WHAT HAPPENS AFTER A FINDING OF INCOMPETENCY TO STAND TRIAL IN TEXAS: COMMITMENTS UNDER ARTICLE 46B, SUBCHAPTERS D, E, AND F

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I. PREFACE

Even for attorneys experienced in criminal law, competency restoration commitments of criminal defendants can be confusing. Once the defendant has been found incompetent to stand trial, the proceedings continue in the criminal court which retains jurisdiction over the defendant, yet after the initial restoration commitment, the commitment criteria come from civil statutes.[1] Through it all, a criminal defense attorney owes a duty to their client to be faithful to the client's objectives while concurrently obligated to ensure they are not brought to trial if they remain incompetent to stand trial.[2]

This Article walks through the process detailed in Texas Code of Criminal Procedure Article 46B, beginning with the moment the criminal defendant is found incompetent to stand trial through their eventual discharge from the court's jurisdiction and discusses the legal standards, relevant case law, additional issues that may arise, and duties of the criminal defense attorney along the way.

II. THE SUPREME COURT'S FORAY INTO MENTAL HEALTH & INCOMPETENCY TO STAND TRIAL

In 1972, the Supreme Court of the United States issued *Jackson v. Indiana*, a watershed case for criminal defendants found incompetent to stand trial.[3] Considering the case of a criminal defendant found incompetent to stand trial who had an intellectual disability, was deaf and nonspeaking, and had limited sign language skills, the Court determined that "due process requires that the nature and duration of [Jackson's incompetency] commitment bear some reasonable relation to the purpose for which [he was] committed."[4]

Despite the fact that Jackson's physicians determined from the outset that he was unlikely to ever become competent because of his lack of communication skills and cognitive impairment, the criminal court committed Jackson until his competence was restored.[5] Jackson claimed that this commitment amounted to a "life sentence" in violation of the Fourteenth

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1. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

2. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.16(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A; Drope v. Missouri, 420 U.S. 162, 171 (1975).

3. *See Jackson*, 406 U.S. *passim*.

4. *Id.* at 717, 738. Though Jackson's case was brought pursuant to the due process guarantees of the United States Constitution, the Texas Constitution's "due course of law" provisions provide the same protections. *See, e.g.*, *Ex parte* Meade, 550 S.W.2d 679, 681 (Tex. Crim. App. 1977) (noting that petitioner had a constitutional right to due course of law regarding his incompetency commitment); *see also* Tex. Workers' Comp. Comm'n v. Patient Advocs. of Tex., 136 S.W.3d 643, 658 (Tex. 2004) ("Texas's due course of law clause and the federal due process clause are textually different, but we generally construe the due course clause in the same way as its federal counterpart.").

5. *Jackson*, 406 U.S. at 718–19.

Amendment's Due Process Clause.[6] The Court agreed and held that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed" and further held that

> a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.[7]

The Court declined to define a "reasonable period of time" to attain competency but stated that "even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."[8] Texas has codified the reasonable periods of time for competency restoration and other protections for criminal defendants in the Code of Criminal Procedure, Article 46B, Subchapter D, as discussed below.[9]

Though most individuals found incompetent to stand trial are able to be restored, a small minority of incompetency detainees are, like Mr. Jackson, immediately identified as unlikely to be restored in the foreseeable future.[10] Others complete their initial[11] competency restoration treatment and remain unrestored. For these detainees, the *Jackson* Court explained that "the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant."[12] Texas has codified the process for evaluating whether incompetency detainees meet the criteria for civil commitment in Subchapter E along with other provisions governing the treatment, review, and release of these defendants.[13]

Finally, throughout the incompetency to stand trial process, the prosecutor retains discretion to drop the charges and transfer the defendant's case to the probate court for the initiation of civil

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6. *Id.* at 719.

7. *Id.* at 738.

8. *Id.*

9. *See infra* Section III.B (discussing the reasonable time periods for competency restoration set by the Texas Legislature)

10. *See Jackson*, 406 U.S. at 719.

11. Because attorneys think of the entire commitment under Subchapter D and E as the competency restoration commitment, in this Article the Authors have generally used the phrase "initial competency restoration" treatment or period to designate the entire commitment under Subchapter D, including both the initial 60- to 120-day restoration period and optional 60-day extension under Subchapter D. TEX. CODE CRIM. PROC. ANN. arts. 46B.073, .079(d).

12. *Jackson*, 406 U.S. at 738.

13. *See infra* Section IV.A (discussing civil commitment of individuals with pending charges).

commitment proceedings.[14] This process is governed by Subchapter F.[15] As discussed below, defense attorneys should always keep this option in mind for individuals found incompetent to stand trial because civil commitment without pending charges is less restrictive than commitment with charges.[16]

III. SUBCHAPTER D: COMMITMENT SOLELY FOR PURPOSES OF COMPETENCY RESTORATION

When an individual is found incompetent to stand trial,[17] what happens next depends on two main factors: (1) whether the expert who evaluated them determined they were likely to be restored in the foreseeable future and (2) the nature of the charges against them.[18]

A. Unable to Be Restored in the Foreseeable Future

An expert's report evaluating a defendant for competency to stand trial *must* state "whether the defendant is likely to be restored to competency in the foreseeable future."[19] Defense counsel reviewing these reports must ensure that the experts included this evaluation. If the expert determines from the outset that the defendant is unlikely to be restored within a reasonable period of time, the court cannot commit them for initial competency restoration treatment and instead can confine them only if they meet civil commitment criteria (discussed in more detail *infra* at Part IV).[20] Otherwise, the "nature . . . of [their] commitment" for competency restoration would not "bear some reasonable relation to the purpose" of their confinement.[21] If the defendant does not meet civil commitment criteria, the court must release the defendant on bail.[22] An incompetency detainee who is unlikely to be restored and who does not meet criteria for civil commitment cannot remain confined

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14. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.004(e).

15. *Id.* art. 46B.151.

16. *Compare, e.g.*, *id.* art. 46B.107 (describing process for release of a defendant found incompetent to stand trial, including notice and hearing by the court that has the authority to deny release), *with* TEX. HEALTH & SAFETY CODE ANN. § 574.086(a) (mandating that mental health facilities discharge patients when they no longer meet criteria for commitment without seeking court approval), *and id.* § 594.011 (stating that state-supported living centers shall discharge residents when the individual no longer meets criteria for residential commitment without seeking court approval).

17. The incompetency order under Subchapter C, Article 46B is not an appealable order. Ortega v. State, 82 S.W.3d 748, 749 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing Jackson v. State, 548 S.W.2d 685, 688–89 (Tex. Crim. App. 1977)).

18. *See* TEX. CODE CRIM. PROC. ANN. arts. 46B.071, .0711, .072, .073 (setting forth options for committing courts based on the likeliness that defendant will be restored in the foreseeable future, including locations for competency restoration services).

19. *Id.* art. 46B.025(b)(2).

20. *Id.* art. 46B.071(b)(1).

21. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

22. TEX. CODE CRIM. PROC. ANN. art. 46B.071(b)(2); *see Jackson*, 406 U.S. at 738.

in jail for any reason, including inability to pay bail.[23] Such a scenario would violate the due process rights of the defendant.[24]

B. Able to Be Restored

Most defendants are determined to be restorable in the near future and thus can be confined solely for competency restoration treatment.[25] For this initial restoration to competency, the defendant does not have to meet any of the civil commitment criteria—they do not have to have a mental illness or an intellectual disability, and they do not have to be dangerous to themselves or others to be involuntarily confined in an inpatient mental health facility or State-Supported Living Center (SSLC) for competency restoration treatment.[26]

In Texas, judges can order defendants to receive their initial competency restoration treatment for a time period of 60 to 180 days (including a single[27] sixty-day extension) in one of three locations: Outpatient Competency Restoration (OCR) programs, Jail-Based Competency Restoration (JBCR) programs, and inpatient or residential facilities, as summarized in the chart and discussed below.[28] Texas's timelines in statute are generally consistent with meta-analyses of competency restoration programs that find that 81% of individuals are restored, with an average length of time to restoration being between 90 and 120 days.[29]

Texas's Statutory Timelines

	OCR		JBCR/Facility	
Charge	Initial	Extension	Initial	Extension
Class B misdemeanor[30]	60 days	60 days	60 days	60 days
Class A misdemeanor[31]	120 days	60 days	60 days	60 days
Felony[32]	120 days	60 days	120 days	60 days

23. *See Jackson*, 406 U.S. at 738.

24. *See id*.; *e.g.*, Harris v. Clay Cnty., 47 F.4th 271, 277 (5th Cir. 2022), *petition for cert. filed*.

25. W. Neil Gowensmith et al., *Lookin' for Beds in All the Wrong Places: Outpatient Competency Restoration as a Promising Approach to Modern Challenges*, 22 PSYCH. PUB. POL'Y & L. 293, 294 (2016).

26. TEX. CODE CRIM. PROC. ANN. art. 46B.071. The order committing a defendant for competency restoration under Article 46B, Subchapter D is also not an appealable order, but habeas relief explicitly remains available. Queen v. State, 212 S.W.3d 619, 622–23 (Tex. App.—Austin 2006, no pet.).

27. TEX. CODE CRIM. PROC. ANN. art. 46B.085. A court committing a defendant for competency restoration purposes under Subchapter D can order a single extension period before it must proceed under Article 46B, Subchapter E. *Id*.

28. *Id.* arts. 46B.071(b)(1), .0711(b)(2), .072(b), .073(b), .080(c).

29. *See* Gowensmith et al., *supra* note 25 (citing three analyses of competency restoration data with similar results).

30. TEX. CODE CRIM. PROC. ANN. arts. 46B.0711(b)(2), .073(b)(1), .080(c).

31. *Id.* arts. 46B.072(b), .073(b)(1), .080(c).

32. *Id.* arts. 46B.072(b), .073(b)(2), .080(c).

Which program ultimately serves a defendant is largely impacted by the individual's charges and circumstances and the county's available programs.[33] As discussed *infra*, OCR and JBCR programs are unavailable in most Texas counties and are underused, resulting in facilities serving the vast majority of defendants committed for initial competency restoration.[34]

Regardless of the location in which initial competency restoration services are provided, the programs have certain basic aspects in common. First and foremost, the purpose of commitment is *solely* for competency restoration treatment.[35] Other services are coordinated to ensure, for example, the detainee's basic medical needs are met;[36] however, the primary purpose remains "progress[ing] toward [the] goal" of restoration of competency to stand trial.[37]

Though individuals presumed to have mental illness are the most common recipients of competency restoration services, all programs and facilities are required to serve individuals whose incompetency to stand trial is due wholly or partially to an intellectual disability.[38] Therefore, JBCR and OCR programs and mental health facilities must provide reasonable accommodations to make their competency restoration services accessible to individuals with intellectual disabilities unless doing so would fundamentally alter the nature of the program.[39]

Based on the needs of the detainee, the program or facility must develop an individualized treatment plan and report to the court at prescribed intervals the detainee's progress towards restoration.[40] All programs are required to report to the court no later than the fifteenth day before the initial 60- or 120-day restoration commitment is to expire.[41] This report, which the court passes on to the prosecutor and defense counsel, contains information about the medications the defendant received during competency restoration treatment and a determination of whether "the defendant has attained competency to stand trial" or remains incompetent, with the reasons for this

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33. *See infra* Sections III.B.1–3 (discussing the availability of programs).

34. *See infra* Section III.B.3 (discussing mental health facilities and SSLC).

35. TEX. CODE CRIM. PROC. ANN. art. 46B.073(b) (noting the defendant is committed "[f]or purposes of further examination and competency restoration with the specific objective of the defendant attaining competency to stand trial").

36. *See id.* art. 46B.091(d)(6) (noting the duty to "ensure coordination of general health care" in JBCR programs); TEX. HEALTH & SAFETY CODE ANN. §§ 576.022, 592.052 (requiring that state hospitals and SSLCs provide adequate medical care and treatment to all patients and residents).

37. Jackson v. Indiana, 406 U.S. 715, 738 (1972); TEX. CODE CRIM. PROC. ANN. art. 46B.073(b).

38. *See* 42 U.S.C. § 12132 (providing that an otherwise qualified individual with a disability cannot be denied access to participation in or "the benefits of the services, programs, or activities of a public entity").

39. *See* 28 C.F.R. § 35.130(b)(7)(i) (2016).

40. TEX. CODE CRIM. PROC. ANN. art. 46B.077(a).

41. *Id*. art. 46B.079(a). An OCR program must give additional progress reports to the court not later than the fourteenth day after services start and at least once every thirty days until the defendant is no longer in the program. *Id.* art. 46B.077(c).

belief.[42] If the report includes a request for an extension of the initial competency restoration commitment, it must also contain evidence of reduction in the severity of the person's symptoms or impairment that suggests, as *Jackson* demands, progress towards restoration.[43] Additionally, at any time during the restoration commitment, if the provider determines the detainee has regained competency or, on the other end of the spectrum, is unlikely to regain competency in the foreseeable future, the provider must promptly issue a report to the court.[44] If civil commitment under 46B Subchapter E or F will be sought at the conclusion of the competency restoration commitment, the report should also include the program professionals' opinions on whether the individual meets criteria for civil commitment and supporting documentation, as discussed *infra*.[45]

1. Outpatient Competency Restoration Programs and Eligibility

As should be clear from their name, OCR programs are the least restrictive commitment option for defendants to receive competency restoration treatment and services. Under these programs, defendants are ordered to participate in specific programming with the goal of restoration to competency; however, they receive this programming in their communities.[46]

OCR programs are available only to those defendants a court determines are "not a danger to others," who "may be safely treated on an outpatient basis," and who reside in an area where OCR is available.[47] Where these factors are satisfied, a court "shall" release an alleged misdemeanant to an OCR program and "may" release a felony defendant.[48]

Before any defendant can be released into an OCR program, the court must receive and approve a comprehensive program plan identifying the treatment to be provided to the defendant for purposes of competency restoration and the person "responsible for providing that treatment to the defendant."[49] The court must find the proposed treatment is actually available and will be provided to the defendant

42. *Id.* art. 46B.079(b)(2)–(3), (b-1), (c).

43. *Id*. art. 46B.079(b)(2)–(3), (d); Jackson v. Indiana, 406 U.S. 715, 738 (1972).

44. TEX. CODE CRIM. PROC. ANN. arts. 46B.079(b)(2)–(3), (b-1), .091(h)–(i).

45. *Id*. art. 46B.083.

46. *Id*. arts. 46B.0711(c)–(d), .072(c)–(d).

47. *Id.* arts. 46B.0711(b), .072(a-1). In practice, although OCR is available to defendants charged with misdemeanors and felonies, individuals with lesser charges are more likely to be committed to them. *See* TEX. HEALTH & HUM. SERVS. COMM'N, ALL TEXAS ACCESS REPORT 2022, at 46 (Dec. 2022), https://www.hhs.texas.gov/sites/default/files/documents/all-texas-access-report-dec-2022.pdf (noting that individuals served by OCRs usually have misdemeanor charges).

48. TEX. CODE. CRIM. PROC. ANN. arts. 46B.0711(b), .072(a-1).

49. *Id.* arts. 46B.0711(c)(1), .072(c)(1).

and may issue additional orders for the defendant to participate in an appropriate, prescribed treatment plan, including a plan for the administration of psychotropic medication.[50] The timelines for services and reports to the court begin to run on the date OCR services actually begin.[51]

Attorneys who are unsure whether OCR is available in their area should look to the Local Mental Health Authority (LMHA)[52] as they are the providers of OCR programs. As of July 2021, eighteen LMHAs serving over fifty counties in the state were funded to operate OCR programs.[53] As of the time of the writing of this Article, Texas courts were underusing available OCR programs, with many having spaces going unused.[54]

2. Jail-Based Competency Restoration Programs

JBCR programs take place within the jails, so the punitive jail environment largely remains in place.[55] Individuals whose charges or indictments include a finding of violence[56] are ineligible for JBCR programs.[57]

As with an OCR program, the time that counts towards the competency restoration period begins the day the competency restoration services begin.[58] If a defendant has not been restored after sixty days in a JBCR program and space becomes available in a facility or appropriate OCR program, the court "shall" transfer the detainee to the alternative setting as long as at least

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50. *Id*. arts. 46B.0711(c)(2), (d), .072(c)(2), (d); *see also id.* art. 46B.0711(b) (providing that the outpatient order can include "conditions reasonably related to ensuring public safety and the effectiveness of the defendant's treatment"); *id.* art. 46B.072(a-1) (same).

51. *Id*. art. 46B.0735.

52. *Find Your Local Mental Health or Behavioral Health Authority*, TEX. HEALTH & HUM. SERVS. COMM'N, https://www.hhs.texas.gov/services/mental-health-substance-use/mental-health-substance-use-resources/find-your-local-mental-health-or-behavioral-health-authority (last visited Sept. 20, 2022).

53. *See HHSC Expands Outpatient Competency Restoration Services in Texas*, TEX. HEALTH & HUM. SERVS. COMM'N (July 2, 2021), https://www.hhs.texas.gov/news/2021/07/hhsc-expands-outpatient-competency-restoration-services-texas.

54. *See Outpatient Competency and Jail-Based Competency Restoration Outcomes*, TEX. HEALTH & HUM. SERVS. COMM'N, at 11 (June 17, 2021), https://www.hhs.texas.gov/sites/default/files/documents/about-hhs/communications-events/meetings-events/jcafs/july-2021-jcafs-agenda-item-9.pdf (stating that in 2020, OCR programs in Texas reached only 70% of their targeted capacity, while only 30% had been served in the first half of fiscal year 2021); *e.g.*, ALL TEXAS ACCESS REPORT 2022, *supra* note 47, at 74 (noting that through May 2022, Pecan Valley LMHA received no referrals for its OCR program in a six-county region and Center for Life Resources enrolled only four people).

55. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.091.

56. As used in Article 46B, "finding of violence" is a term of art meaning an offense listed in Code of Criminal Procedure Article 17.032(a) or an indictment alleging the use or display of a deadly weapon. *See, e.g.*, *id.* art. 46B.104 (using the term "finding of violence").

57. *Id*. art. 46B.073(c). For Class B misdemeanants who were not committed to an OCR program, the court must commit them to a JBCR program if one is available and if they are not determined inappropriate for the program. *Id.* art. 46B.073(f).

58. *Id*. arts. 46B.0735, .080(d).

forty-five days remain in their restoration period (either an original 120-day commitment or an extension).[59] For defendants who transfer, the time on their commitment does not start over but continues with the original expiration date.[60]

Unlike inpatient programs, the efficacy of JBCR programs is still largely unknown as JBCRs are few in number nationally and vary in requirements for admission and treatment provided.[61] Different studies have reported successes varying between 40% and 83% restored.[62] In Texas, the JBCR in the Harris County Jail reported only a 59% restoration rate in fiscal year 2021.[63] JBCRs, in general, are the subject of significant criticism, with charges of less effective treatment and inappropriate correctional environments for providing treatment for individuals who predominantly have mental illness.[64]

3. Mental Health Facilities and State-Supported Living Centers

Due to the demand for competency restoration treatment, the relative unavailability and underuse of OCR and JBCR programs, and the ineligibility of some defendants for such programs, the overwhelming majority of folks who receive competency restoration treatment under Article 46B will do so in a mental health facility or SSLC.[65] In Texas, mental health units and facilities are designated either non-Maximum Security Units (non-MSUs) or Maximum Security Units (MSUs).[66] The non-MSUs in Texas include all but one of the ten[67] state hospital campuses and a handful of private psychiatric

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59. *Id*. art. 46B.091(j), (j-1).

60. *See id*. art. 46B.091(j-1).

61. Peter Ash et al., *A Jail-Based Competency Restoration Unit as a Component of a Continuum of Restoration Services*, 48 J. AM. ACAD. PSYCHIATRY L., no. 1, 1 (Nov. 21, 2018), http://jaapl.org/content/jaapl/early/2019/11/21/JAAPL.003893-20.full.pdf.

62. *Id*. at 5.

63. TEX. HEALTH & HUM. SERVS. COMM'N, REPORT ON THE JAIL-BASED COMPETENCY RESTORATION PILOT PROGRAM, at 6 (Dec. 2021), https://www.hhs.texas.gov/sites/default/files/documents/jail-based-competency-restoration-pilot-program-2021.pdf.

64. Ash et al., *supra* note 61, at 2; *see* Alexandra Douglas, *Caging the Incompetent: Why Jail-Based Competency Restoration Programs Violate the Americans with Disabilities Act under* Olmstead v. L.C., 32 GEO. J. LEGAL ETHICS 525, 528 (2019), https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2019/10/GT-GJLE190027.pdf (arguing that JBCR programs violate the Americans with Disabilities Act).

65. *See Outpatient Competency and Jail-Based Competency Restoration Outcomes supra* note 54, at 9 (noting total number of persons served by OCR programs since inception in 2008 through fiscal year 2020 was only 2,388 persons and number of persons served by JBCR since their start in 2019 through 2020 was only 763). SSLCs are the "residential care facilities" under Article 46B. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.001(13); TEX. HEALTH & SAFETY CODE ANN. § 591.003(18).

66. *See* 25 TEX. ADMIN. CODE § 415.303(18) (2021) (Tex. Dep't of State Health Servs., Definitions); 26 TEX. ADMIN. CODE § 306.172 (2020) (Tex. Health & Hum. Servs. Comm'n, Admission Criteria for Maximum-Security Units).

67. *See State Hospitals*, TEX. HEALTH & HUM. SERVS. COMM'N, https://www.hhs.texas.gov/service

facilities that have contracted with the Texas Health and Human Services Commission (HHSC) to provide services.[68] The MSUs are almost all located at the Vernon campus of North Texas State Hospital, with one additional unit located at Rusk State Hospital.[69] Up until a few years ago, if the defendant's case entailed a finding of violence, the court was required to commit the defendant to an MSU; now, HHSC makes the determination where the defendant will go, to an MSU, non-MSU, or SSLC.[70] As a holdover from the earlier provision, it is not uncommon for individuals who solely have intellectual disabilities to still be committed to a state hospital MSU if they have a finding of violence, even though the Texas Code of Criminal Procedure no longer requires this commitment and an SSLC is often a more appropriate placement, as discussed below.[71] For all other charges, the defendant is committed to a non-MSU facility or SSLC.[72]

SSLCs are designated as forensic or non-forensic.[73] As of the writing of this Article, Mexia SSLC is the forensic facility for males and San Angelo SSLC is the forensic facility for females.[74] Under the Health and Safety Code, only defendants charged with felonies are required to be admitted to a forensic SSLC, though in practice, essentially all defendants are admitted to one of these two SSLCs.[75] If an alleged misdemeanant is committed to an SSLC under Subchapter D, courts and attorneys should be aware that committing the defendant to a forensic SSLC is not required—instead, the defendant can be committed to a non-forensic SSLC where the wait for admission may be shorter.[76]

Because the demand for beds in mental health facilities currently outstrips supply, individuals committed to mental health facilities are waitlisted with 1,547 people currently waiting for a bed in non-MSUs and

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s/mental-health-substance-use/state-hospitals (last visited Sept. 20, 2022). There are nine state hospitals in Texas, one of which (North Texas State Hospital) occupies two different campuses, for a total of ten state hospital campuses. *See North Texas State Hospital*, TEX. HEALTH & HUM. SERVS. COMM'N, https://www.hhs.texas.gov/services/mental-health-substance-use/state-hospitals/north-texas-state-hospital (last visited Sept. 20, 2022).

68. *See State Hospitals*, *supra* note 67 (noting the only maximum-security units are located at North Texas State Hospital in Vernon and Rusk State Hospital).

69. *Id.*

70. TEX. CODE CRIM. PROC. ANN. art. 46B.073(c).

71. *See infra* notes 81–84 and accompanying text (explaining that defendants with intellectual disabilities would be better served in an SSLC for competency restoration).

72. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.073(d).

73. *See* TEX. HEALTH & SAFETY CODE ANN. § 555.002(a).

74. TEX. HEALTH & HUM. SERVS. COMM'N, ANNUAL REPORT ON FORENSIC SERVICES IN STATE SUPPORTED LIVING CENTERS FOR FISCAL YEAR 2020, at 2 (Feb. 2021), https://www.hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2021/annual-report-forensic-sslc-fy2020.pdf. It is the experience of the Authors that trans individuals are committed to the facility corresponding with their biological sex, though facility administration has been receptive to individuals being called their chosen names and wearing clothing corresponding to their identities.

75. *See* TEX. HEALTH & SAFETY CODE ANN. § 555.002(b) (requiring the HHSC to place defendants charged with felonies in forensic SSLCs but containing no such requirement for alleged misdemeanants).

76. *See id.*

995 waiting for a bed in MSUs.[77] As of the writing of this Article, individuals waiting for a bed at a non-MSU facility could expect to wait four to six months while individuals waiting for an MSU hospital bed were waiting over a year, going on two years for some.[78] In several other states, defendants have successfully challenged similar waitlists for violating their due process rights under *Jackson*[79] and, as of the writing of this Article, Authors serve as counsel for class plaintiffs in a lawsuit pending in the Western District of Texas making similar challenges to Texas's lists.[80]

Because courts and attorneys are so used to thinking of incompetency to stand trial as an issue of mental illness, many folks with intellectual disabilities who would be better served in an SSLC—particularly misdemeanants—are instead waitlisted for a state hospital.[81] This misplacement means defendants with intellectual disabilities currently wait in jail for beds at state hospitals despite SSLCs having significantly shorter wait times for admission for competency restoration.[82] Commitment to a mental health facility is not necessary for these defendants to receive mental health treatment—SSLCs have psychiatrists on staff and regularly provide services to the many residents who are dually diagnosed—or to receive competency restoration services.[83] Moreover, very few state hospitals have units for patients dually diagnosed with mental illness and intellectual disabilities, meaning these individuals wait in jail even longer for a bed in an appropriate unit or wind up on a unit where direct-care staff and professionals do not regularly care for or treat individuals with intellectual disabilities.[84] Individuals with intellectual disabilities do far better in consistent

77. *See* Plaintiffs' Sixth Amended Complaint for Declaratory and Injunctive Relief ¶¶ 55–57, Ward v. Young, No. 1:16-cv-00917-LY (W.D. Tex. Oct. 17, 2022).

78. *Id*.

79. *See, e.g.*, Or. Advoc. Ctr. v. Mink, 322 F.3d 1101 (9th Cir. 2003); Trueblood v. Wash. State Dep't Soc. & Health Servs., 101 F. Supp. 3d 1010 (W.D. Wash. 2015), *vacated and remanded on other grounds*, 822 F.3d 1037 (9th Cir. 2016).

80. *See* Plaintiffs' Sixth Amended Complaint for Declaratory and Injunctive Relief, *supra* note 77 (raising due process challenge to HHSC forensic waitlists).

81. *See* Robert D. Fleischner, *Competence to Stand Trial—the Experience of Defendants with an Intellectual Disability Compared to Those with a Mental Illness*, *in* THE ARC NAT'L CTR. ON CRIM. JUST. & DISABILITY, COMPETENCY OF INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM: A CALL TO ACTION FOR THE CRIMINAL JUSTICE COMMUNITY, at 8–9 (2017), http://thearc.org/wp-content/uploads/2019/07/16-089-NCCJD-Competency-White-Paper-v5.pdf (noting competence to stand trial process for persons with intellectual disabilities can be frustrated by commitment to a mental health facility that is not suited to provide treatment to such persons).

82. *See* TEX. HEALTH & HUM. SERVS. COMM'N, EXPLANATION OF SERVICES AND SUPPORTS: INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, at 9 (June 2019), https://www.hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/providers/long-term-care/lidda/iddserviceseng.pdf (noting "[t]here is no waiting list or interest list" for Intermediate Care Facilities, which include SSLCs).

83. *See id.* (stating that SSLCs provide psychiatric services); TEX. CODE CRIM. PROC. ANN. art. 46B.073(b) (authorizing commitment straight to an SSLC for competency restoration commitment, without requiring commitment to a mental health facility first).

84. *See* Fleischner, *supra* note 81, at 9 (noting generally that psychiatric facilities are ill-equipped to provide treatment to persons with intellectual disabilities).

environments and do not benefit from bouncing from unit to unit, hospital to SSLC.[85] Thus, defense attorneys representing clients with intellectual disabilities should advocate for their client to be directly admitted to SSLCs for competency restoration.

C. Charges Dismissed Under Subchapter D

The dismissal of a defendant's charges can interrupt a competency restoration commitment at any time—this is not a process that, once started, must be played out to the end of the competency restoration period.[86] Where the interest of justice or other factors weigh in favor of dismissing charges, zealous defense attorneys will advocate for this result.[87]

When charges are dismissed, the court shall send a copy of the dismissal order "to the sheriff of the county in which the defendant is located" or the head of the program or facility to which the defendant is committed.[88] Upon receipt, the program or facility head shall immediately discharge the individual into the care of the sheriff for transportation back to the committing court, where appropriate.[89] Though somewhat confusingly written, this provision ensures that individuals who may be in a facility far from their home are transported back to the county of their committing court; it should not be read to require an individual in an OCR program to be picked up by the sheriff.[90] If the court is located in a different county than the county providing OCR services, the defense attorney should advocate for any necessary dismissal hearings to occur through electronic broadcast under Article 46B.013 so that an incompetency detainee on OCR does not have to be brought into custody solely to attend court to have their charges dismissed.[91]

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85. *See* Ashley C. Woodman et al., *Residential Transitions Among Adults with Intellectual Disabilities Across 20 Years*, 119 AM. J. INTELL. DEVELOPMENTAL DISABILITIES 496, 497 (Nov. 1, 2014) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4215165/pdf/nihms597257.pdf (summarizing previous literature finding that recurrent placement transitions can "lead to emotional, affective, and behavior[al] problems for people with intellectual disabilit[ies]").

86. TEX. CODE CRIM. PROC. ANN. art. 46B.004(e).

87. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01, cmt. 6 (requiring the attorney to act with "commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf").

88. TEX. CODE CRIM. PROC. ANN. art. 46B.078.

89. *Id*.

90. *See id*. arts. 46B.0711, .073 (noting that outpatient commitment requires finding that the defendant is not a danger to themselves or others and can be safely treated in the community; accordingly, confinement by law enforcement for dismissal proceedings is unnecessary).

91. *See id*. art. 46B.013(a) (providing generally that hearings under Chapter 46B may be held by electronic broadcast).

D. Return to Court

The report from the competency restoration program or facility to the court at the end of the commitment or upon determination that the individual is unable to be restored sets several processes in motion. As soon as practicable after the notice arrives at the court but before the commitment order expires, the defendant is returned to court.[92] For defendants in facilities, this is either a literal transfer from the facility to the jail by the sheriff or a hearing held by electronic broadcast system equipment while the defendant stays in the facility.[93] With few exceptions, defendants returned to jails from facilities should remain on their same psychotropic medication regimens.[94] Defendants on outpatient commitments should receive notice of the hearing but should not be brought back into custody solely to ensure their attendance at the hearing to determine their continued incompetence to stand trial.[95]

Upon the defendant's return to court (either physically or by electronic broadcast), the court can make a determination that the defendant has or has not been restored to competency based on the report from the program and the defendant's other medical and historical information; however, if either the prosecutor or defense counsel objects within fifteen days of receiving the report, the issue of the defendant's incompetency to stand trial is set for a hearing.[96] Any party may request a jury.[97] If the defendant is determined restored to competency, trial against the defendant shall proceed.[98] For defendants who remain incompetent to stand trial, the court shall proceed under either Subchapter E or F, based on whether charges remain pending against the individual.[99]

IV. AFTER INITIAL COMPETENCY RESTORATION: CIVIL COMMITMENT OF INCOMPETENCY DETAINEES, SUBCHAPTERS E AND F

When a defendant reaches the maximum time for commitment for purposes of competency restoration or has been determined unable to be

92. *Id*. art. 46B.081.

93. *Id*. arts. 46B.081, .084(b-1). If a jury is requested, the defendant and defense counsel should consider in-person appearance over electronic broadcast.

94. *Id*. art. 46B.0825. Before this law changed a few years ago, it was not uncommon for defendants to have the medications they were taking in a hospital changed upon their return to jail to less expensive medications. This change sometimes resulted in defendants losing competency to stand trial and/or receiving medications with more negative side effects than the ones they achieved stability on in the facility.

95. *See id*. arts. 46B.0711, .073 (noting that outpatient commitment requires finding that the defendant is not a danger to themselves or others and can be safely treated in the community; accordingly, confinement by law enforcement for continued competency proceedings is unnecessary).

96. *Id.* art. 46B.084(a-1)(1), (b).

97. *Id.* art. 46B.084(b).

98. *Id.* art. 46B.084(d).

99. *Id.* art. 46B.084(e), (f).

restored, "the State must either institute the customary civil commitment proceeding that would be required to commit . . . any other citizen, or release the defendant."[100] The Texas Legislature codified the provisions for evaluation and continued commitment or release of an incompetency detainee consistent with *Jackson* in Article 46B, Subchapters E (charges remain pending) and F (charges dismissed).[101]

Under Subchapters E and F, the purpose of the defendant's confinement is no longer for competency restoration but now *solely* because they meet the civil commitment criteria discussed below.[102] This distinction is important because, while inpatient facilities can continue to provide competency restoration programming for individuals committed under Subchapter E, their continued incompetency to stand trial is wholly irrelevant as to whether they can ultimately be released.[103] As discussed in more detail below, when an incompetency detainee no longer meets civil commitment criteria, they must be released without regard to their charges or continued incompetency.[104]

A. Subchapter E: Civil Commitment for Individuals with Charges Pending

In Texas, the process for a defendant's civil commitment, treatment, and release are dictated initially by whether the individual has a mental illness or intellectual disability.[105] It is vital for courts, prosecutors, and defense attorneys to understand the difference between these two conditions, as the standards, burden of proof, process, treatment, and discharge vary widely between civil commitments for mental illness and those for intellectual disability.[106] Civil commitment criteria for a mental health commitment cannot be used to confine an individual in an SSLC or vice versa.[107]

The defense attorney remains appointed to represent the defendant throughout the period they remain incompetent to stand trial, including

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100. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

101. TEX. CODE CRIM. PROC. ANN. art. 46B, Subchapters E–F.

102. *See infra* Sections IV.A–B (discussing criteria for civil commitment with charges pending and criteria for civil commitment with charges dismissed).

103. *See infra* Sections IV.A–B (discussing criteria for civil commitment with charges pending and criteria for civil commitment with charges dismissed).

104. *See infra* Section IV.A.3 (discussing constitutional limits to continued confinement). As long as the defendant remains incompetent to stand trial and charges remain pending, the court can have the defendant re-evaluated for competency to proceed to trial. TEX. CODE CRIM. PROC. ANN. arts. 46B.108, .111. This re-evaluation can be prompted by notice from the head of the facility or outpatient treatment provider or on motion from the defendant, defense attorney, or prosecutor. *Id.* arts. 46B.109, .110.

105. *Id.* arts. 46B.102, .103.

106. *See infra* Section IV.A.1 (discussing commitment under 46B.102 for individuals with mental illness); *infra* Section IV.A.2 (discussing commitment under 46B.103 for individuals with intellectual disabilities).

107. *See In re* Commitment of J.A.A., No. 11-20-00142-CV, 2021 WL 4097085, at *2–3 (Tex. App.—Eastland Sept. 9, 2021, no pet.) (mem. op.).

through the civil commitment proceedings.[108] It is important to note that continued incompetency to stand trial does *not* mean the person is unable to express their wishes and preferences regarding commitment to an inpatient mental health facility.[109] Under the Texas Health and Safety Code, an attorney representing an individual in civil commitment proceedings "shall thoroughly discuss" with their client the case, options, and grounds upon which commitment is sought.[110] While the attorney may advise the client about the wisdom of agreeing to or resisting commitment, it is ultimately the defendant's choice whether to resist commitment and whether to waive the commitment hearing.[111] The attorney is obligated to represent their client's expressed wishes "regardless of [the] attorney's personal opinion."[112] The defendant is entitled to be present at any hearing, and it is their choice, not the attorney's, whether to waive their presence.[113]

The hearing is on the record and open to the public unless defense counsel moves for it to be closed and the court finds good cause to close the hearing.[114] As a practical matter, because the defendant's sensitive health information will be discussed, defense counsel should move for commitment hearings to be closed as a matter of course to best protect their clients.

1. Civil Commitment for Individuals with Mental Illness

For individuals who appear to have a mental illness, courts look to Texas Code of Criminal Procedure Article 46B.102, which requires courts to hold a hearing pursuant to the Texas Mental Health Code to determine whether the individual meets the criteria for outpatient or inpatient commitment.[115] The only differences in the initial commitment process for criminal defendants and nondefendants being civilly committed for mental health treatment are that the criminal court retains jurisdiction over the commitment, an application for mental health services may not be required, and the defendant is not entitled to the same notice for the hearing.[116] The remaining

108. TEX. CODE CRIM. PROC. ANN. art. 46B.006.

109. *See id.* art. 46B.003(a) (stating that a finding of incompetency is a finding only about the person's ability to consult with their attorney with a reasonable degree of rational understanding and their understanding of the proceedings against them).

110. TEX. HEALTH & SAFETY CODE ANN. §§ 574.004(b), 593.043.

111. *Id.* § 574.004(c), (e).

112. *Id.* §§ 574.004(c), 593.043.

113. *Id.* §§ 574.004(e), 593.050. In the Authors' experiences, one of the most common complaints made by individuals being civilly committed is that their attorney waived their right to appear. The Health and Safety Code is explicit that this decision belongs to the defendant, not counsel. *See id.* § 574.004(e). Waiving a client's right to appear without obtaining consent to do so violates Texas Disciplinary Rule of Professional Conduct 1.02. TEXAS DISCIPLINARY RULES PROF'L CONDUCT R. 1.02, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A.

114. TEX. HEALTH & SAFETY CODE ANN. §§ 574.031(d), (g), 593.050.

115. TEX. CODE CRIM. PROC. ANN. art. 46B.102(a).

116. *Id.* art. 46B.102(b), (d).

civil commitment requirements under the Texas Mental Health Code apply to the civil commitment of the incompetency detainee.[117]

Under Subchapter D, if a defendant received competency restoration services and the head of the program or facility believes the defendant meets the criteria for civil mental health commitment, they will include with their final report to the court a Certificate of Medical Examination (CME) supporting commitment.[118] Prior to the hearing on civil commitment, the program or facility head must also file an additional CME supporting commitment.[119] If an individual does not receive competency restoration services under Subchapter D but is committed immediately under Subchapter E, two CMEs must be filed before the hearing,[120] stating the physicians' opinions on whether the defendant is a person with mental illness and whether the person is dangerous to themselves or others, or will deteriorate if not committed and must include "detailed reason[s]" for each of those opinions.[121] CMEs submitted for inpatient commitment will answer at least one of the dangerousness or deterioration criteria in the affirmative while CMEs for outpatient commitment will answer them all in the negative and additionally opine on outpatient criteria, as discussed below.[122] Defense attorneys reviewing CMEs should always look for detailed reasons for each criterion supporting commitment independently and should be suspicious of CMEs that mark the person as satisfying all three inpatient alternative criteria for commitment.

During the hearing, the burden is on the State to prove each element for commitment by clear and convincing evidence[123] and the Texas Rules of Evidence apply unless they are inconsistent with the Health and Safety Code.[124] Each mental health commitment order issued for a defendant under Article 46B, Subchapter E is appealable to the court of appeals.[125] The appeal is an accelerated appeal with notice due within ten days of the date the judge signs the order.[126]

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

118. *Id.* art. 46B.083(a).

119. TEX. HEALTH & SAFETY CODE ANN. § 574.009(a).

120. *See id.*

121. *Id.* § 574.011(a)(7), (e).

122. *See id.* § 574.011(a)(7)(B)(i)–(iii) (requiring examining physician to document their opinion that the person is "likely to cause serious harm" to themselves or others or meets criteria for distress and deterioration); *see also infra* note 136 and accompanying text (discussing criteria for inpatient civil commitment).

123. TEX. HEALTH & SAFETY CODE ANN. § 574.031(g). The "clear and convincing evidence standard" was adopted following the Supreme Court's opinion in *Addington v. Texas*, determining that a proposed patient's right to due process required a higher burden than preponderance of the evidence, but beyond a reasonable doubt was too high a standard given "the subtleties and nuances of psychiatric diagnosis." Addington v. Texas, 441 U.S. 418, 427, 430–31 (1979).

124. TEX. HEALTH & SAFETY CODE ANN. § 574.031(e), (g).

125. *Id.* § 574.070(a); TEX. CODE CRIM. PROC. ANN. art. 46B.102(d)(3).

126. TEX. HEALTH & SAFETY CODE ANN. § 574.070(b).

a. Inpatient Mental Health Commitment

While the Supreme Court has repeatedly weighed in on commitment of individuals with mental illness,[127] *Foucha v. Louisiana* and *O'Connor v. Donaldson* highlight two main criteria for inpatient mental health commitment relevant here—mental illness and dangerousness.[128] Under *Foucha*, the Court considered the case of an insanity acquittee who remained confined in a mental health facility due to his dangerousness even though he did not have a mental illness—only a personality disorder.[129] The Court held that Foucha's dangerousness alone was not grounds to confine him in a mental health facility; rather, an individual committed to a mental health facility must also have a mental illness.[130] Consistent with *Foucha*, the first element of inpatient mental health commitment criteria in Texas is "the [defendant] is a person with mental illness."[131] Texas law is clear that an intellectual disability, epilepsy, substance abuse, and dementia are not mental illnesses.[132] Personality disorders, including but not limited to antisocial personality disorder, are also not mental illnesses.[133]

Mental illness alone, however, also does not justify confinement. In *O'Connor v. Donaldson*, the Court determined that Donaldson's rights were violated when he was civilly confined for fifteen years in an inpatient mental health facility despite there being no evidence that he was currently a danger to himself or others.[134] In finding for Donaldson, the Court held "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[135]

Consistent with these Supreme Court cases, to be civilly committed to a state hospital, the fact-finder must determine by clear and convincing evidence that:

> (1) the [person] is a person with mental illness; and
> (2) as a result of that mental illness [they]:
> (A) [are] likely to cause serious harm to [themselves];
> (B) [are] likely to cause serious harm to others; or

127. *See, e.g.*, *Addington*, 441 U.S. at 431–33 (describing the burden of proof required for civil commitment); Vitek v. Jones, 445 U.S. 480, 492, 495–96 (1980) (recognizing that loss of liberty due to involuntary commitment is more than loss of freedom from confinement; prisoner was therefore entitled to due process before he could be moved from a correctional facility to a mental health facility for involuntary treatment).

128. Foucha v. Louisiana, 504 U.S. 71, 80 (1992); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

129. *Foucha*, 504 U.S. at 75.

130. *Id.* at 80.

131. TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(a)(1), .035(a)(1).

132. *Id.* § 571.003(14).

133. *See Foucha*, 504 U.S. at 78.

134. O'Connor v. Donaldson, 422 U.S. 563, 564, 568–76 (1975).

135. *Id.* at 576; *see also* Addington v. Texas, 441 U.S. 418, 426 (1979).

> (C) [are]: (i) suffering severe and abnormal mental, emotional, or physical distress; (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.[136]

To prove a defendant meets this criteria by clear and convincing evidence, the State must provide expert testimony and evidence of a recent overt act or continuing pattern of behavior that confirms the likelihood of serious harm or the defendant's distress and deterioration of their ability to function.[137] The failure of the State to present specific evidence of overt acts or continuing patterns of behavior that shows the factual bases of the medical experts' opinions constitutes legally and factually insufficient evidence.[138]

Evidence of overt acts includes not only actions that have caused actual harm but also threats to act or statements of an intent to act.[139] The verbal statement or threat, however, must still tend to confirm the likelihood of serious harm.[140] Insults, no matter how offensive, and the existence of delusions alone[141] do not constitute sufficient overt acts.[142] While the overt act is not required to be dangerous in and of itself, to establish clear and convincing evidence, there must be some "finding that serious harm is probable" as a result of the act.[143]

In considering whether the individual meets commitment criteria based upon the distress and deterioration prong, alleged deficiencies of the patient's living arrangement in the community are neither overt acts nor a pattern of behavior, nor are they a sufficient independent basis upon which to order inpatient confinement.[144] "[A] trial court cannot make a finding [that a defendant satisfies inpatient commitment criteria] simply because inpatient

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136. TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(a)(2), (d), .035(a)(2), (e).

137. *Id.* §§ 574.034(d), .035(e).

138. Johnstone v. State, 961 S.W.2d 385, 388–89 (Tex. App.—Houston [1st Dist.] 1997, no writ).

139. State v. K.E.W., 315 S.W.3d 16, 22 (Tex. 2010); *see also* State *ex rel*. H.S., No. 06-16-00019-CV, 2016 WL 3035971, at *5 (Tex. App.—Texarkana May 27, 2016, no pet.) (mem. op.) (upholding extended mental health commitment of state hospital patient who had made no effort to actually harm anyone but had made statements of the intent to kill others and believed she had authority to do so).

140. *K.E.W.*, 315 S.W.3d at 22–23. A common example of a mild or vague threat that would not confirm the likelihood of serious harm is "just wait until I get out of here."

141. A delusion is a symptom of mental illness, not an overt act sufficient to justify commitment. House v. State, 222 S.W.3d 497, 504–05 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

142. Broussard v. State, 827 S.W.2d 619, 622 (Tex. App.—Corpus Christi–Edinburg 1992, no writ). ("[P]sychotic behavior alone is insufficient to justify commitment on the grounds of mental distress and the deterioration of the ability to function independently.").

143. *K.E.W.*, 315 S.W.3d at 24.

144. Rodriguez v. State, 525 S.W.3d 734, 742–43 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

care may be more reliable than outpatient care."[145] The statute is explicit that poverty alone is an insufficient basis to find that a defendant will experience deterioration, and courts have affirmed this plain language.[146]

Once the fact-finder determines that the State has proven by clear and convincing evidence that the defendant has a mental illness and specifies which of the elements (danger to self, danger to others, or deterioration) form the basis of their commitment decision,[147] the court may commit the defendant to an inpatient mental health facility.[148] Whether the person is confined in an MSU or non-MSU state hospital is at the discretion of HHSC as it was under 46B, Subchapter D.[149]

For individuals committed to an MSU under Subchapter E, the laws and rules governing state hospitals require their transfer to a less restrictive non-MSU when they are found to be no longer manifestly dangerous.[150] Defendants are evaluated by a designated review board for manifest dangerousness not later than the sixtieth day after their admission to an MSU under Subchapter E.[151] The rights of the defendant, as well as other details of this review, are set forth in Title 25 of the Texas Administrative Code, Chapter 415, Subchapter G.[152] If the defendant is found manifestly dangerous and remains in an MSU after their first review board, the board must review them every six months until they are found not manifestly dangerous; however, the defendant's treating professionals can request a review board hearing sooner, subject to review by the facility superintendent.[153] Transfer from an MSU to a non-MSU is not a transfer that is subject to the review or disapproval of the criminal court but is solely at the discretion of HHSC, subject to the review board processes detailed in the regulations.[154]

At both an MSU and non-MSU, an initial inpatient civil commitment *must* begin with a temporary commitment that can last up to forty-five or

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145. *Id.* at 743.

146. *See, e.g.*, State *ex rel*. J.G., No. 06-13-00022-CV, 2013 WL 1858775, at *3–4 (Tex. App.—Texarkana May 13, 2013, no pet.) (mem. op.) (evidence that individual would experience deterioration "because he had no money" constituted insufficient evidence for commitment).

147. An order failing to specify which criterion forms the basis of the court's decision to commit is legally insufficient. State *ex rel.* A.K., No. 12-05000120-CV, 2005 WL 2155217, at *2 (Tex. App.—Tyler Sept. 7, 2005, no pet.) (mem. op.).

148. TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(c), .035(c).

149. *Compare* TEX. CODE CRIM. PROC. ANN. art. 46B.073(c) (providing that, even if defendant's charges include a finding of violence, HHSC has discretion in where to admit them under Subchapter D), *with id.* art. 46B.104 (providing the same for individuals committed under Subchapter E).

150. *Id.* art. 46B.105(a).

151. *Id.*

152. *See* 25 TEX. ADMIN. CODE §§ 415.301–.315 (2022) (Tex. Dep't of State Health Servs., Subchapter G).

153. *Id.* § 415.310(1)(B)–(C).

154. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.105 (does not include review or disapproval by the committing court).

ninety days.[155] While some criminal courts misunderstand the Health and Safety Code and jump straight to an extended civil commitment under Article 46B.102, the language of the Health and Safety Code makes it clear this is not an option.[156] Under a competency restoration commitment, the defendant is court-ordered to receive "competency restoration services" and examination; it is not until the temporary civil mental health commitment that they are court-ordered to receive "inpatient mental health services."[157] A competency restoration commitment therefore does not satisfy the mandatory finding for an extended commitment that the defendant received "inpatient mental health services" for "60 consecutive days during the preceding 12 months."[158]

For temporary inpatient mental health services, the hearing defaults to a judge fact-finder unless the defendant requests a jury.[159] The defendant can waive their right to cross-examine witnesses (in writing), and the court can admit the CMEs as competent evidence and make findings based solely on the CMEs.[160] Where the defendant does not waive the right to cross-examination, the court *cannot* rely solely on the CMEs and, instead, must hear live testimony addressing the criteria for commitment.[161] Unless the defendant waives cross-examination, failure to hear live medical or psychiatric testimony in support of commitment constitutes legally insufficient evidence.[162]

Within thirty days from the start of the defendant's inpatient mental health commitment under 46B, Subchapter E, the facility administrator must assess whether the defendant could be served by outpatient mental health services and, if so, should[163] recommend to the court that the commitment order be modified.[164] If a defendant's commitment is modified to an

155. TEX. HEALTH & SAFETY CODE ANN. § 574.034(g). By default, temporary commitments provide for mental health services to be provided for up to forty-five days; however, up to ninety days can be ordered from the start if the court finds the longer period is necessary. *Id.*

156. *Id.* § 574.035(a)(4).

157. *Compare* TEX. CODE CRIM. PROC. ANN. art. 46B.073(b) (noting that the court commits a defendant under Subchapter D "for purposes of further examination and competency restoration services with the specific objective of the defendant attaining competency to stand trial"), *with* TEX. HEALTH & SAFETY CODE ANN. § 574.035(a)(4) (explaining that the defendant must have received "inpatient mental health services" for sixty days or more to be committed to an extended commitment).

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

159. *Id.* § 574.032(a).

160. *Id.* § 574.031(d-1).

161. *Id.*

162. Martin v. State, 222 S.W.3d 532, 537 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

163. While the language of the statue is "may," because a defendant cannot be confined in an inpatient facility if they are not dangerous under *O'Connor v. Donaldson*, if the facility administrator believes the defendant could be served by outpatient commitment, this is essentially a statement that the person is no longer believed to be dangerous, and the facility administrator therefore has a constitutional duty to notify the court. TEX. HEALTH & SAFETY CODE ANN. § 574.061(a); *see id.* §§ 574.0345, .0355 (listing criteria for outpatient commitment that do not include a finding of dangerousness); O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

164. TEX. HEALTH & SAFETY CODE ANN. § 574.061(a).

outpatient commitment, the new commitment order can extend past the expiration date of the original commitment but by no more than sixty additional days.[165]

Once a temporary inpatient commitment expires, if the person continues to meet inpatient criteria, the court must recommit the defendant, which can be done through another temporary commitment order or an extended commitment.[166] For an extended commitment, the threshold criteria for commitment remains the same, but the State must also prove the defendant's condition[167] "is expected to continue for more than 90 days[] and the proposed patient has received court-ordered inpatient mental health services . . . for at least 60 consecutive days during the preceding 12 months."[168] An extended commitment order that fails to make these two additional findings is legally insufficient.[169] A court cannot issue an extended mental health commitment that lasts longer than twelve months[170] though the facility has an obligation to notify the court before this deadline if the person no longer meets criteria for continued inpatient commitment.[171]

For an extended commitment, the hearing defaults to a jury trial.[172] The defendant or their counsel can waive the right to a jury; however, they cannot waive the requirement for live testimony.[173] A court is explicitly barred from issuing an order for extended mental health services based solely on the CMEs.[174] As before, the failure to hear live testimony to support commitment constitutes legally insufficient evidence.[175] As with a temporary inpatient commitment order, if a defendant's extended inpatient mental health commitment is set to expire and the defendant continues to meet commitment criteria, the State must again prove by clear and convincing evidence that the defendant meets the criteria for extended mental health services, excluding

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165. *Id.* § 574.061(h).

166. *See id.* § 574.034 (including no prohibition on back-to-back temporary commitment orders); *id.* § 574.035(a)(4) (authorizing extended commitment after temporary commitment).

167. "Condition" does not simply mean the person will still have a diagnosis of mental illness in ninety days but that the person is expected to meet criteria for commitment for more than ninety days. *Compare id.* § 574.035(a)(1), (2) (providing for findings related to the person's "mental illness"), *with id.* § 574.035 (a)(3) (using the word "condition" rather than "mental illness" within the same statute). *See* State *ex rel.* Best v. Harper, 562 S.W.3d 1, 12 (Tex. 2018) (noting that where the Legislature used different words in a single statute, they are intended to have different meanings).

168. TEX. HEALTH & SAFETY CODE ANN. § 574.035(a)(3)–(4). This finding is waived if the extended mental health commitment is the second (or more) extended inpatient civil mental health commitment ordered. *See id.* § 574.035(d).

169. State *ex rel.* H.S., No. 12-06-00043-CV, 2006 WL 1791618, at *2 (Tex. App.—Tyler June 30, 2006, no pet.) (mem. op.).

170. TEX. HEALTH & SAFETY CODE ANN. § 574.035(h).

171. TEX. CODE CRIM. PROC. ANN. art. 46B.107(b); *see also supra* note 163 and accompanying text (explaining mandatory nature of notice to the court once person no longer meets commitment criteria without regard to time remaining before commitment order expires).

172. TEX. HEALTH & SAFETY CODE ANN. § 574.032(b), (f).

173. *Id.* §§ 574.032(b), .031(d-2).

174. *Id.* § 574.031(d-2).

175. Martin v. State, 222 S.W.3d 532, 534–35 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

the requirement that the State prove the defendant has been receiving inpatient mental health services.[176]

b. Outpatient Mental Health Commitment

While most people think of inpatient facilities when they think of mental health commitments, outpatient civil commitments are an option for individuals with mental illness. Individuals committed under Subchapter E who are not charged with a finding of violence can be committed straight to outpatient commitment.[177] If outpatient cannot be or is not initially ordered, any inpatient mental health commitment can be modified by the criminal court to an outpatient commitment if the defendant no longer meets criteria for inpatient treatment but does meet criteria for court-ordered outpatient services.[178] Because outpatient settings are less restrictive than inpatient, defense counsel should argue for an outpatient commitment over an inpatient commitment when their client meets the standard for outpatient services. Indeed, for any defendant who has successfully remained in the community in an OCR program but is not restored, outpatient mental health commitment is the only commitment option that should be on the table, if any. Their time in OCR proves they can be safely treated in the community.

Individuals committed directly to outpatient commitment under Subchapter E will first be subject to a temporary commitment like their inpatient counterparts.[179] For individuals who have been subject to Subchapter E commitment to an inpatient mental health facility first, the Health and Safety Code allows the court to commit these individuals to an extended outpatient commitment without first being subject to a temporary outpatient commitment.[180]

For individuals ordered to outpatient services, the court is required to find that appropriate mental health services are available to the defendant and, at least three days before the hearing, identify the person the judge intends to designate as responsible for the services.[181] This person, typically the head of the LMHA that will serve the person once the court orders discharge, must submit a treatment program plan to the court before the hearing; this plan is incorporated into the court's order and includes both mental health care coordination and any other treatment or services available and clinically necessary to assist the defendant in functioning safely in the

176. TEX. HEALTH & SAFETY CODE ANN. § 574.066(f).

177. TEX. CODE CRIM. PROC. ANN. art. 46B.106.

178. *Id.* art. 46B.1055.

179. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.0355(a)(2)(F) (requiring a finding of previous inpatient commitment or outpatient "mental health services" for extended outpatient order).

180. *Id.*

181. *Id.* §§ 574.0125, .0345(a)(1).

community.[182] The LMHA recommendation should specifically include a statement of availability of the proposed outpatient services.[183] The defendant can receive services in the county of the committing court or any county where they have "previously received mental health services."[184] The addition of any "county where a patient has previously received mental health services" is a recent change to the Health and Safety Code and one that is, in practice, important for the success of many individuals.[185] This addition means that individuals whose alleged offense did not occur in their home county or a county where they have friends and family for support (and often housing) can reside and receive outpatient services in a county where they have support as long as they previously received mental health services there.[186]

For outpatient mental health services, the State must prove by clear and convincing evidence that:

> (A) the [defendant] is a person with severe and persistent mental illness;
> (B) as a result of the mental illness, [they] will, if not treated, experience deterioration of the ability to function independently to the extent that [they] will be unable to live safely in the community without court-ordered outpatient mental health services;
> (C) outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to [them] or others; and
> (D) [they have] an inability to participate in outpatient treatment services effectively and voluntarily, [as] demonstrated by: (i) any of [their] actions occurring within the two-year period that immediately precedes the hearing; or (ii) specific characteristics of [their] clinical condition that significantly impair [their] ability to make a rational and informed decision whether to submit to voluntary outpatient treatment.[187]

Again, like inpatient mental health services, "[t]o be clear and convincing . . . the evidence must include expert testimony [unless waived] and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm" the elements above.[188] These overt acts can include both actual acts (e.g., recent refusal to participate in voluntary outpatient services) or statements of intent (e.g., "I will not follow that plan.").[189]

Temporary outpatient mental health commitments, like inpatient mental health commitments, last between forty-five and ninety days.[190] Two CMEs

182. *Id.* § 574.037(a)–(b), (b-2).
183. *Id.* § 574.012(c).
184. *Id.* § 574.037(a).
185. *Id.*
186. *See id.*
187. *Id.* § 574.0345(a)(2).
188. *Id.* § 574.0345(b).
189. *See* State v. K.E.W., 315 S.W.3d 16, 22 (Tex. 2010).
190. TEX. HEALTH & SAFETY CODE ANN. § 574.0345(c).

are still required.[191] Physicians completing these CMEs should answer the questions required by § 574.011(a)(7) in the negative and opine on the outpatient criteria discussed above, modifying the form as necessary to accurately convey their opinion that the person is appropriate for outpatient commitment.[192] It is the Authors' experience that the default language of many available forms is still only the language of § 574.011(a)(7); therefore, defense counsel should review CMEs in advance of the hearing to ensure they satisfy requirements for outpatient and not inpatient commitment (if this is the intent), and take any necessary steps to clarify the CMEs.[193]

For a temporary outpatient commitment, the defendant or their attorney can waive the right to cross-examine witnesses, and when this is done, the court may admit the CMEs, accept them as competent testimony, and make findings solely based on them.[194] Where the detainee does not waive the right to cross-examination, a court cannot order outpatient commitment solely based on the CMEs and must hear testimony.[195] By default, judges are the fact-finders in a temporary commitment hearing unless the defense attorney requests a jury.[196] When a commitment hearing is heard by a jury, the jury decides whether the person is a person with mental illness and meets the criteria for court-ordered services but does not make a finding about the type of services that will be provided.[197]

The standard for an extended outpatient commitment is largely the same as that for temporary commitment with the same additional findings as an extended inpatient commitment—that the defendant's condition is expected to continue for more than ninety days and the defendant has received court-ordered inpatient mental health services under Article 46B for at least sixty days during the proceeding twelve months or outpatient mental health services during the proceeding sixty days under Article 46B.[198]

Similar to extended inpatient commitments, the hearing procedure for extended outpatient commitments changes slightly from that of temporary commitments. For an extended commitment, a court cannot make findings based solely on the CMEs but must hear competent medical or psychiatric testimony supporting each element of commitment.[199] The default fact-finder

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191. *Id.* § 574.009(a).

192. Compare id. § 574.011(a)(7) (setting forth the mandatory elements of a physician's certificate which match those required for inpatient commitment), *with id.* § 574.0345(a), *and id.* § 574.0355(a) (setting forth different criteria for outpatient commitment).

193. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01, cmt. 6 (requiring the attorney to act with "commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf").

194. TEX. HEALTH & SAFETY CODE ANN. § 574.031(d-1).

195. *Id.*

196. *Id.* § 574.032(a).

197. *Id.* § 574.032(f).

198. *Id.* § 574.0355(a)(2)(E)–(F).

199. *Id.* § 574.031(d-2).

for an extended commitment is a jury unless the defendant waives a jury.[200] Orders for an extended outpatient commitment order can be for any length of time up to twelve months.[201] The outpatient provider has a duty to notify the court before the order expires if they believe the defendant no longer meets criteria for continued outpatient commitment so the court can review the defendant for release from the commitment under Article 46B.107.[202]

After the initial extended outpatient commitment, the recommitment process changes a bit. The State is still required to prove each element of the commitment criteria for extended commitment by clear and convincing evidence; however, they are also required to file an application or other documents explaining in detail why the State is requesting renewal.[203] The court can, based on this detailed explanation for why renewal is necessary and the two required CMEs from physicians who have examined the defendant within the last thirty days, make the necessary findings without holding a hearing or receiving testimony.[204] The defendant, defense counsel, or any other individual may request a hearing, or the court can set one sua sponte—where a hearing is requested, the court should not rely solely upon the CMEs but should hear testimony.[205]

During an outpatient commitment, if services are not provided as ordered, the defendant can petition the court for specific enforcement of the order.[206] On the flip side, if the defendant is not participating in the ordered services or there is some other substantial change in the treatment program, the LMHA is required to notify the court, which can set a status conference with the defendant, defense counsel, and the LMHA administrator.[207] The purpose of a status hearing is not to substantially modify the order for outpatient services; instead, if the order is to be modified in a substantial way (including revoking the order for outpatient commitment to order inpatient commitment), the court will hold a hearing on modification of the outpatient commitment after ensuring the defendant and counsel receive sufficient notice.[208]

If modification from outpatient to inpatient commitment is sought because the person, due to mental illness, is believed to present a substantial risk of serious harm to themselves or others and there is probable cause to believe that they cannot remain at liberty pending the modification hearing, the court can order the person temporarily detained in a mental health facility

200. *Id.* § 574.032(b).
201. *Id.* § 574.0355(d).
202. TEX. CODE CRIM. PROC. ANN. art. 46B.107(b)–(c).
203. TEX. HEALTH & SAFETY CODE ANN. § 574.066(a)–(b), (f).
204. *Id.* § 574.066(g).
205. *Id.* § 574.066(c).
206. *Id.* § 574.037(c-1).
207. *Id.* §§ 574.037(c), (c-2), .0665.
208. *Id.* § 574.062.

pending the hearing.[209] The court cannot modify the commitment without a CME dated within the last seven days.[210] At the hearing, the court considers whether the defendant now meets the criteria for inpatient commitment discussed above; however, even if the defendant does meet the criteria, the court is not required to modify the order and may "direct the defendant to continue to participate" in outpatient services—either the original treatment plan or a revised plan submitted to and accepted by the court.[211] The modified order expires on the date the original order was set to expire.[212]

2. Civil Commitment for Individuals with Intellectual Disabilities

For individuals who appear to have intellectual disabilities, Code of Criminal Procedure Article 46B.103 governs their commitments to the SSLCs. As with Article 46B.102 and the Mental Health Code, Article 46B.103 incorporates the Persons with Intellectual and Developmental Disabilities Act (PIDDA) regarding the criteria for civil commitment and the treatment of the defendant–resident during their commitment.[213]

Unlike mental health commitments, commitments to an SSLC under the PIDDA are not divided into temporary or extended commitments, nor do they expire on explicit timelines.[214] Thus, individuals on PIDDA commitments are not subject to periodic judicial review and may come to the attention of the court under Subchapter E only when the SSLC's treating professionals notify the court that the defendant is ready for discharge pursuant to Article 46B.107.[215]

For evidence to be legally sufficient for commitment, the evidence at the hearing must include an Interdisciplinary Team (IDT) report.[216] An IDT is a "group of . . . professionals and paraprofessionals who assess the

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209. *Id.* §§ 574.063, .064.

210. *Id.* § 574.061(b).

211. *Id.* § 574.065(a), (b), (d).

212. *Id.* § 574.065(e).

213. TEX. CODE CRIM. PROC. ANN. art. 46B.103(b)–(c).

214. *Compare* TEX. HEALTH & SAFETY CODE ANN. § 574.034(g) (temporary mental health commitment lasts up to ninety days), *and id.* § 574.035(h) (extended mental health commitment lasts up to twelve months), *with id.* § 593.052 (discussing the order of commitment with no reference to an expiration date).

215. *See supra* note 214 and accompanying text (establishing there is no requirement for periodic judicial review in SSLC commitment statute); *see also* TEX. CODE CRIM. PROC. ANN. art. 46B.107(b) (providing first requirement for SSLC to notify commitment court to review need for continued commitment). *Jackson v. Indiana* still applies, of course, so the individual cannot be confined in an SSLC if they no longer meet commitment criteria. *See* Jackson v. Indiana, 406 U.S. 715, 737–38 (1972). It is possible for a defendant to no longer meet criteria for commitment beyond a reasonable doubt, yet not be put forward for discharge by the facility professionals. Such a scenario would violate the due process rights of the SSLC resident–defendant. *Id*. at 739. Defense counsel who recognize such a violation should file for habeas relief. *See* TEX. HEALTH & SAFETY CODE ANN. § 594.003 (stating that habeas relief remains available to challenge SSLC confinement).

216. TEX. HEALTH & SAFETY CODE ANN. § 593.050(d).

treatment, training, and habilitation needs of a person with an intellectual disability and make recommendations for services for that person" and is required to include the person with an intellectual disability themselves.[217] For the report, the IDT must review the person's "social and medical history"; "medical assessment"; "psychological and social assessment"; and "determination of adaptive behavior level."[218] The IDT is also required to "prepare a written report of its findings and recommendations that is signed by each team member," identifies "the person's habilitation and service preferences and needs[,] and recommend[s] services to address" those needs and preferences.[219]

Under the PIDDA, the standard for SSLC commitment is higher than that in the Mental Health Code—the State must prove beyond a reasonable doubt that:

> (1) the [defendant] is a person with an intellectual disability;
> (2) . . . because of [their] intellectual disability, [they]:
> (A) represent[] a substantial risk of physical impairment or injury to [themselves] or others; or
> (B) [are] unable to provide for and [are] not providing for [their] most basic personal physical needs;
> (1) [they] cannot be . . . habilitated in an available, less restrictive setting [(like a home and community-based services homes)]; and
> (2) the [SSLC] provides . . . services . . . appropriate to [their] needs.[220]

If the State does not prove each of these four elements beyond a reasonable doubt, the court cannot commit the proposed resident for long-term placement in a residential care facility and must dismiss the case.[221]

Regarding the third element above, lawyers should be aware that the Home and Community-Based Services (HCS) Medicaid waiver for people with intellectual disabilities comes with housing, supervision by paid and trained staff 24/7/365, any necessary nursing and medical services, necessary therapies (including but not limited to physical, occupational, speech, and behavioral support), and day habilitation and supported employment.[222] The

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217. *Id.* §§ 591.003(8), 593.013; 40 TEX. ADMIN. CODE § 2.253(20)(A)(iii) (2022) (Tex. Dep't of Aging & Disability Servs., Definitions); *see also In re* A.W., 443 S.W.3d 405, 411–13 (Tex. App.—Eastland 2014, no pet.) (holding that a group of professionals that did not include medical doctors, psychiatrists, psychologists, intellectual disability professional, or A.W. herself was not a properly constituted IDT that could issue a report recommending SSLC placement).

218. TEX. HEALTH & SAFETY CODE ANN. § 593.013(b)(2).

219. *Id.* § 593.013(b)(5)–(6), (e).

220. *Id.* §§ 593.050(e), .052(a).

221. Pratt v. State, 907 S.W.2d 38, 44–45 (Tex. App.—Dallas 1995, writ denied).

222. 40 TEX. ADMIN. CODE § 9.154(c) (2022) (Tex. Dep't of Aging & Disability Servs., Description of the HCS Program and CFC) (describing available HCS program services under Subsection (c)).

majority of HCS waivers are assigned first-come, first-serve; however, certain individuals are entitled to jump the line and take an attrition slot,[223] including individuals being civilly committed to SSLCs—whether purely through the civil process or through 46B Subchapter E—because they are in danger of institutionalization and thus meet the criteria to jump the waiting list.[224] With this in mind, an individual can satisfy the third criterion above only if they cannot be appropriately and safely served, treated, and supervised in an HCS home.[225] In the Authors' experience, this argument has been made in several cases with success and is underused for defendants with intellectual disabilities, particularly individuals with minor alleged offenses or alleged offenses that essentially boil down to a lack of supervision at the time of the alleged offense.[226]

While individuals recommitted under the Mental Health Code can appeal their commitment orders yearly with each new commitment order, the commitment order to the SSLC is a one-and-done proposition, with only the initial commitment order to appeal.[227] SSLC detainees thus cannot use the appeals process to challenge their continued confinement like an individual committed under the Mental Health Code.[228] Therefore, to contest the continued commitment of a defendant committed to an SSLC, a writ of habeas corpus is necessary.[229] An appeal of an original commitment order is to the civil courts of appeal and is given a preferential setting.[230] Unlike mental health commitments, however, the time to file a notice of appeal is not truncated but is, instead, the standard thirty days.[231]

Defendants committed to one of the forensic SSLCs are entitled to a review to determine whether they remain a "high-risk alleged offender" within thirty days of their commitment to the SSLC under Subchapter E.[232] If they are found to be a high-risk alleged offender, they are entitled to annual reviews to determine whether they continue to meet this criteria.[233] Once an

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223. Attrition slots occur when an individual voluntarily relinquishes their waiver, is committed to or confined in an institutional setting for an extended period of time or passes away. *See Interest List Reduction*, TEX. HEALTH & HUM. SERVS. COMM'N, http://hhs.texas.gov/about/records-statistics/interest-list-reduction (last visited Sept. 20, 2022).

224. *See also* 26 TEX. ADMIN. CODE § 261.236 (2022) (Tex. Health & Hum. Servs. Comm'n, Eligibility Criteria) (listing eligibility criteria for admission to SSLC).

225. TEX. HEALTH & SAFETY CODE ANN. § 593.052(a)(3).

226. *See id.*

227. *See* Powell v. State, 487 S.W.3d 768, 771 (Tex. App.—Dallas 2016, no pet.). The appellate court characterized the court's order under Article 46B.107(e) as an order denying release, not a judgment committing the defendant to an SSLC, because they are already committed to an SSLC at the time of the 46B.107 hearing. *Id.*

228. *Id.*

229. TEX. HEALTH & SAFETY CODE ANN. § 594.003.

230. TEX. CODE CRIM. PROC. ANN. art. 46B.103(d)(3); TEX. HEALTH & SAFETY CODE ANN. § 593.056(a), (c).

231. TEX. HEALTH & SAFETY CODE ANN. § 593.056; TEX. R. APP. P. 26.

232. TEX. HEALTH & SAFETY CODE ANN. § 555.003(a).

233. *Id.*

individual is no longer a high-risk alleged offender, they are entitled to transfer from a forensic SSLC to a non-forensic SSLC upon request.[234] Unlike the transfer from an MSU to a non-MSU following a finding that a defendant in a mental health facility is not manifestly dangerous, the SSLC transfer is not automatic, and some defendants may choose to stay at the forensic facility.[235] As with a determination of manifest dangerousness, neither the determination that a defendant is not a high-risk alleged offender nor their subsequent transfer to a non-forensic SSLC are subject to review or disapproval by the committing criminal court.[236] Defendants in forensic SSLCs can be and are referred to the community without first transferring to a non-forensic SSLC.[237]

3. Release from Civil Commitment Under 46B.107

Release of a defendant from civil commitment is governed by Article 46B.107 and generally arises under two scenarios—the head of the state hospital, outpatient program, or SSLC serving the individual notifies the court that the defendant no longer meets criteria for continued commitment, or at the annual review hearing for mental health commitments, the court determines the individual no longer meets the criteria.[238]

As *O'Connor* and *Foucha* demonstrate, circumstances and diagnoses can change, and a commitment that was once constitutional can become unconstitutional over time.[239] The *O'Connor* Court addressed this head-on, holding that it is not enough that a defendant's "[initial] confinement was founded upon a constitutionally adequate basis . . . because even if his involuntary confinement was initially permissible, it could not continue . . . after that basis no longer existed."[240]

For individuals committed under Article 46B, when the program or facility serving the defendant determines that continued court-ordered services are no longer justified, the head of the program or facility must notify the court at least fourteen days before the defendant is to be released from the

234. *Id.* § 555.002(b)(4).

235. *See id.* (requiring that HHSC transfer only those residents who "request" transfer).

236. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.103(c)(1) (providing that the defendant is treated in accordance with the PIDDA); TEX. HEALTH & SAFETY CODE ANN. § 555.003 (containing no mention of court review or approval).

237. *See* ANNUAL REPORT ON FORENSIC SERVICES IN STATE SUPPORTED LIVING CENTERS FOR FISCAL YEAR 2020, *supra* note 74, at 6 (discussing SSLC discharge of residents on forensic commitments with no reference to a resident transfer to a non-forensic SSLC first or as part of discharge).

238. TEX. CODE CRIM. PROC. ANN. art. 46B.107; *see also supra* notes 166–76 and accompanying text (discussing periodic recommitment hearings for individuals on extended mental health commitments under Subchapter E).

239. *See* O'Connor v. Donaldson, 422 U.S. 563 *passim* (1975); *see also* Foucha v. Louisiana, 504 U.S. 71 *passim* (1992).

240. *O'Connor*, 422 U.S. at 574–75 (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

program to give the court time to object to the discharge.[241] The facility or program must simultaneously provide a written statement regarding the defendant's continued incompetency (or, less likely, their having attained competency during their Subchapter E commitment).[242] Upon notice from the facility or provider, the court shall hold a hearing to determine whether the defendant continues to meet criteria for continued commitment.[243] Even where a facility or program does not provide notice, the prosecutor or court—but notably not the defendant or defense attorney—can request a hearing to review the defendant's continued commitment at any time.[244] Like initial commitment hearings, a hearing under Article 46B.107 can be held by electronic broadcast if the elements of Article 46B.013 are satisfied.[245]

a. Release from Inpatient Mental Health Commitment

Though the duty to notify the court when the person no longer meets commitment criteria applies at all times, most mental health providers make this determination and notify the court in advance of a recommitment hearing.[246] Because defendants under inpatient mental health commitments almost always transition to outpatient commitments, state hospital staff will typically work with the LMHA who will be responsible for providing outpatient commitment services to develop the service plan that will be incorporated into the court's order under Health and Safety Code Section 574.037(b) before notifying the court of the intent to discharge the defendant.[247] Where this is done, the hearing for discharge from the state hospital under Article 46B.107(d) will become a hearing on both issues—whether the individual meets criteria for the state hospital under § 574.035 and, if not, whether they meet criteria for extended outpatient commitment under § 574.0355.[248] When the court orders a defendant's commitment to outpatient services following inpatient commitment, the same requirements and processes for extended outpatient commitment described above apply.[249]

While the LMHA can be ordered to provide outpatient treatment, they cannot generally be ordered to provide housing for an individual unless they have housing available (which is rare).[250] In practice, this lack of housing can

241. TEX. CODE CRIM. PROC. ANN. art. 46B.107(a)–(b).

242. *Id.* art. 46B.107(c).

243. *Id.* art. 46B.107(d).

244. *Id.*

245. *Id.* arts. 46B.107, .013.

246. *Id.* art. 46B.107; *see also supra* notes 166–76 and accompanying text (discussing recommitment hearings that occur when extended mental health commitment orders expire).

247. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.037(b).

248. *See id.* §§ 574.035, .0355; *see also* TEX. CODE CRIM. PROC. ANN. art. 46B.107(d).

249. *See supra* Section IV.A.1.b (discussing requirements for CMEs, required findings, etc. for outpatient commitment).

250. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.037.

make it exceedingly difficult for a defendant, state hospital, and LMHA to craft an outpatient plan that criminal courts will approve for individuals charged with more serious offenses.[251] For individuals who have been committed for at least three years to an inpatient mental health facility, the Home and Community-Based Services-Adult Mental Health (HCBS-AMH) Medicaid waiver may be an option.[252] This waiver is the only mental health waiver in Texas that provides defendants with housing and has been instrumental in discharging many long-stay state hospital patients since its inception a few years ago.[253] Defendants and defense counsel who believe a defendant may qualify should push for state hospital staff to have the LMHA assess the defendant for the waiver. Eligibility criteria and implementation specifics for this waiver are found in Title 26 of the Texas Administrative Code, Chapter 307, Subchapter B.[254] Though they are not widely available, a defendant can also transition to one of the four new "step-down" programs on an outpatient commitment if their LMHA operates one.[255]

b. Release from SSLC Commitment

First and foremost, release from an SSLC looks quite different from release from a state hospital because the PIDDA does not contemplate outpatient commitment.[256] Individuals discharging from SSLCs are therefore not subject to a continued commitment order unless they are dually diagnosed

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251. TEX. HEALTH & HUM. SERVS. COMM'N, NEXT STEPS: A STUDY OF STATE HOSPITAL STEP-DOWN SERVICES, at 10 (Sept. 2022), https://www.hhs.texas.gov/sites/default/files/documents/next-steps-state-hospital-step-down-services-rider-57.pdf (summarizing common barriers to state hospital discharge of forensic patients, including the lack of supported housing influencing judges' decisions about facility discharge).

252. 26 TEX. ADMIN. CODE § 307.53(b)(1) (2022) (Tex. Health & Hum. Servs. Comm'n, Eligibility Criteria and HCBS-AMH Assessment). A defendant can be eligible for a HCBS-AMH Medicaid waiver if they meet criteria after an assessment and have been confined in an inpatient mental health facility for three cumulative years during the last five years, had "two or more psychiatric crisis and four or more discharges from correctional facilities during the" preceding three years, or had "two or more psychiatric crises and fifteen or more" emergency department contacts in the last three years. *Id.* § 307.53(a)–(b). While it is possible for a defendant to satisfy one of the other criteria, individuals on Subchapter E commitments are most likely to satisfy the first criteria. *Id.* § 307.53(b)(1).

253. *See* TEX. HEALTH & HUM. SERVS. COMM'N, HOME AND COMMUNITY-BASED SERVICES: ADULT MENTAL HEALTH, https://www.hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/behavioral-health-provider/hcbs-amh/hcbs-amh-overview-flyer-eng.pdf (last visited Sept. 20, 2022).

254. 26 TEX. ADMIN. CODE §§ 307.51–.57 (2022) (Tex. Dep't of Health and Hum. Servs. Comm'n, Subchapter B).

255. *See* NEXT STEPS: A STUDY OF STATE HOSPITAL STEP-DOWN SERVICES, *supra* note 251, at F-1–F-2. Step-down units are currently operated by Bluebonnet Trails in Seguin and Georgetown, Helen Farabee in Wichita Falls, and The Harris Center in Houston. *Id.* at F-2.

256. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 594.001–.045 (containing no provisions for outpatient commitment).

with a mental illness and meet the standard for outpatient mental health commitment.[257]

Individuals discharging from SSLCs, however, are automatically entitled to an HCS waiver upon their discharge, providing them with housing, 24/7/365 supervision by awake staff (if necessary), day programming and employment, and all medically necessary services and therapies.[258] In practice, when the facility IDT determines the individual is ready for discharge to an HCS program, they develop a highly detailed Community Living/Discharge Plan (CLDP).[259] In developing the CLDP, the IDT identifies the needs of the defendant and providers who can meet those needs, visits prospective providers, selects a provider, and ensures the provider is set up to meet the needs of the defendant upon discharge.[260] Defense counsel should ensure that the facility does not notify the criminal court until the provider is selected and the CLDP is completed.[261]

Though the defendant is "discharged" from the facility for purposes of 46B.107 and not subject to an outpatient commitment order, in practice, HHSC does not consider the individual to be immediately released from their custody and control. SSLC staff periodically visit the provider and defendant in the HCS home during at least the first ninety days following the defendant's facility discharge and departure.[262] If SSLC staff identify deficiencies in the care provided by the HCS provider, they can take steps to

257. *See supra* Section IV.A.1.b (discussing standards and process for outpatient commitment).

258. 40 TEX. ADMIN. CODE § 9.154(c) (2022) (Tex. Dep't of Aging & Disability Servs., Description of the HCS Program and CFC).

259. *Id.* § 2.278 (Tex. Dep't of Aging & Disability Servs., Community Living/Discharge Plan for Alternative Living Arrangements) (setting forth requirements for the contents of the CLDP).

260. *Id.* § 2.275 (Tex. Dep't of Aging & Disability Servs., Accessing Alternative Living Arrangements for an Individual Residing in a State MR Facility Who Has the Ability to Provide Legally Adequate Consent or Has a Legally Authorized Representative (LAR)).

261. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.107(b) (requiring notice by the head of the facility to the court). In the Authors' experience, some SSLCs jump the gun and notify a court prematurely under 46B.107 before a provider is identified and prepared and before a CLDP is completed. When the courts then have the requisite hearings under Article 46B.107(d), there is often insufficient evidence to combat the State's arguments regarding commitment criteria, especially as to the availability of a less restrictive setting. *See* TEX. HEALTH & SAFETY CODE ANN. § 593.052(a)(3); *supra* notes 222–26 and accompanying text (discussing the role having an identified and available HCS provider plays in courts' consideration of SSLC commitment criteria). Such hearings then prejudice a defendant whose IDT is typically unwilling to try again for discharge of the defendant for many months. Defense attorneys representing defendants in SSLCs in hearings under 46B.107 should ask for the CLDPs and, if they are not ready, move for continuances to allow the SSLC time to appropriately follow the process to identify and prepare the providers and develop the CLDPs. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01, cmt. 6 (requiring the attorney to act with "commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf").

262. *See* Settlement Agreement at II.T.2.a, United States v. Texas, No. A09-CA-490SS, (W.D. Tex. June 26, 2009) (requiring HHSC to implement by June 2011 post-move monitoring visits during first ninety days for all individuals moving to the community from SSLCs); *id.* at App. C (setting forth a form for facility use during 7-, 45-, and 90-day post-move monitoring visits).

recommit the individual back to the facility through the court process.[263] Likewise, even after the defendant is considered discharged and released from the facility, the local intellectual and developmental disability authority remains involved, ensuring services are provided as required under the individual's community treatment plan.[264] If after discharge the defendant deteriorates and meets commitment criteria again, as long as charges remain pending, the court can recommit the defendant to an SSLC under Subchapter E, following the procedures set forth under Article 46B.103 and described above.[265] In the Authors' experience, such recommitments are exceedingly rare.

B. Subchapter F: Civil Commitment with Charges Dismissed

Subchapter F is made up of a single statute—46B.151—and governs civil commitment of individuals whose charges are dismissed by the court following a motion by the State.[266] This provision can come into play at any time—a prosecutor can elect to dismiss charges and proceed under Subchapter F as soon as a defendant has been suggested incompetent to stand trial (skipping the finding of incompetency and competency restoration treatment altogether) or can proceed under Subchapter F after years of commitments under Subchapter E.[267]

No matter when the 46B.151 process begins, as a matter of first inquiry, the court must determine whether there is evidence to support a finding of mental illness or intellectual disability.[268] If there is evidence to support the finding, the court must enter an order transferring the individual to the local probate court.[269] The order must state that the charges have been dismissed against the individual and it can order either the detention of the individual for a short period of time necessary to promptly initiate civil commitment proceedings or order the individual's release.[270] Because there are no longer

263. If charges remain pending, a second recommitment proceeding can occur under Texas Code of Criminal Procedure 46B.103 if the requirements for commitment are met, including the IDT report and recommendation. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.103 (providing commitment to an SSLC is governed by PIDDA requirements); TEX. HEALTH & SAFETY CODE ANN. § 593.041(d) (requiring an IDT report and recommendation completed within last six months before a person can be committed to an SSLC). If charges have been dismissed and the individual's community IDT believes they meet commitment criteria, they can follow the process set forth in Texas Health and Safety Code Chapter 593, Subchapter C. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 593.041–.056.

264. 26 TEX. ADMIN. CODE § 331.11(b), (d), (f) (2022) (Tex. Dep't of Health and Hum. Servs. Comm'n, LIDDA's Responsibilities).

265. *See supra* note 263 and accompanying text (explaining recommitment under Texas Code of Criminal Procedure Article 46B.103 to an SSLC).

266. TEX. CODE CRIM. PROC. ANN. art. 46B.151.

267. *Id.* art. 46B.004(e).

268. *Id.* art. 46B.151(a). As with Subchapter E, only individuals with mental illness and individuals with intellectual disabilities can be confined pursuant to Subchapter F. *Id.*

269. *Id.* art. 46B.151(b); TEX. HEALTH & SAFETY CODE ANN. §§ 574.008(a), 593.041(c).

270. TEX. CODE CRIM. PROC. ANN. art. 46B.151(b), (d).

charges pending nor is there yet an order for civil commitment, the individual can be held for only the extremely short period of time necessary to initiate inpatient commitment.[271] The order transferring the defendant under Article 46B.151 is not itself an appealable order,[272] though any civil commitment order entered after transfer would be as set forth in the Mental Health Code or PIDDA.[273]

This transfer under Article 46B.151 is not contingent—the criminal court does not retain jurisdiction over the defendant following the transfer.[274] If the probate court ultimately determines the individual does not meet criteria for civil commitment, the criminal court cannot undo the transfer or reinstate charges to try and keep the defendant subject to the court's jurisdiction and supervision.[275]

V. COUNTING TIME UNDER ARTICLE 46B

While a defendant is confined under Subchapter D or E, time is an additional factor that can limit the authority and jurisdiction of the court. Specifically, an individual cannot be confined under Article 46B for longer than the maximum penalty for their alleged crime, excluding any possible penalty enhancements.[276]

For purposes of determining confinement that counts towards the maximum penalty, time begins to run on the date the court finds the person incompetent to stand trial and includes the time the individual waits in jail to start restoration treatment or be civilly committed, the time spent in competency restoration treatment under Subchapter D, and time spent in civil commitment under Subchapter E.[277] If the defendant is restored, time stops upon the defendant's restoration.[278] Defense counsel should also be aware that if a defendant is determined incompetent to stand trial, is restored, and is subsequently found incompetent again—during the same incarceration or on a motion to revoke community supervision that was ordered during a period when the defendant was restored—the first incompetency time periods are added to any subsequent incompetency time periods when determining maximum confinement.[279]

It is incumbent upon defense counsel to keep track of these deadlines and ensure their clients are not confined too long or, if counsel realizes the

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271. *See id.* art. 46B.151(b)(1) (requiring prompt initiation of civil proceedings).

272. Potts v. State, No. 14-14-00939-CV, 2015 WL 732670, at *1 (Tex. App.—Houston [14th Dist.] Feb. 19, 2015, no pet.) (mem. op.).

273. TEX. HEALTH & SAFETY CODE ANN. §§ 574.070, 593.056.

274. TEX. CODE CRIM. PROC. ANN. art. 46B.151.

275. *See id.* art. 46B.151(b) (stating that all charges are dismissed).

276. *Id.* art. 46B.0095(a); *Ex parte* Reinke, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012).

277. TEX. CODE CRIM. PROC. ANN. art. 46B.0095(c).

278. *Id.*

279. *Id.* art. 46B.0095.

length of confinement has exceeded the maximum allowed, to file a motion to release the defendant from confinement or supervision. Though the court will not typically do this on its own motion, once defense counsel files such a motion, the court must dismiss the charge, and the facility confining the defendant must release them.[280]

The current state hospital waitlists have wreaked havoc with this commitment math, and it is not uncommon for Class A and B misdemeanor defendants, whose maximum confinement periods are one year and 180 days respectively,[281] to "time out" while waiting for a bed or while receiving competency restoration services.[282] For any defendant who is waiting for a program, is in a competency restoration program, or is on a civil commitment when their maximum confinement date arrives, the defense counsel must move to dismiss the charges.[283] Though defendants whose alleged offenses have shorter maximum penalties are obviously more likely to be subject to timing out, individuals charged with felonies can also be caught up in this trap.[284]

Once a criminal court loses jurisdiction because a defendant has timed out, the court no longer has authority to disapprove of the defendant's release under Subchapter E, and any order authorizing the defendant's continued confinement is void.[285] If the former defendant meets criteria for continued commitment, they can be committed solely under the civil commitment procedures found in the Texas Health and Safety Code.[286] Article 46B.151 is not a vehicle to transfer a defendant whose charges have timed out.[287]

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280. *Id.* art. 46B.010.

281. TEX. PENAL CODE ANN. §§ 12.21–.22.

282. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.0095(a), (c)(2) (providing a person cannot be committed under article 46B to any facility or program other than OCR for a period longer than the maximum term provided by law for the offense and that time in jail awaiting transfer after an order is included within the relevant time).

283. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01, cmt. 6 (requiring the attorney to act with "commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf").

284. *See, e.g.*, *Ex parte* Reinke, 370 S.W.3d 387, 388 (Tex. Crim. App. 2012) (considering the case of a defendant who had been confined in the state hospital system as incompetent to stand trial for over twenty years—the maximum penalty for his second-degree felony charge).

285. *See* Nix v. Texas, 65 S.W.3d 664, 667–68 (Tex. Crim. App. 2001) *abrogated on other grounds by* Wright v. State, 506 S.W.3d (Tex. Crim. App. 2016) (explaining that if a court lacks jurisdiction, any order it issues is void and "accorded no respect due to a complete lack of power to render the judgment in question").

286. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.001–.037 (governing proceedings for civil commitment under the Texas Mental Health Code).

287. *See Nix*, 65 S.W.3d at 667–69. Because any order the court issues after losing jurisdiction when a defendant times out is void, an order transferring the defendant to probate court under 46B.151 would likewise be void. *See id.*

VI. ANCILLARY HEARINGS: MEDICATION HEARINGS UNDER 46B

A defendant's incompetency to stand trial is not a declaration that they lack capacity to consent to treatment. Thus, individuals found incompetent to stand trial retain the right to consent or refuse to consent to medical and mental health treatment.[288] Where an incompetency detainee refuses psychotropic medications, however, the law does allow for some of these detainees to be medicated over their dissent.[289]

Individuals found incompetent to stand trial can be subject to court-ordered medication if they remain in jail for more than seventy-two hours awaiting transfer to a competency restoration program, are committed to a facility (JBCR, hospital, or SSLC) under Subchapter D or E, or are individuals who have been restored to competency and return to jail to await trial.[290]

In any of these situations, the defendant can be subject to court-ordered medications for two different purposes: to address the defendant's dangerousness or to medicate for competency.[291] Medicating for a defendant's dangerousness is governed by *Washington v. Harper* in which the Supreme Court of the United States held that the State could administer antipsychotic drugs to an inmate with mental illness against their will if the person is dangerous to themselves or others and the treatment is in their medical interest.[292] In Texas, even if the goal of medication is not dangerousness but the defendant's restoration to competency, the *Harper* inquiry must happen first.[293]

The Health and Safety Code hearings under *Harper* occur in the local probate court[294] where the State must prove by clear and convincing evidence that, as a result of the defendant's mental illness or intellectual disability, they present a danger to themselves or others and that medicating the defendant is in their best interests.[295] In determining whether the defendant is dangerous

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288. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003 (finding of incompetency is a finding only regarding the defendant's ability to consult with their lawyer with a reasonable degree of rational understanding and their factual understanding of the proceedings; no findings are made regarding their capacity to consent to treatment).

289. *See generally id.* art. 46B.086 (discussing court-ordered medications).

290. *Id.* art. 46B.086(a). Individuals released to OCR programs may be subject to medication orders as part of their bail conditions. *Id.* arts. 46B.071(d)(2), .072(d)(2).

291. *Id.* art. 46B.086(b).

292. Washington v. Harper, 494 U.S. 210, 227 (1990).

293. TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(4) (stating that the procedure in Article 46B to medicate for competency occurs only after defendant has been found not to meet criteria for medication under the Texas Health and Safety Code).

294. TEX. HEALTH & SAFETY CODE ANN. §§ 574.106(c), 592.156(d). Probate courts appoint counsel from their local bar who represent defendants at these hearings rather than defense counsel. *Id.* §§ 574.105(1), 592.155(1).

295. *Id.* §§ 574.106(a-1)(2)(A), 592.156(b)(2); *see also* State *ex rel.* D.B., 214 S.W.3d 209, 212 (Tex. App.—Tyler 2007, no pet.) (summarizing trial court findings that D.B. lacked capacity but was not dangerous, so the inquiry for medication moved to the *United States v. Sell* analysis).

to themselves or others, the court must determine whether the patient has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to themselves or to another while in the facility or during the six months preceding the date the patient was placed in the facility.[296]

Only after this process is followed and the defendant is determined not dangerous—and therefore, unmedicable under *Harper*—can the State seek to medicate the defendant solely to make them competent to stand trial.[297] Court-ordered medications for nondangerous individuals who are incompetent to stand trial are governed by *United States v. Sell*.[298] In *Sell*, the Court determined that due process constraints do allow the State to forcibly medicate a non-dangerous individual for the purpose of rendering the defendant competent to stand trial, but only if the court finds: (1) the treatment is medically appropriate, (2) it is substantially unlikely that the medication has side effects that undermine the fairness of the trial, (3) there are not less intrusive alternatives to obtain and maintain the defendant's competency, and (4) the State has a clear and compelling interest in the defendant's obtaining competency to stand trial, which often turns on whether the charge is serious enough that bringing the defendant to trial outweighs the defendant's interests in not being forcibly medicated.[299] The Texas Legislature has codified these required findings from *Sell* in Article 46B.086(e), which requires the court to find each of these elements by clear and convincing evidence before ordering medication for competency.[300]

For jails seeking to medicate inmates under *Harper* or *Sell*, they can only do so if they have a licensed psychiatrist on staff or under contract.[301] In practice, this requirement of having a psychiatrist on staff or under contract to create and monitor the mandatory treatment plan eliminates many jails from considering obtaining court-ordered medication while the defendant remains in jail.[302]

Forced medication orders expire on the earlier of the 180th day after the defendant returns to jail; the defendant is acquitted, convicted, or enters a plea; or the charges are dismissed.[303] If the defendant is not returned to jail

296. TEX. HEALTH & SAFETY CODE ANN. §§ 574.1065, 592.157.

297. TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(4).

298. United States v. Sell, 539 U.S. 166, 169 (2003).

299. *Id.* at 179–80.

300. TEX. CODE CRIM. PROC. ANN. art. 46B.086(e).

301. *Id.* art. 46B.086(a)(3).

302. *See* TEX. HEALTH & HUM. SERVS. COMM'N, HEALTH PROFESSIONS RESOURCE CENTER: TRENDS, DISTRIBUTION, AND DEMOGRAPHICS PSYCHIATRISTS, at 1 (May 2021) https://www.dshs.texas.gov/sites/default/files/chs/hprc/publications/2020/Psychiatrist_FactSheet_2020.pdf (showing a geographic distribution of psychiatrists in Texas, including over 150 counties with no psychiatrist generally); Nathan P. Morris & Sara G. West, *Misconceptions about Working in Correctional Psychiatry*, 48 J. AM. ACAD. PSYCHIATRY & L., no. 2, 1 (Feb. 12, 2020) https://jaapl.org/content/early/2020/02/12/JAAPL.003921-20 (noting the particular difficulty correctional facilities have with hiring and retaining mental health professionals).

303. TEX. HEALTH & SAFETY CODE ANN. § 574.110(b).

because they remain incompetent and the court proceeds under Subchapter E or F, the order for court-ordered medication expires at the end of the commitment period.[304]

304. *Id.* § 574.110(a).