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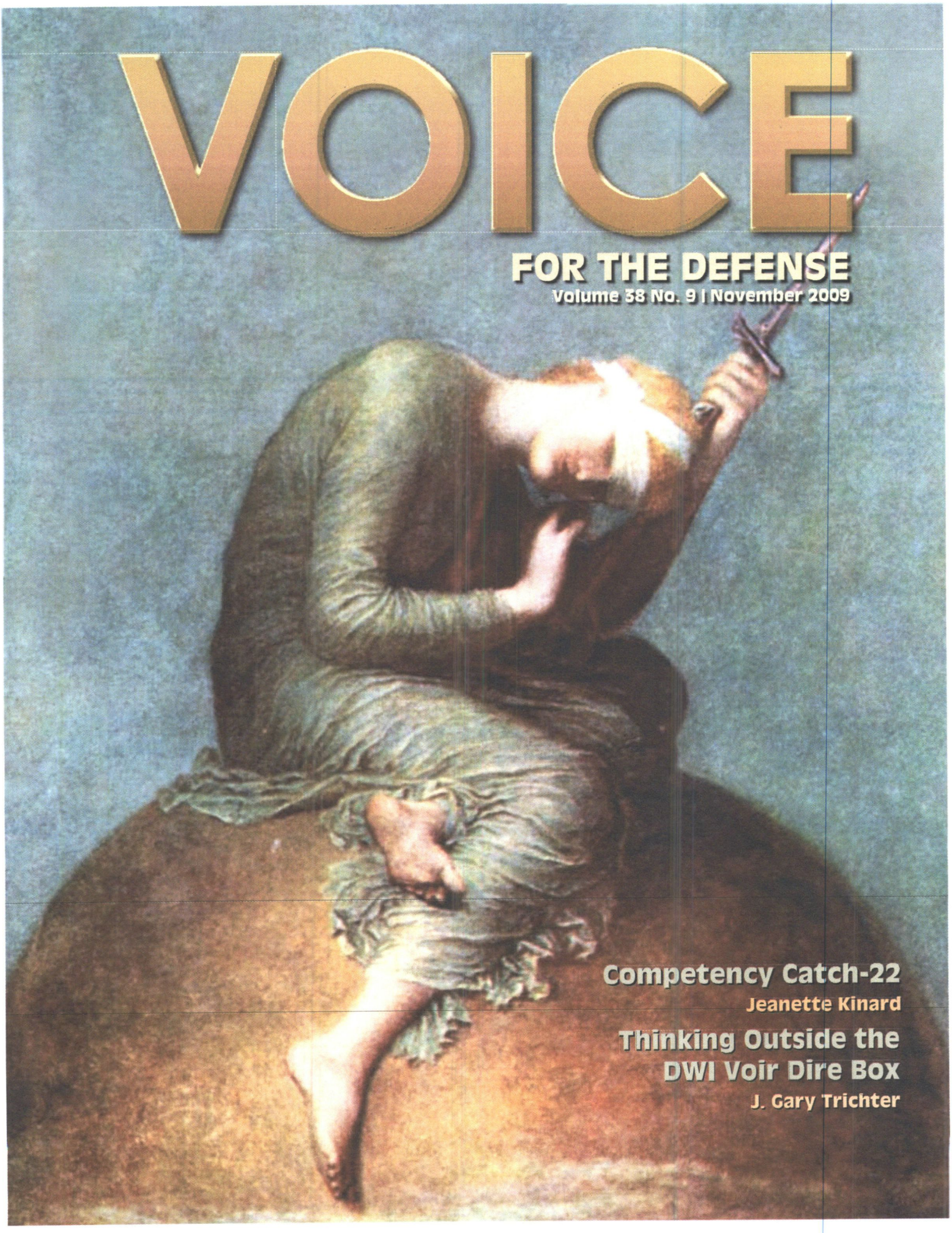

Competency Catch-22

Jeanette Kinard

Thinking Outside the DWI Voir Dire Box

J. Gary Trichter

COMPETENCY CATCH-22: A PLEA FOR ATTORNEY DISCRETION WHEN CONSIDERING COMPETENCY EVALUATIONS FOR DEFENDANTS FACING MINOR CHARGES

George is a 43-year-old schizophrenic man who was making almost daily calls to 911. After representing him three times for "Silent or Abusive Calls to 911" with three evaluations of incompetent, his attorney realized that George was spending more than the maximum sentence for his minor crime(s). George had a lot to lose because he received government benefits and had a stable place to live. After the fourth arrest, counsel realized that the revolving doors of evaluations and restoration to competency were probably not in George's best interest and, at that point, tried to fashion a better solution with the prosecutor.

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If you represent a defendant with mental health problems and that client has been accused of committing a class B misdemeanor,[1] he faces a maximum of six months in jail.[2] But the average number of days a defendant would spend in custody is generally much lower than the maximum sentence. One way to arrive at a sentence less than the maximum is for defendants to make a bargain and just plead guilty to the charge. However, to plead guilty, they must be competent to stand trial.[3] In Texas, the common practice is to move for a competency evaluation whenever there is a good faith or reasonable doubt as to the competency of a defendant. But, due to the increasing number of defendants with questionable competency, the decreasing number of state hospital beds, and other bureaucratic obstacles, a defendant waiting on a competency evaluation will most likely be held in custody longer than the average client. This is the competency catch-22, in which the legal practitioner must make a decision regarding what is in the mentally ill client's best interest (spending less time locked up) or regarding his ability to clearly understand and communicate about the proceeding—and probably their desire to spend less time behind bars.

According to the most recent Bureau of Justice Statistics report regarding mental health and the criminal justice system, in 2005 more than half of all prison and jail inmates in the United States had at least one mental health problem.[4] In the Texas penal system, there are approximately 43,000 prisoners, 55,000 probationers, and 21,000 parolees with a mental health diagnosis.[5] These numbers do not include the roughly 170,000 mentally ill inmates Texas county jails admit yearly.[6] The recent figures are staggering when compared to the number of mentally ill inmates encountered in the United States just 50 years ago, a number that has grown approximately 500% since then.[7] There is also a strong correlation between the gradual decrease in the number of mentally ill patients being treated in state hospitals and the increase in inmates with mental health problems.[8] Unfortunately, the burden has just shifted from one state-run facility to another, with a new concern being recidivism as opposed to relapse. Recidivism of mentally ill inmates is high, with approximately one quarter of inmates, in both jail and prison, also carrying a criminal record with three or more incarcerations.[9]

The numbers strongly indicate many criminal defendants are dealing with mental health issues. Most criminal defense attorneys either have, or will, represent a client who suffers from mental illness. For an attorney to be the best advocate possible for these mentally disabled clients, recognition of what is in the client's best interest is crucial. Are competency evaluations in his best interest? Many criminal defense advocates answer this question with a blanket yes. However, the answer is not always so simple.

Why Seek a Competency Evaluation?

There are many good reasons to request a competency evaluation. For example, if the defendant is found incompetent to stand trial, the state will be required to restore that defendant to competency in order to be tried. It is generally in the client's best interest to be restored to competency. Failing to obtain treatment can, in some cases, seriously harm a person's mental health. Also, there are treatments available that restore competency without significant deprivation of liberty. These outpatient restorative intervention programs are available in at least four Texas counties. Moreover, clients who are not flagged as being incompetent, generally, face either probation or jail. Neither are adequate solutions. Probation generally fails because the mentally incompetent defendant will often violate that probation. Jails, on the other hand, lack the resources to properly care for inmates with mental illness. When the jailors are unaware of any mental health issues, they most likely will not attempt to treat the afflicted prisoner. Thus, the inmate is not treated for the underlying mental health issue behind the criminal act, which leads to high rates of recidivism. Though not exhaustive, this list indicates several of the reasons why a criminal defense attorney would motion to the court regarding competency to stand trial.

Why Avoid Competency Evaluations?

The most obvious reason defense attorneys would not seek evaluation of competency, despite their suspicions, is the time disparity. Clients charged with petty misdemeanors will sometimes spend more time waiting for—or in—a hospital in order to be restored than they would spend in jail if convicted. Also, an attorney could feel that disclosure of such suspicions breaches the attorney-client privilege. The often rightfully cynical attorney might feel that the client will not really get help. Thus, the lawyer might feel there is no point to try to have the client restored. Lastly, many criminal defense attorneys define zealous advocacy as "getting the client off the hook" or obtaining the most lenient sentence possible. When these motivating factors operate in the defense counsel's mind, he or she will likely feel responsible for that additional time spent in the state's custody for the competency evaluation. There are certainly more reasons why attorneys would purposefully avoid a competency evaluation, but these four highlight a handful of the main drivers behind this choice.

Competency Rules and Law in Texas

Article 46B of the Texas Code of Criminal Procedure describes

the process by which competency issues are addressed. The competency standard holds that a defendant must have: (1) a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, or (2) a rational as well as factual understanding of the proceedings against him.[10] Interestingly, the Texas statutory construction is more conducive to findings of incompetence than the Dusky standard, which includes an "and" conjunction that requires a lack of both consultative ability and understanding of the adversarial proceedings. When presenting information that tends to prove either prong of the competency standard, the defendant's burden of proof requires that either item (1) or (2) be proven by a preponderance of the evidence.[11] When a judge encounters evidence suggesting that a defendant is not competent to stand trial, he must motion for a competency evaluation.[12] However, the prosecution or defense counsel *may* motion for an evaluation when evidence suggests the possibility of incompetency, but they are not required to make this motion as is the judge.[13]

The legal implications of a finding of incompetency are numerous. First, the United States Supreme Court has found the conviction of an incompetent defendant to be a violation of the United States Constitution's Fourteenth Amendment Due Process Clause.[14] A defendant who pleads guilty to a charge must be competent enough to understand the implications of that guilty plea.[15] Once a defendant is found incompetent, which under the Texas standard is more likely as compared to other jurisdictions, due process requires that they not undertake the adversarial system until competency is restored. The maximum period of treatment for an incompetent defendant is 120 days, with one possible 60-day extension,[16] though the waiting period and treatment cannot generally exceed the maximum sentence possible for the charged crime.[17]

When the question of competency arises, Texas defense attorneys are ethically bound by the State Bar Rules, which specifically state:

> A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such actions should be taken to protect the client.[18]

This statutory construction appears to have left open the option of attorney discretion via the last clause, which mandates action only when the attorney reasonably believes both that the client is legally incompetent and that the actions should be taken to protect the client. But, how discretionary is this language? A competency evaluation could be considered necessary to protect the client from due process violations, or from their own mental illness. Conversely, an attorney might believe that avoidance of the often disproportionate time in custody during the wait for a competency evaluation and the time it takes to restore an incompetent client better protects the client. Regardless, the language of State Bar Rule 1.02(g) does not absolutely bar attorney discretion in deciding whether or not to seek a competency evaluation.

The Texas Bar Rules also obligate candor, which requires an attorney to not "knowingly . . . make a false statement of material fact" to the court.[19] A knowing omission by the attorney regarding his reasonable belief that a client is incompetent might violate this rule. This possible violation stems from the fact that the omission is equivalent to knowingly making the false statement that a client is competent to stand trial. In Texas, as in most jurisdictions, a defendant is presumed competent.[20] Failure to bring up a reasonable belief in the incompetency of a defendant equates to a silent assertion that the defendant is competent, which might violate the rule regarding candor. But, does the rule regarding candor trump the rule that mandates reasonable action to seek protective orders, which does allow for attorney discretion? Or, does the attorney-client privilege prevail over candor in this situation?

Dr. John King, of Washington and Lee University School of Law in Lexington, Virginia, commenting on the issue of candor and competency, indicated that candor is no more important an ethical talisman than zealous representation or protection of client confidences and secrets.[21] He also implies that most codifications include candor in order to "give lip service" to this "basic systemic value," without recognizing the fact that it is "fundamentally at odds with other values" such as zeal and privilege.[22] Accordingly, he believes defense attorneys should take the rule of candor with a grain of salt when it runs up against other codified ethical obligations. Given that the Texas Bar Rules include a version of this same conflict, and that omissions are not always silent assertions of material fact,[23] it appears that the rule regarding representation of incompetent defendants could be followed without violating the candor requirement. Even if it was a violation of candor, it is arguable that zealous representation of a defendant's best interest would not necessarily sink a defense attorney below that unethical line set by the State Bar because these conflicting ethical obligations do not appear to trump each other.[24]

Because the Texas Bar Rules do not explicitly address the rules of professional conduct in regard to raising the issue of competency, many attorneys look to the American Bar Association's (ABA) Criminal Justice Mental Health Standards. Specifically, these standards state:

> Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence and permit such a motion even over the defendant's objection.[25]

Clearly, the ABA standards do not allow for attorney discretion regarding competency evaluations, and candor trumps even client advocacy. Most commentators improperly place this same mandate of disclosure on defense attorneys.[26] Conversely, one commentator has aptly stated that the ABA mental health standards regarding raising the issue of competency as "outrageous" because it abrogates both the attorney-client privilege and the role of the attorney as advocate for her client.[27] This kind of automatic disclosure, once doubts regarding a client's competency arise, would fail to consider the negative legal effects of such a motion, and could end with numerous undesirable impacts to both the client and the penal system.

For example, oftentimes for minor offenses a defendant would face far more time in state or county custody due to a competency evaluation than if she just served the maximum sentence for the crime.[28] The negative impact to the client is the arguably unnecessary extra time incarcerated, while the state is also affected due to the extra cost of housing and treating this prisoner. For these and other reasons, some practitioners agree that for *misdemeanors,* the defense presumption should be avoidance of incompetency evaluations.[29] Below are three examples of misdemeanor cases where the defense counsel was faced with the difficult decision of whether or not to raise the competency issue. The factors vary from case to case, but the conflict between the best interest of the client and competency is common through each case.

Richard:

Richard is a client that the Travis County Mental Health Public Defender (MHPD) represented last year. He was charged with the minor offense of Criminal Trespass.[30] He is schizophrenic, but lives with his mother and is active with Mental Health and Mental Retardation (MHMR). Psych medication does not seem to work with Richard. At the time of the last case, a competency motion was made and he was found incompetent. Between the time he spent waiting in the jail for a bed to open at the Austin State Hospital (ASH) and the time he spent in ASH, he was locked up for nine months on a Class B misdemeanor. If defense counsel just had him plead guilty to criminal trespass, the maximum time spent in the system would have been six months. After this long stay in state custody, Richard returned from the hospital "incompetent and unlikely to regain."

Shortly thereafter, the MHPD were appointed to Richard again when he was arrested on another criminal trespass. However, this time MHPD did not make the competency motion. Rather, the defense convinced the prosecutor to dismiss the case. Obviously this is a better outcome than the initial situation, which included a nine-month stay with the state for a maximum six-month offense. This did not comply with the ABA rules and the general practice in Texas, but his counsel did not want to send him into the same situation he was in before. Defense counsel felt it was in the client's best interest not to request a competency evaluation.

Shiela:

Another client MHPD represented, Shiela, was a homeless schizophrenic woman charged with Criminal Trespass. Shiela was in the late stages of liver failure due to her chronic alcoholism. This stage of her terminal illness was sadly marked by the fact that her kidneys had shut down. The failure of these vital organs led to her being terribly thin everywhere but her belly, which was swollen due to fluid collection. Shiela's crime involved returning to a particular house and trying to get in because she believed she owned that house. The people who lived there would dial 911 every time she banged on the door, and she would be taken to jail. As long as the jail would take her to a hospital to have her fluid drained, she continued to survive. Without these in-custody treatments, her life expectancy would be roughly two weeks.

Understandably, the High Sheriff wanted her out of his jail, as these trips to the hospital were coming out of his budget. The treatments were a necessary problem because any inmate hospital death is still considered a "death in custody," which triggers an unwanted investigation. In order to release Shiela, the county wanted to be assured she had somewhere to stay. Defense counsel found her mother, but the mother refused to take her. Then, counsel found a nursing home that agreed to take her. After arranging to turn in dismissals and release cards when Shiela was at the hospital, the defense attorney went to her room to get her and drive her to the nursing home. The MHPD's intention was that she live out her last few weeks in a clean, comfortable place.

On the contrary, her intentions were to have one last binge and die on the streets. She refused to get into the car with the defense team or consider going to a nursing home. Two days later, she was arrested again at the same house for the same charge. While in custody the second time around, she continually was moved between the jail and the hospital. Taking into consideration the first experience with Shiela, this time the defense went to civil court before turning in dismissals

and tried to get a guardianship. The judge found that she had capacity and she was released. However, three weeks later she was back. To this day, the MHPD office still believes she is not competent to stand trial and will never be competent. However, the defense also understands that no state hospital will take someone with her complicated and terminal medical problems. Making a Motion for Competency in this situation dooms her to a long, expensive stay in the county jail that will only end with her death. It would be hard to say that a competency motion would benefit Shiela, being that at least without that evaluation process, she is out sooner and possibly will get to live her last days outside a jail cell.

Bobby:

Another real-life example involved a client named Bobby. The defense attorney and Bobby were in a jail call in County Court. This "cattle call" setup involved alternating rows of defendants and attorneys. The attorney was turned around on the bench seat to talk to the appointed client. The client was charged with criminal trespass. There was no doubt in defense counsel's mind that Bobby had a firm grasp on what was occurring *procedurally.* He understood that the person in front of him was his lawyer and that the woman in the black robe was the judge. He understood jail credit, and his most important understanding was that he wanted out of jail. Interestingly, during this interview he also told the attorney it was clear that she was an alien, and also that aliens had put him in jail. Faced with these facts, the attorney had two choices: either plead him for time served and get him out and home to his mother or request a competency evaluation, which would take about ten days and, if incompetent, would keep him locked up another three to four months before he returned to court.

The Plea for Discretion

As the stories of Shiela, Bobby, and Richard illustrate, competency evaluations *particularly on the misdemeanor level,* are not always in the best interest of the mentally ill defendant. The application of this simple truism generally is accompanied by silence because many attorneys in Texas believe that there is an obligation to request these evaluations at the first signs of incompetency. However, neither the State Bar rules nor the Texas Code of Criminal Procedure explicitly prohibits attorney discretion regarding the decision to motion for a competency evaluation. Both of these authoritative codes have attorney discretion built into the statutes regarding raising the issue of competency. Article 46B.004(a) of the Texas Code of Criminal Procedure says that either party may motion for such an evaluation.[31] Use of the word "may" regarding both the defense and prosecution leaves the door wide open for attorney discretion when faced with raising the issue of competency.

This discretion is also built into the Texas Bar rule regarding representation of defendants who might be incompetent. Under that rule, as mentioned above, an attorney must take reasonable actions to seek protective orders for a client when he reasonably "believe[s] that the client lacks legal competence and that such action should be taken to protect the client." A competency evaluation leads to an order regarding competency; thus, motioning for an evaluation is a necessary part of seeking an order of incompetency. But, as the statute states, this action only shall be taken when the attorney believes that the client is incompetent, and that the order of incompetency will protect the client. This notion of protecting the client is equivalent to taking into consideration what is in the mentally ill defendant's best interest.

Moreover, despite the general practice in Texas of following the ABA rules, these rules serve more as a model. The Texas Legislature revised the Code of Criminal Procedure competency framework in 2003. During this revision, legislators maintained the state's aversion to strict and obligatory rules, like those published by the ABA, regarding competency to stand trial. This is most notable in the standards of proof required to motion for a competency evaluation. The ABA rules regarding competency mandate that all parties involved, including the judge, move for a competency evaluation whenever a good faith doubt exists as to the defendant's competency. The Texas Code of Criminal Procedure's evidence suggests the standard is much less strict than the ABA standard and allows for many more opportunities to have the mental competency of defendants evaluated.

As one Texas judge has remarked, the Supreme Court did not establish a standard for determining when to raise competency issues, and that "the purported [bona fide doubt] standard is not a creature of the constitution and our Legislature may prescribe some other one that is adequate to meet due process requirements."[32] The bona fide doubt standard presented in the Dusky opinion is not exactly the same as the good faith doubt standard set forth by the ABA, but it is really close. The legislative history of S.B. 553—and the fact that both attorneys involved are provided discretion to choose whether or not to present a competency motion—indicates that the members of the task force in charge of determining what standard to follow intentionally moved away from what they considered to be a limiting standard. This also suggests that the Texas Legislature believes that a competency statute that includes a lower evidentiary hurdle and attorney discretion is adequate enough to meet the requirements of due process. And, this belief has not been challenged.

Conclusion

In a decision of the United States District Court for the District of Columbia, *O'Beirne v. Overholser,* which was later reversed, Judge Holtzoff attacked the defense counsel's choice to seek an incompetency order for a misdemeanant by saying:

> It may not be inappropriate to observe that counsel for defendants in borderline cases in which the offense is of a type that would carry at most a short term of imprisonment, frequently do their clients a disservice when they request a mental examination. Often the outcome of the examination is that the defendant is found competent and yet will have been incarcerated for several months in the criminal ward of a mental hospital amidst madmen while the study of his mental state is being conducted; and if he is eventually convicted and sentenced to imprisonment, his incarceration is prolonged that much longer. On the other hand, if he is acquitted on the ground of insanity, he runs the risk of being incarcerated for a much longer period than might have been the case if he were sentenced to a short term in jail. Counsel for defendants are advocates and must have the courage to represent their clients' best interests within the orbit of ethical practice. . . . If the defendant is actually in need of mental treatment, his counsel would serve him better by securing treatment for him on the civil side of a mental institution, possibly as a voluntary patient, if and when an opportunity to do so arises. Mental examinations and the defense of insanity are better reserved for capital cases, as well as for cases in which the defendant runs the risk of being sentenced to imprisonment for a long term.[33]

Dr. John King has remarked about this quote that the observation is unremarkable to any attorney who has "wrestled" with this difficult issue.[34] What *is* remarkable is that there are attorneys who mistakenly neglect advocating for their mentally ill client's best interest because they believe that they lack the discretion to choose whether or not to motion for a competency evaluation.

The Texas Bar rules and the Code of Criminal Procedure are both constructed to allow for attorney discretion when confronted with a defendant who might need a competency evaluation. Using this discretion by actually weighing what is in the best interest of the client might call for the defense counsel to avoid the competency issue. This is especially true when the charge is minor, such as Criminal Trespass, a class B misdemeanor. As the stories of Shiela, Richard, and Bobby illustrate, there are some situations where the answer to what is in the client's best interest is not a routine motion for a competency evaluation. In these instances, forgoing the competency evaluation and buying the client more time outside state custody is in those defendants' best interest, and should be considered side by side with the issue of competency.

Notes

1. Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right By Piecemeal Changes to the Insanity Defense*, 5 Hous. J. Health L. & Pol'y 1, 42 (2005) (emphasizing that the majority of the seriously ill are incarcerated for minor misdemeanors).

2. Tex. Penal Code Ann. §12.22 (Vernon 2009).

3. *Criswell v. State*, 278 S.W.3d 455, 457–58 (Tex. App.—Houston [14th Dist.] 2009) (stating that a conviction obtained while the defendant is legally incompetent violates due process of law).

4. Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates* (2006), at 1, http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf.

5. Marc A. Levin, "Expand Program to Divert Mentally Ill from Prisons: New Approach Can Save Money, Improve Safety," *Houston Chronicle,* April 23, 2009, at B11, *available at* http://www.chron.com/CDA/archives/archive.mpl?id=2009_4728379.

6. *Ante,* at n. 5.

7. John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 Am. U.L. Rev. 207, 212 (2008) (stating that a nearly five-fold increase in the number of mentally ill incarcerations has occurred over the last 50 years, with a national incarceration rate of 162 per 100,000 inmates in the mid-1950s and a current incarceration rate that is over 700 per 100,000 inmates).

8. *Ante,* at n. 7 (stating that the institutionalization rate of people in mental hospitals has dropped from 339 to 20 per 100,000 over the last 50 years, and also that the shift from institutionalization to incarceration of the mentally ill in the United States is well documented).

9. James and Glaze, *ante* note 4, at 1.

10. Tex. Code Crim. Proc. Ann. art. 46B.003(a)(1-2) (Vernon 2009)(This is often referred to as the Dusky standard since the standard was formulated by the Supreme Court in *Dusky v. United States*, 362 U.S. 402, 402 (1960). However, the Dusky standard requires both (1) *and* (2), while the Texas standard only requires either (1) or (2) to establish competency).

11. Tex. Code Crim. Proc. Ann. art. 46B.003(b) (Vernon 2009).

12. Tex. Code Crim. Proc. Ann. art. 46B.004(b) (Vernon 2009) ("If evidence suggesting the defendant may be incompetent to stand trial comes to the attention of the court, the court on its own motion shall suggest that the defendant may be incompetent to stand trial").

13. Tex. Code Crim. Proc. Ann. art. 46B.004(a) (Vernon 2009) ("Either party may suggest by motion, or the trial court may suggest on its own motion, that the defendant may be incompetent to stand trial").

14. *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

15. *Godinez v. Moran*, 509 U.S. 389, 396 (1993); Tex. Code Crim. Proc. Ann. art. 26.13(b) (Vernon 2009).

16. Tex. Code Crim. Proc. Ann. art. 46B.073(b) (Vernon 2009); Brian D. Shannon & Daniel H. Benson, *Texas Criminal Procedure and the Offender with Mental Illness: An Analysis and Guide* 88 (4th ed., National Alliance on Mental Illness 2008).

17. Tex. Code Crim. Proc. Ann. art. 46B.0095(a) (Vernon 2009).

18. Texas Disciplinary Rules of Professional Conduct, Rule 1.02(g), 11 (2005) (emphasis added).

19. Texas Disciplinary Rules of Professional Conduct, Rule 3.03(a)(1), 59

(2005).

20. *LaHood v. State,* 171 S.W.3d 613, 618 (Tex. App.—Houston [14th Dist.] 2005), *pet ref'd* (citing Tex. Code Crim. Proc. Ann. art. 46B.003(b) (Vernon 2006)).

21. King, *ante* note 7, at 215–26.

22. King, *ante* note 7, at 219.

23. Texas Disciplinary Rules of Professional Conduct, Rule 3.03(a)(1) Comment 2, 60 (2005) (quoting that there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation, and inferring that there are circumstances where that is not the case).

24. Texas Disciplinary Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities (7), 5 (2005) (stating that within the framework of these Rules many difficult issues of professional discretion can arise, and that the Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment).

25. A.B.A. Crim. Justice Mental Health Standards 7-4.2(c) (1989).

26. King, *ante* note 7, at 234 (commenting that such an approach is not justified by history, necessity, or logic and undermines the integrity of the attorney-client relationship and, therefore, the integrity of the criminal justice system).

27. King, *ante* note 7, at 235.

28. 1 Crim. Prac. Manual §3:3 (2009).

29. *Ante* at n. 28.

30. Tex. Penal Code Ann. §30.05(d) (Vernon 2009) (stating that Criminal Trespass is a class B misdemeanor, except when it meets any of the requirements that heighten the crime to a class A misdemeanor).

31. Tex. Code Crim. Proc. Ann. art. 46B.004(a) (Vernon 2009).

32. *Sisco v. State*, 599 S.W.2d 607, 613 (Tex. Crim. App. 1980).

33. *O'Beirne v. Overholser*, 193 F. Supp. 652, 661 (D.D.C. 1961).

34. King, *ante* note 7, at 238.

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