

# ELIMINATE the WAIT

## What's My Role to Eliminate the Wait for Competency Restoration Services?

### PROSECUTORS

*Prosecutors play a critical role in helping to eliminate the wait for competency restoration (CR) services. If appropriate, diversion and connection to treatment is ideal to reduce further penetration into the criminal justice system and the need for CR services. Provision of mental health (MH) services and medications while a person is incarcerated may increase the likelihood that the person's symptoms improve, reducing the likelihood that the person is found incompetent to stand trial (IST), or leading to the immediate restoration of a person previously found incompetent to stand trial.*

#### 1. Identify and Meet Mental Health and IDD Needs at the Earliest Point

- Does Magistrate Judge order a 16.22 Interview if reasonable cause is found? Does the Magistrate Judge send me a copy of the Collection of Information Report (16.22 Report) in a timely manner?
- Is there a mechanism in place for the 16.22 reports to be maintained and then sent to the trial court and defense attorney once they are assigned? [CCP art. 16.22\(b-1\)](#).
- Do I suspect MH or IDD issues while reviewing discovery? Have I noted this in the file? Have I brought this to the attention of the defense attorney? Do I take this into account when deciding the disposition of the case and alternatives offered?
- Do I participate and attend collaborative meetings with key personnel to review cases and address MH and IDD issues early in the process?

#### 2. Work Toward Diversion First

- Have I reviewed the case and determined if a case should be filed and, if so, at what charging level? Did I consider MH issues or IDD during this process?
- Have I considered a defendant's 16.22 report and risk assessments in my decisions about bail, jail diversions, treatment, and community supervision conditions? [Tex. Code Crim. Proc. \(CCP\) art. 16.22\(c\)\(1\) - \(5\)](#).
- Can I agree to a reasonable bond amount and appropriate bond conditions? Or for a non-violent offense/prior, a PR Bond? [CCP art. 17.032](#); [17.03](#).
- If I am recommending that a defendant is released on personal bond, have I consulted with the defense attorney to determine what, if any, conditions are reasonable, helpful, and doable in this person's circumstances?

- Am I aware that **competency restoration services (CRS) are not comprehensive mental health treatment**?
  - CRS are narrowly focused on stabilization, symptom management, and required legal education. This is not the same as providing access to a fully developed treatment plan and services with the goal of long-term recovery and a positive place in the community.
- During negotiations and discussions with the defense attorney, am I open to options other than a competency evaluation? For example:
  - Can I agree to inpatient or outpatient mental health treatment instead of sending the defendant to the state hospital (SH) for inpatient competency restoration?
  - If the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person, can I agree to using [CCP 16.22\(c\)\(5\)](#) to leave charges pending in criminal court and divert the defendant to the appropriate civil court for court-ordered outpatient mental health services under [Tex. Health & Safety Code ch. 574](#)? [CCP art. 16.22\(c\)\(5\)](#); [HSC 574.0345](#).
  - Is this a case suitable for a straight dismissal under [CCP art. 46B.004\(e\)](#)?
- Have I considered the possibility of dismissal with:
  - a treatment plan;
  - a referral to outpatient mental health services;
  - a referral to an assisted outpatient treatment program (with or without civil/probate court supervision); or
  - a transfer to appropriate court to commence civil commitment proceedings? [CCP art. 46B.151](#); [Tex. Health and Safety Code ch. 571, 574](#).

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- Have I screened the case for possible entry to diversion programs or specialty courts?
- If I decide to dismiss a defendant's case, have I given notice to the defense attorney that allows them to communicate this with their client and assist with a discharge plan or transportation upon release?
- Have I considered whether the potential to adjudicate this case upon restoration is worth the potential personal and societal damage caused by months long wait in the jail before a hospital bed becomes available (i.e., loss of public benefits, disconnection mental health services in the community, loss of housing, loss of connections to community supports, job loss, trauma, or displacement)?
- Am I holding the defense to their burden of proof (BOP) / meeting my BOP?
  - Typically, there is a presumption that the defendant (D) is competent, and defense must prove incompetency by a preponderance of the evidence. [CCP 46B.003\(b\)](#); [Dusky v. U.S., 362 U.S. 402 \(1960\)](#).
  - If the D has a previous, unvacated IST finding, was committed for restoration, & was found not likely to be restored, then the D is presumed incompetent, and the State must prove competency Beyond a Reasonable Doubt. [Manning v. State, 730 S.W.2d 744 \(Tex. Crim. App 1987\)](#).
- Am I suggesting a competency evaluation or inpatient competency restoration services only as a last resort?

### 3. Consider Alternatives to State Hospital if Competency Restoration is Needed

- Have I considered Outpatient Competency Restoration (OCR) or Jail-Based Competency Restoration (JBCR) as an alternative to inpatient and/or SH competency restoration? [CCP art. 46B.071](#).
- I am aware if OCR and JBCR is available in my community? If not available, what can I do to advocate for either or both in my community?

### 4. Continue to Work on Cases when the Defendant Must Wait for Inpatient CR Services at the SH

- Am I continuing to communicate with the defense attorney while the defendant awaits transfer to the SH?
- Have I considered what evidence might fall under the Michael Morton Act specific to MH or IDD cases and produced all evidence that is material to any matter involved in the action? Have I subpoenaed relevant medical, psychological, or education records of the defendant?
- Have I considered what constitutes *Brady* in mental health and IDD cases and produced all evidence to the defense that is in possession of the State and tends to negate the defendant's guilt or mitigate their punishment? Have I reviewed the defendant's previous cases for information, records, or orders that should be produced to the defense?
- Have I considered the mitigation evidence produced by the defense when making an offer on this case? Have I considered offering deferred adjudication?
- Am I working with the court and defense counsel to obtain a fast court setting upon the defendant's return from SH or another CR program to prevent decompensation? Have I requested a preferential case setting under [CCP art. 32A.01](#)?
- Am I advocating that the defendant receive mental health treatment in custody while awaiting transfer to or after returning from SH?
- If necessary, have I filed an application with the probate or other appropriate court to order the administration of medications in custody to help prevent deterioration (or coordinated with the county attorney to file the application)? [Health & Safety Code § 574.106 \(MI\)](#) or [§ 592.156 \(IDD\)](#); [CCP art. 46B.086](#).
- If the Defendant is on court ordered medications, have I requested another competency evaluation after stabilization or a check for evidence of immediate restoration under [CCP art. 46B.0755](#)?
- Is this case one where the defendant is unlikely to restore per [46B.071\(b\)](#)? Have I considered proceeding under [Health & Safety Code subchapters E or F](#) (civil commitment with charges pending or dismissed)?

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## 5. Create Education and Awareness

- Have I been trained on best practices for cases where a D has MI/IDD including identification, interaction, protections in Texas law, and diversion options? *Consider working with JCMH or other appropriate attorney educator for needed training.*
- Does my office actively discuss educational resources, community resources, and court practices and procedures for individuals with MI or IDD?
- Am I communicating with my office about my successes in diversion techniques for individuals with MI or IDD?

## 6. Lead Through Partnerships

- Am I regularly engaging with the LMHA, LBHAs, LIDDAs, other prosecutor's offices, the defense bar and/or public defenders or managed counsel offices, pretrial services, probation, and the courts to meet formally and regularly to improve communication, policies, and procedures regarding mental health / IDD diversion?
- Are the agencies and individuals listed in [Health & Safety Code § 614.017, Exchange of Information](#), accepting and disclosing information about defendants with mental health/IDD challenges, including jails, LMHAs, LBHAs, LIDDAs, attorneys, judges, probation, the Texas Department of Criminal Justice, and

## Additional Resources:

- Judicial Commission on Mental Health, *Texas Mental Health and Intellectual Disabilities Law Bench Book* (3d Ed. 2021-2022) <http://texasjcmh.gov/media/lbrdg1tk/jcmh-adult-bench-book-3rd-edition.pdf>.
- CMHS National Gains Center, *Practical Advice on Jail Diversion: Ten Years of Learnings on Jail Diversion from the CMHS National GAINS Center* (2007), <http://www.pacenterofexcellence.pitt.edu/documents/PracticalAdviceOnJailDiversion.pdf>.
- Texas Appleseed et al., *Mental Illness, your Client and the Criminal Law: A Handbook for Attorneys Who Represent Persons with Mental Illness* (4<sup>th</sup> ed. 2015), [https://www.texasappleseed.org/sites/default/files/Mental\\_Health\\_Handbook\\_Printed2015.pdf](https://www.texasappleseed.org/sites/default/files/Mental_Health_Handbook_Printed2015.pdf).
- Alyse Ferguson, Chief Attorney, Collin County Mental Health Managed Counsel, *Practical Ideas for Counties to Streamline Competency Restoration and Save Money* (2020) [http://iemvirtual.com/wp-content/uploads/2020/11/Practical-Tips-for-Competency-Restoration\\_.pdf](http://iemvirtual.com/wp-content/uploads/2020/11/Practical-Tips-for-Competency-Restoration_.pdf).
- Brian D. Shannon & Daniel H. Benson, *Texas Criminal Procedure and the Offender with Mental Illness 102-03* (6th ed. 2019) <https://3394qh4fg22b3jpwm94480xg-wpengine.netdna-ssl.com/wp-content/uploads/sites/12/2019/10/Shannon-6th-Edition-Oct-2019-for-NAMI-Texas-website.pdf>.

