ETHICAL CHALLENGES IN TEXAS CRIMINAL PROCEEDINGS INVOLVING DEFENDANTS WITH MENTAL ILLNESS *

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I. INTRODUCTION

Under our criminal justice system, a defendant must be mentally competent to stand trial.[1] As first established in *Dusky v. United States*[2] and as codified in Texas under Article 46B.003 Subsection (a) of the Texas Code of Criminal Procedure, a defendant is "incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person."[3]

If a Texas court determines that a defendant is incompetent to stand trial in a criminal proceeding and is likely to be restored to competency in the foreseeable future, Chapter 46B of the Texas Code of Criminal Procedure provides various options for the court to order competency restoration services depending on the level of the offense and availability of services.[4] The alternatives for court-ordered services include Outpatient Competency Restoration (OCR), jail-based competency restoration, or inpatient competency restoration.[5] Despite these statutory options, however, Texas has limited capacity for outpatient and jail-based competency restoration placements.[6] Accordingly, courts must often order inpatient competency restoration services.[7] Unfortunately, just because a court orders an incompetent defendant to receive inpatient competency restoration services, that does not mean the services will commence in a prompt fashion. Instead, according to the Texas Health and Human Services Commission (Texas HHS Commission), as of June 30, 2022, there were 2,435 persons in Texas jails awaiting placement for inpatient competency restoration services.[8] Of that overall total, there were 1,512 people on the non-maximum security forensic

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1. *See* Drope v. Missouri, 420 U.S. 162, 171 (1975) ("It has long been accepted 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.").

2. Dusky v. United States, 362 U.S. 402, 402 (1960).

3. TEX. CODE CRIM. PROC. ANN. art. 46B.003(a). For an extended discussion of the criminal competency procedures in Texas, see BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS: AN ANALYSIS AND GUIDE, at 43–127 (6th ed. 2019), https://namitexas.org/wp-content/uploads/sites/47/2019/10/Shannon-6th-Edition-Oct-2019-for-NAMI-Texas-website.pdf.

4. *See* TEX. CODE CRIM. PROC. ANN. arts. 46B.071, .0711, .072, .073 (describing possible pathways for ordering competency restoration services).

5. *Id.*

6. *See* Brian D. Shannon, *Texas Mental Health Legislative Reforms: Significant Achievements with More to Come*, 53 TEX. TECH L. REV. 99, 105–06 (2020) (discussing 2017 legislation that created "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").

7. *See id.* (noting the lack of available options other than inpatient services).

8. *See Joint Committee on Access & Forensic Services (JCAFS) Agenda*, TEX. HEALTH & HUM. SERVS. (July 20, 2022) [hereinafter *Forensic Access Report*], https://www.hhs.texas.gov/about/communications-events/meetings-events/2022/07/20/joint-committee-access-forensic-services-jcafs-agenda (click the Excel file linked at agenda item 4: "Discussion: JCAFS dashboard and relevant data").

state hospital bed waiting list—with an average of 237 days on the waiting list (almost eight months).[9] In addition, the waiting list for a maximum-security bed, as of that date, included 923 people—with an average waiting time of over a year and a half.[10] Given these long waiting lists for competency restoration inpatient forensic beds and the corresponding lengthy waiting times, consideration of other alternatives is a must. Consistent with my April 2022 presentation at the *Texas Tech Law Review* Mental Health Law Symposium, this Article focuses on the ethical and moral imperative for judges, prosecutors, and criminal defense attorneys to consider avenues other than inpatient competency restoration for appropriate defendants, given the disturbingly long waiting lists and times for inpatient competency restoration services.

II. IS DIVERSION APPROPRIATE?

Judges, prosecutors, and defense attorneys should be aware of and understand the legal framework for potentially diverting defendants with mental illness from the criminal justice system into treatment alternatives, particularly with respect to nonviolent or misdemeanor offenses. This Part discusses several Texas diversion initiatives and opportunities available to Texas courts.[11]

A. Eliminate the Wait

As a means of trying to encourage diversion of offenders and reduce the waiting lists for inpatient competency restoration services, in October 2021 the Texas Judicial Commission on Mental Health (Texas JCMH) and the Texas HHS Commission collaborated to publish a series of checklists entitled *Eliminate the Wait: The Toolkit for Rightsizing Competency Restoration Services* (the Toolkit).[12] In introducing the Toolkit, the drafters noted the following:

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9. *Id.*

10. *Id.* The average time on the waiting list for a maximum-security inpatient placement was 592 days as of June 30, 2022, approximately twenty months. *Id.* These lengthy waiting periods have also been challenged in litigation. *See* Ward v. Hellerstedt, 753 F. App'x 236, 239 (5th Cir. 2018) (reversing and remanding class certification of a suit asserting a violation of due process rights relating to defendants being confined "in county jails for unreasonable periods of time without criminal convictions and failing to . . . [have been provided] with the appropriate mental health treatment and/or services during their confinement").

11. For an additional discussion on diversion authority under Texas law, see TEX. JUD. COMM'N ON MENTAL HEALTH, TEXAS MENTAL HEALTH AND INTELLECTUAL AND DEVELOPMENTAL DISABILITIES LAW BENCH BOOK, at 14–15 (3d ed. 2021–2022) [hereinafter BENCH BOOK], http://benchbook.texasjcmh.gov/.

12. TEX. JUD. COMM'N ON MENTAL HEALTH & TEX. HEALTH & HUM. SERVS. COMM'N, ELIMINATE THE WAIT: THE TEXAS TOOLKIT FOR RIGHTSIZING COMPETENCY RESTORATION (2021) [hereinafter TOOLKIT], http://texasjcmh.gov/media/erwfq1mp/eliminate-the-wait-toolkit-1-19-22-final.pdf. The

> Like other states across the U.S., Texas faces a growing crisis in the number of people who are waiting in county jails for inpatient competency restoration services after being declared incompetent to stand trial. . . . Not only has this increased costs and overburdened state agencies and county jails, but it also is taking a significant toll on the health and well-being of people waiting in Texas jails for inpatient competency restoration services. Meanwhile, resources available to the behavioral health and justice professionals serving our communities are becoming scarce.[13]

As a response, the two state agencies urged "judges, prosecutors, defense attorneys, sheriffs and jail staff, police, and behavioral health providers to join their collaborative effort to change how Texas serves people at the intersection of mental health and criminal justice."[14] Moreover, the Toolkit authors emphasized that "[p]eople with a mental illness or an intellectual or developmental disability are often arrested when diversion is appropriate and possible."[15]

The Toolkit drafters also explained that judges' "[c]ompetency evaluation orders are often tied to a well-intended, but inaccurate, understanding of [the scope of] competency restoration services."[16] Instead, "[c]ompetency restoration services have a narrow focus on stabilization, symptom management, and required legal education. This is not the same as providing access to a fully developed treatment plan and treatment services with the goal of long-term recovery and rejoining the community."[17]

The Toolkit includes detailed checklists for mental health providers, police, sheriffs, jail administrators, judges, court staff, prosecutors, and defense attorneys that focus on topics such as identifying mental health and intellectual disability needs, exploring treatment or diversion options before defaulting to competency restoration proceedings, encouraging training, and developing partnerships with the various stakeholders.[18] Regarding possible diversion of offenders to civil alternatives to the criminal justice process, the checklists for judges, prosecutors, and defense attorneys include an array of questions focusing on diversion alternatives to competency restoration proceedings and alternatives to inpatient hospitalization if competency restoration is nonetheless needed.[19] Indeed, the checklist for judges and court staff includes a subset of questions under the heading "Create a Culture of Diversion First," while the checklists for both prosecutors and defense

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drafters created the Toolkit to "include[] a set of strategies that stakeholders can implement to help eliminate the wait for inpatient competency restoration services in Texas." *Id.* at 6 (emphasis omitted).

13. *Id.*

14. *Id.*

15. *Id.* at 7 (emphasis omitted).

16. *Id.* (emphasis omitted).

17. *Id.*

18. *See id.* at 8–21 (setting forth a series of checklists for the various groups).

19. *See id*. at 14, 16, 19–20 (listing checklist questions for judges, prosecutors, and defense attorneys).

attorneys include sections of questions in a category entitled "Work Toward Diversion First."[20]

B. Nonstatutory Diversion

In recognition of the extensive backlog for inpatient forensic beds, particularly for defendants charged with nonviolent misdemeanors or nonviolent felonies, prosecutors and defense attorneys should explore the option of dismissing appropriate criminal cases in exchange for agreed mental health treatment plans or by seeking court-ordered outpatient civil commitments via a court with probate jurisdiction—typically called Assisted Outpatient Treatment (AOT).[21]

The Treatment Advocacy Center, Judge Oscar Kazen (the presiding judge of Bexar County Probate Court One), NAMI-Texas, and I recently collaborated to develop the *Texas AOT Practitioner's Guide* (the AOT Guide).[22] As part of this AOT Guide, we included a detailed discussion of pathways to AOT from the Texas criminal justice system.[23] One pathway is for "the [S]tate to dismiss the criminal charges against the defendant and divert the individual to the appropriate court for AOT proceedings."[24] Even after competency proceedings begin, upon the State's motion, the court has discretion to "dismiss all charges pending against the defendant, regardless of whether there is any evidence to support a finding of the defendant's incompetency . . . or whether the court has made a finding of incompetency."[25] In turn, for a defendant who has a mental illness and may be incompetent to stand trial, the statute permits the court to divert the defendant to a court with probate jurisdiction to consider civil commitment.[26]

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20. *See id.* By way of example, here are four of the diversion-focused questions in the checklist for judges and court staff: "On misdemeanor cases, am I considering treatment or diversion alternatives first[] and using competency evaluations only as a last resort when alternatives are not available or appropriate? Are diversion alternatives being considered for individuals when appropriate? Have I considered outpatient or inpatient [mental health] treatment instead of competency restoration? Has the option for Outpatient Competency Restoration (OCR) been discussed with Defense and State?" *Id.* at 14.

21. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.0345, .0355 (delineating outpatient civil commitment criteria).

22. BRIAN STETTIN ET AL., TREATMENT ADVOC. CTR. ET AL., TEXAS AOT PRACTITIONER'S GUIDE (2022) [hereinafter AOT GUIDE], https://www.treatmentadvocacycenter.org/storage/documents/aot-implementation-documents/texas%20aot%20practitioners%20guide.pdf.

23. *See id.* at 35–50 (analyzing available pathways for diversion to AOT). I was the principal author of this section of the AOT Guide.

24. *Id.* at 42.

25. TEX. CODE CRIM. PROC. ANN. art. 46B.004(e). Dismissal can occur at any point "during the proceedings under this chapter after the issue of the defendant's incompetency to stand trial is first raised." *Id.*

26. *See id.* (specifying that "if there is evidence to support a finding of the defendant's incompetency[,] . . . the court may proceed under Subchapter F"). Subchapter F includes only Article 46B.151, which permits the court to transfer "the defendant to the appropriate court for civil commitment proceedings" if there is evidence of mental illness or an intellectual disability. *Id.* art. 46B.151(b).

As the Texas JCMH has observed: "Judges should first consider whether competency is the real issue and the effect the competency system will have on an individual's ultimate outcome. For example, dismissal may be more appropriate."[27] For nonviolent offenders with mental illness, prosecutors and courts should give strong consideration to diversion towards court-ordered AOT. As we summarized in the AOT Guide: "For defendants who are deemed to be of low criminogenic risk, are charged with low-severity crimes, and for whom there was a significant contribution from the person's mental illness or a co-occurring substance abuse issue, a pathway from criminal justice to AOT is appropriate."[28]

For this type of diversion to have a reasonable chance of success, there must be cooperation and coordination with the local mental health authority to assure the availability and appropriateness of outpatient mental health services for the defendant.[29] It will also require coordination between the criminal court and the court with probate jurisdiction (including court staff), as well as the prosecutor and the county's attorney handling civil commitment proceedings.[30] In recognition of these needs for coordination, in 2021 the Texas JCMH "partnered with the Texas Health and Human Services Commission . . . to develop a pilot project focused on enhancing coordination between courts and behavioral health providers."[31] Three counties that have the potential to identify best practices were selected for the pilot program.[32]

C. Statutory Diversion

Separate from a criminal court's authority—upon the State's motion—to dismiss a case and consider a referral for civil commitment at any point during the competency process,[33] the Texas legislature previously created various statutory diversion options. This Section describes several of the statutory tools available to courts, prosecutors, and defense attorneys for possible diversion.

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27. BENCH BOOK, *supra* note 11, at 141.

28. AOT GUIDE, *supra* note 22, at 42.

29. *See id.* at 40, 47 (discussing the need for engagement and coordination).

30. *See id.* at 43–44 (discussing the need for coordination and cooperation).

31. *Grants*, TEX. JUD. COMM'N ON MENTAL HEALTH, http://texasjcmh.gov/grants/grantees/community-diversion-coordinator/ (last visited Sept. 6, 2022).

32. *See id.* (indicating that Denton County, Grayson County, and Smith County were selected for the pilot project).

33. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.004(e) (specifying that at any point "during the proceedings under this chapter after the issue of the defendant's incompetency to stand trial is first raised, the court on the motion of the attorney representing the [S]tate may dismiss all charges . . . regardless of whether there is any evidence to support a finding of the defendant's incompetency . . . or whether the court has made a finding of incompetency").

1. Article 16.22

Article 16.22 of the Texas Code of Criminal Procedure sets forth a process for a magistrate to order an early screening of a jail detainee suspected of having a mental illness or an intellectual disability.[34] After this screening and upon receipt of an Article 16.22 report, the trial court has "several options regarding possible next steps if the report reflects that the defendant has a mental illness" or an intellectual disability.[35] During the 2019 legislative session, as part of Senate Bill 362, the Texas legislature added an additional diversion option to Article 16.22 by enacting Subsection (c)(5).[36] As the Texas JCMH has described, the amended statute created

> 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 [mental illness] or [an intellectual disability] 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.[37]

This diversion option is available "if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person."[38] As I have observed previously, in adding this language the legislative "goal was to divert 'more offenders out of the jail setting and into appropriate court-ordered outpatient mental health services.'"[39]

If a court orders a defendant's transfer to a court with jurisdiction to order AOT, the criminal charges remain pending.[40] If the defendant

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34. *Id.* art. 16.22. For a summary of Article 16.22, see AOT GUIDE, *supra* note 22, at 37–38.

35. AOT GUIDE, *supra* note 22, at 38.

36. *See* Act of May 21, 2019, 86th Leg., R.S., ch. 582, § 2, 2019 Tex. Gen. Laws 1, 1–2 (codified at TEX. CODE CRIM. PROC. ANN. art. 16.22) (setting forth amendments to Article 16.22, including Subsection (c)(5)). An online version of the full text of Senate Bill 362 is available at https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB00362F.pdf.

37. TEXAS JUD. COMM'N ON MENTAL HEALTH, 86TH TEXAS LEGISLATIVE UPDATE SPOTLIGHT: SB 362, at 1, http://texasjcmh.gov/media/nykib1ux/legislative-summary-_sb-362.pdf (last visited Sept. 6, 2022).

38. Specifically, Subsection (c)(5) provides that "if 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." TEX. CODE CRIM. PROC. ANN. art. 16.22(c)(5). In addition, as I have described previously, it is also "important to note that the AOT diversion opportunity set forth in Article 16.22(c)(5) does not focus on whether the pending charges are for misdemeanors or certain felonies. Instead, the scope for possible diversion extends to cases in which the charges do not involve an act, attempt, or threat of serious bodily injury to another person. This language is more expansive than, for example, focusing solely on nonviolent misdemeanors." AOT GUIDE, *supra* note 22, at 39.

39. Shannon, *supra* note 6, at 117 (quoting SHANNON & BENSON, *supra* note 3, at 33).

40. TEX. CODE CRIM. PROC. ANN. art. 16.22(c)(5).

successfully complies with the AOT commitment order, the criminal court may then dismiss the charges.[41]

Given the significant, lengthy waitlists for competency restoration services, it is critical that courts, prosecutors, and defense attorneys consider and utilize the diversion opportunity set forth in Article 16.22 Subsection (c)(5). As I have described elsewhere, "[f]or persons with mental illness charged with nonviolent offenses, a diversion to AOT will frequently be a far more appropriate response than criminal prosecution. All too often, the courts move directly to competency proceedings rather than considering alternatives."[42] Indeed, the eliminate the wait checklists for courts, prosecutors, and defense attorneys all include a question as to whether they have considered diversion to the appropriate court for civil outpatient services under Article 16.22 Subsection (c)(5).[43]

2. Additional Statutory Options

In addition to the relatively recent enactment of Article 16.22 Subsection (c)(5), several provisions in the Texas Health and Safety Code have long authorized courts with probate jurisdiction to consider civil commitment for defendants facing minor criminal charges that do not involve an act, attempt, or threat of serious bodily injury to another person.[44] As I have 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. . . . 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.[45]

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41. *Id.* art. 16.22(c-2). The criminal case can resume, however, in the event of noncompliance with the AOT order. *Id.* art. 16.22(c-3).

42. AOT GUIDE, *supra* note 22, at 39.

43. *See* TOOLKIT, *supra* note 12, at 14–20 (providing eliminate-the-wait checklists for judges, prosecutors, and defense attorneys). In addition, for a more detailed discussion of coordination, planning, and other considerations when "executing an Article 16.22 AOT diversion from [a] criminal court to [the] probate court," see AOT GUIDE, *supra* note 22, at 40–41.

44. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(h), .0345(d), .035(i), .0355(e) (disallowing orders for civil commitment if the proposed patient "is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person").

45. SHANNON & BENSON, *supra* note 3, at 32 (emphasis omitted).

Although this diversion tool has long been available, successful implementation requires coordination between the criminal court and a court with probate jurisdiction to consider civil commitment matters.[46] The legislature enacted Article 16.22 Subsection (c)(5), in part, to flag this diversion option for criminal courts that do not normally utilize the Health and Safety Code.[47] Nonetheless, the Health and Safety Code options remain available to criminal courts in nonviolent cases.

Separate from a possible diversion under these Health and Safety Code provisions or under Article 16.22 Subsection (c)(5), another diversion option for many nonviolent defendants with mental illness is set forth in Article 16.22 Subsection (c)(1), which permits the criminal court to consider releasing the defendant on personal bond with a mental health treatment condition under Article 17.032.[48] Under Article 17.032, if the pending charges are not among a number of listed violent offenses, a magistrate must generally release the person on personal bond absent a showing of good cause.[49] Moreover, the statute generally directs the court to condition the person's release on personal bond by requiring mental health services if the defendant's mental illness "is chronic in nature" and if their "ability to function independently will continue to deteriorate" absent treatment.[50] These provisions were first enacted in 1993 "to encourage diversion of defendants from jail and into mental health treatment when appropriate."[51] It is another diversion tool that courts, prosecutors, and defense counsel should consider utilizing.[52]

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46. Courts with probate jurisdiction oversee civil commitment proceedings. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.008(a) (assigning civil commitment proceedings to a "statutory or constitutional county court that has the jurisdiction of a probate court in mental illness matters").

47. *See* SHANNON & BENSON, *supra* note 3, at 32–33 (observing that because the previously existing commitment authority is located in the Health and Safety Code, "most criminal court judges and prosecutors were unfamiliar" with the option). It also should be noted that the authority in the Health and Safety Code extends to both inpatient and outpatient civil commitment. TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(h), .0345(d), .035(i), .0355(e). Given the challenges with inpatient hospital bed availability, however, the language included in Article 16.22 Subsection(c)(5) focuses solely on outpatient orders. SHANNON & BENSON, *supra* note 3, at 33 n.9.

48. *See* TEX. CODE CRIM. PROC. ANN. art. 16.22(c)(1) (permitting the court to consider, after receipt of an Article 16.22 report confirming that the defendant has mental illness and is in need of treatment, "appropriate proceedings related to the defendant's release on personal bond under Article 17.032 if the defendant is being held in custody").

49. *Id.* art. 17.032(a)–(b). For a detailed discussion of Article 17.032, see BENCH BOOK, *supra* note 11, at 116–22. The statute is inapplicable if the defendant has a prior conviction for a listed violent offense. TEX. CODE CRIM. PROC. ANN. art. 17.032(b)(1). In addition to the list of violent offenses set forth in Article 17.032 Subsection (a), since 2021, a release on personal bond is also not available for certain additional serious offenses set forth in Article 17.03 Subsections (b-2) and (b-3). *Id.* art. 17.03(b-2)–(b-3). For a helpful chart describing the interplay between these sections, see BENCH BOOK, *supra* note 11, at 118.

50. TEX. CODE CRIM. PROC. ANN. art. 17.032(c)(1)–(2).

51. BENCH BOOK, *supra* note 11, at 116.

52. For more analysis of Article 17.032, see SHANNON & BENSON, *supra* note 3, at 36–39. In addition, courts have the authority to use the findings in an Article 16.22 report to order a mental health treatment condition as part of a defendant's release on community supervision (e.g., as part of a plea

III. ADDITIONAL ALTERNATIVES

This Part addresses three additional topics that have a bearing on defendants with mental illness who are awaiting resolution of their criminal cases but are incompetent to proceed. These include a discussion regarding medication for defendants in jail,[53] certain anticipated legislation to reduce waitlists for services,[54] and ethical issues pertaining to the review of forensic experts' qualifications and reports to the courts.[55]

A. Medication in Jail

It is important that a jail detainee with mental illness have access to prescribed medications intended to treat the person's illness. As the Texas JCMH has observed: "Continuing a person's prescription medication is critical to preventing mental health deterioration."[56] Indeed, it is important to provide "[p]rompt access to appropriate medications [to] facilitate the person's care, treatment, or stabilization of symptoms of mental illness."[57] To help underscore and assure this goal, in 2021 the legislature enacted legislation requiring:

> [T]hat not only must a qualified medical professional review as soon as possible any prescription medication a prisoner is taking when the prisoner is taken into custody, but also that a prisoner with a mental illness be provided with each prescription medication that a qualified medical professional or mental health professional determines is necessary for the care, treatment, or stabilization of the prisoner.[58]

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agreement). *See id.* at 40–41 (discussing TEX. CODE CRIM. PROC. ANN. art. 42A.506); BENCH BOOK, *supra* note 11, at 232–33 (discussing same). That statute also requires the court to consult with the local mental health authority to assure the availability of appropriate services for the defendant. TEX. CODE CRIM. PROC. ANN. art. 42A.506(2).

53. *See infra* Section III.A (discussing medication for defendants in jail).

54. *See infra* Section III.B (discussing certain anticipated legislation attempting to reduce waitlists for services).

55. *See infra* Section III.C (discussing ethical issues pertaining to the review of forensic experts' qualifications and reports to the courts).

56. BENCH BOOK, *supra* note 11, at 103.

57. Shannon, *supra* note 6, at 129 (internal quotations and citations omitted).

58. BENCH BOOK, *supra* note 11, at 104 (discussing 2021 amendments to TEX. GOV'T CODE ANN. § 511.009(d)). The amended statute required the Texas Commission on Jail Standards to "adopt reasonable rules and procedures establishing minimum standards, as specified, regarding the continuity of prescription medications for the care and treatment of prisoners" to include providing prescribed medication for a defendant's mental illness. TEX. GOV'T CODE ANN. § 511.009(d). In turn, in March 2022, the Commission on Jail Standards finalized its rule "requir[ing] that a county jail inmate with a mental illness be provided with each prescription medication that a qualified medical professional or mental health professional determines is necessary for the care, treatment, or stabilization of [the] county jail inmate." 47 Tex. Reg. 1625, 1625 (2022) (codified as an amendment to 37 TEX. ADMIN. CODE § 273.2(12)) (Tex. Comm'n on Jail Standards), https://www.sos.state.tx.us/texreg/archive/March252022/Adopted%20Rules/37.PUBLIC%20SAFETY%20AND%20CORRECTIONS.html#92.

In this regard, the eliminate the wait Toolkit checklists include questions directly related to the provision of prescribed medications in jail.[59] For example, the checklist for sheriffs begins by asking whether each sheriff is "in compliance with state and federal laws to provide medical care to inmates, including mental health treatment."[60] In turn, the Toolkit directs that courts should communicate with the local sheriff to ensure that jail detainees are "being provided their prescription [mental health] medications as required by law."[61] In addition, defense attorneys should ask their "clients if they are receiving their prescription medications in jail."[62]

There is a reason for this emphasis regarding mental health medications. As stated in the introduction to the Toolkit checklist for sheriffs: "Provision of behavioral health services and medications while a person is incarcerated may increase the likelihood that a person's symptoms improve and reduce the potential for mental health deterioration that may lead to findings that they are incompetent to stand trial."[63] In other words, with appropriate medication, the person might become competent to stand trial.

Unfortunately, however, some defendants will refuse to take prescribed medications. One challenge in this regard "is that many individuals with a mental illness such as schizophrenia or bipolar disorder also have co-occurring anosognosia—a symptom that causes the person to have a lack of insight or awareness that anything is wrong."[64] This is significant regarding some defendants' unwillingness to take medications voluntarily. As the Treatment Advocacy Center has explained:

> Anosognosia, also called "lack of insight," is a symptom of severe mental illness experienced by some that impairs a person's ability to understand and perceive [their] illness. It is the single largest reason why people with schizophrenia or bipolar disorder refuse medications or do not seek treatment. Without awareness of the illness, refusing treatment appears rational, no matter how clear the need for treatment might be to others.[65]

There are several statutory options for considering court-ordered medication. Article 46B.086 sets forth a process that permits a court to order

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59. *See, e.g.*, TOOLKIT, *supra* note 12, at 12, 14, 19 (including checklist questions for, respectively, sheriffs, courts, and defense attorneys about access to prescribed medications in jail).

60. *See id.* at 12 (listing questions for sheriffs; also specifically asking about providing prescription mental health medications).

61. *Id.* at 14 (listing questions for judges and court staff).

62. *Id.* at 19 (listing questions for defense attorneys; also suggesting that if a defense lawyer's client is not receiving prescribed medications, the lawyer should communicate that fact to the jail, magistrate, and trial court).

63. *Id.* at 12 (emphasis omitted).

64. SHANNON & BENSON, *supra* note 3, at 17.

65. *Anosognosia*, TREATMENT ADVOCACY CTR., https://www.treatmentadvocacycenter.org/key-issues/anosognosia (last visited Sept. 6, 2022) ("Approximately 50% of individuals with schizophrenia and 40% with bipolar disorder have symptoms of anosognosia.").

the administration of prescribed medication if the State demonstrates, among other factors, that it "has a clear and compelling interest in the defendant obtaining and maintaining competency to stand trial."[66] The statute can be applied, for example, in the case of a defendant who, "after being restored to competency at a treatment facility, refuses to take the medication prescribed as part of the defendant's individualized plan after returning to the jail to await further criminal proceedings."[67]

Article 46B.086 also permits consideration of medication orders for defendants who have been adjudicated incompetent but who remain in jail for at least seventy-two hours while awaiting a transfer to competency restoration services.[68] With more than 2,400 individuals on waitlists for inpatient competency restoration services across the state, prosecutors and courts have an obligation to consider court-ordered medication proceedings for those defendants with mental illness who are refusing prescribed medications.[69]

Seeking a court order for psychiatric medications for defendants awaiting competency restoration services is "a bifurcated, two-step process."[70] If the defendant has a mental illness, the State must first seek an order for medication in a court with probate jurisdiction under § 574.106 of the Texas Health and Safety Code.[71] If the State fails to meet the criteria for court-ordered medication under the Health and Safety Code, the State may then proceed with a hearing on court-ordered medication under Article 46B.086 before a criminal court.[72] Although these procedures are complex, courts and prosecutors should avail themselves of the opportunity to seek medication orders in appropriate cases. In addition, the Texas JCMH has endeavored to provide guidance for pursuing these options.[73]

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66. TEX. CODE CRIM. PROC. ANN. art. 46B.086(e)(2); *see* BENCH BOOK, *supra* note 11, at 171 ("Article 46B.086 provides procedure[s] for a court to compel a defendant to take medication to maintain competency for trial.").

67. BENCH BOOK, *supra* note 11, at 171 (noting that, in such a case, a defendant who refuses to take prescribed medication could deteriorate to "again become incompetent").

68. TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(2)(A). This option has been available since 2009. BENCH BOOK, *supra* note 11, at 171.

69. *See supra* notes 8–10 and accompanying text (discussing waitlists).

70. BENCH BOOK, *supra* note 11, at 171.

71. TEX. HEALTH & SAFETY CODE ANN. § 574.106.

72. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(4) (authorizing the application of Article 46B.086 only to a defendant who "has been found to not meet the criteria" under the Health and Safety Code for court-ordered medications). For a detailed discussion of the evolution of the Texas psychiatric medication statutes, see Brian D. Shannon, *Prescribing a Balance: The Texas Legislative Responses to* Sell v. United States, 41 ST. MARY'S L.J. 309, 318–37 (2009).

73. *See* BENCH BOOK, *supra* note 11, at 68–73, 171–73 (describing § 574.106 Health & Safety Code proceedings and the Article 46B.086 process).

B. Anticipated Legislation

One additional alternative being explored relates to potential additional legislation that diverts more defendants who are found incompetent to stand trial but who are charged only with certain nonviolent misdemeanors. As described above, the waitlists for inpatient competency restoration services are extremely long.[74] During 2022, and in advance of the 2023 Texas legislative session, the Texas JCMH's Legislative Committee has been working on a legislative proposal that limits the use of inpatient competency restoration for many defendants charged only with certain low-level misdemeanors.[75]

In developing this proposal, the Texas JCMH's Legislative Committee reviewed and considered a comparable statute from New York.[76] Under New York's criminal procedure statute § 730.50(1), if a defendant is deemed incompetent to stand trial but is not charged with a felony, the court must dismiss the charges and order the person to the State's mental health system for follow-up mental health care.[77] Thus, for persons facing low-level charges who are found incompetent to stand trial, New York diverts their cases from the criminal justice system into civil commitment proceedings.[78]

Although not as sweeping as the New York statute, the Texas JCMH proposal focuses on persons who are found incompetent to stand trial but who face only Class B or Class A misdemeanor charges "in which the alleged conduct did not result in bodily injury to another person, and the defendant has not been convicted in the previous two years of an offense that resulted in bodily injury to another person."[79] In such cases, the proposed bill would

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74. *See supra* notes 8–10 and accompanying text (discussing waitlists).

75. *See* TEX. JUD. COMM'N ON MENTAL HEALTH, LEGISLATIVE RESEARCH COMMITTEE: APPROVED PROPOSALS FOR THE 88TH REGULAR LEGISLATIVE SESSION, at 7 (July 12, 2022) [hereinafter APPROVED PROPOSALS], https://acrobat.adobe.com/link/review?uri=urn:aaid:scds:US:c2fffbe8-163f-4bfb-a99f-1a0fbff05b59 (describing a proposal from the Texas JCMH Criminal Law Legislative Subcommittee intended "[t]o help with the competency restoration crisis . . . that would Amend 46B to limit or create alternatives to the use of competency restoration services or competency proceedings in certain misdemeanor cases"). The Author serves as Chair of the Criminal Law Legislative Subcommittee.

76. N.Y. CRIM. PROC. LAW § 730.50(1) (McKinney 2013).

77. *Id.* Specifically, when a defendant is determined to be "an incapacitated person," i.e., incompetent to stand trial, the New York statute provides, in pertinent part: "When the indictment does not charge a felony or when the defendant has been convicted of an offense other than a felony, such court (a) must issue a final order of observation committing the defendant to the custody of the commissioner for care and treatment in an appropriate institution for a period not to exceed ninety days from the date of such order, provided, however, that the commissioner may designate an appropriate hospital for placement of a defendant for whom a final order of observation has been issued, where such hospital is licensed by the office of mental health and has agreed to accept, upon referral by the commissioner, defendants subject to final orders of observation issued under this subdivision, and (b) must dismiss the indictment filed in such court against the defendant, and such dismissal constitutes a bar to any further prosecution of the charge or charges contained in such indictment." *Id.*

78. *Id.*

79. APPROVED PROPOSALS, *supra* note 75, at 8–9 (proposing amendments to TEX. CODE CRIM. PROC. ANN. art. 46B.071).

require courts to first consider outpatient competency restoration orders under Article 46B.0711.[80] If, however, the county has no outpatient competency restoration program or "the defendant cannot be placed in an outpatient competency restoration program within fourteen days of the date of the court's order," the matter would be set for a court hearing to consider dismissal of the charge and then an application of Chapter 46B Subchapter F for transfer to civil commitment proceedings.[81] The one statute in Subchapter F is Article 46B.151, which permits the criminal court to determine whether the defendant has a mental illness or an intellectual disability and, if so, allows the court to "enter an order transferring the defendant to the appropriate court for civil commitment proceedings."[82] Thus, under the proposal, for a defendant who has been adjudicated incompetent to stand trial but faces only certain nonviolent misdemeanor charges, the court may order outpatient competency restoration, if available, or dismiss the case and divert the defendant to civil commitment proceedings.[83]

It is important to identify how this proposal differs from, but also complements, the pretrial diversion option set forth in Article 16.22 Subsection (c)(5), which was discussed above.[84] At the pretrial stage, after a magistrate orders and receives an expert's report finding that a defendant has a mental illness or is a person with intellectual disabilities, containing any treatment recommendations, and discussing whether a full competency examination is needed, the magistrate must provide copies of the report to the court, prosecutor, defense counsel, and the sheriff.[85] After receiving this report, the trial court has several options, including initiating competency proceedings or, "if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person," ordering a transfer of the defendant to the appropriate court for outpatient civil commitment proceedings.[86] Accordingly, for defendants facing many minor charges, the court has the option to divert to civil commitment proceedings at this early stage without turning to competency proceedings.[87]

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80. *See id.* at 8–10 (proposing amendments to TEX. CODE CRIM. PROC. ANN. arts. 46B.071, .0711).

81. *See id.* at 9 (proposing language to amend TEX. CODE CRIM. PROC. ANN. art. 46B.071 to require a dismissal of the charges and a referral to civil commitment proceedings per Subchapter F of Article 46B, i.e., TEX. CODE CRIM. PROC. ANN. art. 46B.151).

82. TEX. CODE CRIM. PROC. ANN. art. 46B.151(a)–(b).

83. *See* APPROVED PROPOSALS, *supra* note 75, at 8–10 (proposing amendments to TEX. CODE CRIM. PROC. ANN. arts. 46B.071, .0711 relating to incompetent defendants charged with either Class B misdemeanors or nonbodily injury Class A misdemeanors and who have no recent history of bodily-injury offenses).

84. *See supra* notes 34–43 and accompanying text (discussing 2019 legislation that added TEX. CODE CRIM. PROC. ANN. art. 16.22(c)(5)).

85. TEX. CODE CRIM. PROC. ANN. art. 16.22(b-1)–(b-2).

86. *See id.* art. 16.22(c)(2), (c)(5) (identifying these two options).

87. Another option for diversion provided in Article 16.22(c) is a diversion to a specialty court, such as a mental health court. *Id.* art. 16.22(c)(4).

Suppose, however, that the court does not undertake the diversion option provided by Article 16.22 Subsection (c)(5) but instead initiates competency proceedings pursuant to Article 16.22 Subsection (c)(2) and Chapter 46B, and the defendant is determined incompetent to stand trial. The Texas JCMH legislative proposal would provide an additional expectation for diversion in such cases either to outpatient competency restoration, if available, or for dismissal and diversion to civil commitment for defendants who are incompetent to stand trial and who face only minor, nonviolent charges.[88]

One additional important consideration for successful implementation of criminal justice diversion options relates to fiscal resources for diversion programs. If the legislature enacts the Texas JCMH proposal, it has the potential of diverting many defendants who are incompetent to stand trial to either outpatient competency restoration programs or to civil commitment.[89] But, concomitantly, outpatient competency restoration programs and outpatient or inpatient civil commitment must have available capacity for these individuals.[90] Unfortunately, there is currently only "limited availability of [OCR] programs in Texas."[91] More resources are necessary to ensure services are available post-diversion, including adequate funding for local mental health authorities to provide outpatient civil commitment services.[92]

C. Competency Examination: Ethical Checks

Judges, prosecutors, and defense counsel should be aware of both the qualifications required for court-appointed experts to conduct examinations and an appointed expert's required findings in the evaluation report.[93]

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88. *See supra* notes 75–83 and accompanying text (describing the Texas JCMH legislative proposal relating to certain misdemeanor charges). It is also worth noting that the array of possible offenses for which an Article 16.22 Subsection (c)(5) diversion is appropriate is broader than those Class A and B misdemeanors identified for diversion in the Texas JCMH proposal. *See* APPROVED PROPOSALS, *supra* note 75, at 9–10; TEX. CODE CRIM. PROC. ANN. art. 16.22(c). An Article 16.22 Subsection (c)(5) diversion to outpatient civil commitment proceedings is possible if the charges against the defendant do "not involve an act, attempt, or threat of serious bodily injury to another person." TEX. CODE CRIM. PROC. ANN. art. 16.22(c)(5). Such offenses might include many nonviolent felonies and not just misdemeanors. *See id.*

89. *See supra* notes 75–83 and accompanying text (describing the Texas JCMH legislative proposal relating to certain misdemeanor charges).

90. For example, suppose that out of 100 defendants who are incompetent to stand trial, ten face only minor misdemeanor charges. Even if courts order their diversion, there must be outpatient mental health services available in the community for those ten individuals for the diversions to be successful.

91. BENCH BOOK, *supra* note 11, at 156 n.144 (also listing the eighteen existing programs as of the October 2021 publication date of the Texas JCMH Bench Book).

92. *See id.* at 56 (observing that "to maintain the most up-to-date information about the availability of outpatient civil commitment services, courts should ensure that they are familiar with their [local mental health authority] and have a contact person who can provide them with what resources are available").

93. *See* TEX. CODE CRIM. PROC. ANN. arts. 46B.022, .025 (setting forth, respectively, the qualifications for court-appointed experts and the requirements for an expert's report).

Regarding qualifications for court appointments, Article 46B.022 is quite clear and specific.[94] In brief, "Article 46B.022 generally limits courts to appoint only psychiatrists and Ph.D.-level psychologists who also meet certain training and continuing education requirements to serve as experts to conduct competency evaluations."[95]

Accordingly, it is incumbent on the courts and counsel to review the qualifications of psychiatrists and psychologists prior to their appointment to ensure they meet the statutory requirements.[96] There is no central state registry of qualified psychiatrists or psychologists; thus, courts must carefully review the qualifications on a case-by-case basis.[97]

It is also important to note that the statutory qualifications for experts relate only to court-appointed experts.[98] That is, Chapter 46B requires the court to appoint a statutorily qualified expert.[99] In contrast, Chapter 46B does not speak to the qualifications for any additional forensic expert hired by the State or defense.[100]

In this regard, consider *Pham v. State*.[101] *Pham* involved a defense challenge to testimony by a forensic expert who did not meet the statutory requirements for appointment in an insanity defense case.[102] Although *Pham* was not an incompetency-to-stand-trial proceeding, the expert qualifications for court appointments in insanity cases are largely the same as those under

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94. *Id.* art. 46B.022.

95. SHANNON & BENSON, *supra* note 3, at 64. In addition, the court may not appoint "[a]n expert involved in the treatment of the defendant." TEX. CODE CRIM. PROC. ANN. art. 46B.021(c). The appointed expert must also be licensed in Texas. *See id.* art. 46B.022(a)(1) (requiring that the expert by licensed "in this state"). The Author is aware of one Texas county having hired a board-certified psychiatrist from Oklahoma to conduct a number of competency examinations prior to the practice being challenged.

96. The statute, however, does include an exception for the appointment of a psychiatrist or psychologist who is not board-certified or does not meet the continuing education requirements but only on narrow grounds "if exigent circumstances require the court to base the appointment on professional training or experience of the expert that directly provides the expert with a specialized expertise to examine the defendant that would not ordinarily be possessed by a psychiatrist or psychologist who meets the requirements." TEX. CODE CRIM. PROC. ANN. art. 46B.022(c). As I have observed previously, "[t]his was intended to be a very narrow exception and should be reserved for extraordinary situations." SHANNON & BENSON, *supra* note 3, at 65.

97. *See* SHANNON & BENSON, *supra* note 3, at 65 (noting that in the bill-drafting process, a registry was considered but rejected for fiscal reasons).

98. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.022(a) (stating that "[t]o qualify *for appointment under this subchapter as an expert*, a psychiatrist or psychologist must" meet the statutory requirements) (emphasis added).

99. *See id.* art. 46B.021(b) (requiring the court to appoint one or more experts upon "a determination that evidence exists to support a finding of incompetency to stand trial"); *id.* art. 46B.022 (delineating qualifications for appointment of an expert).

100. *See id.* art. 46B.

101. Pham v. State, 463 S.W.3d 660 (Tex. App.—Amarillo 2015, pet. ref'd).

102. *See id.* at 667–70 (discussing the application of statutory expert requirements to a psychiatrist hired by the State and who was not appointed by the court). The trial court had appointed its own expert as well. *Id.* at 665.

Chapter 46B for appointments in competency trials.[103] The court concluded that the expert qualifications provisions in Chapter 46C apply only to court-appointed experts and not to those hired by the State or defense.[104]

The same approach should apply with regard to experts in incompetency proceedings. Although the statute requires the court to appoint a statutorily qualified expert, other experts could nonetheless also testify.[105] Indeed, Article 46B.021 Subsection (f) specifically recognizes that in addition to the court-appointed expert, an expert of the defendant's own choosing may also examine a defendant.[106]

Separate from issues relating to qualifications, it is also critical for the court, prosecutor, and defense counsel to be aware of the required matters that must be included in the expert's report to the court.[107] Article 46B.025 sets these out in detail and includes requirements for "the expert's clinical observations, findings, and opinions on each specific issue referred . . . by the court."[108] Moreover, if the expert concludes that the defendant is incompetent to stand trial, they must also state:

> (1) the symptoms, exact nature, severity, and expected duration of the deficits resulting from the defendant's mental illness or intellectual disability, if any, and the impact of the identified condition on the factors listed in Article 46B.024;
> (2) an estimate of the period needed to restore the defendant's competency, including whether the defendant is likely to be restored to competency in the foreseeable future; and
> (3) prospective treatment options, if any, appropriate for the defendant.[109]

Legislation enacted in 2011 added Subsection (b)(2) to Article 46B.025 as a part of House Bill (H.B.) 2725.[110] In particular, it requires the appointed

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103. *Compare* TEX. CODE CRIM. PROC. ANN. art. 46C.102 (expert qualifications for court appointments to examine a defendant for insanity), *with id.* art. 46B.022 (expert qualifications for court appointments to examine a defendant for incompetency to stand trial).

104. *Pham*, 463 S.W.3d at 668–70. The court added that the admissibility of testimony from an expert hired by the State or defense who does not meet the statutory requirements for a court appointment would nonetheless be governed by the requirements of Rule 702 of the Rules of Evidence. *Id.* at 670. There may also be issues and concerns about the weight to be given to testimony by an expert who does not meet the statutory requirements to be court appointed. *See* SHANNON & BENSON, *supra* note 3, at 65–66 (suggesting that a trial court could give less weight to such an expert's testimony or even consider excluding it).

105. *See* TEX. CODE CRIM. PROC. ANN. arts. 46B.021(b), .022 (requiring appointment of a qualified expert).

106. *See id.* art. 46B.021(f).

107. *See id.* art. 46B.025 (delineating the requirements for the court-appointed expert's report).

108. *Id.* art. 46B.025(a)(4).

109. *Id.* art. 46B.025(b)(1)–(3).

110. Act of May 19, 2011, 82nd Leg., R.S., ch. 822, § 8, 2011 Tex. Gen. Laws 1, 7–9 (codified at TEX. CODE CRIM. PROC ANN. art. 46B.025) (passing House Bill 2725 (H.B. 2725)). An online version of the full text of H.B. 2725 is available at https://capitol.texas.gov/tlodocs/82R/billtext/pdf/HB02725F.pdf. Ironically, particularly considering today's extensive waitlists for competency restoration services, the

expert's report to include the expert's opinion as to "whether the defendant is likely to be restored to competency in the foreseeable future."[111] Similarly, with regard to the expert's view of the likely duration of the defendant's lack of competency, H.B. 2725 added Article 46B.024 Subsection (3), which requires the expert to consider and address "whether the [defendant's] identified condition has lasted or is expected to last continuously for at least one year."[112]

There are important substantive and procedural implications if the appointed expert opines that it is unlikely the defendant will be restored to competency in the foreseeable future. If the court concurs with the expert and determines that the defendant is incompetent to stand trial and unlikely to be restored to competency in the foreseeable future, then Article 46B.071 Subsection (b) generally requires the court to "proceed under Subchapter E or F" of Chapter 46B with civil commitment proceedings.[113] That is, an order for a criminal competency restoration commitment under Subchapter D is not permitted in such cases.[114]

It is worth noting that the legislature added Subsection (b) to Article 46B.071 in 2011 as part of H.B. 2725.[115] This was the same bill that also included language requiring the appointed expert to provide an opinion in the report to the court regarding whether the defendant is unlikely to be restored to competency in the foreseeable future.[116] These provisions, when considered in tandem, make it clear that the legislature intended not only that the expert include in the report an opinion about the defendant's likelihood of being restored to competency in the foreseeable future but also that such a finding will impact the applicable law for any ensuing commitment of the defendant.[117]

Given these procedural and substantive requirements, it is critical that the expert's report include all the statutorily required findings, particularly

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intent behind H.B. 2725 in 2011 was to help address the "severe backlog of persons waiting in county jails to receive competency restoration services in the state mental [health] system." *See* S. Rsch. Ctr., Bill Analysis, Tex. H.B. 2725, 82nd Leg., R.S. (2011), https://capitol.texas.gov/tlodocs/82R/analysis/html/HB 02725E.htm (describing the bill author's statement of intent).

111. TEX. CODE CRIM. PROC. ANN. art. 46B.025(b)(2).

112. Act of May 19, 2011, 82nd Leg., R.S., ch. 822, § 7, 2011 Tex. Gen. Laws 1, 9 (adding TEX. CODE CRIM. PROC. ANN. art. 46B.024(3)).

113. TEX. CODE CRIM. PROC. ANN. art. 46B.071(b)(1). Another alternative is to release the defendant on bail. *Id.* art. 46B.071(b)(2).

114. *See id.* art. 46B.071(b)(1) (requiring the court to proceed with a civil commitment process under Subchapter E or F and excepting such a case from a competency restoration commitment).

115. *See* Act of May 19, 2011, 82nd Leg., R.S., ch. 822, § 9, 2011 Tex. Gen. Laws 1, 7 (adding TEX. CODE CRIM. PROC. ANN. art. 46B.071(b)). H.B. 2575 also expressly created Subsection (b) as an exception to the process for competency restoration commitments, with language added to Subsection (a). *See id.* (adding the phrase "[e]xcept as provided by Subsection (b)").

116. *See id.* § 8 (adding this reporting requirement to TEX. CODE CRIM. PROC. ANN. art. 46B.025(b)).

117. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.071(b)(1) (requiring the court to apply Subchapters E or F of Chapter 46B upon a finding that the defendant is not likely to attain competency in the foreseeable future); BENCH BOOK, *supra* note 11, at 155 (summarizing the statute).

the expert's opinion as to the likelihood that the defendant will (or will not) attain competency in the foreseeable future.[118] In turn, prosecutors and defense counsel should closely review the expert's report after receiving it and, prior to any further competency trial or proceeding, ensure that the expert has met the statutory requirements. Moreover, the court *should not accept* the expert's report if the expert has not provided any of the required findings or opinions specified in Article 46B.025.[119] As the Texas JCMH has summarized bluntly:

> Judges should know what to look for in an expert's report. The court does not have to accept a report that does not meet the statutory requirements and/or is of poor quality, but instead can enforce those requirements (i.e., by ordering amendment of the report). It is also important to note that the determination of competency or incompetency is the role of the judge, a role that should not be abdicated to the expert.[120]

IV. AFTER COMPETENCY RESTORATION

Suppose a court determines that a defendant charged with one or more felonies is incompetent to stand trial because of the symptoms of a serious mental illness but also finds that the defendant is likely to be restored to competency in the foreseeable future.[121] The court then commits the defendant to a state mental health facility for a period of 120 days for

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118. In this regard, the Texas JCMH has provided a helpful list of bullet points setting forth the statutory requirements for the expert's report. *See* BENCH BOOK, *supra* note 11, at 151 (summarizing the provisions of Article 46B.025(a)–(b)). On a related note, the Texas JCMH has been working on potential legislation to more precisely define what is intended by the phrase "foreseeable future." *See* APPROVED PROPOSALS, *supra* note 75, at 8 (proposing to amend Article 46B.025(b) by replacing the term "foreseeable future" with "the period permitted under Subchapter D, including any possible 60-day extension under Article 46B.080"). In brief, under this proposed change, the expert would be tasked with opining whether the expert believed that the defendant's competency would likely be restored (or not) within the maximum period allowed by statute for court-ordered competency restoration treatment. *Id.* For example, for a felony offense, the maximum period of competency restoration is 120 days with one possible sixty-day extension. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.073(b)(2) (providing a limit of 120 days of inpatient competency restoration services); *id.* art. 46B.080(a) (authorizing the court to order one additional sixty-day extension). Thus, rather than trying to address the relatively vague term of "foreseeable future," the expert would be opining about the likelihood of competency restoration after a stated period of court-ordered services, e.g., 180 days.

119. TEX. CODE CRIM. PROC. ANN. art. 46B.025.

120. BENCH BOOK, *supra* note 11, at 151. In addition, "the county in which the indictment was returned or information was filed" is required to pay for the expert's services. TEX. CODE CRIM. PROC. ANN. art. 46B.027. Arguably, an expert's failure to provide statutorily required information in a report to the court would run afoul of the expert's contractual obligations. *See generally id.* arts. 46B.025, .027 (listing what the expert's report must include and the expert's compensation).

121. *See* TEX. CODE CRIM. PROC. ANN. art. 46B, Subchapters A–C (describing procedures for determining incompetency to stand trial). Note that if the court determines that the defendant's competency is not likely to be restored in the foreseeable future, different procedures are required. *See id.* art. 46B.071(b) (requiring the court to adhere to Subchapter E or F of Chapter 46B or to release the defendant on bail).

"competency restoration services with the specific objective of the defendant attaining competency to stand trial."[122] Suppose further that after a lengthy wait of many months in jail, a bed for competency restoration services finally becomes available at a state hospital, and the sheriff transports the defendant to the facility for competency restoration services.[123] Then, suppose that at some point during the 120-day commitment period (or an ensuing sixty-day extension), officials at the facility determine that the defendant's competency has been restored.[124]

Once a defendant attains competency at a state hospital, the sheriff from the county in which the court is located must transport the defendant back to the county jail for further proceedings.[125] Thereafter, Article 46B.084 sets forth the process to be followed upon the defendant's return to the court.[126] Indeed, as I have observed previously: "Article 46B.084 includes tight timelines for the court to proceed upon a defendant's return from receiving competency restoration services."[127] Moreover, if the court determines that the defendant is now competent to stand trial, depending on the population of the county, criminal proceedings commence (whether a trial or guilty-plea proceeding) either "as soon as practicable" or within fourteen days of the court's determination.[128] That is, the court should proceed promptly with the criminal case upon a defendant attaining competency to stand trial.[129] At least, this is how the process is supposed to work. The following Sections discuss the issues that can arise instead.

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122. *Id.* art. 46B.073(b). If the charges are for certain violent offenses, the Texas Health and Human Services Commission will designate the appropriate facility. *See id.* art. 46B.073(c) (cross-referencing, e.g., a list of violent offenses specified in TEX. CODE CRIM. PROC. ANN. art. 17.032(a)).

123. For violent offenses, the wait will likely be well over a year before a defendant is transferred to a maximum-security state hospital facility. *See Forensic Access Report*, *supra* note 88, tbl.1 cell AU23 (indicating that as of June 30, 2022, the average waiting time for a forensic bed at a maximum-security facility was 592 days (approximately twenty months)). The county sheriff is responsible for transportation from the county jail to the state hospital facility. TEX. CODE CRIM. PROC. ANN. art. 46B.075.

124. Chapter 46B permits one sixty-day extension if the court finds that the defendant has not yet attained competency and an extension would likely permit the facility to restore the defendant's competency. TEX. CODE CRIM. PROC. ANN. art. 46B.080(a)–(b). If the providers at the facility determine that the defendant's competency has been restored, the head of the facility will so notify the court. *Id.* art. 46B.079(b)(2).

125. *Id.* art. 46B.082(a).

126. *Id.* art. 46B.084.

127. Shannon, *supra* note 6, at 106 (discussing 2017 legislative changes). For a more detailed analysis of the deadlines set forth in Article 46B.084, see SHANNON & BENSON, *supra* note 3, at 95–96.

128. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.084(d)(1)–(2) (drawing distinctions between counties with a population under 1 million or over 4 million and counties in between those sizes).

129. If the case is resolved via a guilty plea, competency is also relevant. *See* Godinez v. Moran, 509 U.S. 389, 399–402 (1993) (defendant must knowingly and voluntarily enter guilty plea); *Ex parte* Lewis, 587 S.W.2d 697, 700 (Tex. Crim. App. [Panel Op.] 1979) (holding that if a defendant is incompetent to stand trial, the defendant is also incompetent to plead guilty).

A. Avoid Decompensation

As I have explained previously, the rationale for the tight timelines in Article 46B.084

> stems from a very real concern that when a period of 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. And, there is then a risk that the defendant will no longer be competent to proceed.[130]

Nonetheless, "[t]he lack of timely adjudications of defendants . . . following competency restoration services has been a recurring problem across Texas."[131] Accordingly, to avoid a situation in which the defendant's mental condition deteriorates prior to resumption of the criminal proceedings, "[p]rompt 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."[132]

To help assure that these cases move promptly after the defendant's return to the court following competency restoration, the legislature in 2017 amended Article 32A.01 of the Code of Criminal Procedure to place these cases at the top of the criminal court's docket.[133] Specifically, Article 32A.01 Subsection (c) provides that except for trials in which the victim is younger than fourteen years of age, "the trial of a criminal action against a defendant who has been determined to be restored to competency under Article 46B.084 shall be given preference over [all] other matters before the court, whether civil or criminal."[134] It is incumbent on judges, prosecutors, defense attorneys, and court administrators to ensure that the requirements of Article 32A.01 Subsection (c) are followed.[135]

Moreover, there are additional statutory provisions intended to help assure continuity of care to avoid mental decompensation after the

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130. *See* SHANNON & BENSON, *supra* note 3, at 96 (discussing the deadlines specified in Article 46B.084).

131. *Id.* at 95.

132. Shannon, *supra* note 6, at 106 (discussing 2017 legislative changes). Relevant to this discussion, the legislature has also used the term "promptly" in this portion of Chapter 46B. TEX. CODE CRIM. PROC. ANN. art. 46B.079(b) (head of facility "shall promptly notify the court" when defendant has attained competency); *id.* art. 46B.082(b) (sheriff is tasked with "promptly" transporting the defendant back to the county in which the criminal court is located).

133. *See* Shannon, *supra* note 6, at 106–07 (discussing 2017 legislative changes).

134. TEX. CODE CRIM. PROC. ANN. art. 32A.01(b)–(c).

135. *See generally id.* art. 32A.01 (discussing the preferential treatment of defendants restored to competency).

defendant's return to the county jail following competency restoration.[136] For example, when the state hospital facility notifies the court that the defendant has attained competency, the head of the facility must also provide a report to the court that includes "a list of the types and dosages of medications prescribed for the defendant while the defendant was receiving competency restoration services."[137] During transportation back to the county jail, the sheriff is tasked with "ensur[ing] that the defendant is provided with the types and dosages of medication prescribed for the defendant."[138] In addition, if the defendant was subject to a court order authorizing the administration of psychoactive medications while at the competency restoration facility, the order continues for up to 180 additional days after the defendant returns to county jail.[139] This statute facilitates a continuation of the defendant's prescribed medication that should be of sufficient duration in most cases to proceed to trial or other resolution of the criminal case.[140] Even if the defendant is not subject to a medication order that was entered while the defendant was receiving inpatient competency restoration services or if the 180 days following such an order have expired, the criminal court can consider issuing a medication order under Article 46B.086 if the criteria are met.[141]

B. What If There Has Been Decompensation?

If the defendant's competency has indeed been restored, Article 46B.084 is quite straightforward in terms of steps the court should take upon the defendant's return to the court.[142] If neither party objects to the conclusions about the defendant's competency in the report by the head of the facility (or other competency restoration provider), the court must promptly make a determination about the defendant's competency based on the findings in the facility head's most recent report.[143] Then, the criminal

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136. *See* BENCH BOOK, *supra* note 11, at 170 ("Defendants restored to competency often decompensate after returning to jail due to refusal to take medications, denial of medications, or provision of less effective substitute medications. . . .").

137. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.079(c) (requiring the court to provide copies of the report to the prosecutor and defense counsel).

138. *Id.* art. 46B.0825.

139. TEX. HEALTH & SAFETY CODE ANN. § 574.110(b)(1). The medication order will expire sooner if the defendant is acquitted, convicted, or pleads guilty prior to the 180th day or if the charges are dismissed prior to that time. *Id.* § 574.110(b)(2)–(3).

140. *See id.* § 574.110.

141. TEX. CODE CRIM. PROC. ANN. art. 46B.086(2)(C). For a more detailed discussion of court-ordered medication procedures under Article 46B.086 and its interplay with the medication provisions in the Health and Safety Code—and for a helpful flowchart of the process—see BENCH BOOK, *supra* note 11, at 171–74. *See also* SHANNON & BENSON, *supra* note 3, at 100–03 (analyzing Article 46B.086); Shannon, *supra* note 72, at 318–49 (discussing the history of the Texas court-ordered medication statutes).

142. TEX. CODE CRIM. PROC. ANN. art. 46B.084.

143. *Id.* art. 46B.084(a-1)(1)–(2). Note that the deadline differs depending on whether the population of the county is less than 1 million or larger than 4 million or is somewhere in between those sizes. *Id.* For

case must proceed either within fourteen days of the determination or as soon as practicable, depending on the county's population.[144]

Consider, however, a situation in which a defendant has attained competency at the inpatient facility (or another competency restoration program) and has returned to the committing court but then decompensates to the point of incompetency. Alternatively, consider a situation in which the court has determined the defendant is competent under Article 46B.084, but the criminal case is not resumed promptly as required by the statute, and the defendant thereafter deteriorates to the point of no longer being competent to be tried or plead guilty.[145] Indeed, in recent times, the impact of the COVID-19 pandemic has exacerbated these delays.[146]

Unfortunately, Article 46B.084 does not provide much guidance for these situations. Although the statute contemplates that a party can object to the findings of the most recent facility report about the defendant's competency, the timelines set forth in the statute do not make much practical sense when there is an objection suggesting a need for a new examination of the defendant.[147] For example, the statute contemplates that defense counsel "shall meet and confer with the defendant to evaluate whether there is any suggestion that the defendant has not yet regained competency."[148] Beyond a requirement that counsel must file any objection to the report within fifteen days following the court's receipt of notice from the provider of competency restoration services, other guidance is scant.[149] Also, the statute does not delineate what to do if a defendant attains competency, but their mental state deteriorates thereafter to the extent that defense counsel, the prosecutor, or the court has concerns that the defendant is no longer competent.[150]

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a county with a population of less than 1 million or 4 million or greater, the court must make its determination no later than twenty days following receipt of the report by the facility head. *Id.* art. 46B.084(a-1)(2). But, for counties with a population of 1 million or more but less than 4 million, the court must act by the earlier of either five days following the defendant's return to the court or twenty days following receipt of the facility head's report. *Id.* art. 46B.084(a-1)(1).

144. *Id.* art. 46B.084(d)(1)–(2). For a county with a population of less than 1 million or 4 million or greater, the criminal case must resume as soon as practicable following the court's determination of competency. *Id.* art. 46B.084(d)(2). If the county's population, however, is 1 million or more but less than 4 million, the criminal case must resume within fourteen days of the competency determination. *Id.* art. 46B.084(d)(1).

145. *See id.* art. 46B.084(d)(1)–(2) (providing deadlines for resuming the criminal case).

146. *See* Luis Soberon, *Justice Delayed: Addressing the Criminal Backlog in Texas*, TEXAS 2036 (Jan. 26, 2022), https://texas2036.org/posts/justice-delayed-addressing-the-criminal-court-backlog-in-texas/ (observing that "[i]n an average pre-pandemic week, 186 criminal jury trials would be held across Texas . . . [but] [t]hat figure dropped to an average of [four] per week in 2020").

147. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.084(a-1)(1) (providing that either "party may object in writing or in open court to the findings of the most recent report [from the facility or program provider] not later than the [fifteenth] day after the date on which the court received the applicable notice under Article 46B.079" that, for example, the defendant had attained competency).

148. *Id.* art. 46B.084(a)(1).

149. *Id.* art. 46B.084(a-1)(1).

150. *See id*. art. 46B.084.

Moreover, Article 46B.084 does not even address the possibility that a new competency examination might be needed.[151]

What should be done in such a situation? Several general principles come into play. First, given constitutional requirements, the person should not be tried or allowed to plead guilty if incompetent.[152] Accordingly, although Article 46B.084 is silent about the possible need to appoint a new forensic examiner, if there is a suggestion that the defendant is no longer competent, the court should follow, once again, the provisions in Chapter 46B to determine whether the defendant is now competent or incompetent to stand trial.[153] As I have written previously: "[I]f there is evidence that the defendant is no longer competent notwithstanding the conclusion in the most recent report [from the provider of competency restoration services], the court should appoint a qualified psychiatrist or psychologist to conduct a new evaluation."[154]

Accordingly, this type of scenario requires the court to apply Subchapters A, B, and C of Chapter 46B to the defendant.[155] Specifically, under Article 46B.004 Subsection (c), if either party suggests that the defendant is no longer competent to stand trial, the court should "determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial."[156] Then, pursuant to Article 46B.005, if the court concludes that "evidence exists to support a finding" that the defendant is incompetent to stand trial, the court must once again appoint an expert under Subchapter B and conduct an incompetency trial under Subchapter C (except as provided in Article 46B.005(c)).[157]

It is in this context that the deadlines in Article 46B.084 appear illogical, at best, and perhaps even nonsensical. For example, under Subsections 46B.084(a-1)(1) and (a-1)(2), depending on the population of the county, the court is tasked with making a determination about the defendant's competency either within twenty days following receipt of notice from the competency restoration services provider, or potentially no later than the fifth

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151. *See id.*

152. *See* Drope v. Missouri, 420 U.S. 162, 171 (1975) (explaining that a defendant must be competent to be tried); Godinez v. Moran, 509 U.S. 389, 389–402 (1993) (noting that a defendant must knowingly and voluntarily enter guilty plea); *Ex parte* Lewis, 587 S.W.2d 697, 700 (Tex. Crim. App. [Panel Op.] 1979) (explaining that if a defendant is incompetent to stand trial, the defendant is also incompetent to plead guilty).

153. *See* SHANNON & BENSON, *supra* note 3, at 97; TEX. CODE CRIM PROC. ANN. art. 46B, Subchapters A–C.

154. SHANNON & BENSON, *supra* note 3, at 97 (discussing the need to appoint a new examiner to evaluate the defendant's competency to stand trial in such a situation).

155. *See* TEX. CODE CRIM. PROC. ANN. art. 46B, Subchapters A–C (describing procedures for determining incompetency to stand trial).

156. *Id.* art. 46B.004(c).

157. *Id.* art. 46B.005(a)–(c).

day after the defendant returns to the county in which the court is located.[158] Plus, the court is supposed to adhere to those deadlines "regardless of whether a party objects to the report."[159] If, however, there is evidence that the defendant is no longer competent to stand trial, the court must appoint an expert to conduct a new competency evaluation.[160] As I have observed previously: "Of course, then, the 20-day time period for the judge's 'determination' under Article 46B.084 would no longer appear to be either practical or logical because the evaluator must have the requisite time to conduct the examination and prepare the proper report."[161] In addition, consider that once the court appoints an expert to conduct a new competency evaluation, another provision in Chapter 46B allows the expert thirty days to prepare and submit their report.[162] That would, of course, extend well beyond the period authorized by Article 46B.084.[163]

Similarly, suppose that a court holds a hearing and makes a finding within Article 46.084's required timeline that the defendant has attained competency to stand trial.[164] Thereafter, however, the criminal case is not resumed promptly, and the defendant's mental condition deteriorates to the point that the defendant might no longer be competent.[165] Article 46B.084 is silent as to this issue altogether and does not specify either timelines or next steps.[166] As noted above, if evidence that the defendant is no longer competent to stand trial exists, the court should proceed with the requirements of Subchapters A, B, and C of Chapter 46B to appoint an expert and conduct an incompetency trial.[167]

Suppose that the appointed psychologist or psychiatrist thereafter concludes that the defendant is once again incompetent to stand trial despite previously having been restored to competency during the earlier competency restoration commitment. In such a case, what should follow next? First, it is critical to note that Subchapter D's provisions relating to

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158. *Id*. art. 46B.084(a-1)(1)(2).

159. *Id.* art. 46B.084(a-1)(2).

160. *Id.* art. 46B.005(a).

161. *See* SHANNON & BENSON, *supra* note 3, at 97 (discussing gaps in Article 46B.084).

162. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.026(a) (stating that the expert must provide the report "not later than the 30th day after the date on which the expert was ordered to examine the defendant"). That period can even be extended based on a good-cause showing. *Id.* art. 46B.026(b).

163. *See id.* art. 46B.084(a-1)(1)–(2) (providing up to twenty days, or less, depending on the population of the county).

164. *See id*. (providing deadlines for the hearing).

165. *See id*. art. 46B.084(d)(1)–(2) (requiring—depending on the population of the county—that the criminal case resume within fourteen days or as soon as practical following the court's finding).

166. *See id.* art. 46B.084.

167. *See id*. art. 46B, Subchapters A–C (describing procedures for determining incompetency to stand trial). Note that a competency trial is not required if neither party requests one or opposes a finding of incompetency, and the court does not determine that an incompetency trial is nonetheless needed. *Id*. art. 46B.005(c).

orders for competency restoration services are no longer applicable.[168] This is the case given Article 46B.085 Subsection (a)'s specific directive that a "court may order only one initial period of restoration and one extension under this subchapter in connection with the same offense."[169] Accordingly, because the previously restored, yet now-incompetent, defendant was previously subject to a Subchapter D commitment for competency restoration, including one possible sixty-day extension, the court has no authority to order a further competency restoration period regarding the pending charges under Subchapter D.[170] Instead, Article 46B.085(b) clearly provides that any subsequent mental health treatment orders in connection with the same charges must be through civil commitment proceedings under either Subchapter E or F of Chapter 46B.[171]

If the prosecutor thereafter elects to dismiss the charges, Subchapter F applies, assuming there is evidence supporting a finding that the defendant is incompetent.[172] In Subchapter F, Article 46B.151 permits the court to determine whether the defendant has a mental illness or an intellectual disability and, if so, "[to] enter an order transferring the defendant to the appropriate court for civil commitment proceedings."[173] Accordingly, unless the criminal court also has probate jurisdiction, the criminal court will no longer be involved in additional commitment proceedings.[174]

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168. *See id.* art. 46B, Subchapter D (describing competency commitment options that are applicable to initial determinations of a defendant's lack of competency to stand trial).

169. *Id.* art. 46B.085(a).

170. For example, when a court initially determines that a defendant facing felony charges is incompetent to stand trial but likely to attain competency in the foreseeable future, Article 46B.073—one of the statutes in Subchapter D—permits the court to commit the defendant to a state mental health facility for a period of 120 days for "competency restoration services with the specific objective of the defendant attaining competency to stand trial." *Id*. art. 46B.073(b)(2). If the defendant has not attained competency within those 120 days at the facility, Subchapter D also authorizes the court to grant one sixty-day extension. *Id.* art. 46B.080(a)–(b).

171. *See id.* art. 46B.085(b) (providing that after the "initial [treatment] period and an extension . . . any subsequent court orders for treatment must be issued under Subchapter E or F"). This conclusion is further supported by Article 46B.084 Subsections (e)–(f), which requires the court to proceed under either Subchapter E or F, depending on whether the charges remain pending or have been dismissed. *Id.* art. 46B.084(e)–(f).

172. *See id.* art. 46B.004(e) (providing that at any point during the proceedings, the court may dismiss the charges upon a motion by the prosecutor, but "if there is evidence to support a finding of the defendant's incompetency . . . the court may proceed under Subchapter F").

173. *Id.* art. 46B.151(a)–(b).

174. *See* SHANNON & BENSON, *supra* note 3, at 124 (observing that "Article 46B.151 generally requires the criminal court to transfer its responsibilities regarding the defendant to the constitutional county court or other court having probate jurisdiction . . . [but a transfer would] not be necessary if the . . . court . . . presiding over the criminal case . . . also has probate jurisdiction"); AOT GUIDE, *supra* note 22, at 43–44 (discussing that "[i]n many Texas counties a dismissal" of charges with follow-up civil commitment proceedings "would likely involve two courts" but could be limited to a single court if the "court with criminal jurisdiction also has probate jurisdiction").

If the criminal charges remain pending, however, the State must proceed with a civil commitment proceeding under Subchapter E of Chapter 46B.[175] In the case of a defendant with mental illness, Article 46B.102 is controlling.[176] Under that Article, the criminal court judge will conduct the proceedings, but the court must apply the Health and Safety Code's civil commitment provisions to the extent they do not conflict with Chapter 46B.[177] That is, "[t]he judge of the criminal court will preside over and make the determinations that a county judge or other court with probate jurisdiction would normally make in the civil commitment process."[178]

Which section of the Health and Safety Code's commitment procedures controls? There are several possibilities. For court-ordered, temporary inpatient mental health services, § 574.034 controls and authorizes a commitment period for "treatment not to exceed 45 days, except that the order may specify a period not to exceed 90 days if the judge finds that the longer period is necessary."[179] In contrast, § 574.035 authorizes an extended inpatient commitment in certain circumstances "for a period of treatment not to exceed 12 months."[180]

The option for an extended twelve-month commitment, however, is only available if "the proposed patient has received court-ordered inpatient mental health services under this subtitle or under Chapter 46B, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months."[181] As I have written previously:

> Given that the usual defendant with mental illness [charged with a felony] who faces a Subchapter E "extended commitment" hearing will typically have been hospitalized for either 120 or 180 days (assuming that a one-time 60-day extension has been granted), the criminal court will typically need to apply the extended, 12-month inpatient commitment provisions set forth in § 574.035, Texas Health & Safety Code, rather than the 45-day commitment rules that are delineated in § 574.034.[182]

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175. *See* TEX. CODE CRIM. PROC. ANN. art. 46B, Subchapter E (describing civil commitment proceedings).

176. *See id.* art. 46B.102(a) (specifying that "[i]f it appears to the court that the defendant may be a person with mental illness, the court shall hold a hearing to determine whether the defendant should be court-ordered to mental health services under Subtitle C, Title 7, [of the] Health and Safety Code").

177. *Id.* art. 46B.102(b).

178. BENCH BOOK, *supra* note 11, at 175 (describing how the proceedings are "[g]overned by the Texas Mental Health Code" but with the criminal court judge presiding).

179. TEX. HEALTH & SAFETY CODE ANN. § 574.034(g).

180. *Id.* § 574.035(h). Similarly, two other provisions of the civil commitment laws authorize orders for outpatient civil commitments on either a temporary forty-five to ninety-day basis or for an extended period of up to twelve months. *See id.* §§ 574.0345, .0355 (governing orders for outpatient commitments).

181. *Id.* § 574.035(a)(4).

182. SHANNON & BENSON, *supra* note 3, at 111.

The foregoing assumes, however, that the defendant's case has proceeded relatively promptly following the defendant's return to the county from the competency restoration treatment facility.[183] In contrast, if the defendant remains in jail without further action in their criminal case for an extended period and their mental condition deteriorates to the point that they are no longer competent to be tried, the case could be outside the permissible window that authorizes use of the extended twelve-month inpatient commitment provisions.[184]

In such a situation, the criminal court is required to utilize the temporary inpatient commitment provisions of § 574.034 that permit a court to order a commitment period of up to either forty-five or ninety days, depending on

183. That is, the defendant will have "received court-ordered inpatient mental health services . . . under Chapter 46B . . . for at least 60 consecutive days during the preceding 12 months." TEX. HEALTH & SAFETY CODE ANN. § 574.035(a)(4). Accordingly, the court may proceed under § 574.035 with an extended twelve-month commitment proceeding. *Id.* It should be noted, however, that this conclusion about the applicability of § 574.035 in such a situation is not free from dispute. Beth Mitchell of Disability Rights Texas, also a presenter at the 2022 *Texas Tech Law Review* Mental Health Law Symposium, interprets the statute differently from my position. She has contended that "under a competency restoration commitment, the defendant is court-ordered to receive 'competency restoration services' and . . . it is not until the temporary civil mental health commitment that they are court-ordered to receive 'inpatient mental health services.'" Beth Mitchell, A Concise Primer to Civil Commitment of a Defendant with Charges Pending under Article 46B, Texas Code of Criminal Procedure, at 4–5 (May 10, 2022) (unpublished manuscript) (on file with Author). She contends further that the statutory "requirement of receiving 'inpatient mental health services' for sixty consecutive days during the preceding twelve months" is thereby not satisfied. *Id.* at 5. Ms. Mitchell also concludes that "some criminal courts misunderstand the Health & Safety Code and jump straight to an extended civil mental health commitment under [Article] 46B.102." *Id.* at 4. I respectfully disagree with that construction of § 574.035(a)(4). Prior to the enactment of Chapter 46B in 2003, Subsection (a)(4) provided that for the extended twelve-month commitment procedures to apply, the proposed patient must have "received court-ordered inpatient mental health services under this subtitle [of the Health and Safety Code] or under Article 46.02, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months." *See* Act of April 30, 2003, 78th Leg., R.S., ch. 35, § 12, 2003 Tex. Gen. Laws 1, 36–38 (amending § 574.035(a)(4) by striking former "Article 46.02" and replacing it with "Chapter 46B"). An online version of the full text of this legislation is available at https://capitol.texas.gov/Search/DocViewer.aspx?ID=78RSB010575B&QueryText=%224 6B%22&DocType=B. In turn, under Subsections 6(b)(5)–(6) of former Article 46.02, Texas Code of Criminal Procedure, if a defendant had previously been subject to an order for an inpatient criminal competency commitment under § 5(a) of former Article 46.02 for at least sixty days in the preceding twelve months, the court could consider committing the defendant to a state mental hospital for up to twelve months. *See* SHANNON & BENSON, *supra* note 3, at 61–62 (reprinting the text of former Subsections 6(b)(5)–(6) of former Article 46.02). That is, under the law as it existed prior to January 1, 2004, when Chapter 46B took effect, former Article 46.02 permitted a criminal court to proceed with an extended twelve-month commitment for a criminal defendant who had been subject to an inpatient commitment for competency restoration for at least sixty days in the twelve months preceding the civil commitment hearing. *See id.* at 66–67 (summarizing former Subsections 6(b)(5)–(6) of former Article 46.02). Accordingly, the 2003 statutory change to § 574.035(a)(4), which replaced the reference to former Article 46.02 with Chapter 46B, did not alter the ability of a court to conduct an extended, twelve-month civil commitment hearing if the defendant has "received court-ordered inpatient mental health services . . . under Chapter 46B . . . for at least 60 consecutive days during the preceding 12 months." TEX. HEALTH & SAFETY CODE ANN. § 574.035(a)(4).

184. That is, the defendant will not have "received court-ordered inpatient mental health services . . . under Chapter 46B . . . for at least 60 consecutive days during the preceding 12 months." TEX. HEALTH & SAFETY CODE ANN. § 574.035(a)(4).

whether the court finds the longer period necessary.[185] At the end of that commitment period, however, the State could still seek an extended twelve-month inpatient commitment under § 574.035 if charges remain pending and there is a continuing need for inpatient mental health services.[186]

The temporary inpatient commitment provisions will also likely apply, at least initially, to a defendant who has been determined incompetent to stand trial yet for whom the court has also determined that the defendant's competency is unlikely to be restored in the foreseeable future.[187] As described above, under Chapter 46B, a court-appointed forensic expert must include in the report submitted to the court their opinion as to "whether the defendant is likely to be restored to competency in the foreseeable future."[188] In turn, if the court concurs and determines that restoring the defendant's competency in the foreseeable future is unlikely, the court must proceed with a civil commitment proceeding under either Subchapter E or F of Chapter

185. *Id.* § 574.034(c). As I have written previously: "We are also aware of many unfortunate situations in which defendants have been returned to the committing court, but have then languished in jail for so many months that § 574.035(a)(4)'s trigger (of at least 60 consecutive days of court-ordered hospitalization in the preceding 12 months pursuant to Chapter 46B) has lapsed. In such a case, the criminal court must then conduct civil commitment proceedings under either § 574.034 (inpatient) or § 574.0345 (outpatient), which permit court-ordered 'temporary' mental health services (a 45-day or 90-day commitment)." SHANNON & BENSON, *supra* note 3, at 112. One other point of confusion in determining whether the temporary commitment provisions in § 574.034 or the extended commitment provisions of § 574.035 is the language in § 574.035(d), which specifies that "[t]he jury or judge is not required to make the finding under Subsection (a)(4) . . . if the proposed patient has already been subject to an order for extended mental health services." TEX. HEALTH & SAFETY CODE ANN. § 574.035(d). That is, there is no need to make the finding in Subsection (a)(4) that the defendant "has received court-ordered inpatient mental health services under this subtitle or under Chapter 46B . . . for at least 60 consecutive days during the preceding 12 months" if the defendant "has already been subject to an order for extended mental health services." *Id.* § 574.035(a)(4), (d). Although the language of Subsection 574.035(d) is not altogether clear, it is intended to apply to a situation in which a person is already subject to a twelve-month "order for extended mental health services," and a renewed order is being considered. *Id.* § 574.035(d). That is, there is no need to make a finding regarding sixty consecutive days of inpatient mental health services in the preceding twelve months if the person is already subject to a twelve-month commitment that has just expired or is about to expire. Correspondingly, the exception in that Subsection would not apply to a situation in which a defendant has not been subject to inpatient competency restoration services under Chapter 46B for sixty consecutive days in the preceding twelve months. This is the case because an order under Chapter 46B for inpatient competency restoration services of, for example, 120 days in the case of a defendant who is facing felony charges is not "an order for extended mental health services," which is governed by § 574.035 and permits a civil commitment period of up to twelve months. *Id.* § 574.035(d).

186. TEX. HEALTH & SAFETY CODE ANN. § 574.035. Note that the previous temporary inpatient commitment must have lasted at least sixty consecutive days to satisfy the requirements of § 574.035(a)(4). This would obviously not be the case if the temporary commitment order was for only forty-five days.

187. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.071(a)(2), (b) (requiring the court to proceed under either Subchapter E or F, relating to civil commitment or releasing the defendant on bail upon "a determination that a defendant is incompetent to stand trial and is unlikely to be restored in the foreseeable future").

188. *Id.* art. 46B.025(b)(2); *see supra* notes 109–19 and accompanying text (discussing TEX. CODE CRIM. PROC. ANN. art. 46B.025(b)(2)).

46B or release the defendant on bail.[189] That is, the court may not consider or apply the competency restoration commitment options set forth in Subchapter D of Chapter 46B.[190] Instead, if the criminal charges remain pending, the State must proceed with a civil commitment proceeding under Subchapter E.[191]

In such a situation, it is also unlikely that the defendant will have "received court-ordered inpatient mental health services under . . . [the Health and Safety Code] or under Chapter 46B [of the] Code of Criminal Procedure[] for at least 60 consecutive days during the preceding 12 months."[192] Accordingly, unless an outpatient commitment is appropriate, the criminal court should proceed by applying the temporary inpatient commitment provisions of Health and Safety Code § 574.034, which permits a court to order a commitment period of up to either forty-five or ninety days depending on whether the court finds the longer period to be necessary.[193] At the end of that commitment period, however, the State could still pursue an extended twelve-month inpatient commitment under § 574.035 if charges remain pending and there is an ongoing need for inpatient mental health services.[194] Of course, a dismissal of the charges and consideration of civil commitment procedures under Subchapter F of Article 46B is also an available option.[195]

With regard to the foregoing discussion about the potential civil commitment of a defendant who is incompetent to stand trial, it is also important to note that the State must prove the required elements of the applicable civil commitment statute. A recent case decided by the Amarillo Court of Appeals, *Cook v. State*, is instructive in this regard.[196] In *Cook,* the trial court initially determined in May 2019 that the defendant was incompetent to stand trial.[197] Thereafter, the state hospital concluded in April

189. TEX. CODE CRIM. PROC. ANN. art. 46B.071(a)(2).

190. *See id.* art. 46B.071 (describing procedural options for competency restoration commitments for a defendant whose competency is likely to be restored in the foreseeable future versus directing the court to Subchapters E or F if the defendant is unlikely to be restored in the foreseeable future); SHANNON & BENSON, *supra* note 3, at 73 (noting "that an opinion by the examiner and a corresponding finding by the trial court that a defendant is incompetent, but is unlikely to be restored in the foreseeable future, precludes the option of a commitment to a competency restoration program").

191. *See* TEX. CODE CRIM. PROC. ANN. art. 46B, Subchapter E (describing civil commitment proceedings when charges remain pending). Per Article 46B.102, the criminal court judge will conduct the proceedings, but the court must apply the Health and Safety Code's civil commitment provisions to the extent that those provisions do not conflict with Chapter 46B. *Id.* art. 46B.102(b).

192. TEX. HEALTH & SAFETY CODE ANN. § 574.035(a)(4).

193. *Id.* § 574.034(c).

194. *Id.* § 574.035. Note that the previous temporary inpatient commitment must have lasted at least sixty consecutive days to satisfy the requirements of § 574.035(a)(4). *Id.* § 574.035(a)(4). This would obviously not be the case if the temporary commitment order was for only forty-five days. *See id.* §§ 574.034(c), .035(a)(4).

195. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.151 (describing the transfer of the case to a court with probate jurisdiction to consider civil commitment following dismissal of the criminal case).

196. Cook v. State, 644 S.W.3d 763, 765 (Tex. App.—Amarillo 2022, no pet. h.).

197. *Id.*

2020 that the defendant's competency had been restored, and he was returned to the Lubbock County Detention Center in May 2020.[198] By April 2021, Cook's case remained pending, and the court determined that Cook was again incompetent to be tried.[199] The court thereafter initiated civil commitment proceedings pursuant to Article 46B.102 and entered an order for temporary civil commitment in June 2021.[200] The appellate court reversed, however, finding that the State had not met its burden of proof with regard to the elements for a civil commitment under § 574.034(a) of the Texas Health and Safety Code.[201] In reaching this conclusion, the court determined that the State had not presented a "testimonial opinion from a competent medical or psychiatric expert that Cook presently suffers from a mental illness."[202] A key takeaway from *Cook* is that, under Article 46B.102, the State must prove that a defendant who remains incompetent nonetheless has a mental illness and meets the criteria for civil commitment.[203]

Much of the foregoing discussion regarding how to proceed when a defendant who has attained competency to stand trial through court-ordered competency restoration services but then later decompensates before the criminal case is resolved, is not, however, spelled out in Article 46B.084 or elsewhere in Chapter 46B. To address these gaps, the Texas JCMH is working on a legislative proposal that expands Article 46B.084 to give courts, prosecutors, and defense counsel more guidance on the appropriate steps to take when a restored defendant's mental condition has deteriorated prior to trial to the point that their competency to stand trial is again in doubt.[204] To address these gaps, I am chairing the Texas JCMH Legislative Committee's subcommittee, which is focused on criminal law issues and developing legislation to expand on the provisions in Article 46B.084.[205]

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198. *Id.*

199. *Id.* Although the court observed that the record did "not indicate why the trial court found Cook to be incompetent," one can readily speculate that the criminal case was not tried promptly following his May 2020 return to the court because of the global pandemic and that his mental condition presumably deteriorated during the ensuing months. *Id.* at 765 n.2.

200. *Id.* at 767.

201. *Id.* at 764.

202. *Id.* at 769. The only medical professional who testified at the hearing concluded that the defendant had an "intellectual dysfunction" and not a mental illness as defined in the Health and Safety Code and "disagreed with the suggestion that Cook posed a substantial risk of serious harm to himself or others and disagreed that evidence of Cook's overt acts . . . were caused by a mental illness." *Id.* at 769–70.

203. *Id.* Chapter 46B also contemplates the possibility of a civil commitment for a defendant with an intellectual disability, if applicable. TEX. CODE CRIM. PROC. ANN. art. 46B.103.

204. *See* APPROVED PROPOSALS, *supra* note 75, at 14 (identifying proposal to amend Article 46B.084 and other sections in Chapter 46B "to address the situation of individuals whose condition degrades in the interim between determination of competency and resumption of adjudicative hearings or a trial") (capitalization and emphasis omitted).

205. *See id.* (describing the legislative proposal).

V. CONCLUSION

The application of Texas criminal procedure to persons with mental illness is challenging, and the legal issues can be complex. Prosecutors, criminal defense attorneys, and judges have ethical obligations to ensure compliance with the applicable legal standards and should familiarize themselves with the statutory requirements and options for diversion of offenders and competency to stand trial. Future legislation has the potential to create more options, but it is unlikely they will reduce the complexity. Happily, there are helpful resources available such as the Texas JCMH Benchbook,[206] the checklists included in the eliminate the wait Toolkit,[207] and the Texas AOT Guide.[208] In addition, through continuing legal education programs such as the 2022 *Texas Tech Law Review* Mental Health Law Symposium, we hope to provide additional platforms to support the work of judges and lawyers involved in these cases.[209]

206. BENCH BOOK, *supra* note 11. For the link to an additional free guidebook, see SHANNON & BENSON, *supra* note 3.

207. TOOLKIT, *supra* note 12.

208. AOT GUIDE, *supra* note 22.

209. For links to the video recording of the Symposium see TEX. TECH L. REV., *2022 Texas Tech Mental Health Law Symposium*, TEX. TECH UNIV. SCH. OF L. (Apr. 8, 2022), https://mediaservices.law.ttu.edu/Panopto/Pages/Viewer.aspx?id=bf9c2caa-79b4-4bbd-93b7-ae740004343c. If you would like to view the speakers' PowerPoint presentations, please contact the *Texas Tech Law Review*.