). After this amendment, the only exception in terms of docket priority would be "the trial of a criminal action in which the alleged victim is younger than [fourteen] years of age." CRIM. PROC. art. 32A.01(b)–(c).

59. *See* Sandra Bland Act, 85th Leg., R.S., ch. 950, § 2.01, 2017 Tex. Gen. Laws 3801 (declaring that the "Act shall be known as the Sandra Bland Act, in memory of Sandra Bland").

60. Jonathan Silver, *Texas Gov. Abbott Signs "Sandra Bland Act" into Law*, TEX. TRIB. (June 15, 2017), https://www.texastribune.org/2017/06/15/texas-gov-greg-abbott-signs-sandra-bland-act-law/.

61. Jolie McCullough & Cassandra Pollock, *The Texas Lawmakers Who Led the Sandra Bland Act are Pushing to Reinstate the Police Reforms Stripped from Their Original Bill*, TEX. TRIB. (June 9, 2020), https://www.texastribune.org/2020/06/09/texas-sandra-bland-act-police/.

62. *Id.* Following the May 2020 death of George Floyd, the two sponsors of the Sandra Bland Act, Senator John Whitmire and Representative Garnet Coleman, announced plans to push "again for measures they hoped to achieve with the 2017 law — like investigations into racial profiling and officer consequences." *Id.*

63. *Id.* As one journalist described, the initiative "became a mostly mental health bill" after the Senate sponsor "removed much of the language related to encounters with law enforcement." Silver, *supra* note 60.

64. *Compare* Sandra Bland Act, 85th Leg., R.S., ch. 950, § 2.01, 2017 Tex. Gen. Laws 3801, *with* Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 2, 2017 Tex. Gen. Laws 3183 (both amending TEX. CODE CRIM. PROC. ANN. art. 16.22 with some overlapping provisions). *But see* Ryan K. Turner & Elizabeth Rozacky, State Bar of Texas, 32nd Annual Advanced Gov't Law Course, *Five Hot Topics in Criminal Justice: Pandemic Edition*, at 9 (July 30–31, 2020), https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:05c2f5ae-e83a-4686-ab7e-17fe096f6d74 (discussing a discrepancy between the Sandra Bland Act's amendment to Article 16.22 that created a twelve-hour limit for a sheriff to notify a magistrate about a defendant's mental illness, and similar language set forth in S.B. 1326). In particular, Judge Turner and Ms. Rozacky have noted that S.B. 1326 expanded the scope of who must notify a magistrate to include

One key provision in the Sandra Bland Act was the addition of Article 16.23 to the Code of Criminal Procedure.[65] The statute requires that law enforcement agencies, in general, "shall make a good faith effort to divert a person suffering a mental health crisis or suffering from the effects of substance abuse to a proper treatment center in the agency's jurisdiction."[66] This new diversion provision is limited, however, to nonviolent misdemeanors for which "the mental health crisis or substance abuse issue is suspected to be the reason the person committed the alleged offense."[67] Although the statute only requires a "good faith effort to divert" and is limited to nonviolent misdemeanors, it is significant as it signals to law enforcement to consider the diversion of offenders with mental illness for appropriate treatment.[68]

The Sandra Bland Act included several additional provisions pertaining to persons with mental illness in the criminal justice system. First, the statute enhanced provisions relating to community collaborative grants designed "to provide services to persons experiencing homelessness, substance abuse

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municipal jailers, but also "limited the obligation to defendants in custody" who are charged with Class B misdemeanors or higher. *Id.* The authors also observed that a 2019 legislative "cleanup" bill retained S.B. 1326's effective exclusion of Class C misdemeanors. *See id.* (discussing Act of May 21, 2019, 86th Leg., R.S., H.B. 4170, § 4.003, at 11). They also have contended that this 2019 recodification was an improper substantive change. *Id.* A counterargument, however, is that the language amending Article 16.22 in S.B. 1326 took precedence over the less restrictive language in the Sandra Bland Act because S.B. 1326 was the later-enacted bill. *See* TEX. GOV'T CODE ANN. § 311.025(b) (describing the interpretative method to construe amendments to the same code section enacted during the same legislative session). Regardless of the proper interpretation, however, if the legislature revisits the Sandra Bland Act in 2021, one topic for consideration would be the scope of Article 16.22 with regard to its possible application to persons charged with Class C misdemeanors. *See* Turner & Rozacky, *supra* at 9 (arguing that the limitation in "Article 16.22 to persons arrested on Class B misdemeanors and higher should be repealed").

65. *See* Sandra Bland Act, 85th Leg., R.S., ch. 950, § 2.02, 2017 Tex. Gen. Laws 3801, 3803 (codifying CRIM. PROC. art. 16.23).

66. CRIM. PROC. art. 16.23(a).

67. *Id.* art. 16.23(a)(3)–(4). There are additional exceptions for persons charged with an array of intoxication-related offenses, including "those accused of driving while intoxicated, driving while intoxicated with a child, flying while intoxicated, boating while intoxicated, assembling or operating an amusement ride while intoxicated, intoxication assault, and intoxication manslaughter." House Research Org., Bill Analysis, Tex. S.B. 1849, 85th Leg., R.S. (2017), at 3 (describing the exceptions codified at CRIM. PROC. art. 16.23(b)).

68. CRIM. PROC. art. 16.23(a). Separately, a law enforcement officer has long had discretion, under the Health and Safety Code's provisions on warrantless emergency detention, "even in the event of possible criminal activity, to divert the individual for a mental health evaluation and possible services, rather than making an arrest and transporting the individual to jail." *See* SHANNON GUIDE, *supra* note 4, at 23 (summarizing a peace officer's "broad discretion to make a warrantless apprehension of a person with mental illness [for transportation to a treatment facility for evaluation and possible treatment] when the officer has reason to believe that because of the mental illness 'there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained'") (quoting TEX. HEALTH & SAFETY CODE ANN. § 573.001(a)(1)(B)); *see also* BENCH BOOK, *supra* note 2, at 75 (observing that "[l]aw enforcement officers have significant discretion to make a warrantless apprehension for an emergency detention if the statutory criteria are met rather than choosing to make an arrest") (internal citation omitted).

issues, or mental illness."[69] In addition, the Act amended § 511.009(a) of the Government Code to require the Commission on Jail Standards to adopt rules requiring county jails to give prisoners "the ability to access a mental health professional at the jail through a telemental health service [twenty-four] hours a day," and "the ability to access a health professional at the jail or through a telehealth service [twenty-four] hours a day."[70] The Act also required the Commission to adopt rules to establish "minimum standards regarding the continuity of prescription medications for the care and treatment of prisoners," since continuity of prescribed medications for a person with mental illness is particularly important.[71]

The Sandra Bland Act also increased the training requirements for county jail staff and peace officers. In particular, the Act required the Texas Commission on Law Enforcement to require officers to have mandatory training in de-escalation and crisis intervention techniques, not only in "interaction with persons with mental impairments," but also "to facilitate interaction with members of the public, including techniques for limiting the use of force resulting in bodily injury."[72] Plus, the Act requires the training program for county jailers to "consist of at least eight hours of mental health training approved by the [C]ommission and the Commission on Jail Standards."[73]

B. Matching Grants for New Initiatives

The Texas Legislature has been very forward thinking in creating statutory mechanisms for the diversion of offenders with mental illness and increasing the availability of options for outpatient mental health services.[74] But, as the Texas Judicial Council's Mental Health Committee recognized prior to the 2017 legislative session, "[s]uccessful implementation of this approach [adopting alternatives to state hospitalization for competency

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69. *See* Sandra Bland Act, 85th Leg., R.S., ch. 950, § 2.03, 2017 Tex. Gen. Laws 3801 (amending GOV'T §§ 539.002(a)–(b)).

70. *See id*. (adding GOV'T §§ 511.009(a)(23)(A)–(B)). The latter provision requires the jail to transport a prisoner "to access a health professional" if one is "unavailable at the jail or through a telehealth service." GOV'T § 511.009(a)(23)(B). In addition, during the 2019 legislative session, the legislature amended this aspect of the Sandra Bland Act relating to twenty-four-hour access to a mental health professional to require jails to provide access to:

> [A] mental health professional at the jail or through a telemental health service [twenty-four] hours a day or, if a mental health professional is not at the county jail at the time, then require the jail to use all reasonable efforts to arrange for the inmate to have access to a mental health professional within a reasonable time.

Tex. H.B. 2327, 86th Leg., R.S., § 1, at 5 (2019).

71. Sandra Bland Act, 85th Leg., R.S., ch. 950, § 3.06, 2017 Tex. Gen. Laws 3801, 3807 (adding GOV'T § 511.009(d)).

72. *See id*. at 3808 (amending TEX. OCC. CODE ANN. §§ 1701.253(j), (n)).

73. *See id*. at 3809 (amending OCC. § 1701.310(a)).

74. *See, e.g.*, *supra* text accompanying notes 47–53 (discussing S.B. 1326 and its expansion of outpatient options).

restoration for defendants charged with non-violent misdemeanors] will require creation and expansion of local treatment options sufficient to meet demand and the needs of these individuals and their communities."[75] Indeed, the Committee's recommendations for statutory changes to encourage alternatives to state hospitals for competency restoration in appropriate cases were "being made based upon the assumption that adequate funding and resources will be made available to allow the changes to be effective."[76] Significantly, the legislature in 2017 addressed, in part, the need for additional resources for expanded community-based services via two matching grant mechanisms: House Bill (H.B.) 13[77] and S.B. 292.[78]

H.B. 13 authorized a matching grant program through the Health and Human Services Commission to support community mental health programs.[79] The statute required that grants under the program "must be used for the sole purpose of supporting community programs that provide mental health care services and treatment to individuals with a mental illness and that coordinate mental health care services for individuals with a mental illness with other transition support services."[80] In addition, the legislature appropriated $30 million for the 2018–2019 biennium to provide the state portion of the matching grants—$10 million for fiscal year 2018 and $20 million for fiscal year 2019.[81] In turn, during the 2019 session, the legislature extended the annual funding for these grants for two more years at the $20 million per annum level.[82]

The implementing statute requires that the Commission reserve half of the grant funding for community mental health programs in counties with populations of 250,000 or less.[83] Many of the resulting programs were "designed to address coordination of mental health care and transition support services for individuals with mental illness."[84] The Commission's "staff categorized the awarded [sixty-three] projects into five main project types" including access to care, co-occurring disorders (both psychiatric and substance abuse), crisis and forensic services, peer support, and school-based

75. *Mental Health Committee Report*, *supra* note 12, at 6.

76. *Id.* at 3 (adding that additional resources would be necessary for an array of recommended alternatives including outpatient treatment services).

77. Act of May 23, 2017, 85th Leg., R.S., ch. 770, § 1, sec. 531.0999, 2017 Tex. Gen. Laws 3274.

78. Act of May 23, 2017, 85th Leg., R.S., ch. 528, § 1, sec. 531.0993, 2017 Tex. Gen. Laws 1419.

79. *See* Act of May 23, 2017, 85th Leg., R.S., ch. 770, § 1, sec. 531.0999, 2017 Tex. Gen. Laws 3274, 3274–75 (codifying the new grant program in TEX. GOV'T CODE ANN. § 531.0999 (current version at GOV'T § 531.0991)).

80. GOV'T § 531.0991(d).

81. 2018–19 General Appropriations Act, Tex. S.B. 1, 85th Leg., R.S. (2017), at II-107 (providing $10 million for fiscal year 2018 and $20 million for fiscal year 2019).

82. 2020–21 General Appropriations Act, Tex. H.B. 1, 86th Leg., R.S. (2019), at II-68 (providing $20 million for each year of the biennium).

83. GOV'T § 531.0991(i).

84. HEALTH & HUM. SERVS. COMM'N, REPORT ON THE COMMUNITY MENTAL HEALTH GRANT PROGRAM 8 (Dec. 2019), https://hhs.texas.gov/reports/2019/12/report-community-mental-health-grant-program.

and early interventions.[85] The awarded grant programs provided services for "over 9,100 individuals monthly, covering 127 counties and nearly all metropolitan areas with over 100,000 population."[86]

The second matching grant program created in 2017, S.B. 292, was intended "to reduce recidivism, arrest, and incarceration of individuals with mental illness."[87] Specifically, the Bill directed the Health and Human Services Commission to "establish a program to provide grants to county-based community collaboratives for the purposes of reducing: (1) recidivism by, the frequency of arrests of, and incarceration of persons with mental illness; and (2) the total waiting time for forensic commitment of persons with mental illness to a state hospital."[88] The legislation required units of local government to work together by creating a collaborative to include "a county, a local mental health authority that operates in the county, and each hospital district, if any, located in the county."[89] The legislature appropriated a total of $37.5 million for the 2018–2019 biennium to establish matching funds for the new grants—$12.5 million for fiscal year 2018 and $25 million for fiscal year 2019.[90] Additionally, the legislature appropriated funding to continue the grants for the 2020–2021 biennium at the $25 million per fiscal year level.[91]

S.B. 292 identified several specific, "[a]cceptable uses" for the grant money.[92] These included, for example, the "establishment," "continuation," or "expansion of a mental health jail diversion program," and "the establishment of alternatives to competency restoration in a state hospital, including outpatient competency restoration, inpatient competency restoration in a setting other than a state hospital, or jail-based competency

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85. *See id.* (listing and describing these five categories of grant award projects).

86. *Id.* at 24.

87. *See* Act of May 23, 2017, 85th Leg., R.S., ch. 528, § 1, sec. 531.0993, 2017 Tex. Gen. Laws 1419, 1419.

88. *Id.* (now codified at TEX. GOV'T CODE ANN. § 531.0993(a)).

89. *Id.* (now codified at GOV'T § 531.0993(b)) (permitting the collaborative to include additional local entities). An additional section of S.B. 292 added § 531.09935 to the Government Code to provide an additional matching grant opportunity relating to forensic issues involving persons with mental illness for the state's "most populous county"—i.e., Harris County. *See id.* § 2, at 1421 (now codified at GOV'T § 531.09935(a)). The bill sponsor for S.B. 292, Sen. Joan Huffman, had previously passed "legislation [in 2013] to create a mental health jail diversion pilot program in Harris County." *See* Press Release from the Tex. Health & Hum. Servs. Comm'n, Texas Awards Millions for Mental Health (Aug. 10, 2018, 8:17 PM), https://www.myhighplains.com/news/texas/texas-awards-millions-for-mental-health/ (quoting Sen. Huffman). This aspect of S.B. 292 allowed for this program in Harris County to continue, along with creating grant opportunities "to address critical mental health issues affecting our criminal justice system and to replicate the successes of that [Harris County pilot] program in other parts of the state." *Id.* (quoting Sen. Huffman).

90. *See* 2018–19 General Appropriations Act, Tex. S.B. 1, 85th Leg., R.S. (2017), at IX-94 (providing $12.5 million for fiscal year 2018 and $25 million for fiscal year 2019).

91. *See* 2020–21 General Appropriations Act, Tex. H.B. 1, 86th Leg., R.S. (2019), at II-67 (providing $25 million for each year of the biennium).

92. *See* Act of May 23, 2017, 85th Leg., R.S., ch. 528, § 1, sec. 531.0993, at 3, 2017 Tex. Gen. Laws 1419, 1420 (now codified at GOV'T §§ 531.0993(f)(1)–(8)).

restoration."[93] The Health and Human Services Commission subsequently awarded grants as permitted by the legislation for projects such as "Forensic Assertive Community Treatment Teams, Jail-Based Competency Restoration Programs, and local community hospital, crisis, respite, or residential beds."[94]

In addition to these matching grant-funding mechanisms first created in 2017, during "the 2019 session the legislature passed S.B. 500, which directed that an additional $445,354,363 be appropriated from the state's rainy day fund to replace the Austin and San Antonio State Hospitals and to add capacity at the Rusk State Hospital."[95] Specifically, the Bill included a $165,000,000 appropriation "to begin construction of a 240-bed replacement" of the Austin State Hospital, $190,300,000 to start construction of a 300-bed replacement for the San Antonio State Hospital, and just over $90 million for a "100-bed non-maximum security unit at Rusk State Hospital."[96] These appropriations for additional bed space in the state hospitals were intended to help address a public policy crisis relating to the state's challenge in grappling "with large numbers of individuals in need of court-ordered forensic services."[97]

C. 2019 Enactments

The legislature enacted three significant bills relating to persons with mental illness or IDD during the 2019 legislative session—S.B. 362,[98] H.B. 601,[99] and S.B. 562.[100] This Subsection will address highlights of these three bills and will then discuss two unsuccessful legislative efforts.

1. S.B. 362

The first of these 2019 bills, S.B. 362, included amendments to both the state's civil commitment laws and the Code of Criminal Procedure.[101] With

93. *Id.* §§ 531.0993(f)(1)–(3). Other allowable purposes include various community-based mental health services and the possibility of creating "interdisciplinary rapid response teams to reduce law enforcement's involvement with mental health emergencies." *Id.* §§ 531.0993(f)(4)–(8).

94. *See* TEX. SEN. COMM. ON HEALTH & HUM. SERVS., INTERIM REPORT TO THE 86TH LEGISLATURE 71 (2018) (summarizing grant awards under both S.B. 292 and H.B. 13). Several counties, including Lubbock, Dallas, Tarrant, and Nueces, utilized S.B. 292 grants to created jail-based competency restoration programs. *See* SHANNON GUIDE, *supra* note 4, at 104 (discussing S.B. 292 grants).

95. SHANNON GUIDE, *supra* note 4, at 82. These dollars were in addition to an appropriation of "$300 million during the 2017 session toward the planning and construction of new hospital capacity." *Id.*

96. Act of Mar. 27, 2019, 86th Leg., R.S., ch. 465, § 21, 2019 Tex. Gen. Laws.

97. *See* SHANNON GUIDE, *supra* note 4, at 81–82 (discussing lack of capacity in state hospitals and litigation relating to lengthy waiting times for available bed space for forensic patients).

98. Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 1, sec. 137.098, 2019 Tex. Gen. Laws.

99. Act of May 19, 2019, 86th Leg., R.S., ch. 1276, § 1, sec. 16.22, 2019 Tex. Gen. Laws.

100. Act of May 22, 2019, 86th Leg., R.S., ch. 1212, § 1, sec. 42.09, 2019 Tex. Gen. Laws.

101. *See* Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 1, sec. 137.098, 2019 Tex. Gen. Laws (amending both the Texas Health and Safety Code and the Texas Code of Criminal Procedure).

regard to the civil provisions, prior to the 2019 legislative session, the Texas Judicial Council's Guardianship, Mental Health, & Intellectual/ Developmental Disability Committee had made a number of recommendations for amendments to the state's civil commitment statutes.[102] Among these recommendations, the Committee urged that the legislature should clarify the "standard for court-ordered temporary outpatient mental health services" and improve the process for transfers from inpatient to outpatient treatment.[103] As to the former, the Committee recognized that the statutory standard for outpatient civil commitment was confusing and "difficult to read and apply."[104] Notably, the Committee had formed a working group of interested stakeholders who had discussed possible improvements to the statutory provisions relating to involuntary outpatient mental health treatment.[105] That working group concluded that an "update of these provisions based upon current practices and research on best practices in mental health treatment could provide a mechanism to divert individuals with mental health conditions from the criminal justice system and the inpatient mental health treatment system."[106]

The legislature was receptive to the Committee's recommendations. S.B. 362 included several key amendments to the state's civil commitment statutes.[107] Significantly, the Bill split up the various provisions governing inpatient and outpatient mental health services "so that there is one [statutory] section for each type of procedure."[108] Although this aspect of S.B. 362 was largely non-substantive in nature, it should assist courts in assuring that the proper set of procedures and commitment standards are being applied in specific cases.

On an important substantive matter, however, S.B. 362 "clarified the standard" for outpatient civil commitments.[109] The Bill removed a former

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102. TEX. JUD. COUNCIL GUARDIANSHIP, MENTAL HEALTH, & INTELL./DEVELOPMENTAL DISABILITIES COMM., COMMITTEE REPORT AND RECOMMENDATIONS 1–2 (June 2018) [hereinafter JUDICIAL COUNCIL 2018 REPORT], https://www.txcourts.gov/media/1441879/guardianship-mental-health-idd-committee-report.pdf.

103. *Id.* at 1. Among the other recommendations, the Committee urged that the legislature appropriate more "funding for community mental health services, including outpatient mental health services" and that judges "receive additional education on standards and procedures for court-ordered outpatient mental health services." *Id.* at 2.

104. *Id.* at 7.

105. *Id.*

106. *Id.*

107. *See* Act of May 15, 2019, 86th Leg., R.S., ch. 582, §§ 9–23, sec. 137.098, 2019 Tex. Gen. Laws, at 5–18 (amending various sections of the Texas Health and Safety Code).

108. TEX. JUD. COMM'N ON MENTAL HEALTH, *86th Texas Legislative Update Spotlight: SB 362*, at 1 [hereinafter *Update Spotlight: S.B. 362*], http://texasjcmh.gov/media/1647/legislative-summary-sb-362.pdf (last visited Nov. 14, 2020). As amended, the procedures for court-ordered inpatient mental health services are included in §§ 574.034 and 574.035 of the Health and Safety Code (temporary and extended services, respectively), and the processes for ordering temporary or extended outpatient services are now included in §§ 574.0345 and 574.0355, respectively. TEX. HEALTH & SAFETY CODE ANN. §§ 574.034, 574.035, 574.0345, and 574.0355.

109. *Update Spotlight: S.B. 362*, *supra* note 108, at 1.

"requirement that courts find that a proposed patient would continue to suffer severe and abnormal mental, emotional, or physical distress without treatment before ordering the patient to receive outpatient mental health services."[110] Prior to the legislative session, the Judicial Council's Guardianship, Mental Health, & Intellectual/Developmental Disability Committee had described this former standard as being "difficult to read and apply because of its many subparts and sub-subparts" and recommended a change.[111] S.B. 362 replaced the former language with a "more specific requirement, that the court find 'outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the proposed patient or others.'"[112] In addition to this clarification of the standard for outpatient commitments, S.B. 362 also altered the former requirement "that the court find characteristics of the patient's clinical condition 'make impossible' a rational and informed decision whether to submit to voluntary outpatient treatment, to a more provable standard; a court must now find that the patient's condition 'significantly impairs' that ability."[113] The new standard is far more realistic and susceptible of proof than requiring the state to demonstrate that the proposed patient's symptoms "rendered impossible" the person's "ability to make a rational and informed decision" about voluntary mental health care.[114]

S.B. 362 included several other notable amendments to the civil commitment statutes. First, as a means of encouraging greater awareness of the options for outpatient civil commitment, the Bill added a provision to the Government Code to require the Texas Court of Criminal Appeals to "ensure that judicial training related to court-ordered outpatient mental health services is provided at least once every year."[115]

In addition, the Bill amended § 574.061 of the Health and Safety Code pertaining to modifications from inpatient civil commitments to outpatient.[116] Specifically, the new language requires an inpatient facility "not later than the [thirtieth] day after the date the patient is committed . . . [to] assess the appropriateness of transferring the patient to outpatient mental health

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110. *See* House Comm. on Judiciary & Civ. Juris., Bill Analysis, S.B. 362, 86th Leg., R.S. (2019), at 2 [hereinafter Bill Analysis], https://hro.house.texas.gov/pdf/ba86r/sb0362.pdf#navpanes=0 (last visited Nov. 14, 2020).

111. *See* JUDICIAL COUNCIL 2018 REPORT, *supra* note 102, at 7 (discussing Recommendation 1 to "clarify . . . [the] standard for court-ordered temporary outpatient mental health services"). The former standard has also been described as a "vague requirement." *Update Spotlight: S.B. 362*, *supra* note 108, at 1.

112. *Id.* The full criteria for temporary or extended outpatient civil commitments are now codified at HEALTH & SAFETY §§ 574.0345 (a)(2) and 574.0355 (a)(2).

113. *Update Spotlight: S.B. 362*, *supra* note 108, at 1.

114. Bill Analysis, *supra* note 110, at 3.

115. *See* Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 6, sec. 137.098, 2019 Tex. Gen. Laws, at 4 (adding § 22.1106 to the Texas Government Code and also permitting the training to take place at the annual Judicial Education Conference).

116. *See id.* § 18, at 13 (amending HEALTH & SAFETY § 574.061).

services."[117] Under prior law, the inpatient facility "had the discretion to ask the judge to modify the order and require the patient to instead participate in outpatient services."[118] Now, there is a mandatory assessment of the appropriateness of a step-down transfer prior to the thirtieth day of an inpatient commitment.[119] Prior to any order to modify the commitment order to require outpatient mental health services, the court must consult with the local mental health authority regarding the availability of appropriate services for the patient.[120] The modified order may also extend in duration beyond the original commitment period by up to an additional sixty days.[121]

S.B. 362 also amended the civil commitment statutes with regard to certain hearing procedures relating to the potential waiver of a patient's right to cross-examination of witnesses.[122] The revised provisions are codified at §§ 574.031(d-1)–(d-2) of the Health and Safety Code.[123] Although versions of "[t]hese provisions about the right to waive cross-examination of witnesses were originally in § 574.034 and § 574.035, . . . they have been pulled out and put into their own section."[124] Specifically, new subsection (d-1) provides, in part, that in "a hearing for temporary inpatient or outpatient mental health services . . . , the proposed patient *or* the proposed patient's attorney, by a written document filed with the court, may waive the right to cross-examine witnesses."[125] The statute had previously permitted the waiver of the right to cross-examine witnesses, but had required that *both* the patient *and* the patient's attorney agree to the waiver.[126]

S.B. 362 was not limited to civil commitment procedures, but also addressed an avenue for diversion of alleged criminal offenders.[127] Prior to the 2019 legislative session, in addition to recommending amendments to the civil commitment statutes, the Judicial Council's Guardianship, Mental Health, & Intellectual/Developmental Disability Committee also

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117. *Id.*

118. *Update Spotlight: S.B. 362*, *supra* note 108, at 2.

119. HEALTH & SAFETY § 574.061(a).

120. *Id.* § 574.061(e).

121. *Id.* § 574.061(h). S.B. 362 also clarified the allowable maximum periods for commitments—typically no more than forty-five days (but up to ninety days upon a judicial finding that a longer period is needed) for temporary court-ordered services, and up to twelve months for extended court-ordered services. *Id.* §§ 574.034(g), 574.0345(c), 574.035(h), and 574.0355(d).

122. *See* Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 9, sec. 137.098, 2019 Tex. Gen. Laws, at 5–6 (adding subsections (d-1) and (d-2) to § 574.031 of the Health and Safety Code).

123. HEALTH & SAFETY §§ 574.031(d-1)–(d-2).

124. *Update Spotlight: S.B. 362*, *supra* note 108, at 2.

125. HEALTH & SAFETY § 574.031(d-1) (emphasis added). The subsection adds that if cross-examination is waived, the court may admit and rely on "certificates of medical examination for mental illness," which will "constitute competent medical or psychiatric testimony." *Id.*

126. *Update Spotlight: S.B. 362*, *supra* note 108, at 2. Note that in hearings for extended inpatient or outpatient commitments, the court must hear testimony, including "competent medical or psychiatric testimony," and the court "may not make its findings solely from the certificates of medical examination." HEALTH & SAFETY § 574.031(d-2).

127. *See* Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 2, sec. 137.098, 2019 Tex. Gen. Laws, at 1–3 (amending Article 16.22, Code of Criminal Procedure).

recommended that the Code of Criminal Procedure and the Health and Safety Code be amended "to create a new civil commitment option for Class B misdemeanor defendants."[128] Perhaps unknown to the Committee at the time, "however, that authority already existed under the Texas Health and Safety Code."[129] As this Author described previously:

> Before 1995, the Texas Mental Health Code precluded a court from issuing a civil commitment order for either temporary or extended mental health services for a proposed patient who faced charges for *any* criminal offense. Thus, law enforcement officials often found themselves in the difficult position of considering whether to drop criminal charges as a means of assuring that an alleged offender could obtain mental health services pursuant to the Mental Health Code. In 1995, however, the legislature narrowed this restriction on the availability of civil commitment orders only to any "proposed patient who is charged with a criminal offense *that involves an act, attempt, or threat of serious bodily injury to another person*." Correspondingly, . . . after the 1995 amendments[,] civil commitment *became* an available option for persons facing criminal charges as long as the charges *do not* involve an act, attempt, or threat of serious bodily injury.[130]

This statutory phrasing is quite awkward. Rather than simply stating that civil commitment *is* potentially available with regard to defendants who have been arrested for nonviolent types of offenses, the statute is structured in the negative. That is, the Health and Safety Code provides that court-ordered mental health treatment is *not* available if the person "is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person."[131]

Although this civil commitment authority has been a part of the Health and Safety Code since 1995, "most criminal court judges and prosecutors were unfamiliar with this possible alternative" for diversion of nonviolent offenders into the civil treatment system.[132] Accordingly, the Judicial Council Committee made its recommendation to create an option in the Code of Criminal Procedure "under which, in appropriate cases, prosecutors could seek a transfer for court-ordered outpatient mental health services . . . without first dismissing charges."[133] Thereafter, as a means to flag this diversion "possibility for criminal trial courts, the legislature as part of S.B. 362 . . .

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128. *See* JUDICIAL COUNCIL 2018 REPORT, *supra* note 102, at 2 (identifying Recommendation 5).

129. *See* SHANNON GUIDE, *supra* note 4, at 32 (discussing S.B. 362).

130. *Id.* The current versions of these provisions are set forth in HEALTH & SAFETY §§ 574.034(h), 574.0345(d), 574.035(i), and 574.0355(e) (internal citation omitted).

131. *Id.*

132. SHANNON GUIDE, *supra* note 4, at 32. Criminal court judges and prosecutors, not surprisingly, work mostly with the Penal Code and Code of Criminal Procedure.

133. JUDICIAL COUNCIL 2018 REPORT, *supra* note 102, at 9.

added subsection (c)(5) to Article 16.22" of the Code of Criminal Procedure.[134]

In particular, new subsection (c)(5) of Article 16.22:

> [A]dds a roadmap in the Code of Criminal Procedure for prosecutors and trial court judges, once an Article 16.22 report is received, to release the defendant with MI or IDD on bail and transfer the defendant by court order to the appropriate court for court-ordered outpatient mental health services under Chapter 574 of the Health & Safety Code.[135]

This process is available only "if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person."[136] The legislature's goal was to divert "more offenders out of the jail setting and into appropriate court-ordered outpatient mental health services."[137]

In addition to amending Article 16.22 with the new diversion option under subsection (c)(5), S.B. 362 also added subsections (c-1), (c-2), and (c-3).[138] These provisions provide guidance to the courts and counsel on procedural steps to take if the trial court exercises its discretion to order the defendant's transfer to a court with jurisdiction to require outpatient mental health services.[139] The key aspect of these new procedures is that "should the defendant be ordered to outpatient mental health services and [then] complies with all appropriate treatment, subsection (c-2) creates a mechanism for the court to dismiss the charges" pending against the defendant.[140] In contrast, if the defendant fails to comply with the court-ordered outpatient mental health services, the state and the criminal trial court may resume the criminal proceedings.[141] Importantly, however, these subsections of S.B. 362 codify the recommendations of the Judicial Council's Guardianship, Mental Health,

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134. SHANNON GUIDE, *supra* note 4, at 32–33. *See also* Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 2, sec. 137.098, 2019 Tex. Gen. Laws, at 2–3 (setting forth the Bill text of new subsection (c)(5)). The Author was one of several attorneys and other interested stakeholders who worked with Senator Joan Huffman's staff in drafting the bill language.

135. *See Update Spotlight: SB 362*, *supra* note 108, at 1.

136. TEX. CODE CRIM. PROC. ANN. art. 16.22 (c)(5). Specifically, the new subsection provides:

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

Id.

137. SHANNON GUIDE, *supra* note 4, at 33. As the Author has discussed elsewhere, the comparable provisions in the Health and Safety Code give "authority to the court with probate jurisdiction to consider *either inpatient or outpatient civil commitment* when . . . non-violent charges are pending. However, given the dearth of available inpatient civil commitment resources, the language added to Article 16.22 focused solely on *outpatient* civil commitment proceedings." *Id.* at 33 n.9 (emphasis added).

138. Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 1, sec. 137.098, 2019 Tex. Gen. Laws, at 2–3.

139. CRIM. PROC. arts. 16.22 (c-1)–(c-3).

140. SHANNON GUIDE, *supra* note 4, at 33.

141. CRIM. PROC. art. 16.22 (c-3).

& Intellectual/Developmental Disability Committee to create a civil commitment option for certain criminal defendants.[142]

2. H.B. 601

The next significant 2019 enactment pertaining to criminal justice and mental health law issues was H.B. 601.[143] As described by the Texas Judicial Commission on Mental Health, H.B. 601 was intended "[i]n large part . . . to clarify two bills passed in the 85th Legislative Session (2017): S.B. 1326 and S.B. 1849 [the Sandra Bland Act]," relating to the screening procedures under "Article 16.22 of the Code of Criminal Procedure . . . regarding criminal defendants who are or may be persons with a mental illness or an intellectual disability."[144] Prior to the 2019 legislative session, the Judicial Council's Guardianship, Mental Health, & Intellectual/Developmental Disability Committee observed that there had been confusion after the 2017 amendments to Article 16.22 with regard to the meaning of "assessment" and other phrases used in Article 16.22, such as "collection of information" and "information collected."[145] The Committee also observed: "Feedback indicates that there is uncertainty about the credentials necessary for an individual to perform an 'assessment;' whether this assessment focuses on competency to stand trial; and payment responsibility for the assessment."[146] Accordingly, the Committee recommended legislation to clarify the language, so that "[a] single uniform term . . . be used in place of 'assessment' or 'collection of information' to convey that a full-blown examination and mental health or IDD diagnosis is not required at" the time of jail screening.[147] Thereafter, in H.B. 601, the legislature amended:

> Article 16.22 to clarify that a full-blown examination of mental illness or IDD is not required before the defendant goes before a magistrate. All that is required is that the local mental health authority (LMHA), local intellectual and developmental disability authority (LIDDA), or another qualified mental health or intellectual and developmental disability (IDD)

142. *See* JUDICIAL COUNCIL 2018 REPORT, *supra* note 102, at 9 (recommending the creation of this diversion of offenders option). Interestingly, the Committee recommended creating a diversion option only for defendants facing Class B misdemeanor charges. *Id*. As enacted, S.B. 362 is potentially broader in that it applies to defendants with mental illness or developmental disabilities when the charges do "not involve an act, attempt, or threat of serious bodily injury to another person." Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 1, sec. 137.098, 2019 Tex. Gen. Laws, at 2.

143. Act of May 19, 2019, 86th Leg., R.S., ch. 1276, § 1, sec. 16.22, 2019 Tex. Gen. Laws.

144. TEX. JUD. COMM'N ON MENTAL HEALTH, *86th Texas Legislative Update HB: 601* [hereinafter *Update H.B. 601*], http://texasjcmh.gov/media/1650/legislative-summary_hb-601.pdf (last visited Nov. 14, 2020).

145. *See* JUDICIAL COUNCIL 2018 REPORT, *supra* note 102, at 3 (describing the confusing statutory references).

146. *Id.*

147. *Id.*

> expert must simply "interview" the defendant and collect related information.[148]

In addition to reframing the characterization of the mental health screening under Article 16.22 as an "interview" of the defendant, rather than an "assessment," another subsection of "H.B. 601 . . . removed the reference to the preparation of a 'written assessment' and replace[d] that language with 'written report.'"[149] To further emphasize that these screening interviews should be informal in nature, H.B. 601 also added a subsection to Article 16.22 to allow the interview to be conducted at "the jail, by telephone, or through a telemedicine medical service or telehealth service."[150]

Separate from these modifications to the mental health screening statutes, H.B. 601 and S.B. 562 included largely identical amendments to Chapters 46B and 46C of the Code of Criminal Procedure relating to secure hospitalization of defendants charged with violent offenses.[151] As an example of these various amendments, prior to the 2019 amendments, Article 46B.073(c) required a commitment for competency restoration "to one of the state's maximum security hospital facilities if the defendant was charged with certain violent offenses."[152] H.B. 601 and S.B. 562 revised subsection (c) to grant discretion to the Health and Human Services Commission to determine the appropriate inpatient hospital setting when a defendant faces charges for certain violent offenses.[153] According to the House Research Organization's bill analysis for S.B. 562, some had raised concerns that mandating hospital placement based on "the offense, rather than a clinical determination . . . result[ed] in many defendants who do not meet the standard for dangerousness being sent to the North Texas State Hospital in Vernon [a secure facility] . . . [and] that this exacerbates waiting lists . . . for competency restoration."[154] These changes now allow the Health and Human Services Commission to make these determinations.[155]

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148. *See Update H.B. 601*, *supra* note 144, at 1 (describing H.B. 601's amendments to TEX. CODE CRIM. PROC. ANN. art. 16.22).

149. *Id.*

150. *See* Act of May 19, 2019, 86th Leg., R.S., ch. 1276, § 2, sec. 16.22, 2019 Tex. Gen. Laws, at 5 (adding CRIM. PROC. art. 16.22(a-4)).

151. *Compare* Act of May 19, 2019, 86th Leg., R.S., ch. 1276, §§ 4–21, sec. 16.22, at 9–21, *with* Act of May 22, 2019, 86th Leg., R.S., ch. 1212, §§ 1–18, sec. 42.09, at 1–13 (including the same statutory amendments).

152. *See* SHANNON GUIDE, *supra* note 4, at 80 (discussing 2019 amendments to CRIM. PROC. art. 46B.073(c)).

153. *See* Act of May 19, 2019, 86th Leg., R.S., ch. 1276, § 7, sec. 16.22, at 14; Act of May 22, 2019, 86th Leg., R.S., ch. 1212, § 4, sec. 42.09, at 5 (including identical amendments to CRIM. PROC. art. 46B.073(c)).

154. *See* House Research Org., Bill Digest, Tex. S.B. 562, 86th Leg., R.S. (Tex. 2019), at 1, https://hro.house.texas.gov/pdf/ba86r/sb0562.pdf#navpanes=0 (last visited Nov. 14, 2020).

155. *See* TEX. JUD. COMM'N ON MENTAL HEALTH, *86th Texas Legislative Update Spotlight: SB 562*, at 1 [hereinafter *Update Spotlight: S.B. 562*], http://texasjcmh.gov/media/1648/legislative-summary_sb-562.pdf (last visited Nov. 14, 2020) (discussing the statutory changes relating to maximum security

3. S.B. 562

In addition to the overlapping amendments with H.B. 601, S.B. 562 included several additional, noteworthy improvements. First, the Bill added provisions relating to mental health court programs to permit the possible expunction of criminal arrest records and files upon a successful completion of a mental health court program.[156] In addition, S.B 562 added a provision to existing legislation relating to mental health court programs to require "counties with populations of more than 200,000 . . . [to] apply for federal and state funds to establish a mental health court program."[157] More specifically, the language in S.B. 562 mandates that counties of over 200,000 in population must establish a mental health court program and seek funding to cover the costs.[158] This directive, while written in mandatory language, is lessened, however, in that the county must only proceed if it receives sufficient federal or state funding.[159] Finally, another provision in S.B. 562 authorizes "[t]he commissioners courts of two or more counties . . . to establish a regional mental health court program."[160] These provisions should prove beneficial to establishing more mental health courts in Texas.

4. Failed Bills

There were two additional pieces of mental health reform legislation of note considered during the 2019 legislative session—H.B. 1936[161] and H.B. 1139.[162] The first of these, H.B. 1936, "would have barred application of the death penalty to a person with severe mental illness who had active psychotic symptoms at the time of the crime that substantially impaired the person's capacity to act rationally or appreciate the nature, consequences, or

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hospitalizations). H.B. 601 and S.B. 562 also both added Article 46B.0831 to the Code of Criminal Procedure to allow the Commission to make determinations as to whether a defendant is manifestly dangerous or not "at any time before the defendant is restored to competency" and whether the Commission can "transfer the defendant to a non-maximum security facility." *See* Act of May 19, 2019, 86th Leg., R.S., ch. 1276, § 8, sec. 16.22, at 14–15; Act of May 22, 2019, 86th Leg., R.S., ch. 1212, § 5, sec. 42.09, at 5–6 (adding CRIM. PROC. art. 46B.0831).

156. Act of May 22, 2019, 86th Leg., R.S., ch. 1212, §§ 19–24, sec. 42.09, at 13–20 (amending CRIM. PROC. arts. 55.01, 102.006, and TEX. GOV'T CODE ANN. § 125.001).

157. *See Update Spotlight: S.B. 562*, *supra* note 155, at 2 (discussing amendments to mental health court programs).

158. Act of May 22, 2019, 86th Leg., R.S., ch. 1212, § 25, sec. 42.09, at 20 (adding GOV'T §§ 125.005(a)–(b)).

159. *See id.* (adding GOV'T § 125.005(c) and making the requirement contingent on obtaining external funding).

160. *See id.* (adding GOV'T § 125.0025).

161. Tex. H.B. 1936, 86th Leg., R.S., ch. 46D, 2019 Tex. Gen. Laws (engrossed version passed by the House).

162. Tex. H.B. 1139, 86th Leg., R.S., ch. 46E, 2019 Tex. Gen. Laws (engrossed version passed by the House).

wrongfulness of the person's conduct."[163] Specifically, the Bill included the following directive:

> If the jury determines that the defendant was a person with severe mental illness at the time of the commission of an alleged capital offense, and the defendant is convicted of that offense, . . . [the death penalty] does not apply to the defendant, and the judge shall sentence the defendant to imprisonment . . . for life without parole.[164]

Although "[t]he [B]ill passed the House in early May by a thin margin, 77-66[,] . . . [it was not] referred to a Senate committee, rendering it dead."[165] Note that had it been enacted, H.B. 1936 would not have amended the insanity defense, but instead would have taken the death penalty off the table if a person with a severe mental illness committed a capital offense while in the throes of "active psychotic symptoms."[166]

In a separate 2019 legislative effort, "the Texas House passed H.B. 1139, which would have provided standards to guide courts in determining intellectual disabilities in capital cases [had it been enacted]."[167] The United States Supreme Court held in 2002 that it is unconstitutional to execute a person with IDD.[168] Despite the passage of almost twenty years, however, the Texas Legislature has never enacted statutory standards for courts to apply in determining whether a person has an intellectual disability.[169] Given this legislative vacuum, the Court of Criminal Appeals established a set of factors in a 2004 decision, *Ex parte Briseno*.[170] The United States Supreme Court,

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163. *See* SHANNON GUIDE, *supra* note 4, at 150 (discussing H.B. 1936).

164. *See* Tex. H.B. 1936, 86th Leg., R.S., ch. 46D, § 1, 2019 Tex. Gen. Laws, at 3 (engrossed version passed by the House) (attempting to add Article 46D.007(a) to the Code of Criminal Procedure).

165. Vickie Camarillo, *Death Penalty Reform Bill Gets Watered Down to "Nothing" Before Passing Senate*, TEX. OBSERVER (May 23, 2019, 9:35 AM), https://www.texasobserver.org/death-penalty-reform-bill-gets-watered-down-to-nothing-before-passing-senate/#:~:text=House%20Bill%201936%2C%20by%20Dallas,the%20time%20of%20the%20offense.&text=The%20bill%20passed%20the%20House,Senate%20committee%2C%20rendering%20it%20dead.

166. *See* Tex. H.B. 1936, 86th Leg., R.S., ch. 46D, § 1, 2019 Tex. Gen. Laws, at 1 (engrossed version passed by the House) (attempting to add Articles 46D.001–.002 to the Code of Criminal Procedure).

167. *See* SHANNON GUIDE, *supra* note 4, at 152 (discussing H.B. 1139).

168. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that "such punishment is excessive" when applied to a person with IDD, then called "mental retardation"). *See also* Hall v. Florida, 572 U.S. 701, 718–19 (2014) (holding that a state may not refuse to consider other evidence of a person's intellectual disabilities even if the defendant's IQ testing is greater than seventy).

169. *See* Cassandra Pollock & Alex Samuels, *Texas House Offers a New Way to Determine Whether a Defendant has Intellectual Disabilities — and is Ineligible for Execution*, TEX. TRIB. (Apr. 29, 2019, 6 PM), https://www.texastribune.org/2019/04/29/Texas-death-penalty-determination-intellectual-defendant-hb-1139/ (reporting that "the Texas Legislature never set a method — despite repeated pleas from the state's highest criminal judges" to provide statutory guidance to define "whether a defendant has an intellectual disability").

170. *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (setting out seven factors). As my coauthor and I have described previously: "This was an unusual task for the Court of Criminal Appeals, and more properly should have been the concern of the Texas Legislature." *See* SHANNON GUIDE, *supra* note 4, at 152 (discussing *Briseno*).

however, rejected the *Briseno* factors in 2017 in *Moore v. Texas*.[171] Because the Texas Court of Criminal Appeals on remand in *Moore* again found the defendant to not be a person with intellectual disabilities, an additional appeal to the United States Supreme Court resulted, and it also ended in a reversal.[172] In a *per curiam* decision, the Supreme Court concluded that based on "the trial court record, Moore ha[d] shown he is a person with intellectual disability."[173] Among its reasons, the Supreme Court indicated that despite the Court's prior rejection of the *Briseno* factors, on remand the Court of Criminal Appeals nevertheless "seem[ed] to have used many of those factors in reaching its conclusion."[174] The Supreme Court handed down its second opinion in *Moore* on February 19, 2019, which was in the midst of the 2019 legislative session.[175] Thus, the legislature had the opportunity in 2019 to adopt, at long last, standards for a trial court to utilize in determining whether a defendant in a death penalty case has IDD, and was, in fact, in session at the time the Supreme Court once again rejected the *Briseno* factors.[176]

There was indeed an attempt to enact such legislation in 2019. H.B. 1139, as passed by the House, would have "creat[ed] a hearing process for purposes of determining whether a defendant is a person with an intellectual disability."[177] The Bill, which attempted to set forth constitutionally permissible factors for determining intellectual disability, "would have allowed a pretrial hearing to determine whether a defendant has an intellectual disability and therefore is ineligible for the death penalty" and "passed the House — on a vote of 102-37."[178] Once the Bill reached the Texas Senate, however, "all language related to a pretrial hearing was stripped from the proposal . . . in the Senate Committee on Criminal Justice."[179] The Senate version of the Bill simply stated that a defendant "with an intellectual disability may not be sentenced to death" and that evidence before the trial court on intellectual disability "must be consistent with

171. Moore v. Texas, 137 S. Ct. 1039, 1052–53 (2017). Even the dissenting Justices were of the view that the *Briseno* factors were "incompatible with the Eighth Amendment." *Id*. at 1060 (Roberts, C.J., dissenting).

172. Moore v. Texas, 139 S. Ct. 666, 667 (2019).

173. *Id.* at 672.

174. *Id.* at 671.

175. *Id.* at 666. In November 2019, the Texas Court of Criminal Appeals heard the further remand from the Supreme Court and reformed Moore's death sentence to life without parole. *Ex parte* Moore, 587 S.W.3d 787, 789 (Tex. Crim. App. 2019).

176. *See* Pollock & Samuels, *supra* note 169 (observing that after the Court had previously "knocked Texas' method for using [*Briseno*'s] decades-old medical standards and a set of nonclinical questions . . . that advanced stereotypes . . . . [T]he high court again slammed the method").

177. House Crim. Juris. Comm. Report (Substituted), Bill Analysis, Tex. H.B. 1139, 86th Leg., R.S. (2019), at 1, https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB01139H.pdf#navpanes=0 (last visited Nov. 14, 2020).

178. *See* Camarillo, *supra* note 165 (observing also that the Supreme Court's decisions in *Moore* "laid the foundation for House Bill 1139").

179. *Id.*

prevailing medical standards for the diagnosis of intellectual disabilities."[180] Because of the differences between the House and Senate versions of the Bill, a conference committee was appointed so that "members from both chambers could iron out the differences between the two versions."[181] But, the clock ran out on the legislative session, and the Bill died.[182] The failure of H.B. 1139 is disappointing and represents a missed opportunity to implement procedures to carry out the Supreme Court's holding in *Atkins v. Virginia* in 2002.[183] It is to be hoped that the legislature will finally pass legislation with appropriate hearing procedures in 2021.

III. CREATION OF THE TEXAS JUDICIAL COMMISSION ON MENTAL HEALTH

In recent years, the Texas Supreme Court and the Texas Court of Criminal Appeals have greatly expanded their collective focus on persons with mental illness and intellectual disabilities who are involved in criminal or civil legal proceedings. This Section will address the two courts' recent establishment of the Texas Judicial Commission on Mental Health.

In 2016, the Texas Judicial Council revamped its committee structure to establish the Committee on Guardianship, Mental Health, and Intellectual and Developmental Disability.[184] The Judicial Council, in turn, directed the newly-formed Committee to "examine best practices in the administration of civil and criminal justice" for persons with mental illness and to "review systemic approaches for diversion of individuals with mental illness from entering the criminal justice system."[185] In addition, the Judicial Council tasked the Committee with exploring whether "a permanent judicial commission on mental health should be created."[186] Thereafter, in late 2016 the Committee made a number of recommendations ranging from screening

180. Senate Comm. Substitute for H.B. 1139, Tex. H.B. 1139, 86th Leg., R.S. (2019), at 1 (proposing the addition of Articles 46E.001–.002 to the Code of Criminal Procedure).

181. *See* Elizabeth Byrne & Jolie McCullough, *Despite Bipartisan Support, Texas Bill Tackling Intellectual Disability in Death Penalty Cases Fails*, TEX. TRIB. (May 26, 2019, 10:00 AM), https://www.texastribune.org/2019/05/26/Texas-death-penalty-intellectual-disability-fails/ (describing the inability of negotiators from the Texas House and Senate to reach a compromise). For a helpful chart that compares the two versions of the Bill, see H.B. 1139 S. Amendments, Section-by-Section Analysis, Tex. H.B. 1139, 86th Leg., R.S. (2019), https://capitol.texas.gov/tlodocs/86R/senateamendana/pdf/HB01139A.pdf#navpanes=0 (last visited Nov. 14, 2020) (comparing the House version of the Bill with the Senate version).

182. *See* Byrne & McCullough, *supra* note 181 (observing that the necessary "deadline passed without a report" of a compromise version).

183. *See supra* note 168 and accompanying text (discussing the holding in Atkins v. Virginia, 536 U.S. 304, 321 (2002)).

184. *See* Supreme Court of Texas and Texas Court of Criminal Appeals Planning Committee, *Creating a Judicial Commission on Mental Health* (Feb. 9, 2018), at 2 [hereinafter *Planning Committee Report*], http://www.txcourts.gov/media/1441380/jcmh-planning-committee-report-final.pdf (providing the report of the Planning Committee).

185. *Id.*

186. *Id.*

protocols at local jails and competency restoration improvements to jail diversion.[187] Notably, the Committee's "cornerstone recommendation was to establish a permanent judicial commission on mental health, similar to the Supreme Court Children's Commission, the Texas Access to Justice Commission, and the Texas Indigent Defense Commission."[188]

In response to the Judicial Council's recommendation, in early January 2018, "the Supreme Court and Court of Criminal Appeals held a historic joint hearing to gather input on what should comprise the priorities of a statewide judicial commission."[189] Then, in February 2018, the state's two highest courts jointly created the Texas Judicial Commission on Mental Health [JCMH].[190] Its charge is broad but includes such matters as endeavoring to "identify and assess current and future needs for the courts to be more effective in achieving positive outcomes for Texans with mental illness" and to "promote appropriate judicial training regarding mental health needs, systems, and services."[191]

A. Rationale and Purpose

As part of their "Order Establishing [the] Judicial Commission on Mental Health," the Texas Supreme Court and Court of Criminal Appeals jointly declared that the Commission had been "created to develop, implement, and coordinate policy initiatives designed to improve the courts' interaction with—and the administration of justice for—children, adults, and families with mental health needs."[192] To carry out the work of the Commission, the Order directed that the Commissioners should be composed of "state and local leaders who have demonstrated a commitment to mental health matters affecting Texans," as well as "members of the judiciary, members of the juvenile, criminal, and child protection systems and community, representatives of the business and legal communities, [and] representatives of foundations or organizations with a substantial interest in

187. *Mental Health Committee Report*, *supra* note 12, at 4–9.

188. *Planning Committee Report*, *supra* note 184, at 3.

189. *See* Order Establishing Judicial Commission on Mental Health, Supreme Court Misc. Docket No. 18-9025 & Court of Criminal Appeals Misc. Docket No. 18-004 (Feb. 13, 2018), at 2, https://www.txcourts.gov/media/1440539/189025.pdf (describing the hearing that, in part, resulted in the creation of the Commission). The hearing was unusual in that the two high courts "did something extraordinary—they sat together as one court." TEX. JUD. COMM'N ON MENTAL HEALTH, *2018–2020 Report to the Supreme Court of Texas and the Texas Court of Criminal Appeals*, at 7 (Aug. 2020) [hereinafter *JCMH Report*], http://texasjcmh.gov/media/1842/jcmh-2019-annual-report-to-the-courts.pdf.

190. Order Establishing Judicial Commission on Mental Health, Supreme Court Misc. Docket No. 18-9025 & Court of Criminal Appeals Misc. Docket No. 18-004 (Feb. 13, 2018), at 3, https://www.txcourts.gov/media/1440539/189025.pdf.

191. *Id.*

192. *Id.* at 1, 3.

mental health matters."[193] The breadth of expertise on the Commission is important to "broaden collaboration to promote better policy development, judicial education, data sharing and performance measurement."[194] As former Texas Supreme Court Justice Harriet O'Neill has recognized, "[j]udges and lawyers often need input from family, professionals, and other experts to achieve better outcomes and appropriately meet these needs of people in crisis."[195] Indeed, the state's two highest courts had heard from "[m]ental health experts, state and tribal judges, law enforcement, veterans, juvenile services experts, psychologists, psychiatrists, and persons with lived experience . . . [who] voiced unqualified support for the creation of a statewide judicial commission."[196]

The Commission's mission "is to engage and empower court systems through collaboration, education, and leadership, thereby improving the lives of individuals with mental health needs, intellectual and developmental disabilities, and substance use disorders."[197] In 2019, the Commissioners adopted a strategic plan that focuses on "[c]ollaboration among court systems, . . . [e]ducation—including specialized training, resources, and tools —for judges, attorneys, and court personnel[,]" and "[j]udicial leadership."[198] Although each of these areas of the Commission's strategic plan includes an array of sub-points, some of the key goals include the following: Collaboration "with stakeholders to collect and analyze data, practices, law, and policy with the goal of improving court functioning for people with mental health needs, substance use disorders, or IDD;" the development of "tools and resources on key concepts and court procedures related to mental health, substance use, or IDD;" and promoting leadership for the judiciary by "serv[ing] as a resource in the development of policy, legislation, and practice recommendations, including policy recommendations for consideration by the Texas Judicial Council."[199]

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193. *Id.* at 4. For a listing of the initial roster of appointed Commissioners, see Order Appointing Judicial Commission on Mental Health, Supreme Court Misc. Docket No. 18-9059 & Court of Criminal Appeals Misc. Docket No. 18-009 (April 10, 2018), at 1, https://www.txcourts.gov/media/1441353/189059.pdf.

194. Harriet O'Neill, *Texas Courts Step Up on Mental Health*, FORT WORTH STAR-TELEGRAM (May 15, 2018, 8:04 PM), https://www.star-telegram.com/opinion/article211186029.html.

195. *Id.*

196. *See* Order Establishing Judicial Commission on Mental Health, Supreme Court Misc. Docket No. 18-9025 & Court of Criminal Appeals Misc. Docket No. 18-004 (Feb. 13, 2018), at 2, https://www.txcourts.gov/media/1440539/189025/pdf (describing the broad array of backgrounds of persons who had testified at the two courts' January 2018 "hearing to gather input on what should comprise the priorities of a statewide judicial commission").

197. *See JCMH Report*, *supra* note 189, at 13 (setting forth mission statement).

198. *See* TEX. JUD. COMM'N ON MENTAL HEALTH, 2019 Strategic Plan, at 1–2, http://texasjcmh.gov/media/1587/jcmh-strategic-plan-2019.pdf (last visited Nov. 14, 2020) (describing the three primary areas of focus for the Commission).

199. *Id.*

B. Early Projects

One of the early and laudable efforts by the JCMH has been the preparation and release of two editions of the *Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book* to provide guidance to the courts on issues involving persons with mental illness and intellectual and developmental disabilities.[200] The Bench Book is designed as a step-by-step "procedural guide organized around the Sequential Intercept Model [SIM]."[201] The SIM is a tool for communities or states to plan for utilization of appropriate "resources for people with mental and substance use disorders at each phase of interaction with the justice system."[202] These intercept points range from civil interventions in the community to law enforcement interactions, initial detentions, court involvement, jail or prison re-entry, and probation or parole.[203] The Bench Book, in turn, includes guidance and analysis of civil interventions such as civil commitment, emergency detention, and protective custody;[204] initial detention and proceedings following arrest;[205] and competency to stand trial.[206] The Bench Book is also intended to provide judges with "immediate information to help address mental health and IDD issues as they arise in [the] courtroom and community."[207] In sum, the Bench Book should prove to be a helpful resource for many participants involved in the legal system including prosecutors, defense attorneys, probation officials, and policymakers.

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200. BENCH BOOK, *supra* note 2.

201. *Id.* at 10. The SIM "was introduced in the early 2000s with the goal of helping communities understand and improve the interactions between criminal justice systems and people with mental and substance use disorders." Substance Abuse and Mental Health Services Administration [SAMHSA], *Data Collection Across the Sequential Intercept Model: Essential Measures*, https://store.samhsa.gov/sites/default/files/d7/images/pep19-sim-data-thumbnail.jpg (last visited Nov. 14, 2020).

202. *Id.*

203. BENCH BOOK, *supra* note 2, at 10. *See also* Mark R. Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People with Serious Mental Illness*, 57 PSYCHIATRIC SERVS. 544 (Apr. 2006), https://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2006.57.4.544 (observing that the SIM "envisions a series of 'points of interception' at which an intervention can be made to prevent individuals from entering or penetrating deeper into the criminal justice system" and can be a useful tool for a community to "develop targeted strategies that evolve over time to increase diversion of people with mental illness from the criminal justice system and to link them with community treatment").

204. BENCH BOOK, *supra* note 2, at 26–81.

205. *Id.* at 83–113.

206. *Id.* at 120–62. The Bench Book concludes with several helpful flowcharts of the procedures relating to incompetency to stand trial that Chris Lopez, from the Texas Health and Human Services Commission, developed. *Id.* at 163–65. For a more detailed listing of community intercept points for local interaction between services providers, law enforcement, and the judiciary with persons with mental illness or IDD, see TEX. JUD. COMM'N ON MENTAL HEALTH, *Assessing the Mental Health and IDD Landscape by Intercept*, http://texasjcmh.gov/media/1436/assessing-the-mental-health-and-idd-landscape-by-intercept.pdf (last visited Nov. 14, 2020).

207. *Id.*

In addition to developing the Bench Book as a valuable resource, the Commission has been active on a number of other fronts. For example, the Commission began hosting annual Judicial Summits in 2018, and the "second annual Judicial Summit on Mental Health [in November 2019] . . . drew nearly five hundred judges and stakeholders from across . . . Texas to discuss and develop solutions to the many challenges faced by individuals in the court system with mental health" concerns or IDD.[208] The Commission has also started an online bank of "sample forms related to mental health court processes that . . . are meant to be resources for courts" and attorneys.[209] Among other initiatives, the Commission has also assembled and arranged publication of "a collection of Texas statutes related to mental health and IDD in one convenient volume,"[210] provided an array of "local court improvement grants" focused on mental health topics,[211] and created a Jurist in Residence who "distributes six [electronic] letters a year . . . [to] keep judges updated on relevant changes to the law as well as share helpful resources and tools" relating to mental health law topics.[212] Importantly, in light of the Coronavirus pandemic, in 2020 the Commission also assembled a collection "of resources available regarding the COVID-19 [pandemic] and the legal system."[213]

IV. NEXT STEPS

The Texas Judicial Commission on Mental Health has also been active in developing legislative proposals for the 2021 legislative session. On October 1, 2019, the Texas Supreme Court and the Court of Criminal Appeals jointly established the Legislative Research Committee of the Judicial Commission on Mental Health.[214] The two high courts tasked the new

208. TEX. JUD. COMM'N ON MENTAL HEALTH, *Report to the Commission*, at 5 (Jan. 31, 2020); TEX. JUD. COMM'N ON MENTAL HEALTH, *January 31, 2020 Meeting Notebook*, at 25, 29 (Jan. 31, 2020) [hereinafter *Meeting Notebook*], http://texasjcmh.gov/media/1800/january-2020-notebook_email.pdf. The Author was one of the speakers at the November 2019 Judicial Summit.

209. A direct link to the forms bank is available at TEX. JUD. COMM'N ON MENTAL HEALTH, *Forms Bank*, http://texasjcmh.gov/publications/bench-book-and-cards/forms-bank/ (last visited Nov. 14, 2020).

210. *See Meeting Notebook*, *supra* note 208, at 5 (noting that the resource builds "on the popular and extremely beneficial work of Chris Lopez at HHSC" who has long assembled and updated a collection of statutes relating to mental health topics following each legislative session).

211. *See id.* at 7 (reporting that there had been a total of eleven grants by August 2019).

212. *See id.* at 6 (describing the work of the initial Jurist in Residence, Judge John Specia, Jr. of San Antonio, a retired state judge). For the full list of Commission activities as of January 31, 2020, see *id.* at 2–7 (discussing Commission initiatives and undertakings).

213. TEX. JUD. COMM'N ON MENTAL HEALTH, *COVID-19 Resources*, http://texasjcmh.gov/covid-19-resources/ (last visited Nov. 14, 2020). For additional activities of the Commission, see *JCMH Report*, *supra* note 189, at 19–36 (describing the breadth of the Commission's projects and efforts).

214. Order Establishing Legislative Research Committee of the Judicial Commission on Mental Health, Supreme Court Misc. Docket No. 19-9095 & Court of Criminal Appeals Misc. Docket No. 19-010 (Oct. 1, 2019) [hereinafter Order Establishing Legislative Research Committee], https://www.txcourts.gov/media/1444914/misc-docket-19-010-and-19-9095.pdf.

Committee with developing legislative proposals and submitting "its recommendations to the Texas Judicial Council by June 1, 2020."[215] That same day, the Texas Supreme Court also created a Task Force for Procedures Related to Mental Health.[216] S.B. 362 from the 2019 legislative session had directed the Supreme Court to "(1) adopt rules to streamline and promote the efficiency of court processes under Chapter 573, Health and Safety Code; and (2) adopt rules or implement other measures to create consistency and increase access to the judicial branch for mental health issues."[217] In turn, the Supreme Court created the S.B. 362 Task Force to make recommendations to the Court to implement these aspects of S.B. 362 and to "provide a status report to the Court by December 1, 2020."[218] This Section will address key legislative proposals developed by the Legislative Research Committee, as well as legislative recommendations from the S.B. 362 Task Force.

A. 2021 Criminal Justice Proposals

The Legislative Research Committee held its first meeting in December 2019 and thereafter "created three workgroups: Competency Restoration, Diversion, [and] Services."[219] In turn, during the first half of 2020, the Competency Restoration and Diversion workgroups developed a number of legislative recommendations, all of which the full Legislative Research Committee supported.[220] This Subsection will provide highlights of these proposals.

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215. *Id.* at 2.

216. Order Creating Task Force for Procedures Related to Mental Health, Supreme Court Misc. Docket No. 19-9094 (Oct. 1, 2019) [hereinafter Task Force Order], https://www.txcourts.gov/media/1444867/199094.pdf. This order also appointed Judge Brent Carr from Tarrant County as Chair of the Task Force. *Id.*

217. *See* Act of May 15, 2019, 86th Leg., R.S., ch. 582, § 26, sec. 137.098 (directing the Supreme Court to undertake these actions).

218. *See* Task Force Order, *supra* note 216, at 1 (specifying the Task Force's charge and report deadline). Note that the Author was appointed to both the Legislative Research Committee and the Task Force. *See JCMH Report*, *supra* note 189, at 15, 17 (listing members of both groups).

219. *See Meeting Notebook*, *supra* note 208, at 2 (summarizing the order that established the Legislative Research Committee and referencing the Committee's first meeting).

220. *See* TEX. JUD. COMM'N ON MENTAL HEALTH, LEGIS. RECOMMENDATIONS AND REPORTS, at 7–9, 33–53, *in* TEX. JUD. COUNCIL, CRIM. JUST. COMM., REPORT AND RECOMMENDATIONS app. A, at 33 (Sept. 2020) [hereinafter LEGISLATIVE RECOMMENDATIONS], https://www.txcourts.gov/media/1449778/criminal-justice-committee-2020_0923_final.pdf (describing the various legislative proposals developed by the Legislative Research Committee, including draft bill language). The Author served as chair of the Competency Restoration Subcommittee. *Id.* at 4. The Legislative Research Committee unanimously supported all of these proposals. In addition, although the *Legislative Recommendations and Reports* identify the drafting body for this set of proposals as the "Legislative Research Task Force," the Order establishing the Committee identified the group as the "Legislative Research Committee." *Compare id.* at 3–4 (labeling the body of experts as the "Legislative Research Task Force"), *with* Order Establishing Legislative Research Committee, *supra* note 214, at 1 (naming the group the "Legislative Research Committee"). To avoid creating confusion in describing the work of this entity versus that of the S.B. 362 Task Force, this Article will refer to the legislative drafting body as the Legislative Research Committee, as it was identified by court order.

The Competency Restoration workgroup recommended several amendments to current state criminal justice legislation. One of these proposals is to expand on recent reforms to state jail requirements.[221] As described above, the Sandra Bland Act included mandates for the Jail Standards Commission to adopt rules to require county jails to provide detainees with the ability to access mental health services either at the jail or through telemedicine twenty-four hours a day.[222] The new proposal would require not only access to a provider of mental health services, but also "access to a prescription medication that is determined necessary for the care, treatment, or stabilization of a prisoner with mental illness by a mental health professional or other health professional."[223] Prompt access to appropriate medications can facilitate the person's "care, treatment, or stabilization" of symptoms of mental illness.[224]

Another recommendation is a proposal to amend Article 16.22 of the Texas Code of Criminal Procedure to eliminate "the requirement of ordering an interview and collection of [mental health] information when the defendant is no longer in custody" at a local jail.[225] The intent of Article 16.22, including amendments in 2017 and 2019 as discussed above, "has been to identify (promptly) persons in custody who will likely need treatment intervention."[226] The Meadows Mental Health Policy Institute has recommended abolishing this "mandatory mental health assessment for those who are not in custody, recognizing that the court can still order assessments as deemed appropriate."[227] The primary concern is that "[t]here is neither the capacity in the system to conduct the required number of assessments[,] nor the mechanism to monitor the assessment requirement of those released on surety bond."[228] The Competency Restoration workgroup agreed and recommended amending the statute to focus on screening those individuals suspected of mental illness or IDD who remain in the jail population, and not "out-of-custody" defendants.[229]

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221. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 9, 53 (adding a requirement for jail standards relating to psychiatric medication).

222. *See supra* notes 70–71 and accompanying text (describing amendments to TEX. GOV'T CODE ANN. §§ 511.009(a)(23)(A)–(B)).

223. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 53 (proposing to amend GOV'T § 511.009(d)).

224. *Id.*

225. *See id.* at 9, 52 (describing proposed amendment to TEX. CODE CRIM. PROC. ANN. art. 16.22 (a)(2)).

226. *See* SHANNON GUIDE, *supra* note 4, at 31 (discussing legislative intent). For analysis of the 2017 and 2019 amendments, see *supra* notes 18–35, 134–150 and accompanying text.

227. TONY FABELO, THE CHALLENGE OF IDENTIFYING, DIVERTING, AND TREATING JUSTICE-INVOLVED PEOPLE WITH MENTAL ILLNESS (Dec. 3, 2018), at 42, https://www.texasstateofmind.org/wp-content/uploads/2018/12/Justice-Involved_with_Mental_Illness_Review_and_Recommendations_TFabelo_WEB_12032018.pdf.

228. *Id.*

229. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 9, 52 (proposing to amend CRIM. PROC. art. 16.22 (a)(2)).

Several other proposals relate to jail-based competency restoration. In 2017, S.B. 1326 added Article 46B.091 to the Code of Criminal Procedure to permit counties to "develop and implement a jail-based competency restoration program" under certain required parameters.[230] The statute, however, unfortunately caps the maximum period for jail-based competency restoration services at sixty days, even though the general period for an order of competency restoration services is longer.[231] As described elsewhere, "[t]he statute contemplates that if the defendant has not been restored by the end of the [sixty]-day period of jail-based services, he or she will be immediately transferred 'without unnecessary delay' to an inpatient facility for the remaining" authorized restoration period.[232] While this statutory requirement is acceptable in theory, the practical concern is "that given long waiting lists and backlogs at state inpatient facilities, immediate transfers simply do not happen."[233]

Another concern relating to the jail-based competency restoration statute pertains to the requirements for "at least two full psychiatric or psychological evaluations of the defendant during the [sixty-day] period the defendant receives competency restoration services in the jail."[234] These evaluations must occur by the twenty-first and fifty-fifth days, respectively, of the sixty-day period.[235] The practical problem, however, is that it can take weeks for a forensic psychiatrist or psychologist to prepare and submit a report of an evaluation.[236] Accordingly, it is effectively impossible for a court to be able to receive a report on an examination conducted on or shortly before the fifty-fifth day prior to the completion of the sixty-day statutory period.

To address these concerns, the Legislative Research Committee unanimously proposed amendments to Article 46B.091 "regarding deadlines for evaluations and addressing the current law's limitation of [sixty] days for [jail-based competency restoration]."[237] As to the latter, the amendments would require the provider of jail-based competency restoration services to continue to provide those services after the initial sixty-day period if space is

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230. *See* Act of May 27, 2017, 85th Leg., R.S., ch. 748, § 30, 2017 Tex. Gen. Laws 3183 (adding CRIM. PROC. art. 46B.091) (quoting *id.* art. 46B.091(b)).

231. *See* CRIM. PROC. art. 46B.091(j) (capping time in the county jail program at sixty days); *but see id.* art. 46B.073(b) (authorizing an initial period of 120 days for felonies).

232. *See* SHANNON GUIDE, *supra* note 4, at 109 (discussing Article 46B.091(j)).

233. *Id.*; *see also* Jennings, *supra* note 51, at 28 (observing that "[t]he most problematic issue in this model is that an inpatient program may not be immediately, or even readily, available").

234. CRIM. PROC. art. 46B.091(g).

235. *Id.*

236. For example, consider the report deadline set forth in Article 46B.026 that authorizes up to thirty days for submission of the initial competency evaluation report. *Id.* art. 46B.026(a).

237. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 8, 44–46 (proposing amendments to CRIM. PROC. arts. 46B.091(g), (j), including language to replace the current two-evaluation requirement set forth in Article 46B.091(g)).

then unavailable in an inpatient facility.[238] The proposal also includes additional language that would grant the court "authority to order the transfer of a defendant who is subject to an order for jail-based competency restoration services to an outpatient competency restoration program" if the defendant meets the requirements for an outpatient competency restoration program and the services are available.[239]

The Legislative Research Committee also proposed amendments to Article 17.04 of the Code of Criminal Procedure relating to personal bonds.[240] That statute requires a defendant, as part of release on personal bond, to swear that he or she will later appear before the court at the designated date and time.[241] During the Competency Restoration Workgroup's deliberations, Dr. Floyd Jennings pointed out a troubling concern about the statute when applied to defendants with mental illness, particularly given that "[a] failure to appear can result in a contempt finding."[242] As the Workgroup reasoned, "the oath requirement is troubling re[garding] a defendant with mental illness who is eligible for a personal bond with treatment conditions under Art. 17.032 . . . [or] if the defendant has been found incompetent and is being placed on personal bond for purposes of an order for outpatient competency restoration."[243] Specifically, the Workgroup was concerned that a person with mental illness, who had just been made the subject of a court order that includes mental health treatment, might not comprehend "the significance of the oath, yet . . . might face a contempt charge for failing to appear."[244] Accordingly, the Committee recommended an exception to the oath requirement for personal bonds involving mental health treatment orders.[245]

The Legislative Research Committee also made two recommendations that were intended to create parallel provisions between certain aspects of Chapters 46B and 46C of the Code of Criminal Procedure. First, the Committee proposed amending Article 46C.102 "to align the expert qualifications in [A]rticle 46C.102 (insanity) with [A]rticle 46B.022 (incompetency)."[246] Article 46C.102 of the Code of Criminal Procedure was

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238. *See id.* at 8, 43–44 (proposing to amend CRIM. PROC. art. 46B.091(j)).

239. *See id.* at 44–45 (proposing to add CRIM. PROC. art. 46B.091(m)). The Legislative Research Committee also made recommendations to amend Article 46B.090, relating to authorization for a state-operated pilot site for jail-based competency restoration, "to better align it with the program requirements later enacted in 46B.091" governing county-based programs. *Id.* at 8, 36–42 (proposing to add CRIM. PROC. art. 46B.090).

240. CRIM. PROC. art. 17.04.

241. *Id.* art. 17.04(3).

242. *See* TEX. JUD. MENTAL HEALTH COMM'N, COMPETENCY RESTORATION WORKGROUP DRAFT REPORT, at 6 (Apr. 22, 2020), https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3A12f8802e-d80c-4629-a765-98dc07cae235&x_api_client_id=shared_recipient&x_api_client_location=view (discussing proposal to amend CRIM. PROC. art. 17.04).

243. *Id.* (emphasis omitted).

244. *Id.*

245. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 9, 51 (proposing language to create an exception to the oath requirement).

246. *See id.* at 9, 50 (proposing amendments to CRIM. PROC. art. 46C.102(a)).

enacted in 2005, and provides that experts in insanity cases, who are psychiatrists or doctoral-level psychologists, must be qualified by board certification or by certain training or experience.[247] The statute also included a "grandfathering" exception for psychiatrists or psychologists who had five years of experience in performing forensic evaluations prior to the enactment of the statute.[248] This language mirrored a comparable "five-year[]" grandfathering exception that was originally a part of Article 46B.022 regarding expert qualifications for competency evaluations, but the exception was eliminated in 2011.[249] Given that fifteen years have passed since the enactment of Article 46C.102, any expert appointed to provide such services should now be otherwise qualified, and the confusing five-year experience exception should be eliminated.

The second recommendation for creating parallel provisions between Chapters 46B and 46C relates to possible step-downs from inpatient hospitalization to outpatient treatment. Chapter 46C currently allows a possible modification from an inpatient hospitalization order for certain insanity acquittees to court-ordered outpatient or community-based care.[250] The Legislative Research Committee recommended a comparable provision in Chapter 46B relating to inpatient civil commitments for certain defendants to permit a court to "modify an order for inpatient treatment or residential care to order court-ordered outpatient mental health services."[251] The new provisions would apply only to certain defendants charged with violent offenses whom the Health and Human Services Commission had previously transferred from a maximum-security unit to another inpatient treatment facility.[252] The proposal includes detailed procedures and requirements for modification hearings, and requires prior "consultation with the local mental health authority or local behavioral health authority" to assure that "treatment and supervision can be safely and effectively provided on an outpatient basis and whether appropriate outpatient mental health services are available to the defendant."[253]

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247. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 831, § 2, 2005 Tex. Gen. Laws 2841 (enacting CRIM. PROC. art. 46C.102).

248. *See* CRIM. PROC. art. 46C.102(a)(2)(B)(ii) (setting forth the five-year experience alternative).

249. *See* Act of May 19, 2011, 82nd Leg., R.S., ch. 822, § 6, 2011 Tex. Gen. Laws 1894 (amending CRIM. PROC. art. 46B.022(a)).

250. *See* CRIM. PROC. arts. 46C.262–.263 (allowing a court to modify an inpatient order and to order outpatient or community-based services).

251. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 8–9, 47 (proposing new Article 46B.1055(1), Texas Code of Criminal Procedure, permitting a modification to "court-ordered outpatient mental health services").

252. *See id.* at 8–9 (describing application of proposed new Article 46B.1055). Existing legislation already permits outpatient treatment orders for defendants who are not charged with violent offenses. CRIM. PROC. art. 46C.106(a)(2).

253. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 47–48 (proposing the consultation requirement in Article 46B.1055(4)).

The Legislative Research Committee recommended several additional statutory changes.[254] Two of the proposals, both developed by the Diversion Workgroup, focus on defendants in justice or municipal courts.[255] One of these recommendations would codify, for those courts, the constitutional principle that a criminal defendant must be competent to enter a guilty plea.[256] If enacted, the proposal would preclude a justice of the peace or municipal court judge from accepting a "plea of guilty or nolo contendere . . . unless it appears that the defendant is mentally competent and the plea is free and voluntary."[257] This proposal tracks existing statutory requirements that are applicable to judges in district and county courts.[258]

The second proposal for amendments to the statutes governing justice and municipal courts relates to capacity to stand trial.[259] Chapter 46B of the Code of Criminal Procedure delineates the procedures relating to competency to stand trial; however, it does not apply to defendants charged with offenses that do not result in confinement—Class C misdemeanors or violations of local ordinances.[260] Despite the lack of coverage in Chapter 46B, however, "Constitutional requirements for competency [to stand trial] should nonetheless be applicable to minor offenses" for which the punishment may only include fines.[261] Accordingly, the Legislative Research Committee endorsed the Diversion Workgroup's recommendation to add a new article

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254. For example, see *id.* at 7–8, 35, 46 (recommending, respectively, an amendment to Article 46B.055 that would require periods of competency restoration orders to "begin on the date the order is signed, or competency restoration services begin, whichever is later[,]" and an amendment to Article 46B.009 that would require good time credits for "any period that the person either was ordered to and participated in, or was committed to and attended, an outpatient competency restoration program").

255. *See id.* at 7, 33–34 (setting forth two recommendations to Chapter 45 of the Code of Criminal Procedure). Judge Ryan Turner, Executive Director of the Texas Municipal Courts Education Center, chaired the Diversion Workgroup. *Id.* at 4.

256. *See* Godinez v. Moran, 113 S. Ct. 2680, 2687–88 (1993) (holding that a defendant must be competent to plead guilty, although the standard for pleading guilty is no higher than the standard for competency to stand trial); *Ex parte* Lewis, 587 S.W.2d 697, 700 (Tex. Crim. App. [Panel Op.] 1979) (holding that convicting a defendant who is not competent violates due process); Hall v. State, 808 S.W.2d 282, 285 (Tex. App.—Houston [1st Dist.] 1991, no pet.) ("[U]nless competent, a defendant cannot knowingly waive his right to trial and plead guilty.").

257. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 34 (proposing a new Article 45.0241, Texas Code of Criminal Procedure).

258. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (providing that "[n]o plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary").

259. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 7, 33 (proposing a new Article 45.0214, Texas Code of Criminal Procedure, pertaining to a lack of fitness to proceed).

260. *See* CRIM. PROC. art. 46B.002 (making Chapter 46B applicable "to a defendant charged with a felony or with a misdemeanor punishable by confinement"); TEX. PENAL CODE ANN. §§ 12.21–.23 (contrasting Class A and Class B misdemeanors, both of which can be punished by confinement, with Class C misdemeanors, for which punishment can only include "a fine not to exceed $500").

261. *See* SHANNON GUIDE, *supra* note 4, at 46 (discussing the scope of Chapter 46B); Drope v. Missouri, 420 U.S. 162, 171 (1975) (observing that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial").

to Chapter 45 of the Code of Criminal Procedure, which, if enacted, would permit the state, the defendant, or the presiding justice of the peace or municipal court judge to "determine whether probable cause exists to believe that a defendant, including a defendant with a mental illness or developmental disability[,] lacks the capacity to understand the proceedings in criminal court or to assist in the defendant's own defense and is unfit to proceed."[262] The statute would then permit the court to dismiss the criminal complaint upon determining that probable cause exists for such a finding, after providing notice to the State.[263] This recommendation is an expansion of existing statutory provisions relating to Class C misdemeanors in juvenile cases.[264]

B. S.B. 362 Emergency Detention

Separate from the foregoing work of the Legislative Research Committee, the S.B. 362 Task Force made five recommendations for statutory changes relating to civil provisions for the emergency detention of persons with mental illness who are experiencing a mental health crisis.[265] Two of these were unanimous recommendations.[266] Of these consensus recommendations, the first relates to public safety and would permit "a peace officer to seize a firearm found in possession of a person who is apprehended under the authority of a warrant for an emergency detention issued by a magistrate."[267] The legislature previously enacted similar legislation in 2013 to authorize a peace officer to seize firearms when taking a person into custody as part of a warrantless apprehension of a person in a mental health crisis for emergency detention.[268] The S.B. 362 Task Force proposal would extend this authority to seize firearms to an emergency detention when supported by a warrant and not only as part of a warrantless apprehension.[269]

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262. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 33 (proposing new Article 45.0214(a), Texas Code of Criminal Procedure).

263. *See id.* (proposing new Article 45.0214(b)). The State would have the right to appeal such a dismissal. *See id.* (proposing new Article 45.0214(c)).

264. *See id.* at 7 (comparing the draft legislation to PENAL § 8.08).

265. *See id*. at 10–12, 54–64 (setting forth and discussing S.B. 362 Task Force legislative proposals). For an in-depth discussion of the existing statutory framework for emergency detention in Texas, see BENCH BOOK, *supra* note 2, at 33–38 (discussing emergency detention pursuant to a magistrate's warrant), and 75–81 (describing warrantless emergency detention by a peace officer).

266. *See* S.B. 362 TASK FORCE, LEGIS. RECOMMENDATIONS, at 3, 8–9 (July 7, 2020) [hereinafter S.B. 362 TASK FORCE REPORT], https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:942005e8-efba-4625-b758-461a994b8786 (noting the committee votes for the three unanimous proposals).

267. LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 10.

268. *See* Act of May 21, 2013, 83rd Leg., R.S., ch. 776, § 1, 2013 Tex. Gen. Laws 1979 (adding TEX. HEALTH & SAFETY CODE ANN. § 573.001(g)). The 2013 Bill also added a set of procedures for the disposition of any firearms seized under the amended statute. *Id.* § 2 (adding TEX. CODE CRIM. PROC. ANN. art. 18.191).

269. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 11 (commenting that the "amendment will grant the peace officer the same authority in both situations").

The second unanimous Task Force recommendation, albeit with one abstention, would amend § 574.106 of the Texas Health and Safety Code relating to court-ordered administration of psychoactive medication to "allow mandatory blood draws for patients admitted to the state hospitals for involuntary psychoactive medication administration purposes."[270] The ability to obtain blood samples "is medically necessary to ensure treating physicians have the ability to monitor medication levels in an effort to determine whether the medications are having their desired effect or need adjustment."[271] In addition, some antipsychotic medications require regular blood monitoring.[272] The Task Force proposal would expand the scope of a medication order under the Health and Safety Code to "include[] the authority to obtain blood samples for analysis and conduct evaluations and laboratory tests that are reasonable and medically necessary to safely administer psychoactive medications."[273]

The other three S.B. 362 Task Force recommendations, although not unanimous, each received greater than two-thirds support.[274] One of these recommendations seeks clarification of the emergency detention statutes with respect to whether a peace officer must generally "remain at a facility or emergency room after the officer has delivered a person for emergency mental health services with the proper completed documentation."[275] The Task Force recommended an amendment to the Health and Safety Code to state that a peace officer has no "duty to wait at a hospital or other facility for the person to be medically screened, treated, or to have their insurance verified."[276] Instead, the proposal would clarify that the officer could depart once "the officer makes a responsible delivery of the person [in need of a mental health evaluation and possible treatment] to the appropriate hospital or facility staff member along with the completed documentation required by" the emergency detention statutes.[277]

An additional Task Force proposal was intended to address a situation in which a person in need of emergency mental health services, who was apprehended under the authority of an emergency detention or OPC, is "resistant and combative" due to the person's "untreated mental health

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270. *See id.* (discussing proposed amendment to HEALTH & SAFETY § 574.106). *See also* S.B. 362 TASK FORCE REPORT, *supra* note 266, at 9 (identifying the committee vote).

271. LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 11.

272. For example, with regard to a drug commonly used for the treatment of schizophrenia, "the Food and Drug Administration requires regular blood count monitoring of all patients taking clozapine." *Clozapine Blood Count Monitoring*, SMI ADVISOR (Mar. 29, 2019), https://smiadviser.org/knowledge_post/clozapine-blood-count-monitoring.

273. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 62 (proposing addition of subsection (j-1) to HEALTH & SAFETY § 574.106).

274. S.B. 362 TASK FORCE REPORT, *supra* note 266, at 1, 7, 9 (listing vote totals of 11–3, 10–4, and 11–3, respectively).

275. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 10 (discussing proposal).

276. *Id.* at 54 (proposing addition of subsection (d-2) to HEALTH & SAFETY § 573.012).

277. *Id.*

condition," and commits an act that harms another person or damages property "after arrival at a hospital or facility for treatment for the severe mental health crisis."[278] The Task Force supported making a change to the law in such a situation to delay any "[a]rrest for an [a]ssault or [o]ther [l]ow-level [o]ffense, until the [p]atient's [m]ental [h]ealth [c]ondition has been [s]tabilized."[279] There was concern that a typical jail might "not have the resources or expertise to resolve the emergency mental health crisis."[280] Moreover, one of the authorized bases for an emergency detention at a hospital or mental health facility is that "the person presents a substantial risk of harm to themselves or others" because of untreated mental illness.[281]

Noting the challenge of "[c]rafting an appropriate solution" to the foregoing type of situation, the Task Force suggested three possible alternatives.[282] One of the alternatives would add language to the Code of Criminal Procedure to require the deferral of any arrest in such a situation until after the period for emergency mental health services.[283] Another alternative would limit the level of offense even if the acts might lead to charges of assault on a public servant or emergency services provider, and a third would create "an exception, a defense, an affirmative defense, or a mitigation instruction in favor of a defendant" in the event charges result from acts committed under an emergency detention or OPC.[284] Of course, the legislature could adopt any or all of these measures to respond to this type of scenario. To do so would be consistent with efforts to divert persons with mental illness into treatment, rather than solely utilizing a criminal justice response.

The final S.B. 362 Task Force legislative recommendation relates to electronic applications for emergency detention warrants.[285] Under the Health and Safety Code, any "adult may file a written application for the emergency detention of another person," and the application must address a number of statutorily-prescribed criteria.[286] In general, the applicant "must present the application personally to a judge or magistrate . . . [who] shall examine the application and may interview the applicant."[287] Since 2011, however, there has been an exception to this in-person presentation requirement, which allows a physician to submit an application by email with

278. *See id.* at 11 (discussing rationale for proposal).
279. *Id.* (emphasis omitted and capitalization revised).
280. *Id.* at 12.
281. *See id.* at 11 (discussing situation for which the recommendation is intended to address).
282. *See id.* at 12 (setting forth three alternatives).
283. *See id.* at 63–64 (proposing the addition of a new Article 15A.01 to the Code of Criminal Procedure).
284. *See id.* at 12 (setting forth the two additional alternatives) (emphasis omitted).
285. *See id.* at 10 (describing proposal).
286. TEX. HEALTH & SAFETY CODE ANN. §§ 573.011(a)–(b).
287. *Id.* § 573.012(a).

the application included as a secure PDF attachment.[288] In turn, the judge or magistrate may transmit the emergency detention warrant back to the physician applicant by e-mail or electronically with a digital signature.[289] The Task Force has recommended expanding this exception for e-mail submission to certain other medical professionals in addition to physicians.[290] If enacted, the exception would expand to include not only physicians, but also "physician's assistants, nurse practitioners, psychologists, and certain licensed master's-level mental health professional counselors or social workers who are currently authorized to make clinical assessments."[291] As proposed, these additional professionals could only utilize e-mail for submission of an application of a warrant "[i]f the person who is the subject of an application is [then] receiving care in a hospital or a facility operated by a local mental health authority."[292]

As discussed in the S.B. 362 Task Force report, some members of the Task Force indicated that "throughout Texas there are circumstances, particularly in less populated areas, where a physician is not available to make an electronic request at the time an emergency detention warrant is needed."[293] Accordingly, proponents of the amendment urged that other medical professionals who are "versed in mental health matters [and] who possess advanced mental health training and education," also be authorized to submit warrant applications by e-mail.[294] The opposing argument, however, is that a hospital or other mental health facility will have physicians, so, "there should not be a problem having a physician fill out the information."[295]

V. CONCLUSION

The Texas Legislature has made significant strides in enacting mental health legislation in recent years, particularly during the 2017 and 2019 legislative sessions.[296] Moreover, there are more opportunities for further

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288. *Id.* § 573.012(h). *See* Act of May 10, 2011, 82nd Leg., R.S., ch. 510, § 1 (codified at HEALTH & SAFETY § 573.012 (h-1)) (adding e-mail option for physician applicants).

289. HEALTH & SAFETY §§ 573.012 (h-1)(1)–(2).

290. *See* LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 10, 55–56 (proposing an amendment to HEALTH & SAFETY § 573.012).

291. *See id.* at 10 (listing the "additional professionals").

292. *See id.* at 56 (proposing to add subsection (h-2) to HEALTH & SAFETY § 573.012).

293. *See id.* at 10 (describing rationale for the proposal).

294. *Id.*

295. GUY HERMAN, MINORITY REPORT TO THE PROPOSED SOLUTION OF THE CREATION OF ELECTRONIC EMERGENCY DETENTION WARRANTS 5 (May 7, 2020), https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:a5c39cd2-5546-48b5-a29e-696a408aa3cc#pageNum=1. Judge Herman also urged an alternative to encourage "the Texas Commission on Law Enforcement to get all law enforcement officers in the state to make entry into hospitals to make warrantless emergency detentions upon request of doctors and hospitals after court hours and on weekends and holidays." *Id.*

296. *See supra* Part II and accompanying text (discussing the 2018–2019 legislative successes).

fine-tuning during the 2021 legislative session.[297] Notwithstanding this array of forward-thinking legislation, however, without more community-based services—and sufficient funding for those services—the promise offered by the legislation cannot be fully realized or implemented.[298] In addition, due to the fiscal implications relating to COVID-19's impact on the economy, the legislature will face tremendous challenges to fund state government during the 2021 legislative session.[299] Nonetheless, lawmakers should develop longer-term strategies to further increase funding and access to community-based programs such as outpatient services. If so, the future is bright.

297. *See supra* Part IV and accompanying text (discussing potential next-steps for the Texas Legislature).

298. *See* JUDICIAL COUNCIL 2018 REPORT, *supra* note 102, at 9 (recommending that "[t]he Legislature should provide additional funding for community mental health services, including outpatient mental health services") (emphasis omitted); LEGISLATIVE RECOMMENDATIONS, *supra* note 220, at 13–27 (identifying and discussing ten areas of service gaps requiring additional resources).

299. *See* Cassandra Pollock, *Texas Faces a Looming $4.6 Billion Deficit, Comptroller Predicts*, TEX. TRIB. (July 20, 2020, 4:00 PM), https://www.texastribune.org/2020/07/20/texas-deficit-comptroller/ (discussing Comptroller Glenn Hegar's budget estimate relating to the "economic fallout triggered by the coronavirus pandemic"); Cassandra Pollock, *Texas Sales Tax Revenue Dips 13.2% in May, The Largest Year-Over-Year Decline in a Decade*, TEX. TRIB. (June 1, 2020, 11:00 AM), https://www.texastribune.org/2020/06/01/texas-sales-tax-coronavirus-decrease-economy-budget/ (discussing Comptroller Glenn Hegar's public statement about sales tax revenue drops); Cassandra Pollock, *Texas Gov. Greg Abbott Instructs State Agencies to Trim Budgets by 5% to Prepare for "Economic Shock"*, TEX. TRIB. (May 20, 2020, 1:00 PM), https://www.texastribune.org/2020/05/20/texas-greg-abbott-budget-cut-coronavirus/ (reporting on planned cuts to current fiscal year budgets months in advance of the next legislative session).