



TEXAS TECH UNIVERSITY
School of Law

COMPETENCY, ETHICS, AND MORALITY



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Competency Restoration: Delays in Treatment

- Federal precedent
- Texas state court case
- Pending federal challenge in Texas
- Alternatives



■ Federal precedent

- *Terry v. Hill*, 232 F. Supp. 2d 934 (E.D. Ark. 2002)
- *Oregon Adv. Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003)
- *Advocacy Center ... v. Louisiana DHH*, 731 F.Supp. 2d 603 (E.D. La. 2010)
- *Trueblood v. Wash. State DSHS*, 822 F.3d 1037 (9th Cir. 2016)
- *J.H. v. Dallas*, No. 1:15-cv-02057-SHR (M.D. Pa. 2016) (settlement agreement)
- *Disability Law Center v. Utah* (D. Utah 2016), class certified



■ Federal precedent

- *Terry v. Hill*, 232 F. Supp. 2d 934 (E.D. Ark. 2002)
- Incompetent defendants waited an average of more than 8 months for evaluations and more than 6 months for treatment
- Limited resources not an excuse



- Federal precedent
 - *Oregon Adv. Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003)
 - Average of a month violates due process
 - Court reasoned that *Indiana v. Jackson* holds that “[i]ncapacitated criminal defendants have liberty interests in freedom from incarceration and in restorative treatment.”



- Federal precedent
 - *Oregon Adv. Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003)
 - Court reasoned that *Indiana v. Jackson* holds that “[i]ncapacitated criminal defendants have liberty interests ... **in restorative treatment.**”



- Federal precedent
 - *Advocacy Center ... v. Louisiana DHH*, 731 F.Supp. 2d 603 (E.D. La. 2010)
 - Defendants had been waiting “many months to be transferred ... and at least two individuals had been waiting for over a year”
 - A lack of funding was no justification



- Federal precedent
 - *Trueblood v. Wash. State DSHS*, 822 F.3d 1037 (9th Cir. 2016)
 - Two weeks to two months average wait time
 - District court ruled that seven days is “the maximum justifiable period ... absent good cause”
 - The state had changed its law to 14 days, with a 7-day goal for evaluations.
 - 9th Circuit reversed the 7-day order as to evaluations and remanded for the district court to “evaluate the effects of the revised legislation” re timing of evaluations



- Federal precedent

- *J.H. v. Dallas*, No. 1:15-cv-02057-SHR (M.D. Pa. Jan. 2016) (settlement agreement)
- Parties agreed that average wait time of 60 days or more violated due process
- State agreed to allocate more money for 60 new “placement options” within 120 days
- To provide \$1 million for supported housing in Philly within 90 days



- Federal precedent

- *J.H. v. Dallas*, No. 1:15-cv-02057-SHR (M.D. Pa. Jan. 27, 2016) (settlement agreement)
- State agreed not to provide jail-based competency restoration
- Parties agreed to negotiate to come up with a maximum allowable wait time



Texas state court case

- Travis County district court ruling re 21 days – *Lakey v. Taylor*
- Brought under Texas state constitutional “due course of law” provision
- **Reversed** by Court of Appeals – 435 S.W. 3d 309 (Tex. App. – Austin 2014, no pet.)



Texas case

- Although acknowledging significant delays, rejected facial constitutional challenge to state’s clearinghouse waitlist approach
- Footnote 9 – declined to follow *Mink*
 - Court disagreed that *Jackson* established “a stand-alone, due process right to receive competency-restoration treatment”
 - Instead, the Texas court more narrowly read *Jackson*



Texas state court case

- The court however opined that per *Jackson* “an incompetent defendant’s continued detention for competency restoration must be justified by progress toward that goal”
- And, due process rights are violated if there is no “competency restoration treatment within a reasonable amount of time following the court’s ... order”
- But, court rejected the FACIAL challenge



Pending Texas challenge in federal court

- Disability Rights Texas filed suit in the Western D. of Texas in July 2016 against DSHS
- Seeks class certification
- Raises due process challenges to the long delays in Texas jails
- Asserts that jails do not have the resources or expertise to provide appropriate restoration treatment and services



Needs/Alternatives

- 2001 – 16%
- 2016 – 52%



Needs/Alternatives

- More forensic bed space in state facilities
 - 1800 more needed over the next 8 years
- Outpatient competency restoration
 - Expansion and extension of pilots
 - Removal of administrative burdens
- Jail-based competency restoration – when appropriate
- Medication in jail
- More initial interventions and diversions by law enforcement
- More MH Courts



Outpatient Competency Restoration

- Pilots have been successful
- Cost is significantly less than the state forensic hospitals
- Potential for shorter stays
- Frees up space on the waitlist for forensic beds, and can help with civil commitment bed availability
- Caution re regulatory challenge: problem encountered in Lubbock
- Various models should be encouraged



Competency Restoration in Jail

- 2013 Legislation in Texas
- Two pilot sites authorized – still waiting
- What about other jails even if not funded?
 - Many jails are inappropriate
 - But, some are
 - Consider alternatives



Court-ordered Medication

- Convoluted statutes/processes
- Duration – follows the individual
- The Texas two-step:
 - First, H&S Code 574.106
 - Before a court with mental-health jurisdiction; which is???
 - Second, the criminal court can utilize 46B.086



46B.086 – Medication Hearings

- Applies to a person who is
 - in jail more than 72 hours while awaiting transfer for competency restoration treatment
 - receiving competency restoration treatment at inpatient facilities or on an outpatient basis
 - back in jail following competency restoration treatment
 - AND for whom there is a continuity of care plan, **AND**



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46B.086 – Medication Hearings

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



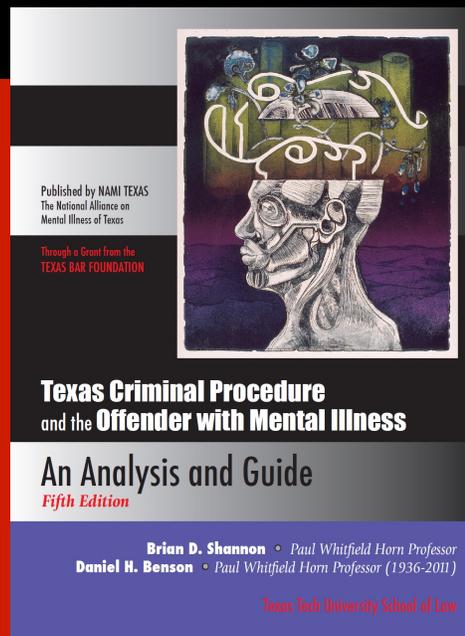
46.04 Competence for Execution

- *Incompetency to Be Executed: Continuing Ethical Challenges & Time for a Change in Texas*, 45 Tex. Tech L. Rev. 420 (2013)
- [Link to article](#)



Resource

[Link to Shannon Book](#)





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THANKS!

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