Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book

Judicial Commission on Mental Health

Fourth Edition
2023 – 2025

Texas Judicial Commission
on Mental Health

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Acknowledgements

The Judicial Commission on Mental Health (JCMH) would like to recognize the leadership and support of Justice Jane Bland and Judge Barbara Hervey, Chairs of the JCMH; Justice Eva Guzman; Justice Jeff Brown; Bill Boyce, Vice-Chair of the JCMH; John Specia, JCMH Jurist in Residence; Brent Carr, JCMH Jurist in Residence; the Supreme Court of Texas; and the Texas Court of Criminal Appeals. The JCMH extends a special thanks to the late Floyd Jennings, J.D., Ph.D., (1940-2021) for his contributions not only to this bench book but also to the professions of law and psychology. The JCMH would also like to recognize the following contributing authors and editors of this Bench Book:

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Contents

Chapter 1: Introduction

People with mental illness, substance use, and intellectual disabilities and developmental disabilities are greatly overrepresented in the criminal justice system compared to the general population.[1] These Texans often cycle in and out of our justice system with little, if any, treatment. Navigating the complex system of care that includes jails, hospital emergency departments, adult and juvenile justice agencies, schools, and child protective services can even exacerbate the behavioral health conditions for which they are seeking support. Providing appropriate and timely care to this vulnerable population is essential to recovery and community reintegration.

1.1 Challenges

The challenges associated with navigating the health care system are as big as Texas itself. Of the nearly 30 million people who live in Texas, approximately 3.8 million adults (nearly 18%) experience mental illness,[2] and 1-in-6 adults in Texas experience mental health disorder in a given year.[3] Data shows that of the adults identifying with having a mental illness, nearly 30% reported they were not able to receive the treatment they needed.[4] Nearly 12% of Texas adults (over 2.5 million people) reported having a substance use disorder in the past year, and 93.5% of that population did not receive any form of treatment.[5] Adults with untreated mental health conditions are eight times more likely to be incarcerated than the general population.[6]

Additionally, an estimated 146,000 youth aged 12 to 17 reported having a substance use disorder in the past year.[7] Substance use disorders frequently accompany mental illness and further complicate the management of mental health issues in the justice systems.[8]

Seventeen percent of adolescents ages 12 to 17 in Texas (429,000 youths) experienced a major depressive episode in the past year, and nearly 11% of youth in Texas (261,000 youths) experienced severe major depression.[9] Nationally, 60% of youth with major depression do not receive any mental health treatment; in Texas, that number jumps to 75%—ranking Texas 50th out of 51 in the United States.[10]

Rural counties face a host of unique challenges including limited personnel and infrastructure for addressing mental health needs; lack of community-based mental health expertise and resources; and

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[1] *See 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; *Issue Brief Justice and People with IDD*, Am. Ass'n on Intell. & Developmental Disabilities (2015) http://www.aaidd.org/docs/default-source/National-Goals/justice-and-people-with-idd.pdf.

[2] M. Reinert & T. Nguyen, *State of Mental Health in America 2023*, MENTAL HEALTH AM., 15 (2023), https://mhanational.org/sites/default/files/2023-State-of-Mental-Health-in-America-Report.pdf.

[3] MEADOWS MENTAL HEALTH POL'Y INST. (citing Substance Abuse and Mental Health Servs. Admin. (SAMHSA)), https://mmhpi.org/work/adults/ (last visited Aug. 23, 2023).

[4] Reinert at 15.

[5] *Id.* at 16.

[6] *Texas Behavioral Health Landscape*, MEADOWS MENTAL HEALTH POL'Y INST., 3 (2014), https://www.texasstateofmind.org/wp-content/themes/texasstateofmind/assets/MediaDownloads/Texas+Behaviorial+Health+Landscape+-+December+2014.pdf.

[7] Reinert, *supra* note 2, at 19.

[8] *Id.* at 19.

[9] *Id.* at 18-20.

[10] *Id.* at 25.

long travel distances for defendants to access supervision and treatment appointments, as well as to attend court. Approximately two-thirds of Texas Counties are designated as rural.[11]

Along with much of the nation, Texas has a shortage of behavioral health workers, and that deficit is expected to grow over time. Many of the most experienced and skilled practitioners are approaching retirement, and higher education institutions in Texas also have difficulty producing enough graduates to meet the demand. Nationally, we average 350 individuals for every one mental health provider. In Texas, that ratio is 760-to-1. In 2009, 173 of 254 Texas Counties (68%) were federally designated as a geographic Health Professional Shortage Area (HPSA) by the Health Resources and Services Administration.[12] As of August 2023, 248 of the 254 Texas Counties (97.6%) are now classified as HPSA.[13]

A disproportionate number of people living with mental health and substance use disorders end up in jail instead of getting the mental health treatment and support they need. Roughly two million people with serious mental illness are incarcerated in the U.S. every year.[14] It is estimated that 34% of the inmate population in Texas have mental health disorders. Youth and adults in our criminal justice system are not the only concern; Texas is home to 17 million veterans. Approximately eight percent experience severe mental health and substance abuse needs and approximately three percent suffer severe and persistent mental illness in a given year, putting veterans with inadequate access to care at higher risk of contact with the criminal justice system.[15]

People with intellectual and developmental disabilities (IDD) also face significant challenges in our criminal justice system. Texas is home to more than 500,000 adults and children with IDD.[16] People with IDD include individuals with autism, cerebral palsy, fetal alcohol spectrum disorder, and many other disabilities that affect a person's intellectual ability or daily living. According to reports by the Bureau of Justice Statistics, less than four percent of the U.S. population has IDD, yet up to 10 percent of the prison and jail population have been identified as having such disabilities.[17] Individuals with IDD are more likely than their non-disabled peers to be arrested, convicted, incarcerated, and serve longer sentences.[18] People with IDD are more likely to be persuaded to confess; more likely to be refused bail, probation, or parole; and are more frequently exploited and abused when incarcerated.[19]

1.2 The Judiciary's Role in Breaking the Cycle of Recidivism

Breaking the cycle of recidivism for people with mental illness or IDD does not begin with the justice system, but the justice system is where individuals with mental illness or IDD often find themselves. Early identification allows for diversion from the criminal justice system when the criminal acts are

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[11] *Texas Statewide Behavioral Health Strategic Plan Fiscal Years 2022-2026*, Tex. Health and Hum. Servs. Comm'n, 24 (2022), https://www.hhs.texas.gov/sites/default/files/documents/hb1-statewide-behavioral-health-idd-plan.pdf.

[12] *Workforce Challenges in Mental Health and Intellectual Disability Services*, Tex. Council of Cmty. Ctrs, 1 (2022), https://txcouncil.com/wp-content/uploads/2022/10/MH_IDD-Workforce-Challenges_8.23.22.pdf.

[13] *Health Professional Shortage Area Dashboard*, Tex. Dep't of State Health Servs., https://experience.arcgis.com/experience/323d93aa45fd43e88515cdf65365bf78/page/Page-1/?views=Mental-HPSA (last visited Aug. 23, 2023).

[14] Abigail jones, *Incarcerated people with mental illness increases in seven months in Travis County, study shows*, KXAN, July 29, 2022; https://www.kxan.com/news/local/travis-county/number-of-incarcerated-people-with-mental-illness-increases-5-in-seven-months-in-travis-county-study-shows/.

[15] *Smart Justice: Texas Needs More Effective Alternatives Than Jail to Treat Mentally Ill*, MEADOWS MENTAL HEALTH POL'Y INST., https://mmhpi.org/topics/policy-research/smart-justice-texas-needs-more-effective-alternatives-than-jail-to-treat-mentally-ill/ (last visited Aug. 23, 2023).

[16] *Intellectual and Developmental Disabilities (IDD)*, Tex. Council of Cmty. Ctrs, https://txcouncil.com/public-policy/intellectual-and-developmental-disabilities/ (last visited Aug. 23, 2023).

[17] *Justice and People with IDD Issue Brief*, Am. Ass'n on Intell. and Developmental Disabilities (2015) http://www.aaidd.org/docs/default-source/National-Goals/justice-and-people-with-idd.pdf.

[18] *Id*.

[19] Leigh Ann Davis, *People with Intellectual Disability in the Criminal Justice System: Victims and suspects* (2009) https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/part_12_victimization_-_people_with_id_in_cj_system.pdf.

clearly attributable to the illness or disability. Diversion processes help break the cycle by using community-based treatment and services as an alternative to jail.[20] Jail-diversion program interventions can occur before or after booking. These programs may be court-based, jail-based, or community-based.

The judiciary is one stakeholder in a highly fragmented system intended to meet the needs and facilitate the recovery of those experiencing or affected by mental health and IDD issues. Judges are well positioned to convene stakeholders and help communities address these challenges. In some localities, there has been effective collaboration among judges, mental health and IDD authorities, and law enforcement to reduce fragmentation and create innovative programs. The following discussion recognizes that no one-size-fits-all approach works in a state as big as Texas because resources, availability of treatment options, and local practices vary widely. This Bench Book provides immediate information to help address mental health and IDD issues as they arise in your courtroom and community.

Even with variations in resources, options, and local practices, this Bench Book provides a baseline for procedures aimed at identifying and addressing the needs of persons with mental health challenges or IDD.

[20] See *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.

Chapter 2: Definitions

2.1 Communicating With and About People with Disabilities[21]

Simply put, it's up to the individual. Some people prefer person-first language, which puts the person before the disability (e.g., a person who is blind), while others prefer identity-first language (e.g., a disabled person), as they feel their disability is an integral part of who they are. Bottom line: Always be respectful and never use words that are hurtful, offensive, or derogatory.

- People-first language is the best place to start when talking to a person with a disability.
- If you are unsure, ask the person how he or she would like to be described.
- It is important to remember that preferences can vary.

2.1.1 People-First Language

People-first language is used to communicate appropriately and respectfully with and about an individual with a disability. People-first language emphasizes the person first, not the disability. For example, when referring to a person with a disability, refer to the person first, by using phrases such as, "a person who …", "a person with …" or, "person who has …"

Tips	Use	Do not use
Emphasize abilities, not limitations	Person who uses a wheelchair	Confined or restricted to a wheelchair, wheelchair bound
	Person who uses a device to speak	Can't talk, mute
Do not use language that suggests the lack of something	Person with a disability	Disabled, handicapped
	Person of short stature	Midget
	Person with cerebral palsy	Cerebral palsy victim
	Person with epilepsy or seizure disorder	Epileptic
	Person with multiple sclerosis	Afflicted by multiple sclerosis
Emphasize the need for accessibility, not the disability	Accessible parking or bathroom	Handicapped parking or bathroom
Do not use offensive language	Person with a physical disability	Crippled, lame, deformed, invalid, spastic
	Person with an intellectual, cognitive, developmental disability	Slow, simple, moronic, defective, afflicted, special person
	Person with an emotional or behavioral disability, a mental	Insane, crazy, psycho, maniac, nuts

[21] *Communicating With and About People with Disabilities*, Ctrs. for Disease Control, https://www.cdc.gov/ncbddd/disabilityandhealth/materials/factsheets/fs-communicating-with-people.html (last visited Aug. 24, 2023).

Tips	Use	Do not use
	health impairment, or a psychiatric disability	
Avoid language that implies negative inferences	Person without a disability	Normal person, healthy person
Do not portray people with disabilities as inspirational only because of their disability	Person who is successful, productive	Has overcome his/her disability, is courageous

2.2 Definitions

Adaptive Behavior:

Adaptive behavior means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group. Tex. Code Crim. Proc. art. 46B.001(1); Tex. Health and Safety Code § 591.003(1).

Admission:

Admission means the formal acceptance of a prospective patient to a facility. Tex. Health & Safety Code § 572.0025(h)(1).

Assessment:

Assessment means the administrative process a facility uses to gather information from a prospective patient, including a medical history and the problem for which the patient is seeking treatment, to determine whether a prospective patient should be examined by a physician to determine if admission is clinically justified. Tex. Health & Safety Code § 572.0025(h)(2). Note that the term "assessment" is generally no longer used to refer to the interview and written report required by article 16.22 of the Texas Code of Criminal Procedure.

Behavioral Health:

Behavioral health is the term typically used when referring to mental health and substance use conditions. In this context it can mean the promotion of mental health, resilience, and wellbeing; the treatment of mental and substance use disorders; and the support of those who experience and/or are in recovery from these conditions, along with their families and communities.[22] The terms may be used interchangeably throughout this document as agency, stakeholder, and consumer preference differs.

Behavioral Health Services:

Behavioral Health Services are defined as programs or services directly or indirectly related to the research, detection, or prevention of mental disorders and disabilities, and all services necessary to treat, care for, control, supervise, and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from alcoholism or drug addiction.[23] In the Texas Government Code, behavioral health services is defined as "mental health and substance abuse disorder services." Tex. Gov't Code § 533.00255(a).

[22] *Behavioral Health Integration*, Substance Abuse & Mental Health Servs. Admin., 1 https://www.samhsa.gov/sites/default/files/samhsa-behavioral-health-integration.pdf.

[23] H.B. 1, 86th Leg., Reg. Sess. (Tex. 2019), IX-54.

Capacity:

Capacity means a patient's ability to understand the nature and consequences of a proposed treatment, including the benefits, risks, and alternatives to the proposed treatment, and to make a decision whether to undergo the proposed treatment. Tex. Health and Safety Code § 574.101(1).

Certified Community Behavioral Health Clinic (CCBHC):

The Certified Community Behavioral Health Clinic (CCBHC) model is designed to ensure access to coordinated behavioral health care regardless of a person's ability to pay, their place of residence, or age. CCBHCs must meet standards for the range of services they provide, and the timeliness of services provided.[24] All 39 Local Mental Health Authorities (LMHAs) and Local Behavioral Health Authorities (LBHAs) in Texas are certified CCBHCs as provided by the Substance Abuse and Mental Health Services Administration (SAMHSA).

Competency Restoration:

Competency Restoration means the treatment or education process for restoring a person's ability to consult with the person's attorney with a reasonable degree of rational understanding, including a rational and factual understanding of the court proceedings and charges against the person. Tex. Code Crim. Proc. art. 46B.001(3).

Disability:

A disability is any condition of the body or mind (impairment) that makes it more difficult for the person with the condition to do certain activities (activity limitation) and interact with the world around them (participation restrictions).

There are many types of disabilities, such as those that affect a person's:

- Vision
- Movement
- Thinking
- Remembering
- Learning
- Communicating
- Hearing
- Mental health
- Social relationships

Although "people with disabilities" sometimes refers to a single population, this is actually a varied group of people with a wide range of needs. Two people with the same type of disability can be affected in very different ways. Some disabilities may be hidden or not easy to see. A mental health disorder is a form of disability, but someone with a disability does not necessarily have a mental health disorder.[25]

Developmental Disability (DD):

A developmental disability is a severe, chronic disability attributable to a mental or physical impairment or a combination of mental and physical impairments that: manifests before the person reaches 22 years of age; is likely to continue indefinitely; reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of a lifelong or extended duration and are individually planned and coordinated; and results in substantial functional limitations in three or more of the following categories of major life activity:

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[24] *Certified Community Behavioral Health Clinics (CCBHCs)*, Substance Abuse & Mental Health Servs. Admin., https://www.samhsa.gov/certified-community-behavioral-health-clinics (last visited Aug. 24. 2023).

[25] *Disability and Health Overview*, Ctrs. for Disease Control, (Sept. 16, 2020), https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html.

- self-care;
- receptive and expressive language;
- learning;
- mobility;
- self-direction;
- capacity for independent living; and
- economic self-sufficiency.

Examples of such disabilities include autism-spectrum disorder, fetal alcohol spectrum disorder, and cerebral palsy.[26] Tex. Health & Safety Code § 531.002 (15).

Developmental Period:

This is the period of a person's life from birth through 17 years of age. Tex. Code Crim. Proc. art. 46B.001(4).

Electronic Broadcast System:

A two-way electronic communication of image and sound between the defendant and the court and includes secure Internet videoconferencing. Tex. Code Crim. Proc. art. 46B.001(5).

Emergency Medical Services Personnel (EMS):

EMS refers to any of the following:

- emergency care attendant;
- emergency medical technicians;
- advanced emergency medical technicians;
- emergency medical technicians—paramedic; or
- licensed paramedic.

Tex. Health & Safety Code § 773.003(10).

Home and Community-Based Services (HCS) Program:

HCS is a Medicaid waiver program approved by the Centers for Medicare & Medicaid Services (CMS) pursuant to section 1915(c) of the Social Security Act. 42 U.S.C. 1396n. It provides community-based services and support to eligible individuals as an alternative to an intermediate care facility for individuals with an intellectual disability or related conditions program. The HCS Program is operated by the authority of the Health and Human Services Commission (HHSC). 26 Tex. Admin. Code § 263.4(a).

Home and Community-based Services Adult Mental Health (HCBS-AMH):

A state plan amendment operated by HHSC Behavioral Health Services, not to be confused with HCS waiver programming for the IDD population. This service is for persons who meet eligibility criteria for the program. The purpose of this program is to provide home and community-based services to adults with extended tenure in psychiatric hospitals (or persons at high risk for recurring inpatient hospitalizations) in lieu of them remaining as long-term residents in those facilities. This program also serves to divert individuals from emergency rooms as well as to divert them from jails into more appropriate, community-based care. The HCBS-AMH program provides an array of services, appropriate to each individual's needs, to enable individuals to live and experience successful tenure in his or her community. 26 Tex. Admin. Code § 307.52.

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[26] *In Community Every Day: Supporting People with Intellectual Disabilities*, Tex. Council of Cmty. Ctrs. (2020) https://txcouncil.com/wp-content/uploads/2022/01/IDD-One-Pager-87th-Session.pdf.

Inpatient Mental Health Facility:

Refers to a mental health facility that can provide 24-hour residential and psychiatric services and that is:

- a facility operated by the Health and Human Services Commission (HHSC);
- a private mental hospital licensed by HHSC;
- a community center, facility operated by or under contract with a community center or other entity HHSC designates to provide mental health services;
- a local mental health authority or a facility operated by or under contract with a local mental health authority;
- an identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided and that is licensed by the department; or
- a hospital operated by a federal agency.

Tex. Health & Safety Code § 571.003(9).

Intake:

Intake means the administrative process for gathering information about a prospective patient and giving a prospective patient information about the facility and the facility's treatment and services. Tex. Health & Safety Code § 572.0025(h)(3).

Intellectual and Developmental Disabilities (IDD):

IDD is a collective term that is broader than intellectual disability (ID); it includes people with ID, DD, or both. DD are often lifelong disabilities that can be cognitive, physical, or both. A person may have an ID and a mental health disorder, but ID itself is not a mental health disorder. Some Texas statutes on early identification, screening, and assessment still do not currently address developmental disabilities, but developmental disabilities are important to consider as they often co-occur with mental illness and ID. Further, people with IDD are more likely than their peers without disabilities to be involved in the justice system, both as victims and suspects.[27]

Intellectual Disability (ID):

ID means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period. Tex. Code Crim. Proc. art. 46B.001(8); Tex. Health & Safety Code § 531.002 (16); Tex. Health & Safety Code § 591.003.

Intellectual Disability Services:

Intellectual disability services include all services concerned with research, prevention, and detection of intellectual disabilities, and all services related to the education, training, habilitation, care, treatment, and supervision of persons with an intellectual disability, but does not include the education of school-age persons that the public education system is authorized to provide. Tex. Health & Safety Code § 531.002 (10).

Local Behavioral Health Authorities (LBHA):

LBHAs are units of government that provide mental health and substance use services to a specific geographic area of the state, called the local service area. They have all the duties and responsibilities of a LMHA, as well as the duty and responsibility to ensure that substance use services are provided in their service area. A local mental health authority may apply to the department for designation as a local

[27] *See FAQs on Intellectual Disability*, Am. Ass'n. on Intell. & Developmental Disabilities, https://www.aaidd.org/intellectual-disability/faqs-on-intellectual-disability (last visited Aug. 24, 2023).

behavioral health authority. Tex. Health & Safety Code § 533.0356(d). Most LMHAs are LBHAs, not all LBHAs are LMHAs.

Local Intellectual and Developmental Disability Authority (LIDDA):

LIDDAs are units of government that provide services to a specific geographic area of the state, called the local service area. LIDDAs serve as the point of entry for publicly funded intellectual and developmental disability programs, whether the program is provided by a public or private entity. LIDDA responsibilities are delineated in section 533.035 of the Texas Health and Safety Code. *See* Tex. Health & Safety Code § 531.002.

Local Mental Health Authority (LMHA):

LMHAs—also referred to as community centers, community mental health centers, or MHMRs—are units of local government that provide services to a specific geographic area of the state called the local service area. HHSC contracts with the 39 LMHAs/LBHAs to deliver mental health services in communities across Texas. Their responsibilities in this capacity are set out in Title 25, Chapter 412 of the Texas Administrative Code. *See* Tex. Health & Safety Code §§ 533.035, 533.0356, 571.003(11).

Each Texas LMHA is now certified under the national designation and expectations for Certified Community Behavioral Health Clinics (CCBHC). Specifically, services expected by all CCBHCs must be available – including care coordination (coordinating services within the CCBHC and external to the CCBHC) and access to substance use treatment. 26 Tex. Admin. Code § 306.105.

Note: there is confusion with how LMHA/LBHAs are named, including the question of the lingering references to MHMR. Entities that can be identified as an LMHA can also be called: Centers/Healthcare Systems/Services/Community center/MHMR Center/Health Authority. Also "community mental health center" is a term under the Medicare/Medicaid program. Some LMHAs/LMBAs may have obtained Medicare certification to get payment as a community mental health center.

Long Term Services and Supports (LTSS):

LTSS enable people who meet certain functional eligibility requirements and those with physical, psychological, intellectual, or developmental disabilities to experience productive lives in safe living environments through a continuum of services and supports ranging from in-home and community-based services to institutional services. LTSS, in contrast to medical care, are meant to support an individual with ongoing, day-to-day activities, rather than treat or cure a disease or condition.[28]

Magistrate:

As used in the Texas Code of Criminal Procedure, a magistrate refers to any of the following:

- justices of the Supreme Court and judges of the Court of Criminal Appeals;
- justices of the courts of appeals;
- judges of the district courts;
- judges of constitutional county courts ("county judges");
- judges of the county courts at law;
- judges of the county criminal courts;
- judges of statutory probate courts;
- other magistrates appointed in various counties;
- justices of the peace; and

[28] *Long-term Services and Supports Available Through the Texas Medicaid State Plan*, Tex. Health & Hum. Servs. Comm'n (Aug. 15, 2018) https://www.hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/providers/resources/ltss-available-texas-medicaid-state-plan.pdf.

- mayors, recorders, and judges of the municipal courts of incorporated cities or towns.

See Tex. Code Crim. Proc. art. 2.09; Tex. Gov't Code § 21.009.

Mental Health Services:

"Mental Health Services" includes all services concerned with research, prevention, and detection of mental disorders and disabilities, and all services necessary to treat, care for, supervise and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from a substance abuse disorder. Tex. Health & Safety Code § 531.002(14).

Mental Health Facility:

A mental health facility refers to:

- an inpatient or outpatient mental health facility operated by the department, a federal agency, a political subdivision, or any person;
- a community center or a facility operated by a community center;
- that identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided; or
- with respect to a reciprocal agreement entered into under section 571.0081 of the Texas Health and Safety Code, any hospital or facility designated as a place of commitment by HHSC, a local mental health authority, and the contracting state or local authority.

Tex. Health & Safety Code § 571.003(12).

Mental Illness (MI):

Mental illness is an illness, disease, or condition that either:

- substantially impairs a person's thoughts, perception of reality, emotional process, or judgment; or
- grossly impairs behavior as demonstrated by recent disturbed behavior.

The term, as statutorily defined, does not include epilepsy, dementia, substance abuse, or intellectual disability. Tex. Health & Safety Code § 571.003.

Note that Chapter 46B of the Code of Criminal Procedure also defines this term and, in contrast to the definition above, provides that mental illness is an illness, disease, or condition that grossly impairs (rather than substantially impairs) a person's thoughts, perception of reality, emotional process, or judgment; or grossly impairs behavior as demonstrated by recent disturbed behavior. Tex. Code Crim. Proc. art. 46B.001(11).

Modification:

Modification means a change of a class of medication authorized in the psychoactive medication order. Tex. Health & Safety Code § 574.106(j).

Alternatively, and more commonly, the word modification is used when a court order for mental health services is changed or modified - e.g., an inpatient commitment may be modified by the court to an outpatient commitment and vice versa.

Non-physician Mental Health Professional:

Non-physician mental health professional means: (1) a psychologist licensed to practice in this state and designated as a health-service provider; (2) a registered nurse with a master's degree or doctoral degree in psychiatric nursing; (3) a licensed clinical social worker; (4) a licensed professional counselor licensed to practice in this state; or (5) a licensed marriage and family therapist licensed to practice in this state. Tex. Health & Safety Code § 571.002(15).

Office of Court Administration (OCA):

OCA is a state agency in the Judicial Branch of Texas that operates under the direction and supervision of the Supreme Court of Texas and the Chief Justice. OCA is responsible for providing resources and information for the efficient administration of the judicial branch. *See* Tex. Gov't Code § 72.011.

People-First Language:

People-first language refers to language used to speak appropriately and respectfully about an individual with a disability. People-first language emphasizes the person first, not the disability.

Physician:

Physician means: (1) a person licensed to practice medicine in this state; (2) a person employed by a federal agency who has a license to practice medicine in any state; or (3) a person authorized to perform medical acts under a physician-in-training permit at a Texas postgraduate training program approved by the Accreditation Council for Graduate Medical Education, the American Osteopathic Association, or the Texas Medical Board. Tex. Health & Safety Code § 571.002(18).

Psychoactive Medication:

Psychoactive medication means a medication prescribed for the treatment of symptoms of psychosis or other severe mental or emotional disorders and that is used to exercise an effect on the central nervous system to influence and modify behavior, cognition, or affective state when treating the symptoms of mental illness. Such medication includes the following categories when used as described: (1) antipsychotics or neuroleptics; (2) antidepressants; (3) agents for control of mania or depression; (4) antianxiety agents; (5) sedatives, hypnotics, or other sleep-promoting drugs; and (6) psychomotor stimulants. Tex. Health & Safety Code § 574.101(3).

Qualified Mental Health Professional—Community Services (QMHP-CS):

A QMHP-CS is a staff member who (1) is credentialed as a QMHP-CS, (2) has demonstrated and documented competency in the work to be performed, and (3) has a bachelor's degree from an accredited college or university with a minimum number of hours that is equivalent to a major (as determined by the LMHA or LBHA) in psychology, social work, medicine, nursing, rehabilitation, counseling, sociology, human growth and development, physician assistant, gerontology, special education, educational psychology, early childhood education, or early childhood intervention. 1 Tex. Admin. Code § 353.1415(a); 26 TAC § 306.45(52).

Qualified Professional:

"Qualified professional" is the term used in this Bench Book to describe a person who may perform an interview and report under Code of Criminal Procedure art. 16.22, as discussed in Chapter 7A of this Bench Book.

Residential Care Facility:

A residential care facility is a state supported living center or the Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF-IID) component of the Rio Grande Center. Tex. Health & Safety Code § 591.003(18).

Sequential Intercept Model:

The Sequential Intercept Model is a conceptual model to inform community-based responses to the involvement of people with mental and substance use disorders in the criminal justice system. For a more detailed description, see Chapter 4 of this bench book.

Serious Mental Illness (SMI):

SMI is a smaller and more severe subset of mental illnesses; SMI is defined as one or more mental, behavioral, or emotional disorder(s) resulting in serious functional impairment, which substantially

interferes with or limits one or more major life activities.[29]

"Serious mental illness" is defined in the Texas Insurance Code as means the following psychiatric illnesses as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM):

(A) bipolar disorders (hypomanic, manic, depressive, and mixed);

(B) depression in childhood and adolescence;

(C) major depressive disorders (single episode or recurrent);

(D) obsessive-compulsive disorders;

(E) paranoid and other psychotic disorders;

(F) schizo-affective disorders (bipolar or depressive); and

(G) schizophrenia.

Tex. Insurance Code § 1355.001(1).

State Hospital:

A state hospital is a state-operated hospital inpatient mental health facility operated by HHSC that provides 24-hour residential and psychiatric services to persons civilly and forensically admitted. Tex. Health and Safety Code § 571.003(9).

State-Supported Living Center (SSLC):

A SSLC is a state-supported and structured residential facility operated by HHSC to provide clients with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills. Tex. Health & Safety Code § 571.002(19).

Subaverage General Intellectual Functioning:

Refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used. Tex. Code Crim. Proc. art. 46B.001(14); Tex. Health & Safety Code § 591.003(20).

Texas Commission on Jail Standards (TCJS):

TCJS is the regulatory authority over all public and private county jail facilities, jail facilities under contract with municipalities, and all county, municipal, and private contract facilities housing out-of-state inmates. The Commission does not have authority over the state prison system, juvenile detention facilities, federal facilities, or any facility comprised solely of federal inmates. Its mission is to empower local government to provide safe, secure, and suitable local jail facilities through proper rules and procedures while promoting innovative programs and ideas. *See* 37 Tex. Admin. Code § 251.1; Tex. Gov't Code Ch. 511.

Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI):

TCOOMMI is the agency responsible for providing a formal structure for criminal justice, health and human services, and other affected organizations to communicate and coordinate on policy, legislative, and programmatic issues affecting justice involved individuals with special needs, mental impairment; a physical disability, terminal illness, or significant illness; or is elderly. The TCOOMMI program monitors, coordinates, and implements a continuity of care and service program through collaborative efforts with the 39 Local Mental Health Authorities throughout the state. Outpatient levels of service include Intensive Case Management, Transitional Case Management, and Continuity of Care for

[29] *Mental Illness*, Nat'l Inst. of Mental Health, https://www.nimh.nih.gov/health/statistics/mental-illness (last visited Aug. 24, 2023).

individuals on community supervision or parole. *See* Tex. Health & Safety Code Ch. 614.

Texas Department of Criminal Justice (TDCJ):

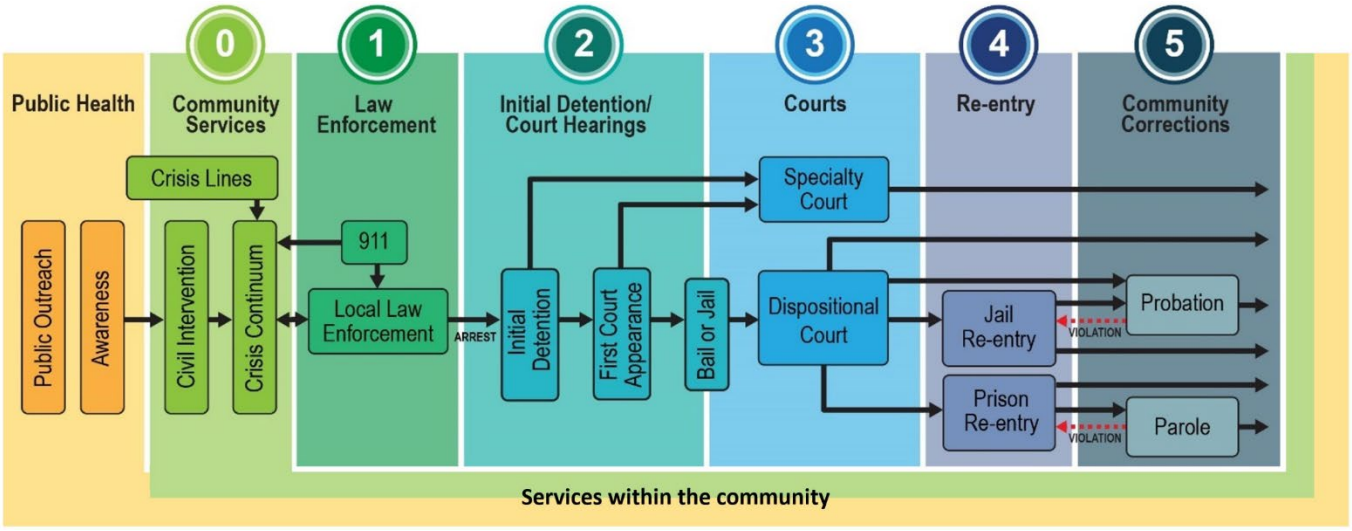
TDCJ manages inmates in state prisons, state jails, and private correctional facilities that contract with TDCJ. The agency also provides funding and certain oversight of community supervision (previously known as adult probation) and is responsible for the supervision of inmates released from prison on parole or mandatory supervision.

Chapter 3: Using This Bench Book

3.1 This Bench Book is a procedural guide organized around the Sequential Intercept Model.

This Bench Book is a procedural guide for Texas judges, attorneys and court stakeholders involved with cases regarding persons with mental illness and/or IDD. Each section contains applicable statutory processes, relevant guidance, and mandatory forms (sample forms can also be found in an online forms bank on the JCMH website). Statutory language is simplified where possible, and practice notes are included in text boxes and footnotes.

The procedures discussed below are organized according to the widely recognized Sequential Intercept Model (SIM). This model was developed as a "conceptual framework for communities to organize targeted strategies for justice-system involved individuals with behavioral health disorders."[30]



3.2 Forms

Sample forms submitted from several courts can now be found in an online forms bank on the JCMH website: https://texasjcmh.gov/technical-assistance/forms/jcmh-committee-forms-database/. If your court would like to add forms to the online bank, please send them to JCMH@txcourts.gov.

In April 2023, the Supreme Court amended Rule 10 of the Texas Rules of Judicial Administration,[31] creating subsection 10(g) that states **a court must not reject a properly completed form that has been approved by the Supreme Court** or an organization that represents the Supreme Court. Formally approved forms regarding Emergency Detentions, Orders of Protective Custody, Court-ordered services, and court ordered medications are located on the JCMH's Officially Approved Forms website: https://texasjcmh.gov/technical-assistance/forms/jcmh-officially-approved-forms/. Note that this edition of the Bench Book only contains forms mandated by the Legislature to be used statewide

[30] Substance Abuse & Mental Health Servs. Admin. GAINS Ctr., *Developing a Comprehensive Plan for Behavioral Health and Criminal Justice Collaboration: The Sequential Intercept Model* (3rd ed., 2013); *See also* Mark R. Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People with Serious Mental Illness*, 57 PSYCH. SERVS. 544, 544-49 (2006). This SIM adopts the traditional model but also expands it to include new intercepts that allow for a better understanding of early intervention to effectively address those with mental health issues before they enter the criminal justice system. *See also Fair Justice for Persons with Mental Illness: Improving the Courts Response*, Nat'l. Ctr. for State Cts., 6 (2018).

[31] Sup. Ct. of Tex., Final Approval of Amendments to Texas Rules of Judicial Administration 7 and 10, effective April 1, 2023, https://www.txcourts.gov/media/1455992/239015.pdf.

and the Officially Approved Forms from the JCMH. Those forms are located within an appendix in the back of the book.

There are many additional topics related to mental illness and IDD, such as substance use disorder, poverty, inadequate low-income housing, veterans, trauma (e.g., child abuse, domestic violence, natural disasters), human trafficking, and other health conditions (e.g., dementia or epilepsy). These issues frequently overlap with mental illness and IDD issues and, while critical to a thorough understanding of mental illness and IDD, are not the focus of this edition.

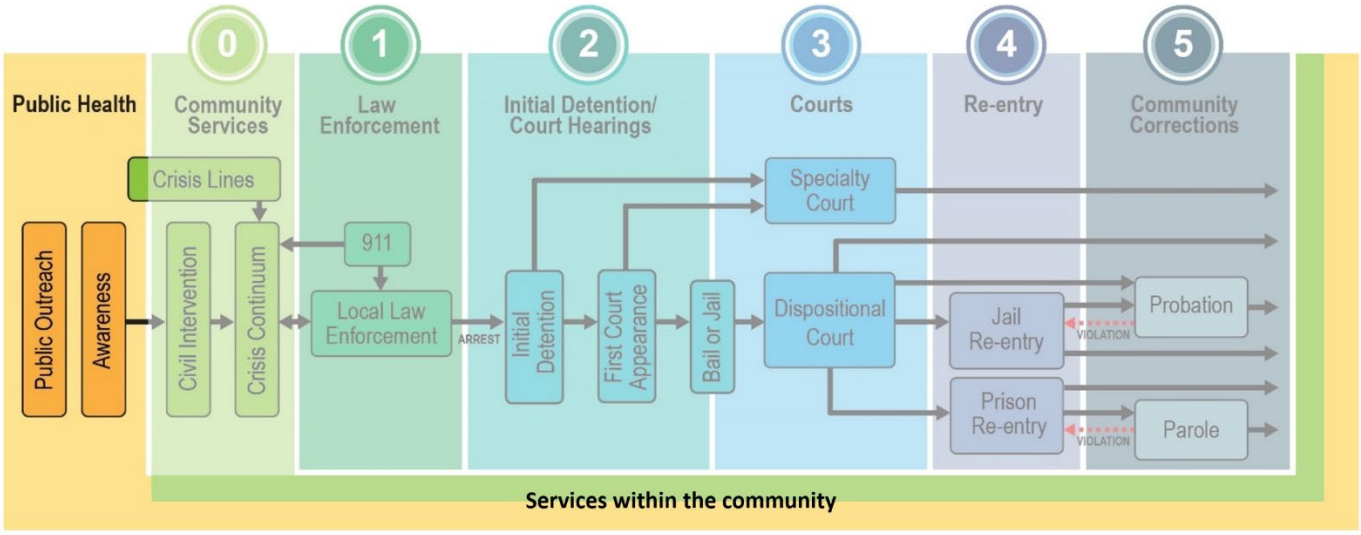
The following icons denote special topics to watch for: Noteworthy Information, Legislative Changes, Reflection Points, and Texas-Specific Examples.

Icon	Explanation
	Noteworthy Information This star icon draws the reader's attention to important points of law or policy that are often overlooked or misunderstood.
	**Legislative Changes** New laws from the 88th legislative session (2023) are noted throughout this bench book with this icon. Changes from previous legislative sessions are incorporated into the text of the bench book.
	**Reflection Points** Reflection Points are at critical places in the processing of a case to that create an opportunity to consider judicial and systemic efficiency. Although the Reflection Points are generally directed at judges, each one of us has a role to play in identifying opportunities to improve the justice system, and we encourage all justice system professionals to use these points for honest and thoughtful consideration in their work.
	**Practical Examples** This icon alerts the reader to practical examples of the statutes and policies that makeup Texas Mental Health Law.

3.3 Stakeholder Input Is Essential

Finally, this Bench Book represents a collaborative effort among stakeholders from across disciplines. It is a dynamic publication that will be regularly updated to incorporate legislative changes, provide current practice tips and other practical information, and highlight matters about which stakeholders disagree. If you are reading this book, you are a stakeholder, and we value your opinion. If you would like to provide feedback on any part of this book, please email us at JCMHBenchBook@txcourts.gov. Thank you for your service and for your interest in these issues.

Chapter 4: Public Health



4.0 Public Health

Public Health addresses the importance of laying a groundwork that sets up individuals, families, and public outreach systems for appropriate identification and responses to mental health and IDD issues before any justice-related system comes into play.[32] Addressing mental health issues does not and should not begin with the justice system.[33] While there is no guarantee that an individual with MI or IDD may not eventually interact with the civil and/or criminal justice system, early intervention is ideal.[34] Therefore, this Bench Book includes Public Health, though in the model above, it might be more appropriate for public health to surround all the intercepts.

Mental health awareness should be heightened through public outreach to individuals, families, and support systems. Awareness is intentionally broad and refers to identification as well as awareness of resources.

QUICK SECTION OVERVIEW

4.1 Systems of Care: A Comprehensive Look at the Needs of People with Mental Health Disorders or IDD

Systems of Care is a shared set of guiding principles that are used to address problems in mental health systems for children and youth. This bench book has adopted this approach to describe comprehensive needs of people with mental health conditions and their families, rather than providing mental health

[32] *Fair Justice for Persons with Mental Illness: Improving the Court's Response*. Nat'l. Ctr. for State Cts. 19 (2018), https://www.neomed.edu/wp-content/uploads/CJCCOE_10-Dave-Byers-COURT-RESOURCES-Mental-Health-Protocols-Oct-2018.pdf.

[33] *Id.*

[34] *Id.*

treatment in isolation.[35] For all interventions in this bench book, it is helpful to consider interagency collaboration; individualized strengths-based care that is trauma-informed; cultural competence; individual and family involvement; community-based services; and accountability. These principles are essential elements of delivering care.

4.1.1 Interagency Collaboration

Interagency collaboration aims to improve behavioral health treatment and support services for service members, veterans, and their families.

Complex systems and complex problems require a collaborative approach to developing solutions. The Service Members, Veterans, and their Families Technical Assistance (SMVF TA) Center works to bring federal, state, and community partners together to close military and civilian gaps and strengthen behavioral health services for military and veteran families.

Focus areas of interagency collaboration include:

- Strengthening infrastructure
- Improving behavioral health policies for service members, veterans, and their families
- Implementing behavioral health best practices
- Building sustainability

Working together, stakeholders can maximize impacts at the community-level on critical behavioral health issues such as suicide prevention, substance use, and access to care.[36]

4.1.2 Individualized Strengths-Based Care that is Evidenced-Based and Trauma-Informed

Individualized, strengths-based services and supports provide individualized services and supports tailored to the unique strengths, preferences, and needs of each person and family that are guided by a strengths-based planning process and an individualized service plan developed in partnership with young people and their families.

Evidence-Based Practices and Practice Based Evidence: Ensure that services and supports include evidence-informed, emerging evidence-supported, and promising practices to ensure the effectiveness of services and improve outcomes for young people and their families, as well as interventions supported by practice-based evidence provided by varied communities, professionals, families, and young people.

Trauma-Informed: Provide services that are trauma-informed, including evidence supporting trauma-specific treatments, and implement systemwide policies and practices that address trauma. [37]

4.1.3 Individualized Consideration

To best serve those in need of services and supports, providers must develop the capacity to understand the past experiences that may mediate the family's perspective of the agency and its plan of care. In the context of the judicial system, the concepts of justice and fairness should drive system responses and outcomes based on the unique characteristics and individual treatment or rehabilitative needs of each impacted person.

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35 Beth A. Stroul *et al.*, *The Evolution of the System of Care Approach for Children, Youth, and Young Adults with Mental Health Conditions and Their Families*, https://www.cmhnetwork.org/wp-content/uploads/2021/05/The-Evolution-of-the-SOC-Approach-FINAL-5-27-20211.pdf

[36] *Interagency Collaboration*, Substance Abuse & Mental Health Servs. Admin., https://www.samhsa.gov/smvf-ta-center/collaboration (last visited Aug. 24, 2023).

[37] Stroul *et al.*

4.1.4 Individual and Family Involvement

Family and individual involvement within a system of care requires mutual respect and meaningful partnerships between families and professionals. Families and youth are involved as key stakeholders, whether they are helping tailor one person's individualized plan of care or helping design, build, or maintain the system of care. Individuals and families are involved in policy development, care coordination, evaluation, strategic planning, service provision, social marketing, and individual and system advocacy.[38]

4.1.5 Community-Based Services

A system of care builds not only on the strengths of the individual and family, but also on the strengths of their community. Providing community-based services means having high quality services accessible in the least restrictive setting possible. A community-based system of care requires systems to see the home, family, and neighborhood of the family from an asset-based perspective, and to identify the natural supports in these familiar surroundings as part of a strength- based approach.[39]

4.1.6 Accountability

Accountability refers to the continual assessment of practice, organizational, and financial outcomes to determine the effectiveness of systems of care in meeting the needs of people with mental illness and IDD.

Two essential components of an effective accountability strategy in a system of care are:

- The development of an interagency management information system that tracks important indicators of service and system performance; and
- A strong evaluation strategy.[40]

4.2 Health and Human Services

4.2.1 The Texas Health and Human Services System

The Texas Health and Human Services (HHS) System manages programs that help families with food, health care, safety, and disaster services.[41] HHS is comprised of more than 41,000 public servants under two agencies:

- The Health and Human Service Commission (HHSC)
- The Department of State Health Services (DSHS)

These agencies serve millions of people each month and affect the lives of all Texans, both directly and indirectly. The client-focused HHSC delivers hundreds of programs and services. It provides for those who need assistance to buy necessities, eat nutritious foods, and pay for healthcare costs, by administering programs such as: Temporary Assistance for Needy Families (TANF); the Supplemental Nutrition Assistance Program (SNAP); the Special Supplemental Program for Women, Infants and Children (WIC); Medicaid; and the Children's Health Insurance Program (CHIP).

The agency operates 13 state-supported living centers, which provide direct services and supports to people with intellectual and developmental disabilities, and 10 state hospitals, which serve people who

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Navigate Life Texas for Families Raising Children with Disabilities, Texas Health and Human Services Commission (HHSC)* https://www.navigatelifetexas.org/en/state-agencies-services/texas-health-and-human-services-commission#:~:text=HHSC%20manages%20programs%20that%20help,Nutritional%20Assistance%20(SNAP)%20programs (last visited Aug. 24, 2023).

need inpatient psychiatric care. All 23 of these residential facilities are operated at all hours of the day, all days of the year. HHSC also provides a multitude of additional mental health and substance use services, regulation of childcare and nursing facilities, help for people with special healthcare needs, community supports and services for older Texans, disaster relief assistance, and resources to fight human trafficking.

During the regular session in 2023, the Texas Legislature passed a $321.3 billion ($144 billion in general funds) state budget for the 2024-2025 biennium, nearly a third, or $102 billion is to be devoted to health and human services.[42] The Health and Human Services Commission (HHSC) is to receive $93 billion ($37 billion in general funds); the Departments of Family and Protective Services (DFPS) is to receive $5 billion ($3.2 billion in general funds); and State Health Services (DSHS) is to receive $2.2 billion ($323.4 million in general funds). Combined Medicaid and Children's Health Insurance Program funding stands at $78.6 billion, with an additional $3.6 billion going to health-related services, which include support for community mental health ($1.4 billion), substance abuse ($554 million), women's health ($447 million), and early childhood intervention ($396 million).[43]

For fiscal year (FY) 2020, HHSC programs accounted for approximately about one-third of state spending. Of this funding, 90 percent was used for grants and client services, while 3.6 percent was for state-operated, facility-based services, and 6.4 percent was for administrative services, including the functions of eligibility determination services, contract management, financial services, information technology, regulatory services, and oversight.[44]

4.2.1.1 Statewide Behavioral Health Strategic Plan[45]

Within HHSC, there are divisions and strategies focused on behavioral health services—which encompass both mental health and substance use disorders (SUDs). Texas has come to recognize the unique needs of individuals with complex behavioral health issues. These individuals experience a range of other risk factors, including unemployment, homelessness, and co-occurring health issues. Texas also appreciates the need for specialized services for individuals with intellectual disabilities, new mothers with depression, and military trauma-affected veterans and their families.

Technological innovations such as telehealth and telemedicine allow people to have greater access to the care they need without having to drive hours to receive it. Agencies now have increased access to behavioral health data to inform decision making. Texas state agencies have continued to move toward research-based assessment tools and services that enable us to do a better job defining and coordinating services. There are also noted improvements in cross-agency coordination and collaboration.

Embedded in the Statewide Behavioral Health Strategic Plan, the Texas Strategic Plan for Diversion, Community Integration, and Forensic Services provides best practices for the delivery of services and support to justice-involved people with behavioral health conditions, highlights existing programs in Texas, and provides goals, objectives, and strategies to guide innovation, encourage collaboration, and foster opportunities to leverage resources across state agencies to:

1. Support the expansion of robust crisis and diversion systems;
2. Increase coordination, collaboration, and accountability across systems and agencies;
3. Enhance the continuum of care and support;

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[42] Boram Kim, *Healthcare highlights from Texas's recently passed $321.3 billion biennium budget*, STATE OF REFORM (June 7, 2023), https://stateofreform.com/featured/2023/06/healthcare-highlights-from-texass-recently-passed-321-3-billion-biennium-budget/#:~:text=During%20its%20regular%20session%20this,to%20health%20and%20human%20services.

[43] *Id.*

[44] *Health and Human Services System Coordinated Strategic Plan for 2021-2025*, Tex. Health & Hum. Servs. Comm'n (Sept. 2020), https://www.hhs.texas.gov/sites/default/files/documents/about-hhs/budget-planning/strategic-plans/2020-25/hhs-coordinated-strategic-plan-2021-25.pdf [hereinafter *HHSC Plan 2021-2025*].

[45] *Texas Statewide Behavioral Health Strategic Plan featuring the Texas Strategic Plan for Diversion, Community Integration and Forensic Services*, Fiscal Years 2022-2026, Tex. Health & Hum. Servs. Comm'n (Sept. 2022) https://www.hhs.texas.gov/sites/default/files/documents/hb1-statewide-behavioral-health-idd-plan.pdf.

4. Strengthen state hospital and community-based forensic services; and
5. Expand training, education, and technical assistance.

4.2.1.2 Behavioral Health Advisory Committee

The Health and Human Services Commission established the Behavioral Health Advisory Committee as the state mental health planning council in accordance with the state's obligations under 42 U.S.C. § 300x-3.

The purpose of the committee is to provide customer/consumer and stakeholder input to the Health and Human Services system in the form of recommendations regarding the allocation and adequacy of behavioral health services and programs within the State of Texas. The BHAC considers and makes recommendations to the HHS Executive Commissioner consistent with the committee's purpose.

"Recommendations[46] to Health and Human Services system agencies regarding behavioral health services may relate to:

- The promotion of cross-agency coordination, state/local and public/private partnerships in the funding and delivery of behavioral health services;
- The promotion of data-driven decision-making;
- The prevention of behavioral health issues and the promotion of behavioral health wellness and recovery;
- The integration of mental health and substance use disorder services in prevention, intervention, treatment, and recovery services and supports;
- The integration of behavioral health services and supports with physical health service delivery;
- Access to services and supports in urban, rural, and frontier areas of the state;
- Access to services and supports to special populations;
- Rules, policies, programs, initiatives, and grant proposals/awards for behavioral health services; and
- Monitoring the five-year behavioral health strategic plan and coordinating expenditure plan developed by the SBHCC."[47]

4.2.1.3 Statewide Behavioral Health Coordinating Council[48]

In an effort to improve coordination between state agencies and to create a strategic approach to providing behavioral health services, lawmakers directed the creation of a statewide mental health coordinator position by directing 18 state agencies that receive general revenue behavioral health funding to work collectively to develop this collaborative five-year behavioral health strategic plan and coordinated expenditures proposal.[49]

The SBHCC is strategically directing efforts of state agencies to address gaps in the intersection of justice and behavioral health. The cross-agency collaboration of the SBHCC is developing and monitoring strategies to **prevent** and **reduce** justice involvement for persons with behavioral health needs.

It is the intent of the Legislature that these presentations serve as an opportunity to increase collaboration for the effective expenditure of behavioral health funds between state and local entities.

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[46] *Behavioral Health Advisory Committee*, Tex. Health & Hum. Servs. Comm'n, https://www.hhs.texas.gov/about-hhs/leadership/advisory-committees/behavioral-health-advisory-committee (last visited Aug, 24, 2023).

[47] *Id.*

[48] *Statewide Behavioral Health Coordinating Counc*il, Tex. Health & Hum. Servs. Comm'n, https://www.hhs.texas.gov/about/leadership/advisory-committees/statewide-behavioral-health-coordinating-council (last visited Aug. 24, 2023).

[49] *HHSC Plan 2021-2025*.

No provision of this Act may be construed as granting the statewide behavioral health coordinating council authority over local projects implemented by the collaboratives listed above.

The SBHCC has several responsibilities and duties, including:

- Meet at least quarterly, or more frequently at the call of the presiding officer;
- Develop and oversee the implementation of the five-year statewide behavioral health strategic plan;
- Prepare an annual coordinated statewide behavioral health expenditure proposal incorporating past and proposed expenditures for the next fiscal year for all state agencies that receive behavioral health funds;
- Publish an annual progress report on the strategic plan's implementation and update the inventory of behavioral health programs and services funded by the state;
- Prepare a biennial consolidated behavioral health schedule summarizing legislative appropriations requests by all state agencies that receive behavioral health funds; and
- Review and comment on proposed exceptional items related to behavioral health funding to avoid duplication and coordinate services across state agencies.

4.2.1.4 Statewide IDD Strategic Plan

In addition to developing a five-year strategic plan to address gaps in the behavioral health services system, stakeholders across Texas recognize the unique challenges faced by individuals with intellectual and developmental disabilities (IDD). In response, stakeholders identified the need to develop a Statewide IDD Strategic Plan to focus on the IDD system across the state. The Foundation of the Statewide IDD Strategic Plan is the first phase in the development.

4.2.1.5 Mental Health Texas Website

The website serves as a one-stop resource for behavioral health services across the state. Mental Health Block Grant funding is being used to enhance the mentalhealthtx.org website. It reflects the work of the HHSC Office of Mental Health Coordination and the strategic goals of the 23-member agencies that comprise the Council. An update and enhancement to the site funded in part by a SAMHSA grant will allow for Council members to update the site with individual agency resource and contact information.[50] Advanced web-based resources such as 2-1-1, MentalHealthTX.org, the ASK: Ask About Suicide App, Behavioral Health Wellness and Mental Health First Aid (MHFA) trainings, and the Texas Veterans Phone App connect Texans to behavioral health services and live supports.

4.2.1.6 Office of Forensic Coordination

In the 2015 legislative session, the Legislature created a State Forensic Director[51] position within HHSC, which oversees the Office of Forensic Coordination (OFC) to improve forensic service coordination and prevent and reduce justice-involvement for people with mental illness, substance use disorders, and intellectual and developmental disabilities. Through statewide and cross-agency initiatives such as Sequential Intercept Model mapping, the Eliminate the Wait campaign, and numerous technical assistance initiatives, the OFC improves coordination and collaboration among state and local leaders.[52]

Established in 2022 by the Texas HHSC Office of Forensic Coordination, the Texas Behavioral Health and Justice Technical Assistance Center[53] (the "TA Center") connects Texans with specialized resources related to behavioral health and justice services. The TA Center aims to support people working in Texas' behavioral health and justice systems, as well as people with lived experience in these systems and their

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[50] *Id.*

[51] Tex. Health & Safety Code § 532.013; S.B. 1507, 84th Leg., Reg. Sess. (Tex. 2015), Sec. 1, eff. May 28, 2015.

[52] *Office of Forensic Coordination*, Tex. Health & Hum. Servs. Comm'n https://www.hhs.texas.gov/about/process-improvement/improving-services-texans/behavioral-health-services/office-forensic-coordination (last visited Aug. 24, 2023).

[53] *Transforming Behavioral Health and Justice Systems in Texas*, Tex. Behav. Health & Just. Tech. Assistance Ctr. https://txbhjustice.org/ (last visited Aug. 24, 2023).

families. They support local agencies and communities in working collectively across systems to improve outcomes for people with MI, SUD and/or IDD. The TA Center provides free training and guidance—also known as technical assistance—both in person and virtually on a variety of behavioral health and justice topics.

4.2.1.7 Joint Committee on Access and Forensic Services (JCAFS)

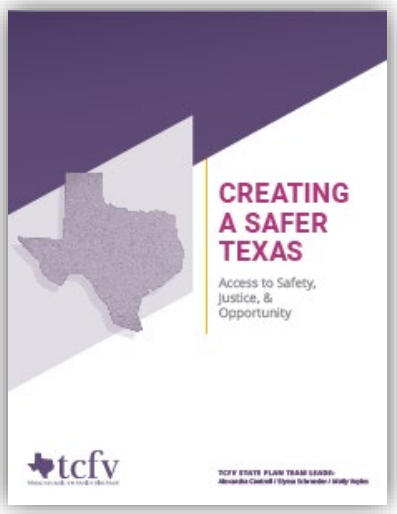
The Department of State Health Services established the Joint Committee on Access and Forensic Services (JCAFS) in accordance with S.B. 1507, 84th Legislature, Regular Session, 2015.

The purpose of the committee is to provide customer/consumer and stakeholder input to the Health and Human Services system in the form of recommendations regarding access to forensic services within the state of Texas. The JCAFS considers and makes recommendations to the Legislature consistent with the committee's purpose.

Recommendations[54] to the Legislature regarding access to forensic services include:

- Monitoring the implementation of updates to the bed day allocation methodology for allocating to each designated region a certain number of state-funded beds in state hospitals and other inpatient mental health facilities for voluntary, civil and forensic patients.
- Implementing a bed day utilization review protocol, including a peer review process.
- Planning for the coordination of forensic services.

Texas Council on Family Violence
Texas State Plan



Codified in 2001, state law directs HHSC Family Violence Program to maintain a plan for delivering family violence services in Texas. Additionally, Texas law requires that HHSC must "consider the geographic distribution of services and the need for services, including the need for increasing services for underserved populations." Texas Human Resource Code, Title 2, Subtitle E, Chapter 51, Section 51.0021. HHSC historically confers this duty to the Texas Council on Family Violence (TCFV), the state domestic violence coalition, which coincides with the Coalition's requirement to complete a needs assessment for family violence survivors in the state.

Together with advocates, survivors, funders, and our partners in the research community, the Texas Council on Family Violence (TCFV) offers the 2019 Texas State Plan, entitled Creating a Safer Texas: Access to Safety, Justice, and Opportunity.

The goal of the 2019 Texas State Plan is to create a detailed inventory of available family violence services in the state, as well as identify gaps in availability of service, and emerging issues with a focus on the self-identified needs of survivors.

TEXAS COUNCIL ON FAMILY VIOLENCE, CREATING A SAFTER TEXAS: ACCESS TO SAFETY, JUSTICE, & OPPORTUNITY (2019), available at https://texas-state-plan.tcfv.org/wp-content/uploads/2019/11/2019-State-Plan-Executive-Summary-11.2.pdf.

[54] *Joint Committee on Access & Forensic Services*, Tex. Health & Hum. Servs. Comm'n https://www.hhs.texas.gov/about-hhs/leadership/advisory-committees/joint-committee-access-forensic-services (last visited Aug. 24, 2023).

4.3 Public Health Initiatives and Best Practices

4.3.1 Individual Awareness:

Identifying mental illness is the first step to effective responses. Individuals can seek medical assistance and treatment if they are able to recognize that it is necessary to seek help and comply with prescribed medications and/or treatment. Comprehensive treatment plans that are proactive and focus on developing protective factors against mental illness provide long-term effects. Avenues of awareness include schools, medical professionals (especially pediatricians), and media.

Mental Health Workforce Shortage

According to NAMI-Texas, three million Texans live in counties that have no psychiatrist. About 200 of the state's 254 counties have a mental health workforce shortage. Therefore, some Texans travel long distances for care and others use telehealth services. Some specific recommendations to address this issue include step-down, supportive housing in communities and peer support services. S.B. 1636 (86th Reg. Sess. (2019)) requires the Health Professions Council to include in its annual report strategies to expand the health care workforce, including methods for increasing the number of health care practitioners providing mental and behavioral health care services.

4.3.2 Family Support:

Often family or friends are the first to respond to a crisis for a loved one. Organizations like the National Alliance on Mental Health (NAMI), and the Treatment Advocacy Center (TAC) provide guidelines for how to respond to a mental health crisis, including how to navigate HIPPA, how to find available resources within the community, and how to navigate the civil and criminal justice system.

4.3.3 Public Outreach:

Public outreach and campaigns to enhance mental health awareness enable citizens, loved ones, and professionals to identify and correctly respond to the need for mental health interventions before a crisis occurs.

4.3.4 Advance Directives:

Advance directives enable an appointment of an agent to give consent or make decisions on an individual's behalf concerning medical, mental health, and financial issues. Some examples include powers of attorney (POA); medical powers of attorney; psychiatric advance directives (PAD); "springing" powers of attorney that only gives the agent authority if and when the principal becomes disabled or incapacitated; and appointment of guardianship for incapacity determinations.

4.3.5 Public Awareness Initiative: Eliminate the Wait

To address the growing crisis in effectively serving the number of people waiting in county jails for inpatient competency restoration services, the JCMH and HHSC have partnered with key stakeholders across Texas to develop a campaign to right-size competency restoration services for Texans. The effort calls for a comprehensive and integrated approach to Eliminate the Wait. See the Eliminate the Wait Checklist Series on the JCMH Website.

ELIMINATE THE WAIT TOOLKIT

4.3.6 Peer Support

Peer support is the process of giving encouragement or assistance to overcome a challenge in life by someone with lived experience. Peer workers can be people who experience the challenges themselves, or family members with loved ones who experienced such challenges. Peers offer emotional support,

share knowledge, teach skills, provide practical assistance, and connect people with resources, opportunities, and communities of support.[55]

Challenges associated with the provision of peer support services include limited access to people in correctional facilities—including jail rules that preclude a person with lived experience from entering the jail due to their lived experiences—a lack of awareness or understanding of the peer role, and the stigma associated with mental illness or substance use, especially as it relates to the provision of services to justice-involved people.

House Bill (H.B.) 1486, 85th Legislature, Regular Session, 2017, enabled the creation of a new Medicaid "Peer Services" benefit and defined the training and certification of substance use and mental health peer workers.[56] Because of this impetus and the need to provide support for the implementation of this new Medicaid benefit across the behavioral health system, the Peer and Recovery Services Programs, Planning and Policy unit[57] was created inside the HHSC IDD-BH infrastructure.[58]

4.3.6.1 Definitions Relating to Peer Support

Certification Entity:
An organization approved by HHSC to certify:
(A) peer specialists;
(B) peer specialist supervisors; and
(C) peer specialist training entities.

Lived Experience:
When a person has experienced a significant life disruption due to the person's own mental health condition and/or substance use disorder and is now in recovery**.**

Peer Specialist:
A person who uses lived experience, in addition to skills learned in formal training, to deliver strengths-based, person-centered services to promote a recipient's recovery and resiliency.
1 Tex. Admin. Code § 354.3003(11).

A Peer Specialist[59]	
Is a person in recovery	Is not a professional with a license
Shares lived experience	Does not give professional advice
Is a role model	Is not an expert or authority figure
Sees the person as a whole person in context of the persons role, family and community	Does not see the person as a case or a diagnosis
Motivates through hope and inspiration	Does not motivate through fear of negative consequences
Supports many pathways to recovery	Does not prescribe one pathway to recovery
Functions as an advocate for the person in recovery, both within and outside the program	Does not represent the perspective of the program
Teaches the person how to accomplish daily tasks	Does not do tasks for the person

[55] *Peer Support Services*, Texas Health and Human Services Commission, https://www.hhs.texas.gov/providers/behavioral-health-services-providers/peer-support-services [hereinafter *HHSC Peer Support*] (last visited Aug 24, 2023).

[56] *Id*.

[57] The Peer and Recovery Services Programs, Planning, and Policy unit was created to develop, support, and advance the peer workforce in Texas. The unit provides technical support, project management, policy consultation, and contract oversight for peer support service programs. Contact the Peer and Recovery Services unit by email at BHS_PeerServices@hhs.texas.gov.

[58] *HHSC Peer Support*.

[59] *About Peer Support Services*, Texas Health and Human Services, https://www.hhs.texas.gov/providers/behavioral-health-services-providers/peer-support-services/about-peer-support-services (last visited Aug. 24, 2023).

Teaches how to acquire needed resources, including money	Does not give resources and money to the person
Helps person find basic necessities	Does not provide basic necessities
Uses language based upon common experience	Does not use clinical language
Helps person find professional resources	Does not provide professional services
Shares local resources	Does not provides case management
Helps set personal goals	Does not tell person how to live his or her life in recovery
Provides peer support services	Does not do whatever the program insists he or she do

Person-centered:
The provision of services:
(A) directed by the recipient;
(B) aligned with the hopes, goals, and preferences of the recipient; and
(C) designed to build on the recipient's interests and strengths.
1 Tex. Admin. Code § 354.3003(12).

Person-centered Recovery Plan:
A written plan that serves as a plan of care and:
(A) is developed with the person, others whose inclusion is requested by the person and who agree to participate, and the persons planning or providing services;
(B) amended at any time based on the person's needs;
(C) guides the recovery process and fosters resiliency;
(D) identifies the person's changing strengths, capacities, goals, preferences, needs, and desired outcomes; and
(E) identifies services and supports to meet the person's goals, preferences, needs and desired outcomes. 1 Tex. Admin. Code § 354.3003(13).

Qualified Peer Supervisor (QPS):
A QPS must:
(A) be a certified peer specialist under this subchapter; and
(B) have one of the following combinations:
(i) a high school diploma or General Equivalency Diploma (GED) and at least four years of work experience as a peer specialist, up to two years of which may be substituted by work experience supervising others; or
(ii) an associate's degree or higher from an accredited college or university and at least two years of work experience as a peer specialist.
1 Tex. Admin. Code § 354.3003(17).

Recipient:
The term Recipient refers to a person receiving Medicaid (peer support) services under this subchapter.
1 Tex. Admin. Code § 354.3003(18).

Recovery:
A process of change through which a person:
(A) improves one's health and wellness;
(B) lives a self-directed life;
(C) strives to reach one's self-defined full potential; and
(D) participates in one's personal community.
1 Tex. Admin. Code § 354.3003(19).

Trauma-informed:
A program, organization, or system that is trauma-informed realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in clients, families, staff, and others involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization.
1 Tex. Admin. Code § 354.3003(23).

4.3.6.2 Peer Support Workers

"The certified peer specialist workforce is relatively new in the behavioral health field, with state-recognized certification programs first emerging in 2001. Within this short time frame, states have recognized the potential of peer specialists to improve consumer outcomes by promoting recovery. A nearly universal definition of a peer specialist is: an individual with lived experience who has initiated his/her own recovery journey and assists others who are in earlier stages of the recovery process. As of July 2016, 41 states and the District of Columbia have established programs to train and certify peer specialists and 2 states are in the process of developing and/or implementing a program. Forty-one states and the District of Columbia bill Medicaid for peer support services."[60]

House Bill (H.B.) 1486, 85th Legislature, Regular Session, 2017, defined the training and certification of substance use and mental health peer workers and created a career ladder for peer workers to move into supervisory positions to support other peers.

Peer support workers are people with a history of mental health and/or substance use concerns who have been successful in recovery and help others who may experience similar challenges. They share their lived experience to inspire hope in a manner that distinguishes them from the services and support provided by behavioral health clinicians, judges, lawyers, and other stakeholders. Peers can help justice-involved people access community-based mental health or primary care, obtain documentation or identification needed for housing or employment, and connect with formal and informal support systems in their community.

Peer support is provided by individuals with lived experience of mental health and/or substance use conditions who are trained and certified. These individuals assist others achieve long-term recovery. Peer specialists offer emotional support, share knowledge, teach skills, provide practical assistance, and connect people with resources, opportunities, and communities of support.[61] Peer specialists provide services support recipients with a mental health condition and/or substance use disorder to actively plan and work toward long-term recovery.

4.3.6.3 Types of Certified Peer Support Workers

All peer specialist services are recovery-oriented, person-centered, relationship-focused, and trauma-informed.

Peer specialist services may include:

- Recovery and wellness support - includes providing information on and support with planning for recovery;
- Mentoring - includes serving as a role model and providing assistance in finding needed community resources and services;
- Advocacy - includes providing support in stressful or urgent situations and helping to ensure that the recipient's rights are respected.[62]

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[60] Laura Kaufman, et al., *Peer Specialist Training and Certification Programs: A National Overview*, The Univ. of Tex. at Austin, Tex. Inst. for Excellence in Mental Health, STEVE HICKS SCHOOL OF SOCIAL WORK 1, 108 (2016) https://sites.utexas.edu/mental-health-institute/files/2017/01/Peer-Specialist-Training-and-Certification-Programs-A-National-Overview-2016-Update-1.5.17.pdf.

[61] *A Guide to Understanding Mental Health Systems and Services in Texas*, Hogg Found. for Mental Health 19 (Supplement to the 5th ed., Jan. 2023) (citing *HHSC Peer Support*).

[62] *What is a Certified Mental Health Peer Specialist (MHPS)?*, Peer Force, https://wiki.peerforce.org/en/knowledge/what-is-a-certified-mental-health-peer-support-specialist-mhps (last visited Aug. 24 2023).

4.3.6.3.a Re-Entry Peer Specialist (JI-RPS)

Reentry Peer Specialist training and certification was created in August 2018 by Via Hope. This certification created a new professional opportunity for the formerly incarcerated persons to use their lived experience to help others. The intent was to directly address the significant obstacles to becoming a whole person; this includes employment, trauma, and other reentry challenges that many people face after release from incarceration. Reentry Peer Support has the potential to dramatically transform the behavioral health workforce.

Unlike other reentry training models, the Via Hope training emphasizes the trauma individuals experience before, during, and after incarceration. The Reentry Peer Specialist credential also offers formerly incarcerated individuals an opportunity to further their own recovery while providing support and hope to other people who may be trying to find their own way through reentry and recovery. The credential is issued by the Texas Certification Board. Via Hope continues to focus on the implementation of this workforce into correctional facilities and broader system change related to incarceration and community reentry.

The core learning objectives of this training involve participants' self-exploration relative to: (1) Recovery from a Reentry Perspective, (2) Trauma, (3) Recidivism Intervention, (4) What it means to be a Peer Specialist, and (5) Maintaining a Whole Person Perspective.

4.3.6.3.b Mental Health Peer Specialist (MHPS)

In Texas a certified Mental Health Peer Specialist is a person who uses lived experience in recovery from a mental health condition*, in addition to skills learned in formal training, to deliver strengths-based, person-centered services to promote a recipient's recovery and resiliency.[63]

Part of the certification process for both Mental Health Peer Specialists and Recovery Support Peer Specialists is the completion of 250 hours of volunteer or paid work experience specific to MHPS or RSPS. These hours must be completed under the supervision of a Peer Specialist Supervisor.[64]

4.3.6.3.c Recovery Support Peer Specialist (RSPS)

In Texas, a certified Recovery Support Peer Specialist is a person who uses lived experience in recovery from a substance use disorder, in addition to skills learned in formal training, to deliver strengths-based, person-centered services to promote a recipient's recovery and resiliency.

4.3.6.3.d Peer Specialist Supervisor (PSS)

A Peer Specialist Supervisor is a person who supports and guides peer specialists after they obtain their certification. A PSS will oversee peer specialists while they provide the necessary components of peer work, such as giving recovery-oriented peer services, skill-building, ethical problem solving, optimizing professional growth, and performing administrative duties.

This supervision may also extend to overseeing aspects specific to the organization where a peer specialist is working. This would include things like learning organization-specific policies or performing and understanding distinct administrative matters.

The role of a PSS is important and ongoing since supervision is consistently required for any peer specialist after they obtain certification. Supervision is likewise required in any organization that implements peer specialists.[65]

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[63] *Id.*

[64] *Supervisor Partner Network*, Peer Force, https://peerforce.org/peer-supervision/ (last visited Aug. 24, 2023).

[65] *What is a Peer Specialist Supervisor (PSS)?,* PEER FORCE, https://wiki.peerforce.org/en/knowledge/what-is-a-peer-specialist-supervisor (last visited Aug. 24, 2023).

4.3.6.3.e Certified Family Partner (CFP)

Peer support is also made available for caregivers of a child with mental health concerns in the form of family partner support.[66] "Certified Family Partner support" is the act of a person who has had lived experience parenting a child with emotional or mental health challenges. Support includes giving encouragement, hope, assistance, guidance, and understanding that aids in recovery. Access to quality family partner supports can be instrumental in engaging families as active participants in the child or youth's care and as equal members of the child/youth's treatment team.

Family Partner Support

A Family Partner is a person who has lived experience parenting a child experiencing mental, emotional or behavioral health challenges and who can articulate the understanding of their experience with another parent or family member. This person may be a birth parent, adoptive parent, foster parent, legally recognized family member standing in for an absent parent, or a person chosen by the family or youth to have the role of parent.

Certified Family Partner

A Certified Family Partner is a parent or guardian who has lived experience raising a child with mental, emotional or behavioral health challenges and who has at least one year successfully navigating a child-serving system. The Certified Family Partner is trained to use this experience to help other parents/guardians for the purpose of educating, role modeling and providing hope related to the recovery process.[67]

A Certified Family Partner has received specialized training and passed a Certification exam demonstrating that she or he has the competencies necessary to successfully navigate systems of care and help other families successfully navigate those systems. Certified Family Partners provide supports to the parents/Legal Authorized Representative (LAR) and/or primary caregivers of the child/youth. They do not provide services directly to the child/youth.

Access to quality family partner supports can be instrumental in engaging families as active participants in the child or youth's care and as equal members of the child/youth's treatment team. A Certified Family Partner's personal experience is critical to establishing a trusting relationship and earning the respect of families currently within the mental health system. Certified Family Partners can be mediators, facilitators, or a bridge between families and agencies; they ensure each family is heard and their individual needs are being addressed and met. Through their work with parents, primary caregivers, and/or LARs, Certified Family Partners directly impact the child or youth's resilience and recovery.

4.3.6.4 National Model Standards for Peer Support Certification

In June 2023, the U.S. Department of Health and Human Services (HHS), through the Substance Abuse and Mental Health Services Administration (SAMHSA), published *National Model Standards for Peer Support Certification*[68] for substance use, mental health, and family peer workers. The national model standards were created to accelerate universal adoption, recognition, and integration of the peer workforce across all elements of the healthcare system.[69]

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[66] *Certified Family Partners,* Tex. Certification Bd., https://www.tcbap.org/page/CertifiedFamilyPartners (last visited Aug. 24, 2023).

[67] *What are the steps to becoming a Certified Family Partner (CFP)?,* Peer Force, https://wiki.peerforce.org/en/knowledge/what-are-the-steps-to-becoming-a-certified-family-partner-cfp (last visited Aug. 24, 2023).

[68] *National Model Standards for Peer Support Certification*, Substance Abuse & Mental Health Servs. Admin. (2023) https://www.samhsa.gov/sites/default/files/national-model-standards-for-peer-support-certification.pdf.

[69] *HHS Publishes National Model Standards for Substance Use, Mental Health, and Family Peer Worker Certifications* (June 6, 2023) https://www.hhs.gov/about/news/2023/06/06/hhs-publishes-national-model-standards-substance-use-mental-health-family-peer-worker-certifications.html [hereinafter *HHS Certifications Press Release*].

Since the 2015 release of SAMHSA's *Core Competencies for Peer Workers in Behavioral Health Services*,[70] the peer workforce has flourished, resulting in the implementation of state-endorsed or state-run peer certification programs across 49 out of 50 states.[71]

4.3.6.4.a Core Competencies for Peer Workers

Core competencies[72] have the potential to guide service delivery and promote best practices in peer support. They can be used to inform peer training programs, help develop certification standards, and inform job descriptions. Supervisors will be able to use these competencies to appraise peer workers' job performance and peers will be able to assess their own work performance and set goals for continued development.

Core competencies are not intended to create obstacles for people wishing to enter the peer workforce. Rather they are intended to guide the development of initial and ongoing training that supports peer workers' entry into this important work and continued skill development.

Core competencies for peer workers reflect certain foundational principles identified by members of the mental health consumer and substance use disorder recovery communities. These are:

- **Recovery-oriented**: Peer workers hold out hope to those they serve, partnering with them to envision and achieve a meaningful and purposeful life. Peer workers help those they serve identify and build on strengths and empower them to choose for themselves, recognizing that there are multiple pathways to recovery.
- **Person-centered**: Peer recovery support services are always directed by the person participating in services. Peer recovery support is personalized to align with the specific hopes, goals, and preferences of the people served and to respond to specific needs the people has identified to the peer worker.
- **Voluntary**: Peer workers are partners or consultants to those they serve. They do not dictate the types of services provided or the elements of recovery plans that will guide their work with peers. Participation in peer recovery support services is always contingent on peer choice.
- **Relationship-focused**: The relationship between the peer worker and the peer is the foundation on which peer recovery support services and support are provided. The relationship between the peer worker and peer is respectful, trusting, empathetic, collaborative, and mutual.
- **Trauma-informed**: Peer recovery support utilizes a strength-based framework that emphasizes physical, psychological, and emotional safety and creates opportunities for survivors to rebuild a sense of control and empowerment.

4.3.6.5 Texas Peer Certifications and Credentials[73]

The Texas Administrative Code §§ 354.3051 - 354.3055 sets out minimum qualifications, scope of work, ethical responsibilities of peer specialists.

Each Credentialed Specialist also has a specific code of ethics, professional standards, and a procedure for the reporting of any code of ethics complaints.[74]

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[70] *Core Competencies for Peer Workers in Workers in Behavioral Health Services*, Substance Abuse & Mental Health Servs. Admin. (2015) https://www.samhsa.gov/sites/default/files/programs_campaigns/brss_tacs/core-competencies_508_12_13_18.pdf.

[71] *HHS Certifications Press Release*.

[72] *Core Competencies for Peer Workers*, Substance Abuse & Mental Health Servs. Admin., https://www.samhsa.gov/brss-tacs/recovery-support-tools/peers/core-competencies-peer-workers (last visited Aug. 24. 2023).

[73] *Certification Applications,* Tex. Certification Bd., https://www.tcbap.org/page/certification (last visited Aug. 24, 2023).

[74] *See Mental Health Peer Specialist Code of Ethics*, Via Hope https://www.viahope.org/programs/peer-specialist-training-and-certification/cps-code-ethics/ (last visited Aug. 24, 2023).

Credential	Description	Medicaid Billable?
Re-Entry Peer Specialist (JI-RPS)	Re-Entry Peer specialists providing services under TCB's Standards support participants with a mental health and/or substance use challenge that have been incarcerated (jail or prison) toward long-term recovery. Must attest to have lived experience with incarceration, demonstrate current self-directed recovery and be willing to appropriately share own recovery story with participants. Education should be relevant to re-entry.[75] The JI-PRS domains include advocacy; mentoring and education; recovery and wellness support; ethical responsibility; and re-entry.	No
Mental Health Peer Specialist (MHPS)	The Mental Health Peer Specialist credential standardizes qualifications of those working in Recovery Support within the field of mental health, and/or co-occurring disorders. In addition to Medicaid, this certification is recognized by other sources, including some General Revenue-funded programs.	Yes
Recovery Support Peer Specialist (RSPS)	The Recovery Support Peer Specialist credential standardizes qualifications of those working in Recovery Support Peer within the field of chemical dependency, mental health, and/or co-occurring disorders. In addition to Medicaid, this certification is recognized by other sources, including some General Revenue-funded programs.	Yes
Peer Specialist Supervisor (PSS)	The Peer Specialist Supervisor credential standardizes qualifications of those working in Recovery Support Peer within the field of chemical dependency, mental health, and/or co-occurring disorders. In addition to Medicaid, this certification is recognized by other sources, including some General Revenue-funded programs.	Yes
Certified Family Partner (CFP)	The Certified Family Partner credential standardizes qualifications for those working with primary caregivers of children with a mental health diagnosis.[76]	No

4.3.6.6 Medicaid Reimbursable Peer Support Services

Peer support services are Medicaid reimbursable if peer is providing services as defined by the Texas Administrative Code Chapter 354, subchapter N. This subchapter establishes requirements for providing peer specialist services through Medicaid and applies only to peer specialist services that are Medicaid reimbursable under this subchapter and other applicable rule or law. 1 Tex. Admin. Code § 354.3003.

To be reimbursed by Medicaid, an organization must be an entity or agency that is Medicaid-enrolled in Texas and meets the other statutory requirements. 1 Tex. Admin. Code § 354.3101. The organization must follow all of the procedures and requirements—such as training, certification, and oversight—as set forth in statute. 1 Tex. Admin. Code §§ 354.3013 - 354.3165.

[75] *Texas Certification Board Standards & Guidelines* 17 (June 2022) www.tcbap.org/resource/resmgr/guidelines/final_guidelines_and_standar.pdf.

[76] *Children's Mental Health Family Partner Support Services*, Tex. Health & Hum. Servs. Comm'n https://www.hhs.texas.gov/services/mental-health-substance-use/childrens-mental-health/childrens-mental-health-family-partner-support-services (last visited Aug. 24, 2023); See *also Certified Family Partner (CFP)* application, Tex. Certification Bd. https://cdn.ymaws.com/www.tcbap.org/resource/resmgr/certifications_/cfp/cfp_initial_application_augu.pdf (last visited Aug. 24, 2023).

The minimum qualifications to be a peer specialist are enumerated in 1 Tex. Admin. Code § 354.3051, including the ethical requirements statutorily required by peer support workers.

In order to be eligible to receive services, the recipient must: be an adult; be a Medicaid recipient; have a mental health condition or substance use disorder, or both; and have peer specialist services included in the recipient's person-centered recovery plan. 1 Tex. Admin. Code § 354.3011.

4.3.6.7 Non-Medicaid Reimbursable Peer Support Services

There are also programs for peer services which are not reimbursable by Medicaid. A majority of the services the State oversees are funded either through General Revenue or federal block grants. The credentials recognized by Texas are set out in Tex. Admin. Code § 354(n).

One such example is offered by Via Hope; their Reentry Peer Specialist training and certification was created specifically for formerly incarcerated individuals to assist other individuals as they reenter the community after incarceration. This program is meant to complement and work with other existing reentry services.[77]

4.3.6.8 Research and Results

In an August 15, 2007, letter, the Centers of Medicaid and Medicaid Services, in conjunction with the U.S. Department of Health and Human Services Center for Medicaid and State Operations, declared peer support to be an evidence-based mental health model.[78]

Evidence suggests that peer support and coaching:

- Reduces the admissions and days spent in hospitals and increases time in the community.
- Reduces the use of acute services.
- Increases engagement in outpatient treatment, care planning and self-care.
- Improves social functioning.
- Increases hope, quality of life and satisfaction with life.
- Reduces substance use.
- Reduces depression and demoralization.
- Improves chances for long-term recovery.
- Increases rates of family unification.
- Reduces average services cost per person.

In Texas, one long-term study focusing on substance use disorder peer specialists, also called recovery coaches, demonstrated exciting results at 12 months:

- Housing status improved, with 54% of long-term coaching participants owning or renting their own living quarters after 12 months, compared to 32% at enrollment.
- Overall employment increased to 58% after 12 months from 24% at enrollment.
- Average wages increased to $879 per month after 12 months from $252 at enrollment.
- Healthcare utilization dropped after 12 months of recovery coaching:
    - Outpatient visits dropped to 815 visits from 4118 at enrollment.
    - Inpatient care days dropped to 1117 days from 9082 at enrollment.
    - Emergency room visits dropped to 146 from 426 at enrollment.

In total, recovery coaching saved $3,422,632 in healthcare costs, representing a 72% reduction in costs over 12 months.[79]

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[77] *Reentry Peer Specialist Certification,* Via Hope https://www.viahope.org/reentry-peer-specialist-certification/ (last visited Aug. 24, 2023).

[78] Letter from Center for Medicaid and State Operations to State Medicaid Directors, August 15, 2007 https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD081507A.pdf.

[79] Laurel Mangrum *et al.*, *Recovery Support Services Project Fiscal Year 2018 Interim Process Evaluation Report*, The Univ. of Tex. at Austin, Steve Hicks Sch. of Social Work, Addiction Rsch. Inst. (Aug. 31, 2018) https://socialwork.utexas.edu/wp-content/uploads/2020/09/Recovery-Support-

4.3.6.9 Supervision

a. Peer specialist supervision must focus on a peer specialist's provision of services, including review of cases and activities, skill building, problem resolution, and professional growth. Supervision may also include aspects specific to the organization, such as following organizational policy or other administrative matters.
b. Peer specialist supervision must occur:
   (1) at least once weekly for a peer specialist with an initial certification;
   (2) at least once monthly for a peer specialist with a two-year certification; or
   (3) more frequently at the request of the peer specialist.
c. Peer specialist supervision may:
   (1) be provided individually or in a group setting;
   (2) be provided face-to-face or via teleconference; and
   (3) include observation of the peer specialist providing services.
d. Peer specialist supervision must be documented.

1 Tex. Admin. Code § 354.3103.

4.3.6.10 Additional Peer Resources

- **PeerForce** is the State-funded resource for peer support. This resource is highlighted on page 27 of the SMI Peer Toolkit at the QR code below.
- **VIA Hope Website**[80] features additional resources, including hiring guidelines, sample job descriptions, and application supplements.
- **Supervision of Peer Workers Technical Assistance Resource Document**.[81] Peer workers are emerging as important members of treatment teams. Help supervisors understand how to supervise peer workers in behavioral health services.
- **Peer Support Roles Across the Sequential Intercept Model**[82] is a two-page tool that provides an overview of how people with lived experience, or peers, can provide support to individuals in contact with the criminal justice system at each intercept of the Sequential Intercept Model. This document was created by Policy Research Associates and is also available in the Apendix of this book.
- **SMI Peer Toolkit**.[83] SMI Adviser and the National Association of State Mental Health Program Directors (NASMHPD) created an SMI Peer Toolkit called "Building New Horizons: Opening Career Pathways for Peers with Criminal Justice Backgrounds." The goal of this toolkit is to transform perspectives on peers. It provides three modules: Pre-Hiring, Hiring, and Post-Hiring.

SMI PEER TOOLKIT: *BUILDING NEW HORIZONS*

Services-2018.pdf; *Benefits of Peer Support Services,* Tex. Health and Hum. Servs. Comm'n https://www.hhs.texas.gov/providers/behavioral-health-services-providers/peer-support-services/benefits-peer-support-services (last visited Aug. 24, 2023).

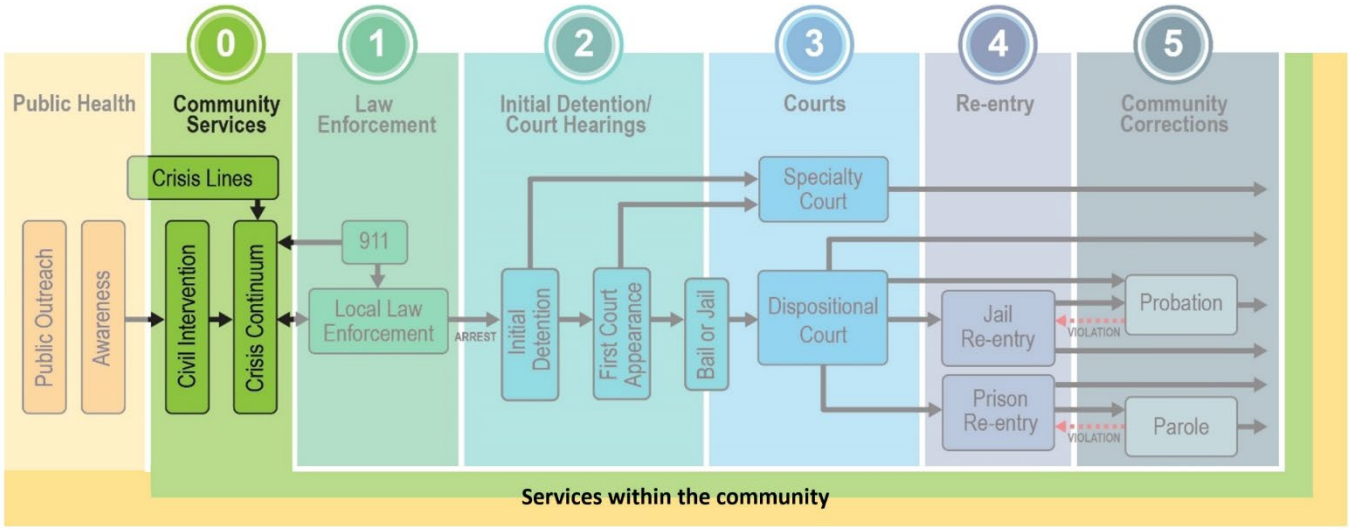
[80] *Peer Support Resources*, Via Hope https://www.viahope.org/resource/peer-support/ (last visited Aug. 24, 2023).

[81] *Supervision of Peer Workers*, Substance Abuse & Mental Health Servs. Admin. https://www.samhsa.gov/sites/default/files/brss-tacs-peer-worker-supervision.pdf.

[82] *Creating Social Change for People and Communities through Technical Assistance, Research, and Training*, Pol'y Rsch. Assoc. (2023) https://www.prainc.com/wp-content/uploads/2020/08/PeersAcrossSim_PRA-508.pdf.

[83] *Building New Horizons: Opening Career Pathways for Peers with Criminal Justice Backgrounds*, SMI Adviser, Nat'l Ass'n of State Mental Health Program Dir. (2023). https://smiadviser.org/wp-content/uploads/2023/07/Building-New-Horizons-Peer-Hiring-Guide-FINAL.pdf.

Chapter 5: Intercept 0—Community Services



5.0 Intercept 0: Community Services

Intercept 0: Community Services encompasses the early-intervention points for people with mental illness or intellectual or developmental disabilities before they are placed under arrest by law enforcement. It captures systems and services designed to connect individuals in need with treatment before a mental health crisis begins or at the earliest possible stage of system interaction. In Texas, these include services such as crisis hotlines, screening and assessment, crisis-response teams, specially trained law enforcement, and court-ordered mental health services.

QUICK SECTION OVERVIEW

5.1 Community-based Mental Health Services

Community-based mental health services are available for individuals with intellectual disabilities, other developmental disabilities, serious mental illnesses, and substance use disorders.

As a judge and community leader, it is advantageous to have a general understanding of those resources.[84]

[84] HHSC has a program called 2-1-1 Texas, which helps Texas citizens connect with services. *See* https://www.211texas.org/about-2-1-1/ for more information. *See also* the Texas Mental Health Resource Guide, created by Judge Barbara Hervey, Texas Court of Criminal Appeals, and her staff. It is a compilation of mental health and substance use disorder resources across Texas organized by county. The first edition (2019) is available at https://www.txcourts.gov/media/1444700/texas-mental-health-resource-guide-email-corrected-09092019.pdf.

5.1.1 Services Provided by Local Mental Health Authorities and Local Behavioral Health Authorities (LMHAs/LBHAs)

LMHAs and LBHAs serve as the point of entry for publicly-funded, privately-funded, or unfunded mental health services for people who are assessed with mental illness in Texas. They are responsible for recommending the most appropriate and available treatment alternative for person in need of mental health services in accordance with the Texas Administrative Code.[85]

Each of the 39 LMHAs/LBHAs is required to provide:

- crisis-response services for all individuals in the service area; and
- ongoing outpatient mental health services for individuals who meet diagnostic and need-based eligibility requirements.

5.1.1.1 Diagnostic Criteria

A local mental health authority shall ensure the provision of assessment services, crisis services, and intensive and comprehensive services using disease management practices for adults with:

- **bipolar disorder;**
- **schizophrenia; or**
- **clinically severe depression**

and for children with serious emotional illnesses.

The local mental health authority shall ensure that individuals are engaged with treatment services that are:

- ongoing and matched to the needs of the individual in type, duration, and intensity;
- focused on a process of recovery designed to allow the individual to progress through levels of service;
- guided by evidence-based protocols and a strength-based paradigm of service; and
- monitored by a system that holds the local authority accountable for specific outcomes, while allowing flexibility to maximize local resources.

Tex. Health & Safety Code §533.0354 (a).

Eligibility for ongoing outpatient mental health treatment is a diagnosis- and need-based determination governed by state and federal requirements and the HHSC performance contract[86] with LMHAs/LBHAs and section 533.0354 of the Texas Health and Safety Code.

The Adult Mental Health Priority Population are people aged 18 or older who have a diagnosis of severe and persistent MI with the application of significant functional impairment and the highest need for intervention. This would include people who have severe and persistent MI such as schizophrenia, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, bulimia nervous, anorexia nervosa, or other severely disabling mental disorders that require crisis resolution or ongoing and long-term support and treatment.

The Child and Youth Mental Health Priority Population are children ages 3-17 with serious emotional disturbance (excluding a single diagnosis of substance abuse, IDD, or autism spectrum disorder) who have a serious functional impairment or who are at risk of disruption of a preferred living or childcare environment due to psychiatric symptoms or are enrolled in special education because of a serious emotional disturbance.

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[85] *See* Tex. Admin. Code § 40 Pt. 1 Ch. 2 Subch. D Rule 2.151.

[86] *Performance Contract Notebook*, Tex. Health & Hum. Serv. Comm'n (2022) https://www.hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/behavioral-health-provider/community-mh-contracts/performance-contract-notebook-program-attachment.pdf.

Tex. Health & Safety Code § 534.053.

5.1.2 Statutorily Required Services

Each of the 39 LMHAs/LBHAs is required to provide:

- 24-hour emergency screening and rapid crisis stabilization services;[87]
- Community-based crisis residential services or hospitalization;
- Community-based assessments, including the development of interdisciplinary treatment plans and diagnosis and evaluation services;
- Medication-related services, including medication clinics, laboratory monitoring, medication education, mental health maintenance education, and the provision of medication; and
- Psychosocial rehabilitation programs, including social support activities, independent living skills, and vocational training.

Tex. Health & Safety Code § 534.053(a).

To the extent that resources are available, LMHAs/LBHAs shall:

(1) ensure that the services listed in this section are available for children, including adolescents, as well as adults, in each service area;

(2) emphasize early intervention services for children, including adolescents, who meet the department's definition of being at high risk of developing severe emotional disturbances or severe mental illnesses; and

(3) ensure that services listed in this section are available for defendants required to submit to mental health treatment under articles 17.032 (Personal Bond for Person with MI or ID, discussed in Intercept 2, Part II, section 1 of this Bench Book) or 42A.104 or 42A.506 (Community Supervision of Person with MI or ID, discussed in Intercept 3 of this Bench Book) of the Texas Code of Criminal Procedure.

Tex. Health & Safety Code § 534.053(c).

Note: Section 534.053(c) of the Texas Health and Safety Code acknowledges the reality of resource limitations for defendants who are court-ordered to receive mental health treatment under articles 17.032, 42A.104, or 42A.506 of the Texas Code of Criminal Procedure.

5.1.3 General Services from LMHAs/LBHAs include:

- Provide a full array of services and supports for people with mental illness.
- Admit eligible people with Medicaid into assessed and most appropriate level of care based on completion of the Uniform Assessment.[1]
- Admit eligible people, when they have capacity, without Medicaid, into assessed and most appropriate level of care based on completion of the Uniform Assessment.
- Complete Preadmission Screening and Resident Review (PASRR)[2] Evaluations, known as a PE, for people suspected of having a serious mental illness seeking admission to a Medicaid-certified nursing facility.
- Provide specialized services in the most appropriate setting for the people, including the nursing facility, who are PASRR positive and agree to receive the Mental Health Specialized Services. [3]

[87] Every LMHA/LBHA has a 24-hour crisis line. Find yours here: *Mental Health Crisis Services,* TEX. HEALTH & HUM. SERV., https://hhs.texas.gov/services/mental-health-substance-use/mental-health-crisis-services (last visited Aug. 24, 2023).

LMHA Diagnostic Criteria by Statute		
Statute	**Diagnostic Criteria**	**Responsibilities**
Health & Safety Code § 533.0354(a)	Adults with: • Bipolar Disorder • Schizophrenia • Clinically Severe Depression Children with: • Serious Emotional Illness	**LMHA shall ensure the provision of:** • assessment services, • crisis services, and • intensive & comprehensive services using disease management practices.
(a)(1)	Children with: • Serious Emotional, Behavioral, or Mental Disturbance not already described in (a); and Adults with: • Severe Mental Illness who are experiencing sign functional impairment due to a mental health Disorder not described in (a) that is defined by DSM-5, including: **1.** major depressive disorder, including single episode or recurrent major depressive disorder **2.** post-traumatic stress disorder; **3.** schizoaffective disorder, including bipolar and depressive types; **4.** obsessive-compulsive disorder; **5.** anxiety disorder; **6.** attention deficit disorder; **7.** delusional disorder; **8.** bulimia nervosa, anorexia nervosa, or other eating disorders not otherwise specified; or **9.** any other diagnosed mental health disorder.	**LMHA may ensure the provision of, to the extent feasible:** • assessment services, • crisis services, and • intensive and comprehensive services using disease management practices. **LMHA shall ensure** these individuals are engaged with treatment services in a clinically appropriate manner. (a-2)
(b)	Adults with: • schizophrenia or • bipolar disorder	**HHSC shall require each LMHA** to incorporate jail diversion strategies into their disease management practices for managing adults with schizophrenia or bipolar disorder to reduce the involvement of the criminal justice system.
(b)(2)	Adults not described in (b) but with the following disorders: • post-traumatic stress disorder;	**HHSC shall require each LMHA** to incorporate jail diversion strategies into their disease management practices to

	• schizoaffective disorder, including bipolar and depressive types; • anxiety disorder; or • delusional disorder.	reduce the involvement of the criminal justice system.

5.1.4 Peer Services at Community-based Organizations[88]

Peer specialists provide services at local mental and behavioral health authorities (LMHAs/LBHAs), peer-run service providers, state hospitals, substance use recovery community-based organizations, recovery organizations, emergency departments, treatment organizations, and more. Access to Peer Support Services

While peer support is expanding into various other facilities and settings, there are several types of peer run organizations within the community that allow access to peer support services.

5.1.4.1 Consumer Operated Service Providers

Consumer-Operated Service Providers[89] (COSPs) are run and governed by peers and typically provide peer support and other non-clinical services, assistance with obtaining resources, drop-in opportunities for socialization, and opportunities to participate in local and state advocacy efforts for individuals in recovery from mental health challenges.

5.1.4.2 Recovery Community Organizations

A Recovery Community Organization[90] (RCO) is a nonprofit organization founded and led by people with direct lived experience with substance use challenges and recovery. RCOs promote public education, peer-based and other recovery support services, and advocate for laws and policies for people in recovery. RCOs also provide peer recovery support training for certification and serve as key employers of peer recovery support professionals.

Practical Example

A Travis County Recovery Community Organization (RCO)—*Communities for Recovery*—contracts with a local specialty court—The Travis County Family Drug Treatment Court: The Parenting in Recovery—to provide each participant with a recovery support peer specialist as a part of their programming.[91]

[88] Hogg Foundation for Mental Health, *A Guide to Understanding Mental Health Systems and Services in Texas* 21 (Supplement to the 5th ed., Jan. 2023).

[89] Consumer-Operated Services Providers: An Exploration of Organization Function and Capacity, THE UNIVERSITY OF TEXAS AT AUSTIN, https://sites.utexas.edu/mental-health-institute/consumer-operated-service-providers-an-exploration-of-organizational-function-and-capacity/ (last visited July 6, 2023). JULI EARLEY, ET AL., STEVE HICKS SCHOOL OF SOCIAL WORK, THE UNIVERSITY OF TEXAS AT AUSTIN, CONSUMER-OPERATED SEE PROVIDERS: AN EXPLORATION OF ORGANIZATIONAL FUNCTION AND CAPACITY. TEXAS INSTITUTE FOR EXCELLENCE IN MENTAL HEALTH 3 (2019) https://sites.utexas.edu/mental-health-institute/files/2020/01/Consumer-Operated-Service-Providers-EPRPIO-Report-2019.pdf.

[90] *Peer Recovery, Resource Library*, Center of Excellence, SAMHSA, https://peerrecoverynow.org/resource-library/ (last visited July 6, 2023).

[91] *Travis County Family Drug Treatment Court,* PARENTING IN RECOVERY, https://www.parentinginrecovery.com/team (last visited July 6, 2023). *Communities for Recovery* https://communitiesforrecovery.org/ (last visited July 6, 2023).

5.2 Community-based IDD Services

5.2.1 How People with IDD Receive Services and Supports

5.2.1.1 Waiver Services

Waiver services include the following:

- **Home and Community-based Services (HCS)** is a Medicaid waiver program approved by Centers for Medicare & Medicaid Services (CMS) pursuant to section 1915(c) of the Social Security Act. It provides community-based services and supports to eligible individuals as an alternative to an intermediate care facility for individuals with an intellectual disability or related conditions program. The HCS Program is operated by the Texas Health and Human Services Commission (HHSC), formerly the Department of Aging and Disabilities Services. 26 Tex. Admin. Code § 263.4(a).
- **Texas Home Living (TxHmL)** supplies essential services and supports to Texans with ID or a related condition so that they can continue to live in the community.
- **Community Living Assistance and Support Services (CLASS)** provides home- and community-based services to people with related conditions as a cost-effective alternative to placement in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID).
- **Deaf-blind with Multiple Disabilities (DBMD)** focuses on increasing opportunities for people who are deaf-blind with multiple disabilities to communicate and interact with their environment, providing a cost-effective alternative to institutional placement.

5.2.1.2 State Plan Services

Community First Choice (CFC) is a state plan option that allows states to provide home- and community-based attendant services and supports to eligible Medicaid enrollees under their state plan.

5.2.2 How Programs are Funded

Medicaid Waivers are federal funds that help provide services to people who would otherwise be in an institution, nursing home, or hospital to receive long-term care in the community.

General Revenue (GR) Funded Services are state funds from the GR that are primarily intended to help people remain in their own or their family's homes. Not all GR funded services are available in all areas of the state. GR services are provided by or directly through a LIDDA.

5.2.3 Where Services are Provided

- In individual's own homes and settings in the community (*e.g.,* grocery store, park, library)
- In three to four-person residential settings (a.k.a. "group homes")
- Intermediate Care Facilities for Individuals with an ID or Related Condition (ICF/IID)
- State Supported Living Centers (SSLC)
- Nursing Facilities

5.2.4 LIDDAs Serve Individuals with IDD

A LIDDA's role is to serve as the single point of access to certain publicly funded services and supports for the residents within the LIDDA's local service area. A LIDDA's responsibilities include:

a. Developing a plan of services and supports. If the designated LIDDA determines an individual is eligible for and desires service coordination, the LIDDA must develop a plan of services and

supports for the individual using person-directed planning that is consistent with DADS *Person Directed Planning Guidelines.*[92]

b. Provision of service coordination.

c. Revising the plan of services and supports.

d. Minimum contact.

e. Individuals enrolled in the TxHmL Program. In addition to the requirements in this subchapter, a LIDDA must ensure service coordination is provided to individuals enrolled in the TxHmL Program in accordance with Chapter 9, Subchapter N of this title (relating to Texas Home Living (TxHmL) Program and Community First Choice (CFC) and Chapter 41 of this title (relating to Consumer Directed Services Option)).

f. Individuals enrolled in the HCS Program. In addition to the requirements in this subchapter, a LIDDA must ensure service coordination is provided to individuals enrolled in the HCS Program in accordance with Chapter 9, Subchapter D, of this title (relating to Home and Community-based Services (HCS) Program and Community First Choice (CFC)) and Chapter 41 of this title.

26 Tex. Admin. Code § 331.11; *see also* LIDDA Performance Contract.[93]

5.2.4.1 Types of Services Offered or Contracted

Screening is performed face-to-face or by telephone contact with persons to determine a need for services.

Eligibility determination includes an interview and assessment, or an endorsement conducted in accordance with Texas Health and Safety Code section 593.005, and 26 Tex. Admin. Code § 331.11 to determine if a person has an intellectual disability or is a member of the IDD priority population.

The Outpatient Biopsychosocial Approach for IDD (OBI) provides outpatient mental health services for people with intellectual and developmental disabilities (IDD) and mental health needs. The 86th Legislature allocated $3 million for IDD outpatient mental health clinics to enhance the services available for individuals with IDD and mental health needs. The services are designed for children and adults who have IDD or who are presumed to have IDD and who also have a co-occurring mental health condition, substance use disorder, or behavior support needs. OBI services offer biopsychosocial assessments, collaborative care case management, skills training, and education and training.

Service coordination helps people access medical, social, educational, and other services and supports that will help them achieve an acceptable quality of life and community participation.

Community supports are individualized activities that are provided in the person's home and at community locations, such as libraries and stores. Supports may include:

- habilitation and support activities that foster improvement of, or facilitate, the person's ability to perform daily living activities;
- activities for the person's family that help preserve the family unit and prevent or limit out-of-home placement of the person;
- transportation for the person between home and his or her community employment site or day habilitation site; and
- transportation to facilitate the person's employment opportunities and participation in community activities.

Respite is either planned or emergency short-term relief provided by trained staff to the person's unpaid caregiver when the caregiver is temporarily unavailable. If enrolled in other services, the person

[92] TEX. DEP'T. OF AGING & DIS. SVCS., PERSON DIRECTED PLANNING GUIDELINES, https://www.hhs.texas.gov/sites/default/files/documents/person-directed-planning-guidelines.pdf

[93] HHSC Statement of Work, available at https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/providers/long-term-care/lidda/performance-contract/performance-contract.pdf.

continues to receive those services as needed during the respite period.

Employment assistance helps people locate paid jobs, and includes helping them:

- identify employment preferences, skills, and work requirements and conditions; and
- identify prospective employers who offer appropriate employment.

Supported employment is provided to a person who has paid employment to help him or her sustain that employment. It includes individualized support services, supervision, and training.

Nursing is provided to people who require treatment and monitoring of health care procedures that are prescribed by a physician or medical practitioner or that are required by standards of professional practice or state law to be performed by licensed nursing personnel.

Behavioral supports are specialized interventions to help people increase adaptive behaviors and to replace or modify maladaptive behaviors that prevent or interfere with their inclusion in home and family life or community life. Supports include:

- assessing and analyzing assessment findings so that an appropriate behavior support plan can be designed;
- developing an individualized behavior support plan consistent with the outcomes identified in the person-directed plan;
- training and consulting with family members or other providers and, as appropriate, to the person; and
- monitoring and evaluating the success of the behavior support plan and modifying it as necessary.

Specialized therapies include assessment and treatment by licensed or certified professionals for social work services, counseling services, occupational therapy, physical therapy, speech and language therapy, audiology services, dietary services, and behavioral health services other than those provided by an LMHA, as well as training and consulting with family members or other providers.

Vocational training is a service provided to people in industrial enclaves, work crews, or affirmative industry settings to help them get a job.

Individualized Skills and Services provide assistance with getting, keeping, or improving self-help, socialization, and adaptive skills necessary to live successfully in the community and to participate in home and community life. Day habilitation is normally provided regularly in a group setting (not in the person's residence) and includes personal assistance for those who cannot manage their personal care needs during day habilitation and need assistance with medications and performing tasks delegated by a registered nurse. 26 Tex. Admin Code § 559.227(l)(1).

Medicaid Program Enrollment: LIDDAs are responsible for enrolling eligible individuals into the following Medicaid programs:

- Intermediate Care Facilities for Individuals with Intellectual Disabilities (a 24-hour residential setting including state-supported living centers);
- Home and Community-based Services (HCS);[94] and
- Texas Home Living.[95]

Transition Support Teams (TST) were originally developed to assist people in the transition from an institutional setting (e.g., SSLCs and nursing facilities) into a community setting, but these TSTs have since expanded their reach. Because individuals with complex needs often require more experienced staff, HHSC has contracted with eight LIDDAs across Texas to provide medical, behavioral, and

[94] *See Home and Community-based Services (HCS)*, TEX. HEALTH AND HUMAN SERVICES, https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/home-community-based-services-hcs (last visited Aug. 24, 2023).

[95] *Texas Home Living (TxHmL)*, TEX. HEALTH AND HUMAN SERVICES https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/texas-home-living-txhml (last visited Aug. 24, 2023).

psychiatric support to other LIDDAs and community IDD waiver providers in designated service areas.

The eight contracted LIDDAs have teams that offer educational activities, technical assistance, and case review. Case Review is typically for individuals with IDD who are at risk of being admitted into an institution, and those who have transition to the community from an institutional setting.[96] The teams have licensed medical staff such as physicians, registered nurses, psychiatrists, and psychologists with experience working with people with IDD.

These programs are currently funded through the Money Follows the Person (MFP) Grant which is distributed by CMS to Texas and passed on to the LIDDAs. Because MFP rebalancing funds are evaluated yearly, uncertainty of ongoing funding affects the existence of the TST Program. LIDDAs are aware that funding is subject to change based on guidance from CMS which impacts whether or not the TST program is an available resource.

5.2.5 Residential Services through the HCS Program

The HCS Program can be an important diversionary program because it can provide housing to prevent an individual's admission to institutional services. Providers offering services under the HCS program maintain three- to four-bed group homes where individuals reside. When residing in an HCS group home, individuals are entitled to many services, including:

- supervised and supported home living 24 hours a day, seven days a week;
- direct personal assistance with activities of daily living (grooming, eating, bathing, dressing, and personal hygiene);
- assistance with meal planning and preparation;
- securing and providing transportation;
- assistance with housekeeping;
- day habilitation;
- supported employment;
- financial management services;
- assistance with medications and the performance of tasks delegated by a registered nurse;
- social worker;
- behavioral support by a licensed professional;
- physicians;
- dietary services; and
- dental treatment.

Those interested in receiving HCS services are placed on an interest list by the LIDDA until funding becomes available. An offer from the HCS program to provide services depends on individual need and one's date of placement on the interest list. Further, funding each individual placement depends on the outcome of HHSC's Legislative Appropriations Request (LAR) where HHSC outlines its funding requirements and/or needs for the upcoming biennium.

An alternate route to enter into the HCS program is available through a crisis diversion slot. A person may qualify for a crisis diversion slot if:

- The person is at imminent risk of admission to an institution;
- The person is not being court-committed to a facility for competency evaluation, such as an SSLC or state hospital;
- Adequate and appropriate community resources are not available, as evidenced by attempts to locate and use community-based services and supports, such as ICF/IID, GR funded services,

[96] *Intellectual and Developmental Disabilities*, TEXAS COUNCIL, https://txcouncil.com/public-policy/intellectual-and-developmental-disabilities/ (last visited June 9, 2023).

CFC services, Crisis Intervention Services, other Medicaid waiver programs, or support through the local school district and

- The person meets the criteria for a Level of Care I.
    - An LOC I requires either a diagnosis of ID or a related condition (RC). Along with the diagnosis of an RC, the person's IQ score must be 75 or below. For the specific requirements for LOC I, s*ee* 26 Tex. Admin. Code § 261.238(a).

5.3 Crisis Services Provided by LMHAs/LBHAs

Each of the 39 LMHAs/LBHAs is required to provide crisis-response services for all individuals in the service area.

5.3.1 Crisis Services

A crisis is defined as a situation in which:

- an individual presents an immediate danger to self or others;
- an individual's mental or physical health is at risk of serious deterioration; or
- an individual believes either that:
    - he or she presents an immediate danger to self or others; or
    - his or her mental or physical health is at risk of serious deterioration. 26 Tex. Admin. Code § 301.303(13).

All providers of crisis services must be available 24 hours a day, every day of the year, to perform immediate screenings and assessments of individuals in crisis, including assessments to determine risk of deterioration and immediate danger to self or others. Crisis assessments cannot be delegated to law enforcement officials. 26 Tex. Admin. Code § 301.327.

5.3.1.1.a What Crisis Response Services Include

Crisis response services include three services:

- a crisis screening;
- a crisis assessment; and
- a recommendation about the level of care required to resolve the crisis.

An LMHA/LBHA shall ensure immediate screenings and assessments of any person found in the LMHA/LBHA's local service area who is experiencing a crisis in accordance with Texas Administrative Code, Title 26, Rule 301.327, which governs access to mental health community services. 26 Tex. Admin. Code § 306.161(a).

LMHAs/LBHAs Conduct Crisis Response for Both MI and ID

For persons with MI and IDD, crisis response will be conducted by the LMHA/LBHA. However, it is recommended that the LMHA/LBHA consult with the LIDDA. For persons with IDD who are NOT in crisis, the LIDDA will serve as the point of access for services. In all but two Texas counties (Bexar and Dallas) the LMHA and LIDDA functions are performed by one local agency. *See* Tex. Health & Safety Code § 533.035(a).

Note: In Bexar County, the Alamo Area Council of Government serves as the LIDDA. In Dallas County, Metrocare serves as the LIDDA.

5.3.1.1.b IDD Crisis Services

Local IDD Authorities provide crisis services to individuals with IDD and their families. Specifically,

crisis intervention services and crisis respite services are available to individuals and families who are experiencing a crisis or at risk of crisis. These services are available for individuals with high medical, mental health, or behavioral needs and seek to reduce hospitalization, incarceration, and other forms of institutionalization.

5.3.1.1.c Crisis Screening and Response System

All LMHAs/LBHAs have a crisis screening and response system in operation 24/7 that is available to individuals throughout its contracted service delivery area. [97]The telephone system to access the crisis screening and response system includes a toll-free crisis hotline number. The crisis hotline number is prominently placed on each LMHA/LBHA website and is typically the primary point of contact for a county jail that does not have mental health professionals available on staff or through a local contract.

5.3.1.1.d Crisis Hotline

The crisis hotline is a continuously available telephone service staffed by trained and competent QMPC-CSs who provide information, screening, intervention, support, and referrals to callers 24 hours a day, seven days a week. The hotline facilitates referrals to 911, a Mobile Crisis Outreach Team (discussed below), or other crisis services and conducts follow-up contacts to ensure that callers successfully accessed the referred services. If an emergency is not evident after further screening, the hotline includes referral to other appropriate resources within or outside the LMHA/LBHA local service area. The hotline works in close collaboration with local law enforcement, 211, and 911 systems.

988 Suicide and Crisis Lifeline

988 offers 24/7 access to free and confidential support for anyone experiencing behavioral health-related distress – whether it is thoughts of suicide, mental health or substance use crisis, or any other kind of emotional distress. When a caller connects to a 988-crisis center or one of the many national backup centers, a trained crisis counselor is there to listen to the caller, provide support, and share resources or referrals as needed. Crisis centers that are part of the 988 network support contacts over the phone, via chat online, and over text. There are currently six 988 crisis centers operating in Texas:

- MHMR of Tarrant County;
- Emergence Health Network;
- The Harris Center;
- Integral Care;
- Bluebonnet Trails through Avail Solutions Inc.; and
- The Suicide and Crisis Center of North Texas.

5.3.1.1.e Mobile Crisis Outreach Team (MCOT)

When the crisis hotline is called, the crisis hotline staff member provides a crisis screening, and determines if the crisis situation requires deployment of the LMHA/LBHA MCOT. If the crisis situation is determined to be emergent or urgent, at least one trained MCOT member shall respond to the site of the crisis situation and conduct a crisis assessment. Immediately upon arrival, a face-to-face screening shall be completed by at least a QMPC-CS if a telephone screening has not been previously completed. MCOTs provide a combination of crisis services including emergency care, urgent care, crisis follow-up, and relapse prevention to the child, youth, or adult in the community. Some local intellectual and developmental disability authorities operate integrated teams to include staff with IDD expertise but

[97] HHSC Performance Contract, Excerpts from Information Item V, Crisis Services Standards.

may not always have a professional available for the crisis call.

Note: Some counties, such as Travis County, have Expanded Mobile Crisis Outreach Teams (EMCOT) that respond to law enforcement when a crime has been committed, but there is a diversion agreement with law enforcement

5.3.1.1.f Youth Mobile Crisis Outreach Team (YCOT)

The Youth Mobile Crisis Outreach Team (YCOT) pilot program, funded through the 88th Legislature, Regular Session, 2023, is a crisis stabilizing resource that will provide support 24 hours a day, seven days a week, when any individual contacts the crisis system for a child or youth in crisis. The YCOT teams will use trauma-informed interventions and strategies to de-escalate a child in crisis, aid in relapse prevention and safety planning and be available to the child's family for up to 90 days (or no less than 4-6 weeks) after the crisis. The LMHA/LBHA is required to provide ongoing stabilization support and ensure connection or community mental health resources. Funded YCOT LMHAs/LBHAs are forthcoming.

5.3.1.1.g Rural Crisis Response and Diversion

Rural Crisis Response and Diversion (RCRD) programs divert individuals in crisis from jails and emergency rooms to engage them in community mental health services. People diverted are then connected to the appropriate level of care in the least restrictive environment. Further, this program allows LMHAs to address the mental health and crisis needs of the rural communities they serve and strengthen the relationship and collaboration between the local mental health authority and law enforcement in their communities.

There are currently eight LMHAs/LBHAs operating rural crisis response and diversion programs in Texas:

- Betty Hardwick
- Border Region
- Burke
- Camino Real
- Central Counties
- Coastal Plains
- StarCare
- Texana

Five additional programs starting in FY 24:

- Brazos Valley
- Heart of Texas
- North Texas Behavioral Health Authority
- Texoma
- West Texas

Note: Some counties, such as Travis County, have an Expanded Mobile Crisis Outreach Team (EMCOT) that collaborates with local law enforcement or other first responders for a real-time co-response to a person in psychiatric crisis. EMCOT connects people to treatment appropriate for psychiatric crises, diverting them from emergency rooms and jails. This improves health outcomes and allows first responders to return to responding to medical emergencies and public safety issues.[98]

5.3.1.1.h Crisis Alternative Programs

Crisis alternative programs, such as Crisis Respite Facilities, are located in the community and allow children and adolescents in behavioral health crisis to receive treatment in the most appropriate and

[98] *Integral Care Crisis Services*, Expanded Mobile Crisis Outreach Team, AUSTINTEXAS.GOV, https://www.austintexas.gov/edims/document.cfm?id=302634 (last visited Aug. 27, 2020).

available setting.[99] Additionally, use of these programs can minimize time spent by law enforcement officers driving to and waiting at hospitals and facilities, divert individuals from the criminal justice system, and reduce use of local emergency room services to manage behavioral health crises. Contact your local LMHA/LBHA to determine if a crisis alternative program is available in your community.

5.3.1.1.i What a Crisis Assessment Includes

A crisis assessment shall include an evaluation of risk of harm to self or others, presence or absence of cognitive signs suggesting delirium, need for immediate full crisis assessment, need for emergency intervention, and an evaluation of the need for an immediate medical screening/assessment by a physician (preferably a psychiatrist), psychiatric advanced practice nurse, physician assistant or registered nurse.[100]

After the crisis assessment is conducted, the LMHA/LBHA will make a recommendation about the treatment necessary to resolve the crisis.

5.3.1.1.j Emergency Care Services: LMHA/LBHA Shall Respond Within One Hour

If, during a crisis screening, it is determined that an individual is experiencing a crisis that may require emergency care services, the QMHP-CS must:

- take immediate action to address the emergency situation to ensure the safety of all parties involved;
- activate the immediate screening and assessment processes as described in title 25, section 412.321 of the Texas Administrative Code; and
- provide or obtain mental health community services or other necessary interventions to stabilize the crisis.

26 Tex. Admin. Code § 301.327(d)(1)(B).

For emergency calls, a face-to-face crisis response (or telehealth based on policies and procedures approved by the medical director) shall be provided within one hour. After crisis intervention services are provided, and if the individual is still in need of emergency care services, then the individual shall be assessed by a physician (preferably a psychiatrist) within 12 hours.

5.3.1.1.k Urgent Care Services: LMHA/LBHA Shall Respond Within Eight Hours

If the crisis screening indicates that an individual needs urgent care services, a QMHP-CS shall, within eight hours of the initial incoming hotline call or notification of a potential crisis situation:

- perform a face-to-face assessment; and
- provide or obtain mental health community services or other necessary interventions to stabilize the crisis.

26 Tex. Admin. Code § 301.327(d)(1)(C).

[99] TEX. HEALTH & HUMAN SERV., Information Item V, Crisis Services Standards at V-38 – V-41.

[100] HHSC Performance Contract, Excerpts from Information Item V, Crisis Services Standards.

5.4 Civil Mental Health Law: The Texas Mental Health Code

Civil Commitment as a Diversionary Tool

Civil commitment can be an important diversionary tool, but it is utilized inconsistently and/or sporadically in many areas of the state.[101] Ideally, civil interventions would occur before an individual ever enters the criminal justice system at Intercept 0. Initiation of civil commitment orders and other court- ordered treatment can be enhanced with the expansion of innovative programs such as assisted outpatient treatment, advance directives, and powers of attorney.

Civil commitment remains an option for diversion of some individuals with a mental illness or intellectual disability even after an individual enters the criminal justice system. The civil commitment provisions in the Texas Health and Safety Code permit the county or district attorney to pursue an order of temporary or extended mental health services (45-day, 90-day, or 12-month commitments, as appropriate) for an individual who faces criminal charges, provided that the person has not been "charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person." However, note that, with limited exceptions, mental health services may be ordered only by a court with probate jurisdiction. Prior to a formal determination of competency, a magistrate may release a defendant on a mental health bond so that the court with probate jurisdiction may order services as appropriate under applicable law. This alternative has been little utilized but has been authorized since 1995.

The statutes that govern the provision of mental health treatment are found in Chapters 571 – 578 of the Texas Health and Safety Code, commonly referred to as the "Texas Mental Health Code." These substantive provisions and procedures apply to all public and private facilities operating in the State of Texas. It is important to remember that the purpose of the Mental Health Code is to provide persons with severe mental illness[102] access to humane care and treatment in the least restrictive appropriate setting while also protecting their fundamental rights. Tex. Health & Safety Code § 571.002.

An individual 16 years of age or older may decide voluntarily to request mental health treatment. For adults, only the patient seeking such treatment may voluntarily agree to the treatment. Chapter 572 of the Texas Mental Health Code addresses the requirements for voluntary admission to mental health treatment. Voluntary admission does not involve the court except when the involuntary commitment process is initiated because a voluntary patient requests discharge and a treating physician determines that the person poses an imminent risk of harm to self or others unless continued treatment is provided. Tex. Health & Safety Code § 572.004. Courts may also be involved when violations of the Mental Health Code in reference to voluntary patients are brought to the attention of the judge and the judge's role as a magistrate comes into play.[103]

Involuntary civil commitment, referred to in the Mental Health Code as court-ordered mental health services, represents a deprivation of personal liberty and of the right of self-determination regarding treatment. As such, a court must delicately balance the civil liberties of a person with mental illness and that person's right to live life as they desire against the government's interest in public safety. As the name suggests, civil commitment is a civil, not criminal, process; yet it can still result in a denial of freedom and basic constitutional rights. Because of this, court-ordered mental health services are only authorized when the mental illness is likely to pose a substantial risk of serious harm either to the patient or to others and inpatient mental health treatment is the least restrictive appropriate setting.

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[101] The reasons for limited use of these diversionary tools by the courts is complex. Underlying the many issues regarding the application of this area of law is the fact that the availability of appropriate court-ordered outpatient mental health treatment programs is limited. Due to funding-related issues, some courts have access to innovative programs, and some do not. The judiciary can play a role in developing these services in the communities they serve and continue to educate members of the legislature to ensure state leaders understand the need for additional r17.032esources to support innovative local programs.

[102] For provisions related to persons with ID, see the Persons with Intellectual Disabilities Act (PIDA) located in Title 7, Subtitle D, Chapters 591-597 of the Texas Health and Safety Code.

[103] Hon. Guy Herman, Mental Health Law 2 (August 2019) (unpublished manuscript, on file with the Judicial Commission on Mental Health).

5.4.1 Jurisdiction

5.4.1.1 Courts

- Statutory probate courts and county courts at law have jurisdiction over civil mental health proceedings for persons who do not have criminal charges pending. These courts also share jurisdiction with constitutional county courts. Tex. Health & Safety Code § 574.008(a).
- In a county with no county court at law, and in which the county judge is not a lawyer, a district court has jurisdiction to hear civil mental health cases, and the case may be transferred there if the proposed patient's attorney files such a request. Tex. Health & Safety Code § 574.008(b).
- If a patient is receiving temporary inpatient mental health services in a county other than the county that initiated the court-ordered inpatient mental health services, and the patient then requires extended inpatient mental health services, the patient shall be transferred back to the county where the proceedings originated, UNLESS the initial court arranges with the appropriate court in the county where the patient is receiving services to hold the hearing before the original order expires. Tex. Health & Safety Code § 574.008(c).
- If a patient receives court-ordered outpatient services in a different county from the court that ordered the services, the court can transfer the case to an appropriate court in that county, and then that court shall have exclusive, continuing jurisdiction. Tex. Health & Safety Code § 574.008(d).

5.4.1.2 Associate Judges (formerly Masters)

- If the commissioners court authorizes it, a county judge may appoint a full-time or part-time associate judge to preside over the proceedings for court-ordered mental health services. Tex. Health & Safety Code § 574.0085(a).
- To be eligible for such an appointment, a person must be a resident of Texas and have practiced law in Texas for at least four years; or be a retired county judge, statutory or constitutional, with at least 10 years of service. Tex. Health & Safety Code § 574.0085(b).
- To refer cases to an associate judge, the referring court must issue an order of referral. Tex. Health & Safety Code § 574.085(e).
- If a jury trial is demanded or required, the associate judge shall refer the entire matter back to the referring court for trial. Tex. Health & Safety Code § 574.085(j).

Associate Judge vs. Master

In 2009, the Legislature passed H.B. 890, which amended Section 574.0085 of the Texas Health and Safety Code by striking the term "master" from the code and substituting the term "associate judge."

5.4.1.3 Magistrates

- Magistrates may sign emergency detention warrants. Tex. Code of Crim. Procedure Art. 2.09, Tex. Health & Safety Code § 573.012.
- A judge of the mental health court may also designate a magistrate to sign Orders of Protective Custody. Tex. Health & Safety Code § 574.021(e).

Magistrate's Emergency Detention Powers Limited in Some Counties

Under subsection 573.012(a) of the Texas Health and Safety Code, a probate judge may issue an administrative order requiring that all emergency detention warrants be submitted to particular judges. For example, the requirement may be that all emergency detention warrants are submitted personally to the court with probate jurisdiction, rather than going through an on-duty justice of the peace or retained by court staff and submitted to another judge or a magistrate as soon as practicable. In counties where there is more than one judge with probate jurisdiction, all the judges must agree to such an order. Tex. Health & Safety Code § 573.012(g).

5.4.1.4 Habeas Corpus

- A petition for a writ of habeas corpus arising from a commitment order must be filed in the court of appeals for the county in which the order is entered. Tex. Health & Safety Code § 571.0167(a).

5.4.2 Voluntary Mental Health Services

5.4.2.1 Request for Admission

- A person 16 years of age or older may request admission to an inpatient mental health facility or for outpatient mental health services by filing a request with the administrator of the facility where admission or outpatient treatment is requested. Tex. Health & Safety Code § 572.001(a).

Mental Health Law and Minors

At 16, a person is considered an adult for the purposes of seeking mental health treatment. However, there are special rules for those 18 and under. Those rules are specifically discussed in the JCMH Texas Juvenile Mental Health and Intellectual and Developmental Disabilities Law Bench Book.

- An admission request must be in writing and signed by the person requesting the admission. Tex. Health & Safety Code § 572.001(b).
- A request for admission as a voluntary patient must state that the person for whom admission is requested agrees to voluntarily remain in the facility until the person's discharge and that the person consents to the diagnosis, observation, care, and treatment provided until the earlier of:
    - the person's discharge; or
    - the period prescribed by section 572.004.

  Tex. Health & Safety Code § 572.001(e).
- Individuals who lack capacity may not voluntarily request admission.
- Family and friends may not "voluntarily admit" anyone 18 or older. Tex. Health & Safety Code § 572.001(a). They must follow the Emergency Detention, Guardianship and/or Court commitment processes described below.

How "Voluntary" is Voluntary Mental Health Treatment?

Under a voluntary admission for inpatient mental health services, a patient may request a discharge, but a facility has four hours in which to notify a physician of the patient's request, and that physician must make a determination whether there is reasonable cause to believe the patient meets the criteria for court-ordered mental health services or emergency detention. The physician has 24 hours from the initial request to conduct an examination and decide whether the patient should be discharged, or whether the facility should pursue court-ordered mental health services. *See* Tex. Health & Safety Code § 572.004 and section 5.4.2.6 below for the statutory requirements for discharge as well as 26 Tex. Admin. Code § 568.83 for the accompanying administrative rules regarding requests for discharge.

5.4.2.2 Admission

After the person requests admission to a facility, the facility may admit the person if the facility determines:

- that the person has symptoms of mental illness and will benefit from the inpatient or outpatient services after conducting a preliminary exam;
- that the person has been informed of the person's rights as a voluntary patient; and
- that the admission was voluntarily agreed to by said person. Tex. Health & Safety Code § 572.002.

Note also that the facility must ascertain whether the person has sufficient capacity to consent to admission. *See Zinermon v. Burch*, 494 U.S. 113 (1990).

5.4.2.3 Information on Psychoactive Medications

- A mental health facility must provide a patient with information about the patient's psychoactive medication ordered by a treating physician. The information must, if possible, be in the patient's own language. Tex. Health & Safety Code § 572.0022(a).
- A facility must also provide the information to the patient's family if they request it, but only if it does not violate state and federal privacy laws. Tex. Health & Safety Code § 572.0022(b).

5.4.2.4 Intake, Assessment, and Admission

- HHSC has promulgated administrative regulations that establish rules regarding the intake and assessment process that takes place prior to a formal admission of the patient to an inpatient facility. These rules govern a patient's consent to treatment as well as ensure the patient's understanding of the financial commitments such treatment will entail. Tex. Health & Safety Code § 572.0025.
- The three following terms are defined in a way that is unique to this section.
    - An "admission" means the formal acceptance of a prospective patient to a facility. Tex. Health & Safety Code § 572.0025(h)(1).
    - An "assessment" means the administrative process a facility uses to gather information from a prospective patient to determine whether a prospective patient should be examined by a physician to determine if admission is clinically justified. This term does not refer to the examination that must be performed within 72 hours before or 24 hours after a patient or prospective patient is admitted to the facility. Tex. Health & Safety Code §§ 572.0025(g), (f), (h)(2).
    - "Intake" means the administrative process for gathering information about a prospective patient and giving a prospective patient information about the facility and treatment services. Tex. Health & Safety Code § 572.0025(h)(3).

- The rules governing the intake process shall establish minimum standards for:
    - reviewing a prospective patient's finances and insurance benefits;
    - explaining to a prospective patient the patient's rights; and
    - explaining to a prospective patient the facility's services and treatment process. Tex. Health & Safety Code § 572.0025(b).
- The rules governing the assessment process prescribe:
    - The types of professionals who may conduct an assessment,
    - The minimum credentials each type of professional must have to conduct an assessment; and
    - The type of assessment that professional may conduct. Tex. Health & Safety Code § 572.0025(d).
- The applicable rules can be found in the Texas Administrative Code. 26 Tex. Admin. Code §§ 306.175, 306.221.
- A prospective patient may not be formally admitted to the facility unless:
    - there is an order from a physician who has conducted a physical and psychiatric exam of the patient, in person or through communications technology:
        - 72 hours before admission; or
        - 24 hours after admission; or
        - the admitting physician consulted with another physician who examined the patient within the above time frames; and
        - the facility agrees to accept the patient in writing. Tex. Health & Safety Code § 572.0025(f).
    - If a facility admits a patient prior to performing a physical and psychiatric exam, the patient must be immediately discharged if a physician performing the exams after admittance determines the person does not meet clinical standards to receive inpatient mental health services. Tex. Health & Safety Code § 572.0025(f)(1).
    - If a person is discharged under these circumstances, the facility may not bill the patient or the patient's insurance for the temporary admission. Tex. Health & Safety Code § 572.0025(f)(2).

5.4.2.5 Rights of Patients

- A person's voluntary admission into an inpatient mental health facility does not affect any legal capacity, civil rights, or the person's right to obtain a writ of habeas corpus. Tex. Health & Safety Code § 572.003(a).

Mental Illness, Legal Capacity, and Competency

It is worth noting here the difference between terms related to an individual's mental health and their legal status. The Texas Health and Safety Code is careful to point out that receiving voluntary services for mental health treatment will not have any effect on that person's legal capacity in a civil sense (i.e. guardianship issues, the ability to sign legal documents). Civil capacity in voluntary and involuntary mental health treatment must also be differentiated from competency in criminal cases, which analyzes not whether a person suffers from mental illness, but whether a person is able to consult with a lawyer and understand the charges brought against himself or herself. (*See Koehler v. State*, 830 S.W. 2d 665 (Tex. App.—San Antonio 1992, no pet.) for a discussion of civil incapacity vs. criminal competency.) *See also* Tex. Health & Safety Code § 576.002(a), which states: "[t]he provision of court-ordered, emergency, or voluntary mental health services to a person is not a determination or adjudication of mental incompetency and does not limit the person's rights as a citizen, or the person's property rights or legal capacity."

- Specifically, a person voluntarily admitted to an inpatient mental health facility has the right:
    - To be reviewed periodically to determine the need for continued treatment; and
    - To have an application for court-ordered services (involuntary civil commitment) filed only as provided by the requirements of section 572.005. Tex. Health & Safety Code § 572.003(b).
- A person must be informed of the rights contained in this section and section 572.004 (Discharge):
    - both orally and in writing (in the person's primary language, if possible) within 24 hours after the person is admitted Tex. Health & Safety Code § 572.003(c)(1); or
    - through means necessary to communicate with a hearing or visually impaired person. Tex. Health & Safety Code § 572.003(c)(2).

5.4.2.6 Discharge

- Except as noted below, a patient is entitled to leave the facility after the patient signs, times, and dates the written request for discharge and files it with the facility administrator. This document must be made part of the patient's clinical record.
    - If a patient informs an employee of his or her wish to be discharged, the employee must help the patient in creating the document and present it to the patient for signature as soon as possible. Tex. Health & Safety Code § 572.004(a).
- After the patient files the request for discharge, the facility has four hours to notify the patient's treating physician. If that physician is not available during that time period, the facility may notify any other physician. Tex. Health & Safety Code § 572.004(b).
- The physician must discharge the patient before the end of the four-hour period unless the physician has reasonable cause to believe that the patient might meet the criteria for court-ordered mental health services or emergency detention. Tex. Health & Safety Code § 572.004(c).
- If the physician does have reasonable cause, the physician has to examine the patient as soon as possible, but no later than 24 hours after the written request for discharge was filed.
    - After the exam, if the physician determines that the patient does not meet the criteria for court-ordered mental health services or emergency detention, the physician shall discharge the patient.
    - If the patient does meet the criteria for court-ordered mental health services or emergency detention, the physician has until 4 p.m. on the next business day after the exam to either discharge the patient or file an application for court-ordered mental health services or emergency detention and obtain a written order for any further detention.
    - The patient must be notified if the physician files an application for court-ordered mental health services or seeks an emergency detention.
    - The physician's decision and the reasons behind it must be made part of the patient's clinical record.

  Tex. Health & Safety Code § 572.004.
- In the case of extremely hazardous weather conditions or a disaster, the physician may request the judge who has jurisdiction over court-ordered mental health services proceedings to extend the time period for which the patient may be detained. There must be a new order from the judge every day, which may extend the time period until 4 p.m. on the next business day, and this order must state that an emergency exists due to the weather or a disaster. Tex. Health & Safety Code § 572.004(e).
- If the patient files a written withdrawal of the request for discharge before the end of the proscribed period, or an application for court-ordered mental health services or emergency

detention is filed, the patient cannot leave the facility. Tex. Health & Safety Code § 572.004(f)(1); (f)(2).

- The facility must prepare a plan for continuing care in accordance with section 574.081 (Continuing Care Plan Before Furlough or Discharge) for each patient who is discharged. If there is not time to prepare the plan before discharge, the facility may mail the plan to the patient within 24 hours of discharge. Tex. Health & Safety Code § 572.004(g).
- The facility must notify the patient (or other person who files a request for discharge of a patient) that the person filing the request assumes all responsibility for the patient upon discharge. Tex. Health & Safety Code § 572.004(h).

Notification of Family Members

Section 576.007 of the Texas Health and Safety Code addresses a concern that family members often have regarding whether a facility will notify them when their relative is released. By law, the facility is required to notify a patient that he or she has a right to have family notified upon discharge. The facility is then required to make a reasonable effort to notify the patient's family if the patient grants permission for such a notification. Tex. Health & Safety Code § 576.007.

5.4.2.7 Application for Court-Ordered Treatment

- The physician responsible for the patient's treatment must notify the patient if the physician intends to file an application for court-ordered mental health services. Tex. Health & Safety Code § 572.005(b).
- An application for court-ordered mental health services may not be filed against a voluntary patient unless:
  - A request for release has been filed with the facility administrator; or
  - In the opinion of the patient's treating physician, the patient meets the criteria for court-ordered services and:
    - Is absent from the facility without authorization;
    - Is unable to consent to appropriate and necessary psychiatric treatment; or
    - Refuses to consent to such treatment as recommended by the treating physician, and said physician completes a certificate of medical examination (CME) for mental illness that, in addition to the information required by section 574.011 (Certificate of Examination for Mental Illness), includes the opinion of the physician that:
      - There is no reasonable alternative to the treatment recommended by the physician; and
      - The patient will not benefit from continued inpatient care without the recommended treatment. Tex. Health & Safety Code § 572.005(a)(1); (a)(2).

5.4.2.8 Transportation of Patient to Another State

- A court order is required to transport a patient to another state for voluntary inpatient mental health services. Tex. Health & Safety Code § 572.0051.

5.4.3 Involuntary Commitment (Court Ordered Mental Health Services)

Understanding the Parts of the Commitment Process

Substantial confusion surrounding the civil commitment process can be avoided by being specific and clear about the terminology involved. The process can be broken into three distinct parts:

- **Emergency Detention**
- **Protective Custody**
- **Commitment (Inpatient or Outpatient / Temporary or Extended) also called, Court Ordered Mental Health Services**

Many people confuse these terms, for example, asking for an Order of Protective Custody when what they really want is an emergency detention.[104] By making sure one has a clear understanding of each part of the process and what it does, a waste of valuable time and resources can be avoided.[105]

Emergency Detention: the legal procedure by which a person experiencing a severe mental health crisis may be detained for a preliminary examination and crisis stabilization, if appropriate.

Order of Protective Custody: A court ordered mental health commitment issued by a judge in order for a facility to continue to hold a patient in a mental health facility pending a hearing on the application for court-ordered mental health services. *Note:* If the person is not held in a facility pending a hearing for court ordered MH services, this step may be skipped.

Court Ordered Mental Health Services (Civil Commitment): A court will determine whether the individual subject to the application for court ordered mental health services should be ordered by the court to receive mental health services. Any services ordered will be classified as inpatient or outpatient and as temporary or extended services.

5.4.3.1 Emergency Detention

Found in sections 573.001 and 573.011 of the Texas Health and Safety Code, the emergency detention procedure is the way that the civil commitment process is initiated in most cases.[106]

Emergency detention is the legal procedure by which a person experiencing a severe mental health crisis may be detained for a preliminary examination and crisis stabilization, if appropriate.

Emergency detention may be necessary and appropriate when a person must be placed in the least restrictive, most appropriate setting, while safeguarding the person's legal rights to a subsequent judicial

[104] Hon. Guy Herman, Mental Health Law 3 (August 2019) (unpublished manuscript, on file with the Judicial Commission on Mental Health).

[105] *Id.*

[106] *Id.*

determination of their need for involuntary mental health services. Tex. Health & Safety Code §§ 571.004; 576.021(a)(1).

Overview of the Emergency Detention Process
How to get an Emergency Detention?

Emergency Detention without a Warrant

1. **Law Enforcement—No Warrant** (Apprehension by a Peace Officer Without a Warrant "APOWW")
    a. ***Typical Situations:***
        i. Police are called to the scene. It is determined that this is a mental health crisis, not a criminal offense. Officer has reason to believe person is a harm to themselves or others and the person will not voluntarily go to an appropriate facility.
        ii. Another common situation involves a person who is being treated in a hospital emergency department. They may have arrived there of their own volition or been brought by a friend or family member. If they decide they want to leave, the physician and hospital staff have no legal basis for holding the patient and preventing them from leaving. The hospital staff would contact their local law enforcement for a determination of whether an APOWW may be initiated in the facility in this circumstance.
    b. **Standard for Apprehension:** a peace officer has reason to believe and does believe that:
        i. the person is a person with Mental Illness (MI);
        ii. and because of the MI, there is a substantial risk of serious harm to self or others (demonstrated by behavior **or** evidence of severe emotional distress and deterioration) unless the person is immediately restrained; and
        iii. there is insufficient time to get a warrant.

        Tex. Health & Safety Code § 573.001(a).
    c. **Notice to Facility:** Officer must give the facility a "Notification of Emergency Detention." The requirements and form are set out in statute. Health & Safety Code § 573.002. Without this notice, the facility may not detain the person involuntarily.
    d. **Court Involvement:** No initial court involvement required. Must notify the court only if guardianship exists. Tex. Health & Safety Code § 573.0021.
    e. **Full Procedural Explanation:** See section 6.2.2 of this bench book.
2. **Guardian—No Warrant** (must notify court)
    a. ***Typical Situation:*** Guardian has previously been granted guardianship over ward by a Court. Guardian believes ward is a harm to themselves or others and that it is necessary for them to go to an appropriate facility. Ward will not go voluntarily.
    b. **Apprehension**: same as law enforcement standard of apprehension but not required to show insufficient time to get a warrant. Tex. Health & Safety Code § 573.003.
    c. **Notice to Facility:** After transporting the ward to the facility, the guardian must file an

application for detention with the facility. Tex. Health & Safety Code § 573.004.

d. **Notice to Court**: Immediately provide written notice of the filing of an application with the facility to court that granted guardianship. Tex. Health & Safety Code § 573.004(c).

e. **Application**: substantial risk of serious harm to self or others; risk of harm is imminent unless the person is immediately restrained. Tex. Health & Safety Code § 573.004(a), (b).

f. **Further Procedural Explanation:** See section 5.4.3.2.b.

Emergency Detention with a Warrant

3. **Any Adult may Apply—Warrant** (must apply to the court)

a. ***Typical Situation:*** Family, friends, or non-police medical professionals believe this person is a harm to themselves or others and believe it is necessary for the person to go to an appropriate facility. The person will not go voluntarily. (Or they went voluntarily, but now wish to leave).

b. **Application to the Court**:

i. **Legal Standard:**

1. The applicant has reason to believe and does believe that:
    a. the person evidences Mental Illness (MI);
    b. the person evidences a substantial risk of serious harm to self or others;
        i. Include a specific description of the risk of harm.
    c. the risk of harm is imminent unless the person is immediately restrained;
2. the applicant's beliefs are derived from specific recent behavior, overt acts, attempts, or threats.
    a. Include a detailed description of that specific behavior.
3. Include a detailed description of applicant's relationship to the person whose detention is sought.

ii. **Procedure:** application must be presented in person to the judge. Tex. Health & Safety Code § 573.012(a).

1. Exception: Electronic applications may be presented if the applicant is:
    a. a physician; or
    b. a licensed mental health professional employed by the LMHA. Tex. Health & Safety Code § 573.011(h). *See* S.B. 2479 (88th Reg. Sess. (2023)); in previous law, only a physician could apply electronically.
2. Acceptance of Electronic Application for Emergency Detention: a judge **must** accept an electronic application, so long as the applicant is statutorily allowed to present the application electronically. *See* S.B. 1624 (88th Reg. Sess. (2023)). Under previous law, acceptance in electronic format was discretionary.

c. **Warrant**: Judge has reasonable cause to believe that [same as application legal standard] + the necessary restraint cannot be accomplished without ED. Tex. Health & Safety Code § 573.012.

d. **Warrant Issued to Peace Officer:** If the application is granted, magistrate must issue

to an on-duty peace officer a warrant for the person's immediate apprehension. Tex. Health & Safety Code § 573.012(d).

e. **Transport Person to Facility:** That person shall be transported for preliminary examination to the nearest inpatient MH Facility, or a MH Facility deemed suitable by the LMHA if the inpatient facility is not available. Tex. Health & Safety Code § 573.012(e). The transport provision only applies to a person who is not already physically located in the MH facility when the warrant is issued. *See* S.B. 1624 (88th Reg. Sess. (2023)) Sec. 18.

f. **Notice to Facility:** Warrant serves as an application for detention in the facility. Tex. Health & Safety Code § 573.012(f).

   i. Court sends copy: A warrant and a copy of the application for the warrant shall immediately be transmitted to the facility. Tex. Health & Safety Code § 573.012(f). This can be done electronically Tex. Health & Safety Code § 573.012(h-1).

g. **Important Note**: any adult who is not a guardian or law enforcement, such as family members, friends, or EMS, must apply for a warrant or obtain an APOWW notice. *Without a warrant, a facility has no legal right to hold an individual if that individual refuses preliminary examination or treatment*.

h. **Further Procedural Explanation:** See section 5.4.3.2.c.

4. Facility / The Hospital (must apply to court)

a. ***Typical Situation:*** The person went to the facility voluntarily, but now wants to leave, and the facility staff believe that this person is a harm to themselves or others and an ED is the least restrictive way that necessary restraint may be accomplished.

b. **Application to the Court:**

   i. **Legal Standard** [same the legal standard for any adult] + ED is the least restrictive means by which the necessary restraint may be accomplished. Tex. Health & Safety Code § 573.022(a).

   ii. **Procedure:** [same as the procedure for any adult, making sure to note special privilege for doctors and LMHPs employed by a LMHA to submit the application electronically].

c. **Warrant**: [same as warrant standard for any adult] or

d. **Warrant Transmitted to a Facility.** If the application was submitted under § 573.012(h), then the judge or magistrate may transmit the warrant electronically back to the facility. *See* S.B. 1624 (88th Reg. Sess. (2023)); which amends Health & Safety Code 573.012 (h-1). In transmitting the warrant electronically to the facility, the facility may detain the person to perform a preliminary examination.

   i. Note that the magistrate could also issue the warrant to an on-duty officer who brings the warrant to the facility where the person is located, however, this method is likely slower than an electronic transmittal directly to the facility.

e. **Facility may detain person to perform a preliminary exam**:

   i. Person is physically located in facility;

   ii. A court transmits a warrant electronically under subsection (h-1); and

   iii. The person is not already under another order under Ch. 573 (APOWW or Emergency Detention Warrant) or 574 (Court-ordered MH services).

Tex. Health & Safety Code § 573.012(h-2).

f. **Further Procedural Explanation:** See section 5.4.3.2.d.

What happens once the person gets to the hospital?

1. **Temporary Acceptance by Facility:** Occurs when application or warrant is given to the hospital. Tex. Health & Safety Code § 573.021(a).
2. **Preliminary Examination at Facility** Tex. Health & Safety Code § 573.021.
    a. When it Must Occur:
        i. The exam must be performed by a physician within 12 hours after the person is apprehended or transported by guardian. Tex. Health & Safety Code § 573.021(c).
        ii. ****It could be argued**** that with the addition of § 573.012(h-2), that the 12-hour clock begins when an Emergency Detention Warrant is transmitted to the facility if the person is already in the facility. *See* S.B. 2479 (88th Reg. Sess. (2023)) Sec. 18.
3. **Admission to the Facility for Emergency Detention**

    a. The person may be admitted to the facility, only if the preliminary examination showed that:
        i. The person is a person with MI;
        ii. The person evidences a substantial risk of serious and harm to self or others.
        iii. Risk of harm is imminent unless immediately restrained; and
        iv. Emergency detention is the least restrictive means to accomplish the restraint. Tex. Health & Safety Code § 573.022(a).
    b. The examining physician must make a written statement with sufficiently detailed information supporting the admission requirements. (This is not a CME).
    c. The admitted patient may be transferred to a more appropriate mental health facility. Tex. Health & Safety Code § 573.022(b), (c).

When may the hospital keep a patient longer than 48 hours?

1. **Order of Protective Custody (OPC) Required**
    a. The facility has 48 hours from the time of person's arrival to obtain an OPC, unless the time period expires on a weekend or holiday. Tex. Health & Safety Code § 573.021(b).
    b. The Request for OPC is filed in the same court, and typically at the same time, as the Application for Court-ordered mental health services.
    c. Requires a Certificate of Medical Examination (CME). Tex. Health & Safety Code § 573.021(d).
    d. Full Procedural Explanation of OPC: See section 5.3.7.
2. **If an OPC is issued, the Following Deadlines Apply:**
    a. Immediately upon signing OPC: Judge must appoint an attorney for proposed patient. Tex. Health & Safety Code § 573.024.
    b. Within 72 Hours: Probable Cause Hearing to Determine Continued Detention
        i. At the probable cause hearing, the court determines if proposed patient should remain in protective custody until the hearing on court-ordered mental health services. Tex. Health & Safety Code §§ 573.025, 573.026.

ii. Exception: If the 72-hour period ends on a Saturday, Sunday, or legal holiday, the hearing must be held on the next day that is not a Saturday, Sunday, or legal holiday. Tex. Health & Safety Code § 574.025(b).

iii. The court may postpone the hearing each day for an additional 24 hours if the court declares that an extreme emergency exists because of extremely hazardous weather conditions or the occurrence of a disaster that threatens the safety of the proposed patient or another essential party to the hearing. Tex. Health & Safety Code § 574.025(b)

3. If the Person Does Not Meet the OPC Criteria, Person Must be Released.

a. Transportation After Release**:** The person must be returned to the location of apprehension, residence in Texas, or another suitable location. This does not apply if person was arrested or objects to transportation. If the person was apprehended by peace officer, immediate transport is required; otherwise, it must be reasonably prompt. Tex. Health & Safety Code § 573.024.

5.4.3.2 Who Can Initiate the Emergency Detention Process?

5.4.3.2.a Peace Officers: Apprehension Without a Warrant.

The Texas Health and Safety Code permits peace officers to make a warrantless apprehension of a person with mental illness when appropriate for the purpose of transporting that person to a mental health treatment facility for evaluation.

Many jurisdictions in Texas refer to this process as an APOWW—application by a peace officer without a warrant.

Tex. Health & Safety Code § 573.002 contains the language for the Notification of Emergency Detention. Hospitals may not require peace officers to complete a different or additional form. Tex. Health & Safety Code § 573.002(d).

A detailed description of emergency detention procedures initiated by peace officers without warrants can be found under section 6.2.2 of this bench book. This section has a brief overview of the emergency detention process for law enforcement (above), but focuses on non-law enforcement persons who may initiate an emergency detention.

Least Restrictive Appropriate Setting

The Mental Health Code is clear to point out that the patient's right to liberty must always be respected and balanced against society's interest in safety. This balance is seen in section 571.004 of the Texas Health and Safety Code:

The least restrictive appropriate setting for the treatment of a patient is the treatment setting that:

- is available;
- provides the patient with the greatest probability of improvement or cure; and
- is no more restrictive of the patient's physical or social liberties than is necessary to provide the patient with the most effective treatment and to protect adequately against any danger the patient poses to himself or others.

5.4.3.2.b Guardian: Emergency Detention Without a Warrant

A legal guardian of the person, if any, may also so transport the person to an inpatient treatment facility.

- A guardian may transport an adult ward under their guardianship to an inpatient mental health facility for a preliminary examination under the same standard set forth for peace officers.
  - The guardian must have reason to believe and must believe that:
    - the ward is a person with mental illness; and
    - because of that mental illness there is a substantial risk of serious harm to the ward or to others. Tex. Health & Safety Code § 573.003(a).
  - A substantial risk of serious harm must be demonstrated by:
    - the ward's behavior; or
    - evidence of severe emotional distress and deterioration in the ward's mental condition to the extent that the ward cannot remain at liberty. Tex. Health & Safety Code § 573.003(b).
- A guardian may also transport a ward to an inpatient mental health facility for a preliminary examination pursuant to section 1151.051(d) of the Texas Estates Code.
- If a guardian needs assistance or is unable to bring the ward into a mental health facility, the guardian may file an application for an emergency detention under section 573.011 which will result in the issuance of a warrant to a peace officer.

A legal guardian shall file an application for detention with the facility and provide written notice of the filing to the court that granted the guardianship.

- After transporting a ward to a facility under Section 573.003, a guardian shall immediately file an application for detention with the facility.
- The Guardian's application for emergency detention must contain:
  - a statement that the guardian has reason to believe and does believe that the ward evidences mental illness;
  - a statement that the guardian has reason to believe and does believe that the ward evidences a substantial risk of serious harm to the ward or others;
  - a specific description of the risk of harm;
  - a statement that the guardian has reason to believe and does believe that the risk of harm is imminent unless the ward is immediately restrained;
  - a statement that the guardian's beliefs are derived from specific recent behavior, overt acts, attempts, or threats that were observed by the guardian; and
  - a detailed description of the specific behavior, acts, attempts, or threats.
- The guardian shall immediately provide written notice of the filing of an application under this section to the court that granted the guardianship.

  Tex. Health & Safety Code § 573.004.

5.4.3.2.c Any Adult: Application for Emergency Detention Order and Warrant

Persons other than peace officers or a legal guardian must file an application for emergency detention with the court to seek a magistrate's warrant for emergency detention.

- Any adult may file an application for the emergency detention of another person with the court.
- The application must state:
  - that the applicant has reason to believe and does believe that the person evidences mental illness;
  - that the applicant has reason to believe and does believe that the person evidences a substantial risk of serious harm to himself or others;
  - a specific description of the risk of harm;

- that the applicant has reason to believe and does believe that the risk of harm is imminent unless the person is immediately restrained;
- that the applicant's beliefs are derived from specific recent behavior, overt acts, attempts, or threats;
- a detailed description of the specific behavior, acts, attempts, or threats; and
- a detailed description of the applicant's relationship to the person whose detention is sought. Tex. Health & Safety Code §573.011**.**
- A detailed description of the applicant's relationship to the person. Tex. Health & Safety Code §573.011(b).

- The application may be accompanied by any relevant information. Tex. Health & Safety Code § 573.011(c).
- An applicant for emergency detention must present the application personally to the magistrate or judge, who:
  - must examine the application; and
  - may interview the applicant. Tex. Health & Safety Code § 573.012(a).
  - The application may be accompanied by any relevant information. Tex. Health & Safety Code § 573.011(c).
- In-person presentation of the application for emergency detention is not required when the applicant is:
  - A physician;
  - Licensed mental health professional employed by the LMHA.

5.4.3.2.d The Facility: Application for Emergency Detention Order and Warrant

The procedure for a person at a facility to file an application for emergency detention is the same as it would be for any adult. The difference typically occurs when considering who is making the application, and whether that person qualifies under the statute to transmit the application electronically to the judge, or if it requires an in-person presentment of the application.

When In-person Presentment of an Application is Not Required

Physician & Licensed Mental Health Professionals. If the applicant is a physician, or a licensed mental health professional employed by the LMHA, the magistrate **must** permit electronic presentation of the application following the procedure described in section 573.012(h) of the Texas Health and Safety Code. *See* S.B. 2479 (88th Reg. Sess. (2023)).

Legislative Changes

S.B. 2479 (88th Reg. Sess. (2023)) and S.B. 1624 (88th Reg. Sess. (2023)), both effective September 1, 2023, amended Tex. Health & Safety Code § 573.012 in multiple ways.

1) The judge must accept electronic applications for emergency detention warrants.

The law now mandates that judges must accept applications for emergency detention warrant requests submitted electronically from applicants who are authorized to present the application electronically. Previously, accepting the application in electronic format was discretionary.

2) Doctors and licensed mental health professionals employed by a LMHA can both apply for emergency detention warrants electronically.

These legislative changes expand who is authorized to request a warrant electronically (e.g., via email) from a judge for an emergency mental health detention under Texas Health and Safety Code section 573.012. Previous law only allowed physicians to request a warrant for an emergency detention electronically. In less populated areas, a physician is often not available to make an electronic request when an emergency detention warrant is needed. This amendment remedied that issue by allowing other licensed mental health professionals with advanced training and education who are employed by the LMHA to make the request electronically.

3) Transport is only required when an apprehended person is not already at MH facility.

This legislative amendment clarified that if the individual being apprehended is not already located at the facility, then they should be transported. Thus, clarifying that if the person is already located in the facility, it is not necessary to transport that individual.

4) Law Enforcement Officer is not required to remain at mental health facility after presenting the person under an emergency detention warrant, and proper documentation, to facility.

This amendment to Texas Health and Safety Code section 573.012 clarifies a law enforcement officer's duty upon presenting an individual to a mental health facility under a warrant for emergency detention. Under the revised law, a law enforcement officer does not have a duty to remain at a healthcare facility or emergency room once the officer responsibly delivers an individual under a warrant for emergency detention with all required documentation.

A problem faced by law enforcement officers is that they often have been required to wait while the individual they have transported for emergency mental health services is medically screened or treated before they can leave the healthcare facility or emergency room. This amendment clarifies that this waiting time is not required.

NOTE: This legislative change ONLY amends an officer's duties relating to Emergency Detentions with a Warrant, and not Warrantless Emergency Detentions or Apprehension by a Peace Officer Without a Warrant (APOWWs). Nonetheless, the recommended practice is for healthcare facilities and emergency rooms to follow a similar practice for APOWWs.

5) If the warrant is transmitted from the Judge to the Mental Health Facility electronically, the facility may detain the individual for the preliminary examination.

While it might seem obvious that once the facility has the warrant they may begin their preliminary examination and detain the individual who is the subject of the emergency detention warrant, this provision clarifies that the hospital may detain and start work with the individual under the ED warrant even if the police officer has not yet arrived at the facility to officially present the warrant to the person.

6) Directs the Office or Court Administration to create and implement a uniform system for the electronic transmittal of the application and subsequent warrant for emergency detention.

Each of Texas's 254 Counties have different procedures for electronic transmittal of applications for emergency detentions. Creating a uniform system will streamline this process and clarify expectations and duties for all parties.

Tex. Health & Safety Code § 573.012

with 2023 Legislative Changes underlined:

Sec. 573.012

(a) Except as provided by Subsection (h), an applicant for emergency detention must present the application personally to a judge or magistrate. The judge or magistrate shall examine the application and may interview the applicant. Except as provided by Subsections (g) and (h), the judge of a court with probate jurisdiction by administrative order may provide that the application must be:

(1) presented personally to the court; or

(2) retained by court staff and presented to another judge or magistrate as soon as is practicable if the judge of the court is not available at the time the application is presented.

(b) The magistrate shall deny the application unless the magistrate finds that there is reasonable cause to believe that:

(1) the person evidences mental illness;

(2) the person evidences a substantial risk of serious harm to himself or others;

(3) the risk of harm is imminent unless the person is immediately restrained; and

(4) the necessary restraint cannot be accomplished without emergency detention.

(c) A substantial risk of serious harm to the person or others under Subsection (b)(2) may be demonstrated by:

(1) the person's behavior; or

(2) evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty.

(d) The magistrate shall issue to an on-duty peace officer a warrant for the person's immediate apprehension if the magistrate finds that each criterion under Subsection (b) is satisfied.

(d-1) A peace officer who transports an apprehended person to a facility in accordance with this section:

(1) is not required to remain at the facility while the person is medically screened or treated or while the person's insurance coverage is verified; and

(2) may leave the facility immediately after:

(A) the person is taken into custody by appropriate facility staff; and

(B) the peace officer provides to the facility the required documentation.

(e) A person apprehended under this section who is not physically located in a mental health facility at the time the warrant is issued under Subsection (h-1) shall be transported for a preliminary examination in accordance with Section 573.021 to:

(1) the nearest appropriate inpatient mental health facility; or

(2) a mental health facility deemed suitable by the local mental health authority, if an appropriate inpatient mental health facility is not available.

(f) The warrant serves as an application for detention in the facility. The warrant and a copy of the application for the warrant shall be immediately transmitted to the facility.

(g) If there is more than one court with probate jurisdiction in a county, an administrative order regarding a presentation of an application must be jointly issued by all of the judges of those courts.

(h) A judge or magistrate shall permit an applicant who is a physician, or a licensed mental health professional employed by a local mental health authority to present an application by:

(1) e-mail with the application attached as a secure document in a portable document format (PDF); or

(2) another secure electronic means, including:

(A)satellite transmission;

(B)closed-circuit television transmission; or

(C)any other method of two-way electronic communication that:

(i)is secure;

(ii)is available to the judge or magistrate; and

(iii)provides for a simultaneous, compressed full-motion video and interactive communication of image and sound between the judge or magistrate and the applicant.

(h-1) After the presentation of an application under Subsection (h), the judge or magistrate may transmit a warrant to the applicant:

(1) electronically, if a digital signature, as defined by Article 2.26, Code of Criminal Procedure, is transmitted with the document; or

(2) by e-mail with the warrant attached as a secure document in a portable document format (PDF), if the identifiable legal signature of the judge or magistrate is transmitted with the document.

(h-2) A facility may detain a person who is physically located in the facility to perform a preliminary examination in accordance with Section 573.021 if:

(1) a judge or magistrate transmits a warrant to the facility under Subsection (h-1) for the detention of the person; and

(2) the person is not under an order under this chapter or Chapter 574.

(h-3) The Office of Court Administration of the Texas Judicial System shall develop and implement a process for an applicant for emergency detention to electronically present the application under Subsection (h) and for a judge or magistrate to electronically transmit a warrant under Subsection (h-1).

(i) The judge or magistrate shall provide for a recording of the presentation of an application under Subsection (h) to be made and preserved until the patient or proposed patient has been released or discharged. The patient or proposed patient may obtain a copy of the recording on payment of a reasonable amount to cover the costs of reproduction or, if the patient or proposed patient is indigent, the court shall provide a copy on the request of the patient or proposed patient without charging a cost for the copy.

5.4.3.3 Who Can Issue a Warrant?

See the full discussion relating to the jurisdiction of magistrates in section 5.4.1.3 above.

While the law states that any Magistrate may sign an emergency detention warrant, Tex. Code of Crim. Procedure Art. 2.09, Tex. Health & Safety Code § 573.012, this power may be limited by **administrative order** by the judge(s) of a court(s) with probate jurisdiction. Tex. Health & Safety Code § 573.012(g). A judge of the mental health court may also designate a magistrate to sign Orders of Protective Custody. Tex. Health & Safety Code § 574.021(e)

Practical Examples

Some Texas county administrative orders issued under Tex. Health & Safety Code § 573.012(g), limit the magistrates who may sign any emergency detention order by requiring that the application for emergency detention be retained by court staff and presented only to the judge in the county with probate jurisdiction.

Some counties allow any judge or magistrate to consider the application as soon as practicable if the judge of the court is not available at the time the application is presented.

Other counties, like Travis County for example, have chosen to exclusively use warrantless detentions (APOWW) instead of utilizing county judges or magistrates to issue emergency detention warrants.[107]

5.4.3.4 When the Magistrate Must Issue a Warrant

- The magistrate must deny the application and refuse to issue a warrant unless the magistrate finds that there is reasonable cause to believe that:
  - the person evidences mental illness;
  - the person evidences a substantial risk of serious harm to self or others;
    - A substantial risk of serious harm must be demonstrated by:
      - the person's behavior; or
      - evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. Tex. Health & Safety Code § 573.003(b).
  - the risk of harm is imminent unless the person is immediately restrained; and
  - the necessary restraint cannot be accomplished without emergency detention. Tex. Health & Safety Code § 573.012(b).
- If the magistrate finds reasonable cause, the magistrate must issue a warrant to an on-duty peace officer[108] for the person's immediate apprehension, detention, and transportation to the nearest appropriate inpatient mental health facility or a mental health facility deemed suitable by the LMHA, if an appropriate inpatient mental health facility is not available for a preliminary examination under section 573.021 of the Texas Health and Safety Code. Tex. Health & Safety Code § 573.012(d).

5.4.3.4.a The Warrant is the Application for Detention

- The warrant serves as an application for detention in the facility.
- The warrant and a copy of the application for the warrant shall be immediately transmitted to the facility. Tex. Health & Safety Code § 573.012(f). This transmittal can be done electronically. Tex. Health & Safety Code § 573.012(h-1).

[107] *Emergency Detention*, TRAVISCOUNTYTX.GOV, https://www.traviscountytx.gov/probate/emergency-detention (last visited June 7, 2023).

[108] A 2018 Attorney General Opinion concluded that "a magistrate may direct the emergency detention warrant to any on-duty peace officer listed in article 2.12 of the Texas Code of Criminal Procedure, regardless of the apprehended person's location within the county." Tex. Att'y Gen. Op. KP-0206 at *1 (May 16, 2018) (internal footnote omitted).

Legislative Change

S.B. 1624 (88th Reg. Sess. (2023)) Section 18, effective September 1, 2023, amended Tex. Health & Safety Code § 573.012 by adding subsection (h-3) to direct the Office or Court Administration to create and implement a uniform system for the electronic transmittal of the application and subsequent warrant for emergency detention.

Each of Texas's 254 counties has different procedures for electronic transmittal of applications for emergency detentions. Creating a uniform system will streamline this process and clarify expectations and duties for all parties.

5.4.3.4.b Facility may detain person to perform a preliminary exam

In circumstances when the person is physically located in the facility already, when the court transmits the warrant electronically, then the facility may detain that person and preform the preliminary exam. An exception though, is that this person cannot already be under another order under Ch. 573 (APOWW or Emergency Detention Warrant) or 574 (Court-ordered MH services). Tex. Health & Safety Code § 573.012(h-2).

Legislative Changes

S.B. 1624 (88th Reg. Sess. (2023)), effective September 1, 2023, amended Tex. Health & Safety Code § 573.012 to clarify that when a warrant is transmitted from the Judge to the Mental Health Facility electronically, the facility may then detain the individual for the preliminary examination.

This amendment added language to clarify that once the facility has the warrant they may begin their preliminary examination and detain the individual who is the subject of the emergency detention warrant. It makes clear that the mental health facility may detain and start work with the individual under the ED warrant even if the police officer has not yet arrived at the facility to officially present the warrant to the person. This amendment goes hand-in-hand with the legislative change that clarified that when a person is already in a mental health facility and a warrant is issued for their emergency detention, then provisions regarding transportation to the facility would not apply.

Rights of Persons during Emergency Detention Procedures

The purpose of emergency detention procedures is not "to punish a person for acting with criminal intent, but to protect individuals from self-inflicted harm and to protect society from harm from others as a result of mental illness."[109] Section 573.025 of the Texas Health and Safety Code codifies the rights of persons involved in the emergency detention process. These rights are the same whether the person is detained by a peace officer, a guardian, or some other person, and whether the detention occurs with or without a warrant. A person apprehended, detained, or transported under Chapter 573 has the right:

- to be advised of the location and reasons for the detention, and that the detention could result in a longer period of involuntary commitment;
- to a reasonable opportunity to communicate with and retain an attorney;

[109] Hon. Guy Herman, Mental Health Law 4 (August 2019) (unpublished manuscript, on file with the Judicial Commission on Mental Health).

- to be transported upon release to a location as provided by section 573.024 unless the person is arrested or objects;
- to be released as provided by section 573.023 if the person does not meet the requirements for admission to an inpatient mental health[110] facility after the preliminary examination, or if the facility determines that the requirements of subsection 573.022(a)(2) no longer apply;
- to be advised that any communication with a mental health professional may be used in proceedings for further detention;
- to be transported in accordance with the requirements of Chapters 573 and 574; and
- to a reasonable opportunity to communicate with a relative or other responsible person who has a proper interest in the person's welfare.

Tex. Health & Safety Code § 573.025(a)(1)-(7).

A person must be notified of these rights both orally and in writing (in the person's primary language, if possible) within 24 hours after the person is admitted, or through means necessary to communicate with a hearing or visually impaired person. Tex. Health & Safety Code § 573.025(b)(1); (b)(2).

5.4.3.5 Temporary Acceptance Required

- A facility must temporarily accept a person for whom:
  - an application for detention is filed; or
  - an officer or EMS personnel under an MOU provides a notice of detention completed by the officer under section 573.002(a) of the Texas Health and Safety Code.

Tex. Health & Safety Code § 573.021(a).

- **Exception**: A person may not be detained in a private mental health facility without the consent of the facility administrator. Tex. Health & Safety Code § 573.021(e).

5.4.3.5.a Within 12 Hours of Apprehension, a Physician Must Perform a Preliminary Examination

Regardless of whether a person was transported to a facility with or without a warrant, the person must be evaluated by at least one physician within 12 hours *after the time the person is apprehended by the peace officer or transported for emergency detention by the person's guardian.* Tex. Health & Safety Code § 573.003(18).

JCMH Round Table Reports

5.4.3.5.b When a Person May be Admitted to a Facility After a Preliminary Exam

- The person can be admitted to a facility only if the physician who performed the preliminary examination makes a written statement that:
  - is acceptable to the facility;
  - states that after a preliminary examination it is the physician's opinion that:
    - the person is a person with mental illness;
    - the person evidences a substantial risk of serious harm to self or others;
    - the risk of harm is imminent unless the person is immediately restrained; and
    - emergency detention is the least restrictive means by which the necessary restraint may be accomplished; and

[110] Note that this language is not in the statute, which less specifically refers to a facility.

- includes:
  - a description of the nature of the person's mental illness;
  - a specific description of the risk of harm, which may be demonstrated by:
    - the person's behavior; or
    - evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty; and
    - the specific detailed information from which the physician formed the opinion.

Tex. Health & Safety Code § 573.022.

Distinguish: CME for Mental Illness

A physician's "written statement" documenting a preliminary examination under section 573.022 of the Texas Health and Safety Code is not a "CME for mental illness" under section 574.011 of the Texas Health and Safety Code. The former is required after a preliminary examination is performed for a facility to hold a person under emergency detention provided by Chapter 573 (Emergency Detention); the latter must accompany a motion for protective custody under Chapter 574.

5.4.3.6 Release

- The person must be released on completion of the preliminary examination unless the person is admitted to a facility as described in section 5.4.3.5.b above. If the person is admitted, the person must be released if the facility administrator determines at any time during the emergency detention period that one of the criteria described above no longer applies. Tex. Health & Safety Code § 573.022(a), (b).

5.4.3.6.a Transport

- After admission, the admitting facility may transport the person to a facility deemed suitable by the LMHA. At the LHMA's request, the judge may order that the person be detained in a department mental health facility (i.e., State Mental Health Hospital). Either the admitting facility or the facility where the person is detained may transfer the person to an appropriate mental hospital (inpatient mental health facility) with the written consent of the hospital administrator. Tex. Health & Safety Code § 573.022(b), (c); *see also* Tex. Health & Safety Code § 574.045 (detailing more requirements pertaining to transportation of a patient).

5.4.3.6.b Within 48 Hours of Initial Detention, the Person Must be Released if No Order of Protective Custody Is Obtained

- Unless a written order of protective custody (OPC) is obtained under section 574.022 of the Texas Health and Safety Code as discussed in section 5.4.3.7 below, a person accepted for a preliminary examination may be detained in custody for no more than 48 hours *after the time the person is presented to the facility*. That includes any time the person spends waiting in the facility for medical care before the person receives the preliminary examination. Tex. Health and Safety Code § 573.021(b).
- If the 48-hour period ends on a Saturday, Sunday, legal holiday, or before 4 p.m. on the first succeeding business day, the person may be detained until 4 p.m. on the first succeeding business day. If the 48-hour period ends at a different time, the person may be detained only until 4 p.m. on the day the 48-hour period ends. Tex. Health and Safety Code § 573.021(b).

Subsequent Applications for Emergency Detention

As described in section 5.4.3.7.b, there are statutory limits on the allowable period for an emergency detention under subsection 573.021(b) of the Texas Health and Safety Code. The statute contemplates that, if after a preliminary examination, additional involuntary inpatient mental health services are required, steps must be taken to seek and obtain an order of protective custody during the emergency detention period. The legislative intent of section 573.021 bolsters the interpretation that a second consecutive emergency detention order arising out of the same nexus of events would not be authorized. In contrast, however, a subsequent emergency detention order following the expiration of the statutory period would be permissible if supported by a new or different nexus of events that meet the statutory criteria. Similarly, sequential warrants should not be issued on the basis of a single nexus of events.

5.4.3.7 Order of Protective Custody

Overview: Protective Custody and Probable Cause Under HSC Chapter 574

A. Motion for Protective Custody Order (filed with 574 commitment application)

- Trial court may issue order for protective custody if the person presents a substantial risk of serious harm to self or others if not immediately restrained pending the hearing. Tex. Health & Safety Code § 574.022(a)(2).
- If a person is charged with criminal offense, facility administration must agree to the detention. Tex. Health & Safety Code § 574.022(e).
- The Application for Court-Ordered Mental Health Services (Commitment) must be filed with the Motion for OPC. This Application requires a CME. Tex. Health & Safety Code § 574.001.

B. Probable Cause Hearing to Determine Continued Detention (within 72 hours)

Trial court may order continued detention if it finds probable cause to believe that the person presents a substantial risk of serious harm to self or others to the extent that he cannot remain at liberty pending the hearing on court-ordered mental health services. [no immediacy requirement] Tex. Health & Safety Code § 574.026(a).

5.4.3.7.a Where to File an OPC Motion

- The OPC Motion must be filed in the Court where the Application for Court Ordered Mental Health Services is pending. Tex. Health & Safety Code § 574.021(a).
  - The Application for Court Ordered Mental Health Services *may* be filed with the county clerk of any of the following:
    - County where the patient resides; or
    - County where the patient is found; or
    - County where the patient is receiving mental health services by court order or under Emergency Detention; or
    - County of child's commitment if proposed patient is in the custody of the Texas Juvenile Justice Department.

    Tex. Health & Safety Code § 574.001(b), (f).
  - If the application is not filed in the county where the patient resides, the court may, *on the request of the proposed patient or the proposed patient's attorney with good cause shown*, transfer the application to the county where the proposed resides. Tex. Health & Safety Code § 574.001(c).
  - An application may be transferred to the county in which the person is being detained if the county to which the application is to be transferred approves the transfer. Tex. Health & Safety Code § 574.001(d).

Practical Examples of Where the Application Can Be Filed

- *The person was found in Cameron County but has a permanent residence in Harris County. The application may be filed in either county.*
- *The person may be from out of state but is visiting a Texas county. If the person is found in that Texas county, the application may be filed there.*
- *Suppose a Texas Tech student from Plano (Collin County) is in psychosis and is found just to the west of Lubbock (e.g., Hockley County) driving erratically. Because Hockley County is in the StarCare service area, an officer transports the student to Sunrise Canyon in Lubbock (Lubbock Co.) under a warrantless ED. Under 574.001(b), all three counties could have personal jurisdiction over the application. That is, the application could be filed in Collin (residence), Hockley (was found), or Lubbock (where services per the ED are being provided), but it's most likely that the application is going to filed in Lubbock.*[111]
- *An individual from Galveston County is within the current catchment area of Austin State Hospital. If that individual has been receiving court-ordered mental health services at Austin State Hospital, located in Travis County, a hearing on an application for further court-ordered mental health services may be heard in Travis County. The Travis County probate court, however, has the discretion, upon motion and good cause shown, to transfer the application to the county of the individual's residence.*[112]

[111] Professor Brian Shannon, email dated August 8, 2023, on file with author.

[112] Professor Michael Churgin, *An Analysis of the Texas Mental Health Code* (Hogg Foundation, 2d ed., 1994, 3d ed., (2010).

Personal Jurisdiction Case Law for "Is Found" Statutory Language

Argument has been had over the meaning of the words "is found" in this statute. Some believe it means the location where the patient was apprehended under an emergency detention. Others interpret it to mean where the patient is located at the time the application is filed.

Goldwait v. State, 961 S.W.2d 432, 434 (Tex. App.—Houston [1st Dist.], no pet.). Texas brothers were worried about the mental health of another brother who lived in Boston. They persuaded him to return with them to Houston. The family initiated civil commitment in Harris County after the brother with mental illness refused voluntary care. In challenging the commitment order, the appellant contended that the court lacked personal jurisdiction. The court held that the appellant, although a resident of Massachusetts, had traveled to Houston voluntarily, and that the Harris County Probate Court had jurisdiction because the appellant "was found in Harris County at the time the application was filed."

See also State ex rel. E.M., 2014 Tex. App. LEXIS 11890, *5-*6, unreported (Tex. App.—Dallas 2014, no pet.). Appellant was discharged from a hospital in Georgetown (Williamson County). While her sons were driving her to Dallas, she became unresponsive, and they took her to St. Paul Hospital. She was initially a voluntary patient. A few days later, an application for court-ordered services was filed in Dallas. The court's personal jurisdiction was challenged. The court held that although she was a resident of Georgetown, "she was physically present in Dallas" and "was found in Dallas County at the time the application was filed." Thus, the Dallas court had jurisdiction.

Another unreported case, *Ledbetter v. State*, 2004 Tex. App. LEXIS 7295, *3, unreported (Tex. App.—Fort Worth, no pet.) is similar, holding that Denton County had jurisdiction over the patient's OPC and commitment at Wichita Falls State Hospital because the patient "was found in Denton County where the application was filed."

- **46B, Subchapter F Cases**: An order transferring a criminal defendant against whom all charges have been dismissed to the appropriate court for a hearing on court-ordered mental health services under Chapter 46B serves as the application for court-ordered mental health services. The order must state that all charges have been dismissed. Tex. Health & Safety Code § 574.001(e).

- In contrast to an application for emergency detention, which may be presented to any judge or magistrate, a motion for OPC may be filed only if an application for court-ordered mental health services has been filed, and only in the court in which the application is pending. Compare Tex. Health & Safety Code § 573.021 with Tex. Health & Safety Code § 574.008(a). An application for court-ordered mental health services must be filed in the statutory or constitutional county court that has jurisdiction of a probate court in mental health proceedings. *See* Tex. Health & Safety Code § 574.021(a).

Hearings, Notice, and Appointment of Attorney

When an Application for Court-Ordered Mental Health Services is filed, the court or its designated magistrate becomes obligated to:

- appoint an attorney for the proposed patient;
- set a probable cause hearing if an OPC has been or will be issued;
- set a final hearing on the merits;
- serve notice of all pleadings, attorney appointments, and hearings to the proposed patient and his or her attorney, as well as provide a written list of attorney duties.

These things should be done along with the issuance of an OPC, and the county clerk is responsible for service of any notice.[113] Tex. Health & Safety Code §§ 574.001–574.006.

5.4.3.7.b Who May File an OPC Motion

- The motion may be filed by the county or district attorney or on the motion of the court with probate jurisdiction. Tex. Health & Safety Code § 574.021(b).

5.4.3.7.c Contents

- The motion must state that:
    - The judge or county or district attorney has reason to believe and does believe that the proposed patient meets the criteria authorizing the court to order protective custody; and
    - The belief is derived from:
        - The representations of a credible person;
        - The proposed patient's conduct; or
        - The circumstances under which the proposed patient is found.

  Tex. Health & Safety Code § 574.021(c).

5.4.3.7.d CME Required

- The motion must be accompanied by a CME for mental illness prepared by a physician who has examined the proposed patient. The physician must have prepared the CME not earlier than the third day before the day the motion is filed (in other words, the CME must be very recent). Tex. Health & Safety Code §§ 574.011; 574.021(d).

5.4.3.7.e Judge May Appoint a Magistrate

- The judge of the court in which the application is pending may designate a magistrate to issue OPCs. That includes a magistrate appointed by the judge of another court if the magistrate has at least the qualifications required for a magistrate of the court in which the application is pending. Tex. Health & Safety Code § 574.021(e).

5.4.3.7.f When the Judge or Designated Magistrate May Issue an OPC

- The judge or designated magistrate may issue an OPC if the judge or magistrate determines:
    - That a physician has stated the physician's opinion and the detailed reasons for the physician's opinion that the proposed patient is a person with mental illness; and
    - The proposed patient presents a substantial risk of serious harm to the proposed patient or others if not immediately restrained pending the hearing.

  Tex. Health & Safety Code § 574.022(a).

- Substantial risk of serious harm may be demonstrated by the patient's behavior or by evidence of severe emotional distress and deterioration in the proposed patient's mental condition to the extent that the proposed patient cannot remain at liberty. Tex. Health & Safety Code § 574.022(b).
- **Note:** The judge or magistrate may issue an OPC for a proposed patient charged with a criminal offense if:

[113] Hon. Guy Herman, Mental Health Law 7 (August 2019) (unpublished manuscript, on file with the Judicial Commission on Mental Health).

- the proposed patient meets the requirements of section 574.022 of the Texas Health and Safety Code; and
- the facility administrator designated to detain the proposed patient agrees to the detention.

Tex. Health & Safety Code § 574.022(a).

Who May Sign an Order of Protective Custody vs. an Order for Emergency Detention

While any Texas magistrate can issue an Order for Emergency Detention, a magistrate may only sign an Order of Protective Custody if the judge of the court where an Application for Court-Ordered Mental Health Services is pending has designated the magistrate to sign such orders. If the magistrate does not have such a designation and is not the judge in a court that has original jurisdiction over probate matters, then the magistrate should decline to sign any OPCs that are presented.[114]

5.4.3.7.g Apprehension Under an OPC

- An OPC shall direct a person authorized to transport patients under section 574.045 to take the proposed patient into protective custody and transport the person immediately to a mental health facility deemed suitable by the LMHA. On the LMHA's request, the judge may order that the proposed patient be detained in an inpatient mental health facility operated by HHSC. The proposed patient shall be detained in the facility until a probable cause hearing is held under section 574.025 as discussed below. Tex. Health & Safety Code § 574.022.
- In many cases, a person for whom an OPC is sought is already in a mental health facility or hospital under an Order for Emergency Detention, and the need to transport the person will not arise.

Note: A facility must comply with this section only to the extent that the commissioner of HHSC determines that the facility has sufficient resources to perform the necessary services. Tex. Health & Safety Code § 574.022(c).

Bed Availability

Some judges hesitate to sign an OPC until a placement option for the patient has been specifically identified (sometimes referred to as a "bed letter"). This is not required by Chapter 574 and due to the limited capacity of inpatient beds statewide, delays caused by such a practice could result in the expiration of the emergency detention period with no option to continue to detain a person who has been shown to meet the criteria for protective custody.

5.4.3.8 Within 72 Hours of OPC Detention, Court Must Hold Probable Cause Hearing

- Not later than 72 hours after the time that the proposed patient was detained under an OPC, the court must hold a hearing to determine if:
  - there is probable cause to believe that a proposed patient under an OPC presents a substantial risk of serious harm to the proposed patient or others to the extent that the proposed patient cannot be at liberty pending the hearing on court-ordered mental health services; and

[114] *Id.*

- a physician has stated that it is the physician's opinion that the proposed patient is a person with mental illness and has also detailed the reasons for this opinion. Tex. Health & Safety Code § 574.025.

Distinguish the Hearing

It is important to note that the purpose of the probable cause hearing is to determine if the patient continues to meet the criteria for detention. It is NOT a ratification of the original detention or the OPC itself.

- If the 72-hour period ends on a Saturday, Sunday, or legal holiday, the hearing must be held on the next day that is not a Saturday, Sunday, or legal holiday. Tex. Health & Safety Code § 574.025(b).
- The court may postpone the hearing each day for an additional 24 hours if the court declares that an extreme emergency exists because of extremely hazardous weather conditions or the occurrence of a disaster that threatens the safety of the proposed patient or another essential party to the hearing. Tex. Health & Safety Code § 574.025(b).
- The proposed patient and the proposed patient's attorney may appear at the hearing to present evidence to challenge the allegation that the proposed patient presents a substantial risk of serious harm to himself or others. Tex. Health & Safety Code § 574.025(d).
  - In practice, the patient often waives his or her appearance at the probable cause hearing because the probable cause standard can be met on the basis of the CME, and this is not typically contested.
  - Note that some courts allow a proposed patient's attorney to waive an appearance at the probable cause hearing on behalf of their client by the filing of a motion.
- The state is represented at the hearing by the county or district attorney, and the state may prove its case based on the physician's CME filed in support of the initial motion. Tex. Health & Safety Code § 574.025(f).
- Certain hearsay testimony that would not be admissible under the Texas Rules of Evidence is admissible at this hearing although it would not be at the final hearing if it was objected to. Examples of such evidence include letters or affidavits. Tex. Health & Safety Code §574.025(e).
- If the court determines that the above criteria are met, the court may order that the proposed patient remain in protective custody pending a hearing on an application for court-ordered services. Tex. Health & Safety Code § 574.026.

5.4.3.9 Notification of Probable Cause Hearing

- After the probable cause hearing, the court shall arrange for the proposed patient to be returned to the mental health facility, or other suitable place, along with:
  - copies of the CME;
  - any affidavits or other material submitted as evidence in the hearing; and
  - a notification of probable cause hearing **(note that the language of this notification is mandated by the statute; *see* Appendix in this Bench Book)**.

  Tex. Health & Safety Code § 574.026(b), (d).
- If a facility administrator where the person is being detained does not receive a copy of the notice of probable cause hearing within 72 hours of the person's initial detention under an OPC and there is no final commitment order, the facility must release the person. Tex. Health & Safety Code § 574.028(c)(1), (2).

- Note that the 72- hour period does not include Saturdays, Sundays, legal holidays, or periods of extreme emergencies as codified in subsection 574.025(b). Tex. Health & Safety Code § 574.028(c)(1).

- A facility must also release a person under an OPC if at any time the facility determines that the person no longer meets the criteria for protective custody under section 574.022.

Collaboration is Key

It is essential for local probate courts to collaborate with the LMHA/LBHA and LIDDA to ensure that: services are available; the judge and court personnel know what exactly the local services can and will provide; and there are no time delays due to questions surrounding bed availability or eligibility for certain services.

5.4.3.10 Detention in Protective Custody

- If probable cause is found, a person under the authority of a protective custody order shall then be detained in a mental health facility deemed suitable by the applicable LHMA until a final order for court-ordered mental health services is entered or the patient is discharged prior to the hearing because they no longer meet the criteria for detention. Tex. Health & Safety Code § 574.027.
- If the court does not find probable cause at the hearing, the person must be released, and arrangements must be made to return the person to:
  - the location of the person's apprehension;
  - the person's residence in Texas; or
  - another suitable location.

  Tex. Health & Safety Code § 574.028.

5.4.3.11 Pre-Hearing Proceedings for Court-Ordered Mental Health Services

5.4.3.11.a Application for Court-Ordered Mental Health Services

- Any adult can file a sworn, written application for court-ordered mental health services, but only a county or district attorney can file an application that is not accompanied by a certificate of mental examination. Tex. Health & Safety Code § 574.001(a).
- The application must be filed in the county where:
  - the proposed patient resides;
  - is found; or
  - is receiving mental health services by court order or an emergency detention without a warrant.

  Tex. Health & Safety Code § 574.001(b).
- If the application is filed in a different county than where the proposed patient lives, the proposed patient or their attorney can request that the application be transferred to the county where the proposed patient lives. Tex. Health & Safety Code §574.001(c).
- If a person is being detained under an OPC, the application can also be transferred to that county, but only if the county approves such a transfer. This does not preclude the proposed patient being able to request a transfer to the county of his or her residence. Tex. Health & Safety Code § 574.001(d).
- If a proposed patient is a criminal defendant and all pending charges have been dismissed, then an order transferring the case to an appropriate court for court-ordered mental health services

under Chapter 46B of the Texas Code of Criminal Procedure (Incompetency to Stand Trial) will be considered an application for court-ordered mental health services under section 574.001. This order must state that all criminal charges have been dismissed. Tex. Health & Safety Code § 574.001(e).

What Should be Included in the Application?

An application must:

- be styled using the proposed patient's initials and not the proposed patient's full name;
- state whether the application is for temporary or extended services;
- the proposed patient's name, address, and county of residence in Texas;
- a statement that the proposed patient is a person with mental illness and meets the criteria in Chapter 574 for court-ordered mental health services; and
- whether the proposed patient is charged with a criminal offense.

Tex. Health & Safety Code § 574.002(b), (c).

Application Requirements for Extended vs. Temporary Court-Ordered Services

- Applications for **extended** court-ordered services have several statutory requirements that applications for **temporary** court-ordered services do not require.
- An application for **extended inpatient** mental health services must state that the person has received:
  - *court-ordered inpatient mental health services* under either this subtitle or Chapter 46B, Subchapter D of the Texas Code of Criminal Procedure (Procedures after Determination of Incompetency) or Subchapter E (Civil Commitment: Charges Pending) for *at least 60 consecutive days during the prior 12 months*.
- An application for **extended outpatient** mental health services must state that the person has received:
  - *court-ordered inpatient mental health services* under either this subtitle OR under Chapter 46B, Subchapter D or E of the Texas Code of Criminal Procedure for *a total of at least 60 days during the prior 12 months*; OR
  - *court-ordered outpatient mental health services* under this subtitle or Chapter 46B, Subchapters D or E *during the preceding 60 days*.

Tex. Health & Safety Code §574.002(b).

5.4.3.11.b Appointment and Duties of an Attorney

- The judge must appoint an attorney for the proposed patient within 24 hours after the application is filed unless the proposed patient already has an attorney. Tex. Health & Safety Code § 574.003(a).
- Texas codifies the duties that an attorney has toward a client in a court-ordered services proceeding in section 574.004, and the court is required to give a copy of these duties to every court-appointed attorney. Tex. Health & Safety Code § 574.003(b).

Reflection Point

Consider what training attorneys in your jurisdiction who are routinely assigned to cases involving people with mental illness or ID receive or have related to these issues?

The same question applies to judges who handle these types of cases. What training have they had regarding serious mental illness and treatment, and IDD specific issues?

The Statutory Professional Responsibility of Attorneys in Civil Commitment Cases

The requirements set forth in section 574.004 of the Texas Health and Safety Code were the result of publicity surrounding the actions of some court-appointed lawyers who were not communicating with clients before hearings or were conducting group interviews with multiple clients. "The publicity surrounding such inappropriate and inadequate representation caused the Legislature to strengthen the rights of patients."[115]

Note that the Rules of Professional Conduct governing attorneys comment specifically on the attention and respect that is to be given to every client, regardless if the client suffers from a mental illness. Comment 5 to Rule 1.02 of the TDRPC states: "When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being…The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect."

- Included in the list of duties owed by the attorney to the proposed patient is that the attorney must respect the client's decision to agree or resist the efforts to provide mental health services, even though he or she may personally disagree with the client's wishes. Though the attorney may provide counsel, he or she must abide by the client's final decision on the matter. Tex. Health & Safety Code § 574.004(c).

5.4.3.11.c Setting the Hearing

- The court must set a hearing within 14 days of the date the application was filed but may not hold a hearing within the first three days after the application is filed if the proposed patient or the attorney objects. Tex. Health & Safety Code § 574.005(a), (b).
    - There are witnesses that may appear at the hearing to present evidence, which may be unknown to the parties prior to the hearing date. If either party wishes, they may request a continuance based on surprise and the court may continue the hearing date. Tex. Health & Safety Code § 574.006(d).
- While the court may grant continuances for the hearing, the final hearing must be held no more than 30 days from the date the application was filed. The only exception is for extreme weather or disaster, in which case the judge may by a written order each day postpone the hearing for 24 hours. Tex. Health & Safety Code § 574.005 (c).

[115] Hon. Guy Herman, Mental Health Law 8 (August 2019) (unpublished manuscript, on file with the Judicial Commission on Mental Health).

Continuances and CMEs

A court must carefully consider granting a continuance, as doing so may negatively affect the 30-day requirement for having two valid CMEs, if there was an OPC filed at the same time an application for commitment was filed, and an examination was conducted within the three days allowable prior to filing the OPC. *See* Tex. Health & Safety Code § 574.021(d).

5.4.3.11.d Notice of Hearing

- The proposed patient and attorney are entitled to receive a copy of the application and written notice of the court hearing immediately after it is set. Notice must also be delivered in person or via certified mail to the proposed patient's:
  - Parent, if a minor; or
  - Appointed guardian, if applicable; or
  - Each managing and possessory conservator, if applicable. Tex. Health & Safety Code § 574.006(b).
- If a parent cannot be located, and the proposed patient does not have a guardian or conservator, the notice may be given to the proposed patient's next of kin. Tex. Health & Safety Code § 574.006(c).

Notice and Confidentiality

Upon request, any clerk, judge, magistrate, court coordinator, or other officer of the court must provide the time and place of any hearing as well as the names and addresses of the attorneys for the proposed patient and the state to anyone claiming to have evidence to present at the hearing. If this information is provided, the above persons are immune from any civil suit resulting from providing such notice. However, these persons are not to release ANY other information about the patient or the hearing whatsoever. Tex. Health & Safety Code § 574.006(d).

5.4.3.11.e Disclosure of Information

- If the proposed patient's attorney seeks information that he or she cannot obtain in any other way, he or she may request that information from the county or district attorney at least 48 hours prior to the hearing date. Tex. Health & Safety Code § 574.007(a).
- The county or district attorney is also required to tell the proposed patient's attorney whether they will request inpatient or outpatient services no later than 48 hours prior to the hearing UNLESS the proposed patient and proposed patient's attorney agree to waive this requirement:
  - orally and in court; OR
  - in a sworn, written statement signed by the proposed patient and his or her attorney. Tex. Health & Safety Code. § 574.007(d).
- The county or district attorney is then required to provide a statement that includes:
  - under which subtitle the state is seeking to establish that the proposed patient requires mental health services;
  - the reasons that voluntary outpatient services are not appropriate;
  - the name, phone number, and address of each witness who may testify;
  - a brief description of the reasons why the particular mental health services being requested are required;
  - a list of any acts committed by the proposed patient which the applicant will attempt to prove at the hearing.

  Tex. Health & Safety Code § 574.007(b).

- Note that the judge is able to admit evidence not provided to the proposed patient and his or her attorney prior to the hearing if the admission would not deprive the proposed patient of a fair opportunity to contest the evidence or testimony. Tex. Health & Safety Code § 574.007(c).

5.4.3.11.f Medical Examination Requirement

- Prior to the final hearing, two certificates of medical examination must be on file. They must be conducted by two different physicians, one of which must be a psychiatrist, if a psychiatrist is available in that county. Tex. Health & Safety Code § 574.009(a).
    - Both of these examinations must have been completed within 30 days of the hearing. Tex. Health & Safety Code § 574.009(a).
- If two certificates of medical examination are not filed at the time of the application for court-ordered mental health services, then the court may appoint a physician to examine the proposed patient and file the certificates. The court can also order the proposed patient to submit to the examinations, in some cases issuing a warrant authorizing a peace officer to transport the proposed patient to the examination. Tex. Health & Safety Code § 574.009(b), (c).
- If, on the hearing date, the required certificates are not on file, the court must dismiss the application and order the immediate release of the proposed patient if he or she is detained. Tex. Health & Safety Code § 574.009(d).
- The court also has the authority to order an independent evaluation of the proposed patient by a psychiatrist of the proposed patient's choosing if the court feels it will assist the finder of fact. If the proposed patient is indigent, the county must reimburse the proposed patient's appointed attorney for any expenses incurred in securing the psychiatrist's testimony. Tex. Health & Safety Code § 574.010(a), (b).

What Should a CME for Mental Illness Include?

- Name and address of examining physician
- Name and address of the person examined
- Date and place of examination
- Brief diagnosis of the examined person's physical and mental condition
- The time period, if any, the person has been under the physician's care
- A description of the mental health treatment the examining physician has given to the person, if any

The examining physician's opinion that:

i) The examined person is a person with mental illness; and

ii) As a result of that illness the examined person is likely to cause serious harm to the person or to others or is:

(1) suffering severe and abnormal mental, emotional, or physical distress;

(2) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, exhibited by the inability to provide for basic needs; and

(3) not able to make a rational and informed decision as to whether to submit to treatment.

The examining physician must be as specific and detailed as possible as to what criterion form the basis of the opinion, and if it is offered in support of an application for court-ordered services, must state that the person's condition is likely to continue for more than 90 days. If offered in support of an OPC motion, it must include the opinion that the person presents a substantial risk of serious harm to himself or others if not immediately restrained, and such harm may be demonstrated by the examined

person's behavior or by evidence of severe emotional distress and deterioration in the examined person's mental condition to the extent that the person cannot remain at liberty. Tex. Health & Safety Code § 574.011.

5.4.3.11.g Recommendation and Responsibility for the Treatment to be Ordered

- Unless the person will be receiving treatment in a private mental health facility, the LMHA in the county where the application is filed must file a recommendation for the most appropriate treatment alternative with the court prior to the date of the hearing. Tex. Health & Safety Code § 574.012(a), (b).
  - The court cannot hold a hearing without this recommendation on file except in cases of emergency. Tex. Health & Safety Code § 574.012(d).
  - If the LMHA recommends outpatient treatment, the LMHA must file a statement regarding whether those services are available, but this section does not relieve a county of its responsibility under other provisions of this subtitle to diagnose, care for, or treat persons with mental illness. Tex. Health & Safety Code § 574.012(c)(d).
- Three days before the hearing, the court must identify the person the court intends to be responsible for any outpatient treatment that may be ordered. Tex. Health & Safety Code 574.0125.

Emergency Detention and Commitment Hearing Timeline

TD = time detained by peace officer or transported by guardian to facility

TD + 12 Hours:

- Preliminary examination must be completed by a physician. Tex. Health & Safety Code § 573.021(c).

TD + 48 Hours:

- Person must be released unless an order of protective custody (OPC) is obtained. May be extended until 4:00 p.m. on the first succeeding business day if 48-hour period ends on a Saturday, Sunday, or legal holiday. Tex. Health & Safety Code § 573.021(b).
- Motion for OPC may be filed only in the court in which an application for court-ordered mental health services is pending. Tex. Health & Safety Code § 574.021(a).
- Application for court-ordered mental health services must also be filed and pending in the court issuing the OPC. Tex. Health & Safety Code § 574.001.

Note: There is not a requirement in Chapter 574 that the specific facility in which the patient will be detained be named in the OPC nor any requirement that a "bed letter" be obtained prior to or in conjunction with issuing an OPC.

TD + HSC 574 Application Filed + 24 Hours:

- Judge shall appoint an attorney to represent the person

TD + 120 Hours (with OPC filed):

- Probable cause hearing: if there is probable cause to believe a person under an OPC presents a substantial risk of serious harm to the person or others such that the person may not remain at liberty pending a hearing on the application for court-ordered mental health services. Must be held within 72 hours of OPC being issued. May be extended to the first succeeding business day if 72-hour period ends on a Saturday, Sunday, or legal holiday. Tex. Health & Safety Code § 574.025.
- This is a hearing to determine if probable cause exists at the time of the hearing for further detention and restriction of a person's liberty, not a confirmation of the peace officer's original decision. Note that by this time the patient has been in treatment at a mental health facility for 24 to 120 hours depending on county procedures.

TD + HSC Application Filed + 14 Days:

- Full evidentiary hearing on application for court-ordered mental health services. Tex. Health & Safety Code § 574.005.
- May not be held during the first three days after the application has been filed if either the person or the attorney objects.
- Court may grant one or more continuances on motion by a party and for good cause shown or on agreement of the parties. Hearing must be held within 30 days of when original application was filed. Tex. Health & Safety Code § 574.005(c).

5.4.3.12 Proceedings for Court-Ordered Mental Health Services

Proceedings for Court-Ordered Mental Health Services are divided into four parts, one for each procedure:

- Order for *Temporary* Inpatient Mental Health Services. Tex. Health & Safety Code § 574.034.
- Order for *Temporary* **Outpatient** Mental Health Services. Tex. Health & Safety Code § 574.0345.
- Order for Extended Inpatient Mental Health Services. Tex. Health & Safety Code § 574.035.
- Order for Extended **Outpatient** Mental Health Services. Tex. Health & Safety Code § 574.0355.

5.4.3.12.a General Hearing Provisions

- The hearing may be held anywhere in the county unless the proposed patient or his or her attorney request that it be held at the courthouse. Tex. Health & Safety Code § 574.031(a), (b).
- The proposed patient is entitled to be present at the hearing, but the proposed patient or the proposed patient's attorney may waive this right. Tex. Health & Safety Code § 574.031(c).
- The hearing must be open to the public unless the proposed patient or his or her attorney request that it be closed, and the court finds good cause to do so. Tex. Health & Safety Code § 574.031(d).
- In a hearing for *temporary* inpatient or outpatient mental health services, the proposed patient or the proposed patient's attorney may waive the right to cross-examine witnesses by filing a written waiver with the court. If that right is waived, the court may admit the CMEs as evidence, the CMEs will constitute competent medical or psychiatric testimony, and the court can make its findings based solely on the CMEs. Tex. Health & Safety Code § 574.031(d-1).
- In a hearing for *extended* inpatient or outpatient mental health services, the court must hear testimony and cannot make findings solely on the CMEs. Tex. Health & Safety Code § 574.031(d-2).
- Unlike the probable cause hearing, the final hearing is governed by the Texas Rules of Evidence unless otherwise stated in this subtitle. Tex. Health & Safety Code § 574.031(e).
- The state must prove each element of the applicable criteria by clear and convincing evidence, and the hearing must be on the record. Tex. Health & Safety Code § 574.031(g).
- The court may consider the testimony of a non-physician mental health professional in addition to medical or psychiatric testimony. Tex. Health & Safety Code § 574.031(f).
- The hearing for *temporary* mental health services must be before the court unless the proposed patient or the proposed patient's attorney requests a jury trial. A hearing for extended mental health services must be in front of a jury unless waived by the proposed patient or the attorney. The waiver must be sworn and signed unless orally made in the court's presence. Tex. Health & Safety Code § 574.032(a), (b), (c). The court may allow a jury waiver to be withdrawn for good cause no later than the eighth day before the hearing. Tex. Health & Safety Code § 574.032(d).
- A jury must determine if the proposed patient is a person with mental illness and meets the criteria for court-ordered services, however, the jury cannot make a finding regarding the type of services to be provided. Tex. Health & Safety Code § 574.032(f).

5.4.3.12.b Order for Temporary Inpatient Mental Health Services

- The judge may order a proposed patient to receive court-ordered temporary inpatient mental health services only if the judge or jury finds, from clear and convincing evidence, that:
  - the proposed patient is a person with mental illness; and
  - as a result of that mental illness the proposed patient:
    - is likely to cause serious harm to himself;
    - is likely to cause serious harm to others; or

- is:
  - suffering severe and abnormal mental, emotional, or physical distress;
  - 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
  - unable to make a rational and informed decision as to whether or not to submit to treatment.

  Tex. Health & Safety Code § 574.034(a).

- The judge or jury must specify which criteria form the basis for the decision, should the judge or jury decide the proposed patient meets the commitment criteria. Tex. Health & Safety Code § 574.034(c).

Orders that Clearly Specify Commitment Criteria

The Code requires that orders for temporary or extended inpatient treatment must specify which criteria the judge or jury is basing their decision upon. There has been conflicting caselaw in this area. Some appellate courts have allowed an order to submit the criteria in the disjunctive (i.e., listing the criteria with OR), while other courts have found that listing the criteria in the conjunctive (with AND) is the only way to ensure that there are specific findings.[116]

A suggested practice to avoid any confusion is to take the word "or" out of any order for temporary or extended inpatient treatment, thus requiring specific findings on any of the criteria listed.

- In order for the judge or jury to make a finding on the above requirements by a clear and convincing evidence standard, the evidence must include expert testimony and evidence of a recent overt act[117] or a continuing pattern of behavior that tends to confirm:
  - The likelihood of serious harm to the proposed patient or others; or
  - The proposed patient's distress and the proposed patient's deterioration of ability to function. Tex. Health & Safety Code § 574.034(d).
- An order for temporary inpatient services must include a treatment period of not more than 45 days, except that the judge may order 90 days if he or she finds the longer period necessary. Tex. Health & Safety Code § 574.034(g).

Note: The "majority of [appellate courts] find that the requirement of 'overt acts or patterns of behavior' may not be fulfilled merely by citing a patient's refusal of treatment.[118]

Person Must Be Released If They Stop Meeting Commitment Criteria

Note that a facility still must release a person if he or she no longer meets commitment criteria, even if the court-mandated time period has not elapsed. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) ("even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.")

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[116] *Id.* at 11.

[117] Note that the Texas Supreme Court in *State v. K.E.W.*, 315 S.W. 3d 16 (Tex. 2010), clarified the "overt act" requirement. The Court held that the act does not have to be actually harmful or demonstrate that harm to others is imminent. The case also states that speech alone may be considered an overt act. *See State v. K.E.W.*, 315 S.W. 3d 16, 24 (Tex. 2010).

[118] Hon. Guy Herman, Mental Health Law 13 (August 2019) (unpublished manuscript, on file with the Judicial Commission on Mental Health).

5.4.3.12.c Order for Temporary Outpatient Mental Health Services

- The judge may order a proposed patient to receive court-ordered temporary outpatient services only if:
  - the judge finds that appropriate mental health services are available to the proposed patient; and
  - the judge or jury finds, from clear and convincing evidence, that:
    - the proposed patient is a person with severe and persistent mental illness;
    - as a result of the mental illness, the proposed patient will, if not treated, experience deterioration of the ability to function independently to the extent that the proposed patient will be unable to live safely in the community without court-ordered outpatient mental health services;
    - outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the proposed patient or others; and
    - the proposed patient has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:
      - any of the proposed patient's actions occurring within the two-year period that immediately precedes the hearing; or
      - specific characteristics of the proposed patient's clinical condition that significantly impair the proposed patient's ability to make a rational and informed decision whether to submit to voluntary outpatient treatment.

  Tex. Health & Safety Code § 574.0345(a).
- In order for the judge or jury to make a finding on the above requirements by a clear and convincing evidence standard, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm the listed requirements. Tex. Health & Safety Code § 574.0345(b).
- An order for temporary outpatient mental health services must state that treatment is authorized for not longer than 45 days, but the judge may specify a period up to 90 days if he or she finds it necessary. Tex. Health & Safety Code § 574.0345(c).

Open and Frequent Communication Between Courts and LMHAs

In order to maintain the most up-to-date information about the availability of outpatient civil commitment services, courts should ensure that they are familiar with their LMHA and have a contact person who can provide them with what resources are available.

5.4.3.12.d Order for Extended Inpatient Mental Health Services

- The judge may order a proposed patient to receive court-ordered extended inpatient mental health services only if the jury, or judge if the right to a jury is waived, finds, from clear and convincing evidence, that:
  - the proposed patient is a person with mental illness;
  - as a result of that mental illness the proposed patient:
    - is likely to cause serious harm to the proposed patient;
    - is likely to cause serious harm to others; or
    - is:
      - suffering severe and abnormal mental, emotional, or physical distress;

- 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, heath, or safety; and
- unable to make a rational and informed decision as to whether or not to submit to treatment;

– the proposed patient's condition is expected to continue for more than 90 days; and

– the proposed patient has received court-ordered inpatient mental health services under this subtitle OR under Chapter 46B, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months. (The judge or jury is not required to make this finding, however, if the proposed patient has already been subject to an order for extended mental health services. Tex. Health & Safety Code § 574.035(d).

Tex. Health & Safety Code § 574.035(a).

- If the judge or jury finds that the proposed patient meets the commitment criteria listed above, the jury or judge must specify which commitment criteria the decision is based upon. Tex. Health & Safety Code § 574.035(c).
- In order for the judge or jury to make a finding on the above requirements by a clear and convincing evidence standard, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
  - The likelihood of serious harm to the proposed patient or others; or
  - The proposed patient's distress and the proposed patient's deterioration of ability to function.

  Tex. Health & Safety Code § 574.035(e).
- An order for extended inpatient mental health services must provide for a period of treatment not to exceed 12 months. Tex. Health & Safety Code § 574.035(h).

5.4.3.12.e Order for Extended Outpatient Mental Health Services

- The judge may order a proposed patient to receive court-ordered extended outpatient mental health services only if:
  - the judge finds that appropriate mental health services are available to the proposed patient; and
  - the judge or jury finds, from clear and convincing evidence, that:
    – the proposed patient is a person with severe and persistent mental illness;
    – as a result of the mental illness, the proposed patient will, if not treated, experience deterioration of the ability to function independently to the extent that the proposed patient will be unable to live safely in the community without court-ordered outpatient mental health services;
    – outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the proposed patient or others;
    – the proposed patient has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:
      - any of the proposed patient's actions occurring within the two-year period that immediately precedes the hearing; or
      - specific characteristics of the proposed patient's clinical condition that significantly impair the proposed patient's ability to make a rational and informed decision about whether to submit to voluntary outpatient treatment;
    – the proposed patient's condition is expected to continue for more than 90 days; and

- the proposed patient has received:
  - court-ordered inpatient mental health services under this subtitle or under Chapter 46B of the Texas Code of Criminal Procedure, for a total of at least 60 days during the preceding 12 months; or
  - court-ordered outpatient mental health services under this subtitle or under Chapter 46B of the Texas Code of Criminal Procedure during the preceding 60 days. (However, this finding is not required if the proposed patient has already been subject to an order for extended mental health services. Tex. Health & Safety Code § 574.0355(b).

Tex. Health & Safety Code § 574.0355(a).

- In order for the judge or jury to make a finding on the above requirements by a clear and convincing evidence standard, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
  - the deterioration of the ability to function independently to the extent that the proposed patient will be unable to live safely in the community;
  - the need for outpatient mental health services to prevent a relapse that would likely result in serious harm to the proposed patient or others; and
  - the proposed patient's inability to participate in outpatient treatment services effectively and voluntarily. Tex. Health & Safety Code § 574.0355(c).
- An order for extended outpatient mental health services must have a treatment period of no longer than 12 months. Tex. Health & Safety Code § 574.0355(d).

5.4.3.12.f The Order for Care or Commitment

- The judge can hear additional evidence relating to where the patient will receive care, but only after he or she has dismissed the jury, if any, once an affirmative commitment finding has been entered. Tex. Health & Safety Code § 574.036(a), (b).
- As part of the decision on the appropriate setting for care, the judge must consider the LMHA's recommendation and must order the mental health services provided in the least restrictive appropriate setting available. Tex. Health & Safety Code §§ 574.036(c), (d); 574.012.

5.4.3.12.g Court-Ordered Outpatient Services

- If, after the commitment hearing, the court orders the patient to receive outpatient services,—often identified as assisted outpatient treatment or AOT, the court in that order must designate a person to provide those services. This person does not have to be the same person that the court previously identified under section 574.0125. That person may not be designated by the court without consenting, unless the person designated is the administrator of a facility that provides such services:
  - in the region where the committing court is located; or
  - in a county where a patient has previously received mental health services. Tex. Health & Safety Code § 574.037(a).
- The court order must also include a general program for treatment submitted to the court by the facility administrator. The program must include:
  - services to provide care coordination; and
  - any other treatment or services, including medication and supported housing, that are available and considered clinically necessary by a treating physician or the person responsible for the services to assist the patient in functioning safely in the community. Tex. Health & Safety Code § 574.037(b).
- If the patient is receiving inpatient services at the time, the person preparing the program should seek input from those treatment providers. Tex. Health & Safety Code § 574.037(b-1).

- The program must be submitted to the court before any hearing. Tex. Health & Safety Code § 574.037(b-2).
- A patient may petition the court for specific enforcement of the court order. Additionally, the court can order the patient to participate in the program but cannot compel performance. If the court receives information that a patient is not participating, the court can:
    - Set a modification hearing; and
    - Issue an order for temporary detention if an application is filed by the person responsible for the patient's court-ordered outpatient treatment. Tex. Health & Safety Code § 574.037(c-1), (c-2), (c-3). *See also* Tex. Health & Safety Code § 574.063. The patient may not be punished for contempt of court. Tex. Health & Safety Code § 574.037(c-4).
- A facility must comply with this section to the extent that the commissioner determines that the designated mental health facility has enough resources to perform the services. However, a private mental health facility does not have to accept a patient without the consent of the administrator. Tex. Health & Safety Code § 574.037(d), (e).

AOT Courts

Assisted Outpatient Treatment is the practice of providing community-based mental health treatment under civil court commitment as a means of: (1) motivating an adult with mental illness who struggles with voluntary treatment adherence to engage fully with their treatment plan; and (2) focusing the attention of treatment providers on the need to work diligently to keep the person engaged in effective treatment. Multiple studies attest to the power of AOT in helping individuals with severe mental illness escape the "revolving doors" of the public mental health and criminal justice systems. Across the United States, communities of all types and sizes have unlocked this promise by establishing AOT programs: collaborations between local mental health agencies and civil courts to systematically identify individuals who meet legal criteria for AOT, ensure due process of law, and provide each participant high-quality treatment and services with court oversight. Texas is home to one of the nation's pioneering AOT programs (established in Bexar County in 2005), as well as a handful of newer programs established since 2016 in counties such as Harris, Travis, Tarrant, Smith, Johnson, and El Paso. To help more counties follow suit, we are proud to offer this Texas AOT Practitioner's Guide. Our aim is to distill what Texans planning to implement and practice AOT in their own communities need to know about the relevant state law and the experience of other programs.

Resources for Creating an AOT Program

2022 Summit Programs[119]

SUMMIT AOT PRESENTATION

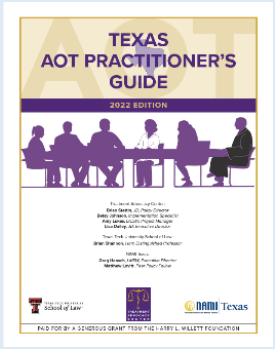
SUMMIT SUPPORTING DOCUMENTS

Implementing AOT: Essential Elements, Building Blocks, and Tips for Maximizing Results (2019)

The Treatment Advocacy Center's AOT Implementation guide[120] "offers guidance in the establishment and operation of formal AOT programs on the local level."

Texas AOT Practitioner's Guide (2022)

The Texas AOT Practitioner's Guide[121] describes the components and operational steps to implement an effective AOT program. While a fully realized AOT program as described in the guide is the aspiration for every county, the authors of the AOT Practitioner's Guide recognize that few if any counties are likely to put every piece in place, especially in the early stages. However, the steps presented here offer some basic principles and concepts to get counties off on the right foot. Key partnerships across systems are essential. Details like extensive data collection are likely to come much later. The guide is meant to encourage and inspire you to move your county forward.



[119] JCMH, Summit Session Video (2022) https://www.youtube.com/watch?v=yly5lFAHAAI; JCMH, Summit Session Supporting Documents (2022) https://texasjcmh.gov/events/summit/2022-jcmh-summit/.

5.4.3.12.h Writs of Commitment

- The court shall direct the court clerk to issue to the person authorized to transport the patient two writs of commitment requiring the person to take custody of and transport the patient to the designated mental health facility. Tex. Health & Safety Code § 574.046.

Transportation of Patients

The persons responsible for transporting a patient to the designated mental health facility in order of priority are as follows:

- Certified Mental Health Officer (This may be a peace officer who is certified under section 1701.404 of the Texas Occupations Code.)
- Facility Administrator of the designated mental health facility
- LMHA representative (must be reimbursed by the county)
- Qualified transportation service provider (this person must be selected from a list that county commissioners may establish under section 574.0455 of the Texas Health and Safety Code)
- The sheriff or constable
- A relative or other responsible person who has a proper interest in the patient's welfare (this person receives no remuneration for the care of the patient, aside from actual and necessary expenses)

Texas Health & Safety Code § 574.045(a)(1).

Note that a patient may not be physically restrained unless it is necessary to protect the health and safety of the patient or the person traveling with them. Also note that subsection 574.045(b)-(l) lists the requirements of transport.

5.4.3.12.i Transcripts

- The court clerk must prepare a certified transcript of any proceedings for court-ordered mental health services and must send the transcript to the designated mental health facility along with the patient.
  - The clerk must also send any available information relating to the patient's medical, social, and economic status and history as well as information related to the patient's family. Tex. Health & Safety Code § 574.047.

5.4.3.12.j Acknowledgement of Patient Delivery

- After a facility admits the patient, the facility administrator must:
  - give the person transporting the patient a written statement acknowledging that they received the patient and all of patient's personal property; and
  - must file a copy of that statement with the clerk of the committing court.

Tex. Health & Safety Code § 574.048.

[120] Treatment Advocacy Center, et al., Implementing Assisted Outpatient Treatment: Essential Elements, Building Blocks and Tips for Maximizing Results (2019) https://texasjcmh.gov/media/xnclhmtb/white_paper_final_1.pdf.

[121] TREATMENT ADVOCACY CENTER, ET AL., TEXAS AOT PRACTITIONER'S GUIDE (2022) https://www.treatmentadvocacycenter.org/storage/tac%20texas%20aot%20guide_final_6-2022.pdf.

5.4.3.13 Post-Commitment Proceedings

5.4.3.13.a Modification of Order for Inpatient Treatment

- The facility administrator of the facility in which a patient has been committed for inpatient court-ordered mental health services must assess the appropriateness of transferring the patient to outpatient mental health services no later than the 30th day after the patient is committed to the facility. Tex. Health & Safety Code § 574.061(a).
- The facility administrator may then recommend that the court who entered the commitment order modify that order to require the patient to participate in outpatient services. Tex. Health & Safety Code § 574.061(a).
- If the administrator recommends transfer, he or she must support the written request with a CME from a physician who examined the patient within seven days of the administrator's request.
- The patient must be given notice of such a recommendation. Tex. Health & Safety Code § 574.061(b).
- On the request of the patient or any other interested person, the court must hold a hearing on the facility administrator's recommendation that the court modify the commitment order.
    - The patient must be represented by an attorney, and the court must appoint an attorney to represent the patient at the hearing.
    - The court must consult with the LMHA before issuing a decision.

Tex. Health & Safety Code § 574.061(d), (e).

- The hearing must be held before the court, without a jury, and conducted according to section 574.031, just as a hearing for court-ordered mental health services is conducted. Tex. Health & Safety Code § 574.061(d).
- If no one requests a hearing, the court can make a decision regarding the recommendation based on:
    - the recommendation;
    - the supporting certificate; and
    - consultation with the LMHA concerning available resources.

  Tex. Health & Safety Code § 574.061(e).
- If the court modifies the order, the court must designate a person to be responsible for the outpatient services, and that person must comply with subsection 574.037(b). Tex. Health & Safety Code § 574.061(f), (g).
- The court can extend the term of the modified order but cannot exceed the original order by more than 60 days. Tex. Health & Safety Code § 574.061(h).

5.4.3.13.b Modification of Order for Outpatient Treatment

- On its own motion, a request of the person responsible for treatment, or a request of any interested person, the court that entered an order directing a patient to participate in outpatient services may hold a hearing to determine whether that order should be modified in a substantial way from the treatment program in the court's original order. Tex. Health & Safety Code § 574.062(a).
- The court must give the patient notice as set out in section 574.006 and appoint an attorney for the patient. Tex. Health & Safety Code § 574.062(b).
- The hearing must be held before the court, without a jury, and conducted according to section 574.031, just as a hearing for court-ordered mental health services is conducted. Tex. Health & Safety Code § 574.062(c).

- The court must set the hearing no later than seven days after the motion is filed. While the court may grant one or more continuance, the hearing must be held within 14 days. Tex. Health & Safety Code § 574.062(d).
- A hearing may be held outside of the 14-day requirement only in case of extremely hazardous weather conditions or disaster. In that case the court, by written order each day that declares such an emergency exists, may postpone the hearing for not more than 24 hours. Tex. Health & Safety Code § 574.062(e).

Temporary Detention Order

- When a modification of outpatient treatment hearing under section 574.062 is pending, the person responsible for a patient's outpatient treatment may file a sworn application for the patient's temporary detention. Tex. Health & Safety Code § 574.063(a).
- The application must state the applications opinion and details reasons for that opinion that:
    - the patient meets the criteria described by subsection 574.064(a-1); and
    - detention in an inpatient mental health facility is necessary to evaluate the appropriate setting for continued court-ordered services. Tex. Health & Safety Code § 574.063(b).
- If the court finds probable cause to believe that the opinion in the application is valid, the court may issue an order for temporary detention if a modification hearing is set. Tex. Health & Safety Code § 574.063(c).
- If a patient does not have an attorney at the time the order is signed, the court must appoint one. Tex. Health & Safety Code §574.063(d).
- Within 24 hours after the detention begins, the court must provide notice to the patient and the attorney that states:
    - the patient has been placed under a temporary detention order;
    - the grounds for the order; and
    - the time and place of the modification hearing.

  Tex. Health & Safety Code § 574.063(e).

Apprehension and Release under a Temporary Detention Order

- After the court issues a temporary detention order, a peace officer or other designated person must take a patient into custody and transport the patient immediately to:
    - the nearest appropriate inpatient mental health facility; or
    - if that facility is not available, a mental health facility deemed suitable by the LMHA for the area.

  Tex. Health & Safety Code § 574.064(a).
- Once at the facility, a physician must evaluate the patient as soon as possible, but within 24 hours after the time the detention began. The physician must determine whether the patient, due to mental illness, presents a substantial risk of serious harm to the patient or others so that the patient cannot be at liberty pending the probable cause hearing. Whether the patient presents a substantial risk of serious harm may be demonstrated by:
    - the patient's behavior; or
    - evidence of severe emotional distress and deterioration in the patient's mental condition to the extent that the patient cannot live safely in the community.

  Tex. Health & Safety Code § 574.064(a-1).
- If the physician who conducted the evaluation determines that the patient does not present a substantial risk of serious harm, the facility must:
    - notify the person responsible for providing outpatient services to the patient; and
    - notify the court; and

- release the patient.

Tex. Health & Safety Code § 574.064(a-2).

- If the physician conducting the evaluation does find that the patient presents a substantial risk of serious harm, then the court must hold a probable cause hearing within 72 hours. The patient may not be detained until the modification hearing unless the court finds probable cause to believe that:
  - the patient, due to mental illness, presents a substantial risk of serious harm to the patient or others using the criteria from subsection 574.064(a-1) to the extent that the patient cannot remain at liberty until the modification hearing; and
  - detention in an inpatient mental health facility is necessary to evaluate the appropriate setting for continued court-ordered services.

Tex. Health & Safety Code § 574.064(b), (c).

- A patient remains subject to the original court order for outpatient services if he or she is released by the facility under section 574.064, as long as the order has not expired. Tex. Health & Safety Code § 574.064(e).

Modification Hearing

- The court can modify the original order for outpatient services if at the modification hearing the court finds the patient meets the criteria for court-ordered inpatient services OR the court may decide not to modify the order and the patient will continue in outpatient treatment. Tex. Health & Safety Code § 574.065(a), (b).
- If the court decides to modify the order, that decision must be supported by at least one CME signed by a physician who examined the patient no more than seven days prior to the hearing. Tex. Health & Safety Code § 574.065(c).
- The court can order a revised treatment program and continue a patient in outpatient services, OR the court can commit the patient to an inpatient facility. However, a court cannot extend the time period beyond the time in the original order. Tex. Health & Safety Code § 574.065(d)(e).

5.4.3.13.c Application for Renewal of Order for Extended Mental Health Services

- A county or district attorney or other adult may file an application to renew an order for extended mental health services. Tex. Health & Safety Code § 574.066(a).
- **The Application must contain**:
  - a detailed explanation why the person requests renewal and why a less restrictive setting is not appropriate Tex. Health & Safety Code § 574.066(b).
  - two CMEs signed within 30 days preceding the application Tex. Health & Safety Code § 574.066(c).
- The court must appoint an attorney for the patient when the application is filed. Tex. Health & Safety Code § 574.066(d).
- The patient or attorney may request a hearing, or the court may set a hearing on its own motion. If a hearing is set or requested, the application for renewal will be treated like an original application for court-ordered extended health services. Tex. Health & Safety Code § 574.066(e).
- Whether or not a hearing is set, a court must make findings that the patient meets the criteria for extended mental health services under subsections 574.035(a)(1), (2), and (3), and the new order may not extend treatment by more than 12 months. Tex. Health & Safety Code § 574.066(f).
- The court can admit the CMEs into evidence and make findings based solely upon them and the application only if there is no hearing. Tex. Health & Safety Code § 574.066(g).

- If the court renews the order, it can modify the order to provide outpatient mental health services under section 574.037. Tex. Health & Safety Code § 574.066(h).

5.4.3.13.d Status Conference

- A court may on its own motion set a status conference. The persons in attendance are:
  - the patient
  - the patient's attorney
  - the person providing the court-ordered outpatient services.

Tex. Health & Safety Code § 574.0665.

5.4.3.13.e Motion for Rehearing

- Upon a showing of good cause, a court may set aside an order for court-ordered mental health services and grant a motion for rehearing. Tex. Health & Safety Code § 574.067.
- Pending the hearing, the court:
  - may stay the services and release the patient if the proposed patient does not meet the criteria for protective custody under section 574.022; and
  - require an appearance bond if the patient is released.

Tex. Health & Safety Code § 574.067(b).

5.4.3.13.f Request for Reexamination

A patient receiving court-ordered extended mental health services, or any interested person on the patient's behalf AND with the patient's consent, may file a request for reexamination in the county where the patient is receiving services. Tex. Health & Safety Code § 574.068(a), (b).

- Upon a showing of good cause the court:
  - may require that the patient be reexamined
  - may schedule a hearing
  - may notify the facility

Tex. Health & Safety Code § 574.068(c).

A court is not required to order a reexamination if the request is within six months of the original order or another request. Tex. Health & Safety Code § 574.068(d).

- If after the examination the facility administrator determines that the patient does not meet the criteria for court-ordered mental health services, he or she must immediately discharge the patient. Tex. Health & Safety Code § 574.068(f).

If the facility administrator determines the patient does meet the criteria, he or she must file a certificate stating as such with the court within 10 days of the request for reexamination. Tex. Health & Safety Code § 574.068(g).

Hearing on Request for Examination

- If a court requires a patient's reexamination, the court may set a hearing on the request if not later than the 10th day after the date the request is filed:
    - a CME stating that the patient continues to meet the criteria has been filed; or
    - a CME has not been filed and the patient has not been discharged.

  Tex. Health & Safety Code § 574.069(a).
- The judge must appoint an attorney for the patient if he or she is not represented and must give notice to both of them, along with the facility administrator. Tex. Health & Safety Code § 574.069(b).
- The judge must also appoint a physician to examine the patient and file a CME. This physician should be a psychiatrist (if one is available in the county) who is not on the staff of the facility where the patient is receiving treatment. However, if the patient requests a physician, the court must ensure that the patient be examined by the physician the patient chooses (at the patient's own expense). Tex. Health & Safety code §574.069(c).
- If the court finds from clear and convincing evidence that the patient continues to meet the criteria for treatment, the court must dismiss the request. If the court does not make such a finding, the court must order the facility to discharge the patient. Tex. Health & Safety Code § 574.069(e), (f).

5.4.3.13.g Appeal

- An appeal must be filed in the county in which the order for court-ordered mental health services was entered, no later than the 10th day after the order was signed. Tex. Health & Safety Code § 574.070(a), (b).
- The court clerk must immediately send a transcript of the proceedings to the court of appeals. Tex. Health & Safety Code § 574.070(c).
- Pending appeal, the court may:
    - stay the order and release the patient if he or she does not meet the requirements for protective custody under section 574.022; and
    - require an appearance bond if the patient is released.

  Tex. Health & Safety Code § 574.070(d).

Data Collection

The clerk of each court with jurisdiction to order commitment must provide a monthly report to OCA containing the number of applications for commitment orders for involuntary mental health services filed with the court and the dispositions of those cases. The dispositions should include the number of commitment orders for inpatient and outpatient mental health services. OCA will make this data available to HHSC.[122]

Note that this collection requirement does not require the court to produce confidential information or court records protected by section 571.015 of the Texas Health and Safety Code. Tex. Health & Safety Code § 574.014(a), (b).

[122] Forms and information on reporting to OCA can be found on the OCA website: https://www.txcourts.gov/reporting-to-oca/.

5.4.3.14 Furlough, Discharge, and Termination of Court-Ordered Mental Health Services

5.4.3.14.a Continuing Care Plan Before Furlough or Discharge

A furlough or pass is when a facility administrator may permit a patient to leave the facility for not more than 72 hours (pass) or for a longer period as specified by the administrator (furlough). Tex. Health & Safety Code § 574.081. The administrator may attach certain conditions and must notify the court if either is granted. Tex. Health & Safety Code § 574.082.

- When a patient is scheduled to be furloughed or discharged from services, the physician responsible for the patient's treatment must prepare a continuing care plan, unless the patient does not need continuing care. Tex. Health & Safety Code § 574.081(a).
- The plan must be prepared according to the rules of HHSC found in the Texas Administrative Code. 26 Tex. Admin. Code § 306.201.
    - The plan must address the patient's mental health and physical needs, including, if appropriate the need for:
        - outpatient mental health services; and
        - sufficient psychoactive medication to last until the patient can see a physician.

    Tex. Health & Safety Code § 574.081(c).
- A private mental health facility is responsible, unless otherwise specified in the plan, for providing and paying for certain medication until the patient can see a physician, subject to available funding from HHSC, and only for up to seven days. Tex. Health & Safety Code § 574.081(c-1), (c-2).
- Note that a patient who is to be discharged may refuse the continuing care services. Tex. Health & Safety Code § 574.081(f).

5.4.3.14.b Discharge

- When a court order expires, a facility must discharge the patient. Tex. Health & Safety Code § 574.085.
- If at any time before the court order expires the facility administrator determines that the patient no longer meets the criteria for court-ordered services, the patient must be discharged. Tex. Health & Safety Code § 574.086(a).
    - In this instance, before discharging the patient, the administrator must consider whether the patient needs court-ordered outpatient services through (1) a furlough or (2) a modified order under section 574.061. Tex. Health & Safety Code § 574.086(b).
- A facility must file a certificate of discharge with the court. Tex. Health & Safety Code § 574.087.

5.4.3.14.c Relief from Firearms Disability

- 18 U.S.C. § 922(g)(4) makes it a federal crime for anyone who has been civilly committed to possess a firearm.
- A person who is furloughed or discharged from court-ordered mental health services may petition the court for an order granting relief from a firearms disability. Tex. Health & Safety Code § 574.088(a).
- The court must hear and consider evidence about:
  - the circumstances that led to the disability;
  - the person's mental history;
  - the person's criminal history; and
  - the person's reputation.

  Tex. Health & Safety Code § 574.088(b).
- The court may not grant relief unless it finds and enters into the record that:
  - the person is no longer likely to act in a manner dangerous to public safety; and
  - removing the person's disability to purchase a firearm is in the public interest.

  Tex. Health & Safety Code § 574.088(c).

5.4.4 Court-Ordered Medications: Psychoactive Medication Orders

In 1993, Texas first adopted procedures regulating the administration of psychoactive medication following litigation challenging the use of forced psychoactive medication in non-emergencies during involuntary commitments. Rather than cumbersome guardian proceedings, the Mental Health Code permits treating physicians to seek court orders to allow the administration of psychoactive medications to persons who lack capacity to consent to such medication.

5.4.4.1 Situations when Court-Ordered Medications are Allowed by Statute

There are two situations under Texas law when a court may issue an order authorizing psychoactive medications. Those situations are:

- **Court-Ordered Inpatient Mental Health Treatment (Civil Commitment):** The first situation is when the person is under a court order to receive inpatient mental health services. Additionally, if a client is in custody awaiting trial in a criminal proceeding and was ordered to receive inpatient mental health services in the preceding six months this provision also applies. Tex. Health & Safety Code § 574.106 (Mental Health); Tex. Health & Safety Code § 592.156 (IDD).
- **CCP 46B Competency:** The second situation is when a criminal defendant has been found incompetent and is either: (i) in jail waiting more than 72 hours to go to competency restoration services; (ii) has been committed to inpatient, residential, or jail-based competency restoration services; (iii) is in jail after returning from competency restoration services; or (iv) is out on bond for outpatient competency restoration services Tex. Code of Crim. Pro. 46B.086.

> *Before a criminal court may proceed with a hearing under 46B.086 for court-ordered medications, a court with probate jurisdiction must have a hearing for a medication hearing under Section 574.106, Health and Safety Code.*

Before a criminal court may proceed with a court-ordered medication hearing under 46B, a court with probate jurisdiction must hold a medication hearing under Section 574.106, Health & Safety Code. Therefore, the Mental Health Code provisions described below are also relevant to the administration of medication in certain criminal proceedings. Further detail on court-ordered medication hearings relating to a defendant's lack of competency to stand trial are discussed in detail *infra* at section 8.7.2.8.

5.4.4.2 Administration of Psychoactive Medication to a Patient Under an Order for Court-Ordered Mental Health Services

For the court to order the administration of psychoactive medication,[123] the patient must be subject to an order for **in**patient mental health services (section 574.106 of the Texas Health and Safety Code does not authorize a court to order forced medication for a person in outpatient services) or in custody awaiting trial and was ordered to receive inpatient mental health services in the six months preceding a hearing for forced medication.[124] Tex. Health & Safety Code § 574.106 (a)(1)-(2).

- A person may not administer a psychoactive medication to a patient who refuses to take the medication voluntarily unless:[125]
  - the patient is having a medication-related emergency; Tex. Health & Safety Code § 574.103 (1).
  - the patient is younger than 16 years of age (or younger than 18 years of age and voluntarily admitted) and the patient's parent, managing conservator, or guardian consents to the administration on behalf of the patient; Tex. Health & Safety Code § 576.025 (a)(2).
  - the patient's representative authorized by law to consent on behalf of the patient has consented to the administration; Tex. Health & Safety Code § 576.025 (a)(3).
  - the patient is under an order issued under section 574.106 authorizing the administration of the medication regardless of the patient's refusal; Tex. Health & Safety Code § 576.025 (a)(4).
  - the administration of the medication regardless of the patient's refusal is authorized by an order issued under article 46B.086 of the Texas Code of Criminal Procedure; Tex. Health & Safety Code § 576.025 (a)(5); or
  - the adult patient's guardian, if any, consents. Tex. Health & Safety Code § 574.103 (b)(3).

Note: It is a common mistaken belief that guardians cannot consent to psychoactive medications. Guardians CAN and SHOULD consent as necessary. Guardians can also decide that certain medications are NOT necessary. Tex. Health & Safety Code § 574.103 (b)(3).

5.4.4.3 Jurisdiction and Venue

- An application by a physician treating a patient may be filed in a probate court or a court with probate jurisdiction or a judge may refer a hearing to a magistrate or court-appointed associate judge who has training regarding psychoactive medications. Tex. Health & Safety Code § 574.106 (c), (d).

Training Regarding Psychoactive Medications

An identified area of concern is that section 574.106(d) includes a specific requirement that magistrates or associate judges can hear applications for orders to authorize psychoactive medications upon referral from the court with probate jurisdiction if the magistrate or associate judge has "training regarding psychoactive medications." It is unclear what type of training meets this requirement. Further, it is unclear whether this requirement applies to an associate judge appointed under Chapter 54A of the Texas Government Code, or just to one appointed under section 574.0085 of the Texas Health and Safety Code.

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[123] "Psychoactive medication" means a medication prescribed for the treatment of symptoms of psychosis or other severe mental or emotional disorders and that is used to exercise an effect on the central nervous system to influence and modify behavior, cognition, or affective state when treating the symptoms of mental illness. Tex. Health & Safety Code § 574.101(3).

[124] Judge Herman clarifies in his paper that "inpatient mental health services" are services under section 574.034 or section 574.035 (temporary or extended commitment).

[125] Hon. Guy Herman, Mental Health Law 20 (August 2019) (unpublished manuscript, on file with the Judicial Commission on Mental Health), summarizing sections 576.025 and 574.103 of the Texas Health and Safety Code.

- A trial before the court shall be on the record while a trial in front of an associate judge does not need to be on the record. Tex. Health & Safety Code § 574.106 (d), (g).
- A party is entitled to a trial de novo by a judge if an appeal of the magistrate's or associate judge's report is filed with the court within three days after the report is issued. Tex. Health & Safety Code 574.106 (e).

5.4.4.4 Motion to Transfer Hearing for Court-Ordered Psychoactive Medication

- If a hearing or an appeal of an associate judge's or magistrate's report is to be held in a county court in which the judge is not a licensed attorney, the proposed patient or the proposed patient's attorney may request that the proceeding be transferred to a court with a judge who is licensed to practice law in this state. The county judge shall transfer the case after receiving the request, and the receiving court shall hear the case as if it had been originally filed in that court. Tex. Health & Safety Code § 574.106 (f).

5.4.4.5 Physician's Application for Order to Authorize Psychoactive Medication

- A physician who is treating a patient may, on behalf of the state, file an application in a probate court or a court with probate jurisdiction for an order to authorize the administration of a psychoactive medication regardless of the patient's refusal if:
  - the physician believes that the patient lacks the capacity to make a decision regarding the administration of the psychoactive medication;
  - the physician determines that the medication is the proper course of treatment for the patient;
  - the patient is under an order for inpatient mental health services under Chapter 574 or other law or an application for court-ordered mental health services under section 574.034 or 574.035 of the Texas Health and Safety Code has been filed for the patient; and
  - the patient, verbally or by other indication, refuses to take the medication voluntarily.

  Tex. Health & Safety Code § 574.104(a).
- The application must state:
  - that the physician believes that the patient lacks the capacity to make a decision regarding administration of the psychoactive medication and the reasons for that belief;
  - each medication the physician wants the court to compel the patient to take;
  - whether an application for court-ordered mental health services under section 574.034 or 574.035 of the Texas Health and Safety Code has been filed;
  - whether a court order for inpatient mental health services for the patient has been issued and under what authority;
  - the physician's diagnosis of the patient; and
  - the proposed method for administering the medication and, if the method is not customary, an explanation justifying the departure from customary methods.

  Tex. Health & Safety Code § 574.104(b).

5.4.4.6 Timing of the Hearing for Court-ordered Medication

- The hearing on the application for medication may be held on the date of a hearing for court-ordered mental health services under section 574.034 or 574.035 but shall be held not later than 30 days after the filing of the application for the order to authorize psychoactive medication. Tex. Health & Safety Code § 574.104(d).
- If the hearing is not held on the same day as the application for court-ordered mental health services under section 574.034 or 574.035 and the patient is transferred to a mental health facility in another county, the court may transfer the application for an order to authorize psychoactive

medication to the county where the patient has been transferred. Tex. Health & Safety Code § 574.104(d).

- Subject to the requirement in subsection 574.104(d) that the hearing shall be held not later than 30 days after the filing of the application, the court may grant one continuance on a party's motion and for good cause shown. The court may grant more than one continuance only with the agreement of the parties. Tex. Health & Safety Code § 574.104(e).

5.4.4.7 The Hearing

- A hearing shall be conducted on the record by the probate judge or judge with probate jurisdiction. Tex. Health & Safety Code § 574.106(c).
- In proceedings under Chapter 574, judges may use secure electronic means, including satellite transmission, closed-circuit TV, or any other method of secure, two-way electronic communication accessible to both parties, approved by the court, and capable of visually and audibly recording the proceedings. The patient and his attorney and the local prosecutor must consent in writing. If requested, the patient must be able to communicate privately with his attorney without being heard by the judge or prosecutor. Tex. Health & Safety Code § 574.203.
- A hearing for psychoactive medication may not be held for a patient who receives services under an order of protective custody under section 574.021. Tex. Health & Safety Code § 574.106(k).

5.4.4.8 Proceeding Costs

- When more than one county is involved in proceedings of this type, the determination of which county pays for the proceeding costs can become confusing. Look to Tex. Health & Safety Code § 574.018 for full details on which county will need to pay for the proceedings for psychoactive medications. Simply explained:
    - If there are pending or adjudicated criminal charges, the county which is hearing or adjudicated those charges shall pay the costs of a hearing for psychoactive medications if the person was determined incompetent to stand trial, acquitted by reason of insanity, or ordered to receive mental health services for competency restoration and then found competent. Tex. Health & Safety Code § 574.107(b).
    - In all other situations when proceedings for psychoactive medication occur, then Texas Health & Safety Code sections 571.017 and 571.018 govern. Generally speaking, the county where the emergency detention occurred, or the application for court-ordered mental health services is pending will pay the costs of this hearing. Tex. Health & Safety Code §§ 571.017, 571.018.

5.4.4.9 Procedural Rights of Patient and Requirements

- Under section 574.105 of the Texas Health and Safety Code, a patient for whom an application for an order to authorize the administration of a psychoactive medication is filed is entitled to:
    - representation by a court-appointed attorney who is knowledgeable about issues to be adjudicated at the hearing;
    - meet with that attorney as soon as is practicable to prepare for the hearing and to discuss any of the patient's questions or concerns;
    - receive, immediately after the time of the hearing is set, a copy of the application and written notice of the time, place, and date of the hearing;
    - be told, at the time personal notice of the hearing is given, of the patient's right to a hearing and right to the assistance of an attorney to prepare for the hearing and to answer any questions or concerns;
    - be present at the hearing;
    - request from the court an independent expert; and

- oral notification, at the conclusion of the hearing, of the court's determinations of the patient's capacity and best interests.

Tex. Health & Safety Code § 574.105.

5.4.4.10 Order Authorizing Psychoactive Medication

- The court may consider ordering psychoactive medication for only two classes of patients:
  - those under court order to receive inpatient mental health services; or
  - those in custody awaiting trial in a criminal proceeding who were ordered to receive inpatient mental health services in the six months preceding the current hearing.

  Tex. Health & Safety Code § 574.106(a).
- The court may issue an order authorizing the administration of one or more classes of psychoactive medication if the court finds by clear and convincing evidence after the hearing:
  - that the patient lacks the capacity, as defined in section 574.101(1) of the Texas Health and Safety Code, to make a decision regarding the administration of the proposed medication and treatment with the proposed medication is in the best interest of the patient; or
  - if the patient was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient, that treatment with the proposed medication is in the best interest of the patient and either:
  - the patient presents a danger to self or others in the inpatient mental facility in which the patient is being treated as a result of a mental disorder or mental defect as determined under section 574.1065; or
  - the patient has remained confined in a correctional facility for more than seventy-two hours while awaiting transfer for competency restoration services and presents a danger to himself or others in the correctional facility as a result of a mental disorder or defect.

  Tex. Health & Safety Code § 574.106(a-1).
- In making the finding that treatment with the proposed medication is in the patient's best interest, the court must consider:
  - the patient's expressed preferences regarding treatment with psychoactive medication;
  - the patient's religious beliefs;
  - the risks and benefits, from the perspective of the patient, of taking psychoactive medication;
  - the consequences to the patient if the psychoactive medication is not administered;
  - the prognosis for the patient if the patient is treated with psychoactive medication;
  - alternative, less intrusive treatments that are likely to produce the same result; and
  - less intrusive treatments likely to secure the patient's agreement to take the psychoactive medication.

  Tex. Health & Safety Code § 574.106(b).
- A court may order psychoactive medication when a treatment facility or applicant believes a current patient receiving inpatient mental health services is a danger to self or others because of a mental disorder or defect. Under section 574.1065, the court must consider the following when deciding whether to order psychoactive medication for the potentially dangerous patient:
  - an assessment of the patient's present mental condition;
  - whether the patient has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to himself or to another while in the inpatient mental health or correctional facility; and
  - whether the patient, in the six months prior to being placed in the facility, has inflicted, attempted to inflict, or threatened to inflict substantial physical harm to another that resulted in the patient being placed in the facility.

Tex. Health & Safety Code § 574.1065.

- As soon as practicable after the conclusion of the hearing, the patient and patient's attorney are entitled to written notification of the court's determinations. The notification shall include a statement of the evidence on which the court relied and the reasons for the court's determinations. Tex. Health & Safety Code § 574.106(g).
- An order for psychoactive medication must authorize the administration to a patient, regardless of the patient's refusal, of one or more classes of psychoactive medications specified in the application and consistent with the patient's diagnosis. The order must also permit an increase or decrease in the medication's dosage, restitution of medication authorized but discontinued during the period the order is valid, or the substitution of a medication within the same class. Tex. Health & Safety Code § 574.106(h).
- The classes of psychoactive medications in the order must conform to classes determined by HHSC. Tex. Health & Safety Code § 574.106(i).
- Any party may petition for reauthorization or modification of the order. The order remains in effect pending action on a petition for reauthorization or modification. ("Modification" means a change of a class of medication authorized in the order.)

  Tex. Health & Safety Code § 574.106(j).
- For patients who are confined in a correctional facility while awaiting transfer for competency restoration treatment, the court may issue an order that authorizes initiation of any appropriate mental health treatment, but the order may not authorize the correctional facility to retain the patient while the patient is receiving competency restoration treatment. Tex. Health & Safety Code § 574.106(L).

Legislative Change

S.B. 2479 (88th Reg. Sess. (2023)), effective September 1, 2023, amended Tex. Health & Safety Code § 574.106 by adding section (m), which clarifies the ability to conduct blood draws for patients who already are subject to an order for involuntary psychoactive medications.

With this legislative change, the order for psychoactive medication now also expressly authorizes the taking of a patient's blood sample to conduct reasonable and medically necessary evaluations and laboratory tests to safely administer a psychoactive medication authorized by the order.

5.4.4.11 Appeal

A patient may appeal an order. The requirements for this appeal are the same as for an appeal of an order requiring court-ordered mental health services under section 574.070 of the Texas Health and Safety Code. An order authorizing the administration of medication regardless of the refusal of the patient is effective pending an appeal of the order. Tex. Health & Safety Code § 574.108.

Chapter 574 does not provide the State with the right to appeal a denial of an application for court-ordered medication. For persons who have been adjudicated incompetent to stand trial in a criminal case, however, there is a further legal mechanism for the State to seek court-ordered medications. As described in more detail *infra* at Subchapter 7.2.8b, for certain defendants who have been adjudicated incompetent to stand trial and refuse medications, Article 46B.086 provides a procedure for the consideration of a court order for medications. However, before a criminal court can conduct a medication hearing under article 46B.086, there must first be a threshold medication proceeding conducted by the court with probate jurisdiction under Chapter 574 (MI) or Chapter 592 (IDD) of the Texas Health and Safety Code, as appropriate. If the court with probate jurisdiction determines that the defendant does not meet the criteria for court-ordered medication (in sections 574.106 or 592.156 of the Texas Health and Safety Code), the prosecutor may thereafter seek an order for the administration of

medication under article 46B.086.[126]

5.4.4.12 Effect of Order

- A person's consent to take a psychoactive medication is not valid and may not be relied on if the person is subject to an order issued under section 574.106 of the Texas Health and Safety Code.
- The issuance of an order under section 574.106 is not a determination or adjudication of mental incompetency and does not limit in any other respect that person's rights as a citizen or that person's property rights or legal capacity. Tex. Health & Safety Code § 574.109(b).

5.4.4.13 Expiration of Order

With one exception, all orders expire on the same date as expiration of the temporary or extended mental health services in effect when the medication is ordered. An order for medication of a person returned to a correctional facility and awaiting trial in a criminal proceeding continues to be in effect until the earlier of:

- the 180th day after the defendant returns to the correctional facility;
- the date the defendant is acquitted, convicted, or pleads guilty; or
- the date all criminal charges are dismissed.

Tex. Health & Safety Code § 574.110(b).

5.4.5 Admission and Commitment to Certain Intellectual Disability Services

Chapter 593 of the Texas Health and Safety Code governs the admission of persons with an ID into certain services offered by departments of HHSC, Community Centers, voluntary residential care programs, and commitments to one of the 13 State Supported Living Centers (SSLCs). SSLCs are operated directly by HHSC and function as part of the broad continuum of care for people with ID. Chapter 593 is a part of the "Persons with an Intellectual Disability Act," which encompasses Chapters 591–587 of the Texas Health and Safety Code.

Time-limited emergency admission to a residential care facility, and the receipt of emergency services by a person with an ID do not require court involvement. However, there are two areas in which the courts can become involved. The first is when there is an application for involuntary commitment to a residential care facility, and the second is when a patient needs a transfer to a mental hospital for more than 30 days.[127] Just as in voluntary and involuntary mental health proceedings, an order for an ID commitment is NOT an adjudication of mental incompetency. Tex. Health & Safety Code § 593.054.

5.4.5.1 Determination of ID

- In most cases, an authorized provider must first make a determination that a person has an ID before that person will be able to receive services or be admitted to any facility or program. Tex. Health & Safety Code § 593.003.
- An "authorized provider" in this section is:
  - a physician licensed to practice in Texas;
  - a psychologist licensed to practice in Texas;
  - a professional licensed to practice in Texas and certified by HHSC pursuant to 26 TAC §304.302; or
  - a provider certified by the Department of Aging and Disability Services DADS prior to September 1, 2013.

  Tex. Health & Safety Code § 593.004(a)(1)–(a)(4).

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[126] Brian D. Shannon & Daniel H. Benson, Texas Criminal Procedure and the Offender with Mental Illness (6th ed. 2019).

[127] Hon. Guy Herman, Mental Health Law 24 (August 2019) (unpublished manuscript, on file with the Judicial Commission on Mental Health).

5.4.5.2 Emergency Admission without an ID Determination

- A time-limited emergency admission to a residential care facility is permitted without a determination of an intellectual disability and an interdisciplinary team recommendation if:
  - there is persuasive evidence that the proposed resident is a person with an ID;
  - space is available at the facility for which placement is requested;
  - the proposed resident has an urgent need for services that the facility director determines the facility provides; and
  - the facility can provide relief for the urgent need within one year after admission.

  Tex. Health & Safety Code § 593.027(a).
- A determination of an ID and an interdisciplinary team recommendation for the person admitted under this section shall be performed within 30 days after the date of admission. Tex. Health & Safety Code § 593.027(b).

5.4.5.3 Emergency Services Without an ID Determination

- A person may receive emergency services without a determination of an ID if:
  - there is persuasive evidence that the person is a person with an ID;
  - emergency services are available; and
  - the person has an urgent need for emergency services.

  Tex. Health & Safety Code § 593.0275(a).
- A determination of an ID for the person served under this section must be performed within 30 days after the date the services begin. Tex. Health & Safety Code § 593.0275(b).

5.4.5.4 Commitment to a Residential Care Facility

- The following persons may apply for a recommendation that a person is in need of long-term placement in a residential care facility:
  - the proposed resident if an adult;
  - the guardian of the person;
  - the court;
  - any other interested person, including a community center or agency that conducted a determination of ID for the proposed resident.

  Tex. Health & Safety Code § 593.041(a).

Legislative Change

S.B. 944 (88th Reg. Sess. (2023)), effective September 1, 2023, amended Tex. Health & Safety Code § 593.0511, to create an exception to the requirement that a person may not be admitted or committed to a residential care facility unless an interdisciplinary team recommends placement. S.B. 944 also amended Tex. Health & Safety Code §§ 593.013, 593.041(d), and 593.050(d), to create exceptions under each statute.

The criteria for what is required for an individual to be admitted or committed under this section to long-term placement in a residential care facility remain the same and must be proven beyond a reasonable doubt—*see Health and Safety Code § 593.052(a)*—however a guardian (or parent if the child is a minor) may now petition the court without the agreement of the interdisciplinary team report and recommendations. The bill creates an alternate path for involuntary commitment in which a parent or guardian petitions the court directly and the court determines whether the proposed resident meets criteria without the recommendation of an IDT.

- Except as provided by section 593.0511, the proposed resident must be a person with an ID as determined by an authorized provider, and usually an interdisciplinary team must have recommended the placement in the six months preceding the hearing. Tex. Health & Safety Code § 593.041(d). If there is not a determination of ID or, in some cases, a report from an interdisciplinary team, the court shall order such a determination to be conducted. Tex. Health & Safety Code § 593.048(a).
- The application for commitment of a person to a residential care facility must:
  - Be executed under oath and include:
    - the name, birthdate, address, and sex of the resident and the name and address of the guardian or parent, if applicable;
    - a short, plain statement of the facts demonstrating that commitment to a facility is necessary and appropriate; and
    - a short, plain statement explaining why the proposed resident cannot be admitted to a less restrictive alternative.

  Tex. Health & Safety Code § 593.042(a).
- The court must appoint an attorney for the proposed resident if necessary, and the attorney must be paid by the county in which the proceeding is brought. The parent or guardian may also be represented by counsel. Tex. Health & Safety Code § 593.043.

5.4.5.4.a Order of Protective Custody

- While the commitment hearing is pending, a court may order the proposed patient taken into protective custody if the court determines from certificates filed with the court that the proposed resident is:
  - believed to be a person with an ID; and
  - likely to cause injury to the proposed resident or others if not immediately restrained.
- If the court issues an OPC, the court may order a health or peace officer to take the person into custody and transport him or her to:
  - a designated residential care facility that has space available; or
  - a place deemed suitable by the county health authority.

  Tex. Health & Safety Code § 593.044(a), (b).
- A person may not be detained under an OPC for more than 20 days after custody begins. Tex. Health & Safety Code § 593.045(a).
- A person may not be detained under an OPC in a jail unless an extreme emergency exists and even then, not for more than 24 hours. Tex. Health & Safety Code § 593.045(b).
- After 20 days, the facility must release the person if there are no further orders from the court. However, if the facility administrator believes the person is a danger to him or herself or others, the administrator must notify the court. Tex. Health & Safety Code § 593.046.

5.4.5.4.b Commitment Hearing

- The court must set a hearing on the earliest practicable date and must serve notice of the hearing on the proposed resident, the proposed resident's parent, or guardian, if applicable, and the department. Tex. Health & Safety Code § 593.048.
  - If a party requests, or upon motion of the court, the hearing must be in front of a jury. Tex. Health & Safety Code § 593.049(a).
  - The hearing must be open to the public unless the judge determines there is good cause for a closed hearing. Tex. Health & Safety Code § 593.050(a).

- The proposed resident must be present at the hearing unless the court finds in writing that it would cause harm to the proposed resident. Tex. Health & Safety Code § 593.050(b).
- The Texas Rules of Evidence apply, and the proposed resident may cross-examine witnesses. Tex. Health & Safety Code § 593.050(c), (d).
- The party who filed the application must prove beyond a reasonable doubt that long-term placement of the proposed resident in a residential care facility is appropriate. Tex. Health & Safety Code § 593.050(e).

5.4.5.4.c Commitment Without Interdisciplinary Team Recommendation

- A court may commit a proposed resident to a residential care facility without an interdisciplinary team recommendation under Section 593.013 if the petition to the court was filed by the parent (in the case of a minor) or legal guardian and the court determines beyond a reasonable doubt that the proposed resident meets the requirements for commitment to a residential care facility under Section 593.052. Tex. Health & Safety Code § 593.0511.

5.4.6 Decision

- The court in each case shall promptly report in writing the decision and findings of fact. Tex. Health & Safety Code § 593.053.

5.4.6.1.a Criteria for Order of Commitment

- the proposed resident must be a person with an ID;
- evidence must show that because of the ID, the proposed resident:
  - represents a substantial risk of physical impairment or injury to the proposed resident or others; or
  - is unable to provide for and is not providing for the proposed resident's most basic personal physical needs;
- the proposed resident cannot be adequately and appropriately habilitated in an available, less restrictive setting; and
- the residential care facility provides habilitative services, care, training, and treatment appropriate to the proposed resident's needs.

Tex. Health & Safety Code § 593.052(a).

Burden of Proof

At least two Texas courts of appeals have found that in order to commit a person for long-term placement in a State Supported Living Center, each of the elements in subsection 593.052(a) of the Texas Health and Safety Code must be proven beyond a reasonable doubt. *See Pratt v. State*, 907 S.W.2d 38, 44 (Tex. App.—Dallas 1995, writ denied); *In re A.W.*, 443 S.W.3d 405, 414 (Tex. App.—Eastland 2014, no pet.).

5.4.6.1.b Dismissal After Hearing

- If long-term involuntary commitment to a SSLC is not found to be appropriate, the court shall enter a finding to that effect, dismiss the application, and if appropriate, recommend application for admission to voluntary admission services under Subchapter B. Tex. Health & Safety Code § 593.051.

5.4.6.2 Appeal

- A party to a commitment proceeding has the right to appeal, and the court may grant a stay of commitment pending appeal. Tex. Health & Safety Code § 593.056.

5.4.6.3 Transfer to a Mental Hospital

- A director of a residential care facility may transfer a court-committed resident to a state mental hospital for mental health care if:
  - the resident has been examined by a physician who is of the opinion that the resident has symptoms of mental illness to the extent that transfer of the resident for services at the state hospital are in the resident's best interest; and
  - the hospital administrator agrees to the transfer and the director coordinates the transfer.

  Tex. Health & Safety Code § 594.032(a).
- A resident may not be transferred for more than 30 days without a court order. Tex. Health & Safety Code § 594.032(b).
- After the resident is transferred, the state hospital must perform an evaluation on the resident. Tex. Health & Safety Code § 594.033.
- If the evaluation reveals that a hospitalization for longer than 30 days is necessary, the hospital must promptly request and order transferring the resident to the hospital from the court originally committing the resident. Tex. Health & Safety Code § 594.034(a).
- The hospital must send two CMEs for mental illness (described in §574.011) along with this request. Tex. Health & Safety Code § 594.034(b).
- A copy of the transfer request and notice of the transfer hearing must be served on the resident, or the resident's parent or guardian, if appropriate, at least 8 days prior to the hearing. Tex. Health & Safety Code § 594.036.
- The hearing should be held in a setting that will not adversely affect the resident. Tex. Health & Safety Code § 594.037.
- The hearing must be before a jury unless waived in writing by the resident (or parent or guardian). Even if the resident waives a jury, the resident may change his or her mind and request a jury determine the issue at any time before a determination is made. Tex. Health & Safety Code § 594.038.
- Unless the court determines that it is in the resident's best interest not to be present, the resident must be present at the hearing. Tex. Health & Safety Code § 594.039.
- The hearing must be open to the public unless the court determines that is not in the resident's best interest. Tex. Health & Safety Code § 594.040.

5.4.6.3.a Medical Evidence

- A person may not be transferred to a state mental hospital except on competent psychiatric or medical testimony. Tex. Health & Safety Code § 594.041(b).
- Two physicians, one of whom must be a psychiatrist, must testify at the hearing, and they must have examined the resident no more than 15 days prior to the hearing. Tex. Health & Safety Code § 594.041(a).

Burden of Proof

While the statute does not state the burden of proof for involuntary commitment to a mental health facility, the U.S. Supreme Court has ruled that a clear and convincing evidence standard is required in these cases. *Addington v. Tex.*, 441 U.S. 418 (1979).

5.4.6.3.b Criteria for Court-Ordered Transfer

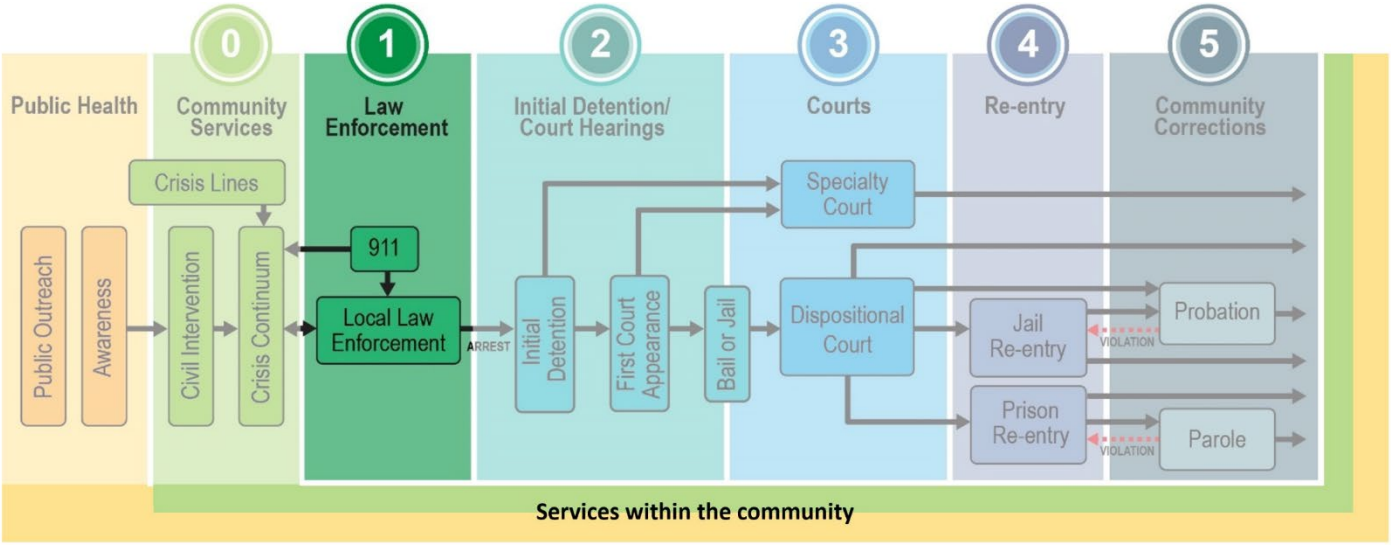
- In order for a court or jury to order a resident transferred to a state mental hospital, the court or jury must determine the resident:
  - is a person with mental illness; and
  - requires a transfer to a state mental hospital for treatment for the resident's own welfare and protection or for the protection of others.

  Tex. Health & Safety Code § 594.042.

5.4.6.3.c Return of Court-Ordered Transfer Resident

- If a resident who is the subject of a court-ordered transfer no longer requires hospitalization in a state mental hospital, the administrator must send a certificate to the committing court stating the resident no longer requires hospital care but does require residential facility care. The transfer can only be made with court approval. Tex. Health & Safety Code § 594.045.

Chapter 6: Intercept 1—Initial Contact with Law Enforcement



6.0 Intercept 1: Initial Contact with Law Enforcement

Intercept 1: Initial Contact with Law Enforcement is the gateway to the criminal justice system. Officers have considerable discretion in responding to a situation in the community involving a person with a mental illness or intellectual disability who may be engaging in criminal conduct, experiencing a mental health crisis, or both. New practices and programs are emerging across the state which recognize the gatekeeper role that law enforcement plays.

While arrest may be legally permissible, there may be alternatives that would better serve the individual and the community. It is important that judges (1) are informed of alternatives to incarceration and (2) encourage the provision of training and resources for law enforcement on these issues.

QUICK SECTION OVERVIEW

Reflection Point

The initial contact with law enforcement is an important discretionary point to examine.

Remember, while an officer may have the authority to arrest, they also may use their discretion on a misdemeanor, to issue a citation or to immediately release the individual and issue an arrest warrant later. Additionally, Tex. Code Crim. Proc. art. 14.035 also gives officers discretion to release individuals with IDD in certain situations.

Distinguish: Emergency Detention and Emergency Admission

Note that the emergency detention provisions discussed in this section apply only to persons with MI. Emergency admission of persons with ID is discussed in Intercept 0, section 5.4.3 of this Bench Book.

6.1 Law Enforcement Must Divert When Appropriate

6.1.1 Good-faith Effort Required

Every law enforcement agency must make a good-faith effort to divert a person (1) suffering a mental health crisis or (2) suffering from the effects of substance abuse to a proper treatment center in the agency's jurisdiction. This provision applies if:

- a treatment center is available;
- diversion is reasonable;
- the offense is a non-violent misdemeanor; and
- the mental health or substance abuse issue is suspected to be the reason for the offense.

Tex. Code Crim. Proc. art. 16.23(a).

6.1.2 Scope of Provision

This provision applies to all persons described above except for persons accused of certain intoxication offenses. *See* Tex. Code Crim. Proc. art. 16.23(b). Note that the statute does not specify when the dictates of this provision begin or end.

The statute also does not specify which law enforcement agencies are subject to this provision. Absent a definition or limiting language, that term should be given its commonly understood meaning. *See* Tex. Code Crim. Proc. art. 3.01; *see also* Tex. Code Crim. Proc. art. 59.01(5) ("'Law enforcement agency' means an agency of the state or an agency of a political subdivision of the state authorized by law to employ peace officers."); Tex. Code Crim. Proc. art. 2.12 (defining "peace officer").

6.1.3 Diversion Centers

Although several counties around the country are considering diversion centers as a solution, no ideal model is established, so each community determines what best fits the existing infrastructure; the key effort is to develop interlocking system changes to reach a successful and efficient system of care, anchored in but not exclusively reliant upon a diversion center.

6.1.3.1 What is a Diversion Center?

A diversion center is considered an alternative to incarceration—to get low level offenders with mental health issues immediate help, into recovery, and prevent future interactions with the criminal justice system. Providing both pre- and post- arrest support allows for a maximum number of exit points from the legal system into better community supported treatment and residential opportunities.

For law enforcement, a diversion center offers an alternative location to bring low level offenders other than the jail or a hospital. Not only does this alternative tool for the officers handling low level offenders with mental illness comply with CCP 16.23 (good faith diversion), it also allows the officers the ability to address the individual's needs and then get back on the street to help the rest of the community, too.

Practical Examples

Diversion centers can look different in different communities.

- The Harris County Diversion Center opened its doors in 2018. It is a pre-charge diversion center operated by the LMHA, The Harris Center; this model of a diversion center supports keeping individuals who have serious mental health needs out of the criminal justice system. All the county leaders are on board working with a successful diversion center—Judges, including the county judge, sheriff, district attorney's office, local mental health authority, etc. The center was created by a bi-partisan group from all different branches of government. "The Jail Diversion program serves as an alternate location for law enforcement to drop off adults ages 18 or older with behavioral illness who have been detained for low-level offenses, such as trespassing, in lieu of charges being filed. This program is housed at the Judge Ed Emmett Mental Health Diversion building and provides preventive support to the community to reduce incarceration and homelessness recidivism for individuals with serious behavioral illness within Harris County. Jail Diversion is a voluntary program which operates 24 hours/day, 365 days/year. Individuals are offered housing at the center for up to 14 days."[128]
    - Services:
        - Psychiatric and psychological assessment
        - Medical assessment
        - Housing (up to 14 days)
        - Medication management
        - Peer support and skills training
        - Linkage to community resources, which may include the Jail Diversion Aftercare program.
- In Travis County, a planning team made specific recommendations for the Travis County Diversion Center.[129] They recommended: "a facility designed to co-locate functions and services to create a platform to support individuals in the mental health/criminal legal intersection to avoid jail whenever possible and receive mental health disorder care, while also supporting community safety. It represents a significant component of an idealized system. . . . Specifically, we recommend creating a facility that includes clinical evaluation, psychiatric and medical (including substance abuse) treatment, legal support when required, and triage capabilities for placement back into the community. Integrating legal support within the center could create collaborative approaches for people whose mental health disorder led to being detained by the police and charges are not dismissed. Other key components co-located in a center would include social support services with a goal of identifying and referring people to the least restrictive setting possible to meet clinical needs and ensure public safety. Determining the optimal size of such a facility to meet current and future Travis County needs is difficult within the current data technology environment. Inadequate records (and information) are available to specifically

[128] Jail Diversion Center, *Adult Justice System Services,* THE HARRIS CENTER, https://www.theharriscenter.org/services/adult-justice-system-services#:~:text=The%20Jail%20Diversion%20program%20serves,lieu%20of%20charges%20being%20filed (last visited July 13, 2023).

[129] THE UNIVERSITY OF TEXAS AT AUSTIN, DELL MEDICAL SCHOOL, TRAVIS COUNTY FORENSIC MENTAL HEALTH PROJECT, FINAL REPORT (2023) https://civicclerk.blob.core.windows.net/stream/TRAVISCOTX/956f1347-2fce-43cb-b1ee-ba892db89ae7.pdf?sv=2021-10-04&st=2023-03-14T16%3A15%3A50Z&se=2024-03-14T16%3A20%3A50Z&sr=b&sp=r&sig=BJ3KDFoP1rlWOT8EK7VSMr%2ForkqNjA%2FCesBehjIm06Y%3D. In Travis County, the Commissioners Court contracted with Dell Medical School (Dell Med) to lead stakeholders including people with lived experiences, mental health and legal experts, judicial leaders, law enforcement and community advocates in a 10-month solution-driven process to create actionable recommendations to address these complex issues. The charge given to the team was to decrease the number of people with mental health needs entering jail, help them exit jail, and then keep them out of jail. This document is the final report of this team.

identify the number of individuals within a specified time (e.g., 1 month) who might be referred into a diversion center."[130]

- In Lubbock County, "one of the main goals of the diversion center is to divert law enforcement from jail, from emergency rooms, and from having to be off their beat because they're helping people access health care services. [The goal would be for law enforcement to] drive in, drop off, and drive away. We want to help law enforcement not even have to get out of their car when they help people access services."[131]
- In Tarrant County, "the jail diversion center is operated by My Health My Resources of Tarrant County, and it is staffed in part by seven Tarrant County sheriff's deputies. Its purpose is to keep offenders of low-level crimes, such as trespassing, out of jail and to give them the help and resources that no jail facility could ever offer them."[132] It also allows officers to get back on the street faster.
- The Dallas County Deflection Center opened in August 2022. It is a partnership between many parties working in Dallas to offer jail diversion for Class B criminal trespass cases. It is housed in a wing specifically renovated for deflection at Homeward Bound Inc., a substance abuse and mental health treatment center. This allows for comprehensive levels of care and treatment for those individuals accepted into the Dallas County Deflection Center.

6.1.3.2 How a Diversion Center Works

The policies and procedures will look different in each community, based on the goals and available services for each diversion center.

In Harris County, when police encounter a person alleged to have committed a low-level offense, they use their CIT training to determine whether there's an underling mental health issue and if it is a factor in the offense itself. The police officer connects with the district attorney's intake line to determine if this person would be a candidate for the diversion program. If they can be diverted, and the person agrees to go to the diversion center, then the officer will transport the person to the center. At the center they provide services to engage, treat, and transition individuals into future services. Upon arrival, the individual will immediately receive an assessment and treatment for immediate mental health issues, see a psychologist, receive an assessment for services, and be connected with appropriate services, including medication management, housing, medical support, case management, peer support and skills training.

6.1.3.2.a Services and Staff

One key aspect of a diversion center is providing enough time for an individual to stabilize and receive referrals for connections in the community. Individuals brought to a diversion center must also have time to engage with staff and providers when first dropped off to provide a better chance of success.

Coordinating both legal and clinical processes is necessary for a successful center. There are several legal mechanisms used by other diversion centers to hold individuals who may not want to remain for the duration needed, while this work is completed.

- The first is to file charges and subsequently dismiss or expunge the arrest records once treatment is completed (Nashville).

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[130] THE UNIVERSITY OF TEXAS AT AUSTIN, DELL MEDICAL SCHOOL, TRAVIS COUNTY FORENSIC MENTAL HEALTH PROJECT, FINAL REPORT 18 (2023) https://civicclerk.blob.core.windows.net/stream/TRAVISCOTX/956f1347-2fce-43cb-b1ee-ba892db89ae7.pdf?sv=2021-10-04&st=2023-03-14T16%3A15%3A50Z&se=2024-03-14T16%3A20%3A50Z&sr=b&sp=r&sig=BJ3KDFoP1rlWOT8EK7VSMr%2ForkqNjA%2FCesBehjIm06Y%3D.

[131] KCBD News Channel, *Group established for construction, initial operations of Lubbock mental health diversion center*, https://www.kcbd.com/2022/11/22/group-established-construction-initial-operations-lubbock-mental-health-diversion-center/ (Nov. 21, 2022).

[132] KRLD, *MHMR of Tarrant County: Mental health jail diversion center operating well so far*, https://www.audacy.com/krld/news/local/mental-health-jail-diversion-center-operating-well-so-far (March 15, 2023).

- A second is to use existing emergency detention and OPC laws to their fullest extent or create new parameters which allow for involuntary treatment for a longer period of time (the current Texas statute allows for extensions up to 30 days—an emergency detention, coupled with an OPC, and a delayed commitment hearing).
- Alternatively, treatment may be completely voluntary, accepted in lieu of additional legal processes, and individuals are free to leave at any time (Harris County & Dallas County).
- The Tucson, AZ diversion center has had success in building relationships with individuals originally brought in involuntarily and then transitioning them to voluntary treatment (commonly done in many private psychiatric facilities).

Peer support workers can provide valuable support to people receiving services at a pre-arrest diversion center or program. When the person arrives at the center or program, a peer may be well suited to provide a warm hand-off for law enforcement or other public safety personnel, describe the services and support available at the center or program, and, after intake, help the person identify the skills or resources needed prior to their return to the community. Peer knowledge of formal and informal support systems in the community may be particularly helpful to people with needs beyond clinical treatment for behavioral health concerns, including obtaining the documentation or identification required to for housing or employment, linking the person to recovery-oriented support organizations and fellowships, and mentoring, skills development, and goal setting. However, the primary benefit of peer support workers in diversion centers or programs may be their ability to share their lived experience to increase engagement in the clinical services and impart their potential immediate and long-term benefit.

6.1.3.3 Benefits of a Diversion Center

The impact of these investments is just beginning to be understood, primarily through cost avoidance within a currently fragmented system. In fact, most successes for counties with diversion centers come not from the center itself, but from the implementation of wide-ranging, widely available mental health treatment and programs, and just as important, decriminalizing mental health and substance misuse issues.[133]

- For example, even though the Miami-Dade diversion center is still being built, Crisis Intervention Teams (CIT) decreased arrest rates and the number of individuals referred to emergency departments; the Miami-Dade CIT team was able to divert enough arrests that they successfully closed one of their jails saving roughly $12 million annually in taxpayer dollars. Between 2010-2018, their CIT team had an arrest rate of .002%, decreasing the inmate population by 39%. They estimate this resulted in roughly 109,704 fewer inmate jail days annually which is a cost avoidance of $29 million per year. In contrast, they expect their diversion center (when opened) to operate at roughly $25 million per year, which will include a scope of services, including long term supportive housing.[134]

- In Harris County, a third party conducted an external evaluation of the program. ROI for every one dollar spent on diversion, the county avoided $5.54 in criminal justice costs. Comparing pre-diversion and post diversion, those individuals who were diverted had a 50% reduction in re-bookings. In the first two years of opening, 3000 people were diverted.[135]

Other discussed benefits include:

- Reduced effects of mental or physical health symptoms;

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[133] THE UNIVERSITY OF TEXAS AT AUSTIN, DELL MEDICAL SCHOOL, TRAVIS COUNTY FORENSIC MENTAL HEALTH PROJECT, FINAL REPORT (2023) https://civicclerk.blob.core.windows.net/stream/TRAVISCOTX/956f1347-2fce-43cb-b1ee-ba892db89ae7.pdf?sv=2021-10-04&st=2023-03-14T16%3A15%3A50Z&se=2024-03-14T16%3A20%3A50Z&sr=b&sp=r&sig=BJ3KDFoP1rlWOT8EK7VSMr%2ForkqNjA%2FCesBehjIm06Y%3D.

[134] *Id*. at 21.

[135] Jail Diversion Center, *Adult Justice System Services,* THE HARRIS CENTER, https://www.theharriscenter.org/services/adult-justice-system-services#:~:text=The%20Jail%20Diversion%20program%20serves,lieu%20of%20charges%20being%20filed (last visited July 13, 2023).

- Help with staying in the community;
- Help with legal issues;
- Helping to stop the revolving door;
- Minor offenses – no longer a burden on the jail, decreases or eliminate them from reoccurring, getting to the actual issue rather than the symptom of an issue (ex trespass);
- Connection to services and people;
- Warm Handoffs – making accessing services more comfortable;
- Not using the Jail as mental health facility.

6.1.3.4 Costs of a Diversion Center

National research on diversion facilities found that costs could range anywhere from $8-$56 million for an initial building or to refurbish a space, with ongoing annual operating budgets between $2.5-$35 million. Students at the LBJ School of Public Affairs completed an interactive calculator to estimate the cost of building a diversion center. Without a full design and programming effort, the estimated costs provided are recommended for initial investment planning only, as they cannot be considered the true costs of construction and operation. The range in cost estimates vary based on building size, co-located services provided, staffing, room occupancy and other factors. For example, to build a 32-bed, secure, clinically intensive facility, at an estimated 32,000 square feet, the cost would be ~$30 million (Table 4) and operating expenses ~ $5 million annually.[136]

- Not necessarily "mandatory" for the person. They could leave after being dropped off by police without consequence.

6.1.3.5 Comparison of Diversion Centers

Comparison Chart Created by Travis County Planning Team, Dell Medical School[137]

Diversion Center Comparison

	Nashville, TN	Harris County, TX	MiamiDade, FL	Tucson, AZ
Capacity	60 beds (30 men/30 women)	12 recliners/24 Beds	208 beds	34 recliners/15 subacute inpatient beds
Number of people served monthly	N/A – still only operating at 50%	125 people / month*	750 people /month– 600 assessment and Triage, 150 inpatient/residential	800 people / month
Pre/Post Arrest	Post-Arrest	Pre-Arrest	Both; 60% prearrest; 40% postarrest	Pre-Arrest
Voluntary or Involuntary	Voluntary but locked	Voluntary	Voluntary; however, offers locked CSU and STR	Both – Locked but accepts voluntary and involuntary
Stand alone or connected to jail	Connected to Central Booking	Stand alone**	Stand Alone	Stand Alone
Distance from jail	Attached, but different address	Few miles	10 miles	5 miles
Who runs the facility	Sherriff's Office runs BCC with contracted medical and MH (partnership with local stakeholders)	LMHA w/committee of DA, HCSO, PD, HPD, LMHA, etc.	TBD – likely county managed building subleased to non-profit	Connections Health Solutions (contract from LMHA)
Cost to build or renovate	$8MM (as part of new jail cost)	Existing building with minimal renovations	$51.1 MM renovation	$15MM via county bond funds, leased from LMHA for $1/year
Annual operating budget	$2.6MM	$5MM	~$30MM ($17M from Medicaid)	$20-25MM
Legal grounds for holding	Charges filed and pending until program completion, usually 30 days. Once completed, record expunged along with arrest information	N/A – voluntary only	Passed Baker Act and Marchman Act expanding involuntary detention parameters for prearrest diversion. Post arrest pend charges until programs completion	Utilizes civil commitment laws for involuntary patients;generally individuals are not brought to them who have criminal charges. They have a 60?70% conversion rate from involuntary to voluntary treatment.

[136] The University of Texas at Austin, Dell Medical School, Travis County Forensic Mental Health Project, Final Report 20 (2023) https://civicclerk.blob.core.windows.net/stream/TRAVISCOTX/956f1347-2fce-43cb-b1ee-ba892db89ae7.pdf?sv=2021-10-04&st=2023-03-14T16%3A15%3A50Z&se=2024-03-14T16%3A20%3A50Z&sr=b&sp=r&sig=BJ3KDFoP1rlWOT8EK7VSMr%2ForkqNjA%2FCesBehjIm06Y%3D.

[137] *Id.* at 21. Miami Dade, FL Report https://utexas.app.box.com/s/kucnpyrs21mjpa1wfgvxhmhn0fr39rp1. Tucson, AZ Report: https://utexas.app.box.com/s/hzcm5hbjnw6f910vyblf0gx63x2kklgk.

6.1.3.6 Creating a Diversion Center

Determining the best approach for your county requires an implementation team to work through issues, including operational details throughout the planning and programming of the center. Not only should the goal of the diversion center be decided upon, but also each agency should have individualized agency goals.

Legislative Change

S.B. 1677 (88th Reg. Sess. (2023)), effective September 1, 2023, amended Government. Code § 531.0991 to require HHSC, in coordination with LMHAs located primarily in rural areas, to develop a new grant program to establish or expand regional behavioral health centers or jail diversion centers.

S.B. 30 (88th Reg. Sess. (2023)), the Supplemental Appropriations Bill, provides funding for important inpatient mental health and substance use services. The supplemental appropriations bill appropriates funds for one-time costs. One such program is for $100 million in General Revenue for a mental health grant for a one-time community mental health program for county-based collaboratives that must:

- Construct jail diversion facilities, step-down facilities, permanent supportive housing, crisis stabilization units, and crisis respite units, not including office space; and
- Provide a local match of 25% if the collaborative includes a county with a population of less than 100,000, 50% if the collaborative includes a county with a population of at least 100,000 but less than 250,000, or 100% of the grant amount if the collaborative includes a county with a population of 250,000 or more.

6.2 Emergency Detention and Protective Custody of Persons with MI by Peace Officers

6.2.1 What Is an Emergency Detention?

An emergency detention is not an arrest. Emergency detention is the legal procedure by which a person experiencing a severe mental health crisis may be detained for a preliminary examination and crisis stabilization, if appropriate.

Emergency detentions can occur both with and without a warrant, they can also be initiated by a variety of individuals. For a full overview of the emergency detention procedures go to section 5.3.1 of this bench book. The following sections will discuss the procedures for a peace officer conducting a warrantless emergency detention—typically called an Apprehension by Police Officer Without a Warrant or "APOWW." Tex. Health & Safety Code § 573.001.

6.2.2 Apprehension by Police Officer Without a Warrant

Law enforcement officers have significant discretion to make a warrantless apprehension for an emergency detention if the statutory criteria are met (*See* Tex. Health & Safety Code § 573.001(a)) rather than choosing to make an arrest. This is frequently referred to as an "APOWW" (Apprehension by Police Officer Without a Warrant).

Emergency detention may be necessary and appropriate when a person will not submit to voluntary services. The person must be placed in the least restrictive, most appropriate setting, while safeguarding the person's legal rights to a subsequent judicial determination of their need for involuntary mental health services. *See* Tex. Health & Safety Code §§ 571.004, 576.021(a)(1).

6.2.3 Peace Officer: Transport to a Facility Without a Warrant

Law enforcement officers have the opportunity to provide the fastest intervention to begin deescalating a crisis and obtain the necessary early information to evaluate, stabilize, and safeguard the individual. Law enforcement officers trained in crisis intervention can provide an immediate response with support and access to emergency medical services that would be further delayed during the time necessary to obtain a warrant.[138]

6.2.3.1 Standard: A Substantial Risk of Serious Harm

A peace officer may take a person into custody, regardless of the age of the person, without a warrant if the officer has reason to believe and does believe that:

- the person has MI;
- because of that MI, there is a substantial risk of serious harm to the person or others unless the person is immediately restrained; and
- there is insufficient time to obtain a warrant before taking the person into custody.

Tex. Health & Safety Code § 573.001(a).

A substantial risk of serious harm may be demonstrated by:

- the person's behavior; or
- evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty.

Tex. Health & Safety Code § 573.001(b).

6.2.3.2 What May Support an Officer's Belief

The officer must be able to cite specific recent behavior, overt acts, attempts, or threats in support of his belief. Tex. Health & Safety Code § 573.002(b)(5).

The officer's belief may be based on:

- the representation of a credible person;
- the person's conduct; or
- the circumstances under which the person is found.

Tex. Health & Safety Code § 573.001(c).

Officer's Personal Observations Not Required

Note that the statute does not require an officer's personal observations of conduct or behavior suggesting a substantial risk of serious harm. An officer's belief may be based on credible information given to the officer by a witness, such as a family member.

6.2.3.3 An Officer Must Investigate

A peace officer must "investigate the circumstances surrounding a mental health call prior to taking the subject into custody and before transporting the subject to a mental health facility." *Trevino v. State*, 512 S.W.3d 587, 595 (Tex. App.—El Paso 2017, no pet.).

6.2.3.3.a An Officer's Protection from Liability

Officers are often concerned about their liability when transporting a person under an APOWW, and whether the person may or may not meet criteria when they actually get to the facility. The Health and

[138] HOUSTON POLICE DEPARTMENT, RESPONDING TO THE MENTALLY ILL: A GUIDE FOR TEXAS PEACE OFFICERS (May 2018), http://texasjcmh.gov/media/1760/texas-peace-officer-guide-for-responding-to-the-mentally-il.pdf.

Safety Code states that "[a] person who participates in the examination, certification, apprehension, custody, transportation, detention, treatment, or discharge of any person or in the performance of any other act required or authorized by this subtitle and who acts in good faith, reasonably, and without negligence is not criminally or civilly liable for that action." Tex. Health & Safety Code § 571.019(a).

Where liability may be a concern is when an officer does not take the person for help when they are in need of it, and then after the officer leaves the scene the person harms themselves or others.[139]

Obstacles to Communication with an Officer

An individual with a health condition or disability, including mental illness or IDD, which may impede effective communication with a police officer, may voluntarily indicate this information on their Texas driver license, state ID, and/or vehicle registration through Texas Department of Motor Vehicles (TxDMV). If provided, this information would be made available when an officer runs a query through TLETS, thereby letting the officer know of any potential impediments to effective communication with the individual.

Tex. Transportation Code § 502.061.

Legislative Change

H.B. 3132 (88th Reg. Sess. (2023)), effective September 1, 2023, amended Subchapter F, Chapter 521, Transportation Code by adding § 521.1251, which directs the department of transportation to allow the opportunity to voluntarily indicate on a driver's license or personal identification certificate that the person is deaf or hard of hearing.

6.2.3.4 Transport to a Facility

An officer must transport the person:

- to the nearest appropriate inpatient mental health facility;
- if such a facility is unavailable, to another mental health facility[140] deemed suitable by the LMHA; or
- to EMS personnel in accordance with a memorandum of understanding (MOU) for transport to an appropriate facility as described in section 6.2.3.5 below.

Tex. Health & Safety Code § 573.001(d).

The jail must not be used except in an extreme emergency, and the person must be kept separate from inmates charged with or convicted of a crime. Tex. Health & Safety Code § 573.001(e), (f).

6.2.3.5 Memorandum of Understanding (MOU) Regarding Transportation for Emergency Detention

A law enforcement agency and an EMS provider may execute an MOU under which EMS personnel employed by the provider may transport a person taken into custody under an emergency detention by

[139] Response Guide for First Responders, *Mental Health Division,* HOUSTON POLICE DEPARTMENT, 20-21 https://www.houstoncit.org/response-guide/ (last visited Aug. 8, 2023).

[140] The definition of mental health facility includes "that identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided." Tex. Health & Safety Code § 571.003(12). Pursuant to their obligations under the federal Emergency Medical Treatment and Active Labor Act or otherwise, hospital emergency departments often diagnose, treat, and care for persons with mental illness.

a peace officer employed by the law enforcement agency. The MOU must:

- address responsibility for the cost of transporting the person taken into custody; and
- be approved by the county in which the law enforcement agency is located and the LMHA that provides services in that county with respect to provisions of the MOU that address the responsibility for the cost of transporting the person.

Tex. Health & Safety Code § 573.005(b).

6.2.3.6 Person's Rights

An officer must immediately inform the person orally in simple, nontechnical terms:

- of the reason for the detention; and
- that a staff member of the facility will inform the person of their rights within 24 hours.

Tex. Health & Safety Code § 573.001(g).

6.2.3.7 Firearms

An officer may immediately seize any firearms in the person's possession. Tex. Health & Safety Code § 573.001(h). Note that specific procedures for seizure and return of firearms will vary by jurisdiction.

6.2.3.8 Notice of Detention to Facility

After taking the person to a facility, the officer must immediately file with the facility a notification of detention on the statutorily required form (***see* the appendix of this Bench Book**). The facility must honor the statutorily prescribed form and cannot require use of a different form. The facility must include the notice in the person's clinical file. Tex. Health & Safety Code § 573.002(a), (c).

If emergency medical personnel transport the person at the request of a peace officer, they must immediately file with the facility the notification of detention completed by the peace officer who made the request. Tex. Health & Safety Code § 573.002(a).

6.3 Arrest

Reflection Point

Absent a mental health crisis, a law enforcement custodial event is an important discretionary point to examine. Remember, while an officer may have the authority to arrest, they also may use their discretion on a misdemeanor, to issue a citation or to immediately release the individual and issue an arrest warrant later. Additionally, Tex. Code Crim. Proc. art. 14.035 also gives officers discretion to release individuals with IDD in certain situations. Similarly, law enforcement should exercise discretion as appropriate in considering not making an arrest if a person subject to an APOWW allegedly commits a new offense at a facility while under an ED or OPC.

Training on mental health and ID plays a role in the likelihood of officers diverting an individual instead of arresting them. Without training, preconceived perceptions will likely influence the result.

6.3.1 Arrest Is Usually Discretionary

A peace officer may arrest a person who:

- has committed an offense in the officer's view (Tex. Code Crim. Proc. art. 14.01(b));
- is found in a suspicious place if the circumstances reasonably show that the person has committed or is about to commit certain offenses (Tex. Code Crim. Proc. art. 14.03(a));
- the officer has probable cause to believe has committed certain offenses (Tex. Code Crim. Proc. art. 14.03(a)); or
- has made an admissible statement to the officer that establishes probable cause to believe that the person has committed a felony.

Tex. Code Crim. Proc. art. 14.03(a).

In lieu of arresting a person with IDD who lives in a group home or ICF/IID, a peace officer may release him or her at the person's residence if the officer:

- believes confinement of the person in a correctional facility as defined by section 1.07 of the Texas Penal Code is unnecessary to protect the person and the other persons who reside at the residence; and
- made reasonable efforts to consult with the staff at the person's residence and with the person regarding the decision.[141]

Tex. Code Crim. Proc. art. 14.035.

6.3.2 When Arrest Is Mandatory

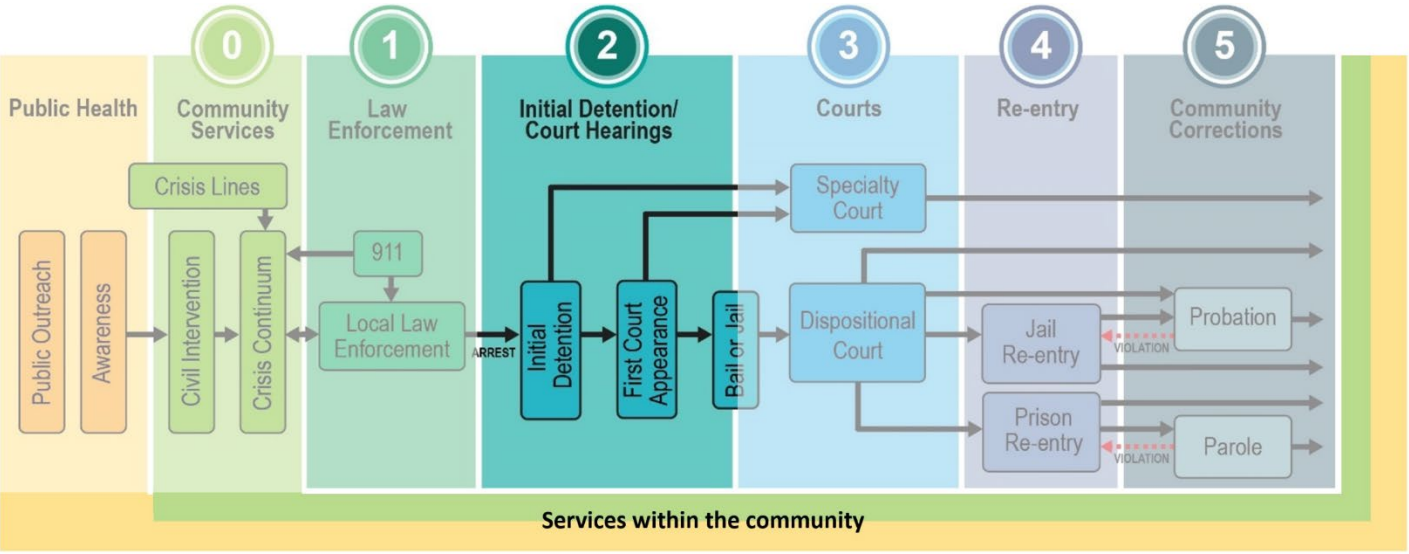
A peace officer must arrest a person whom the officer has probable cause to believe has committed an offense under section 25.07 of the Texas Penal Code (Violations of Certain Court Orders or Conditions of Bond) in the presence of the officer. Tex. Code Crim. Proc. art. 14.03(b).

6.3.3 Notice to the Magistrate May Be Required

If the arresting officer is a sheriff or deputy sheriff and the officer suspects the person has MI or ID, the officer must notify the magistrate within 12 hours as discussed in Intercept 2, Part I, section 5.1. of this Bench Book (a municipal jailer has the same duty). Tex. Code Crim. Proc. art. 16.22(a)(1).

[141] A peace officer and the agency or political subdivision that employs the peace officer may not be held liable for damage to persons or property that results from the actions of a person released. Tex. Code Crim. Proc. art. 14.035(c).

Chapter 7: Intercept 2—Initial Detention and Court Hearings



7.0 Intercept 2: Initial Detention and Court Hearings

Intercept 2: Initial Detention and Court Hearings focuses on initial detention and court hearings. This intercept will frequently be the first opportunity for judicial involvement. This includes matters such as intake screening, early assessment, and pretrial release of those with mental illness or intellectual disabilities. Identification at this stage can facilitate informed decision making around an individual's care, treatment continuation, and pretrial orders. Diversion and data sharing continue to be a focus in this intercept.

Legislation Promoting Early Identification

Although statutes requiring early identification of individuals with mental illness or intellectual disabilities have been on the books for decades, the issue received renewed attention in the 85th Texas Legislative Session (2017). In response to the tragic suicide of Sandra Bland in a Texas jail three days after a traffic stop in 2015, the 85th Legislature passed Senate Bill 1849 (the Sandra Bland Act) amending early- intake and bail procedures for persons with MI or ID.

The bill addressed a variety of criminal justice topics and identified areas of improvement in officer training, jail safety, bail reform, and behavioral health and data collection. Specifically, the bill:

- shortened the periods for the notice by the jail of possible MI or ID to the magistrate and for completing the written report;
- mandated release on personal bond for a defendant with a mental illness or intellectual disability if certain criteria are met;
- required law enforcement to make a good-faith effort to divert to treatment a person suffering a mental health crisis or from the effects of substance abuse;
- required training by law enforcement and jail personnel in the areas of mental illness and intellectual disabilities; and
- required continuity of, and access to, mental health care, including availability of medication to persons incarcerated in Texas jails.

Similarly, resolutions passed by the Texas Judicial Council—the policy-making body for the state judiciary—led to legislative changes in the 85th Session that promote early identification. Senate Bill 1326 revised the process of collecting information about an arrestee who may have mental illness in the

magistration process, streamlined the competency restoration process, and allowed counties to establish jail-based competency restoration programs.

Building on that work, the 86th Legislature (2019), the 87th Legislature (2021),[142] and the 88th Legislature (2023), likewise demonstrated a commitment to early identification and diversion. The JCMH summarized the bills related to mental health and IDD, with a focus on the criminal justice system. Those bills, when organized by sequential intercept, demonstrated comprehensive changes at each point in the criminal justice system where individuals with MI or IDD may be diverted to the community for services.[143] The new laws also appropriately concentrated on early intercepts, such as public outreach, community services, and initial detention. Relevant legislative changes have been noted throughout the Bench Book.

In the 88th Legislature, Senate Bill 2479 affects early identification and diversion by removing the requirement that a magistrate can order a 16.22 interview only if the defendant has been charged with a Class B Misdemeanor or higher offense. This bill amended the 16.22 statute to make it discretionary for the judge to order a 16.22 interview and report if the person in front of them is charged with only a Class C Misdemeanor.

[142] For a detailed discussion of recent Texas mental health legislation, see Brian D. Shannon, *Texas Mental Health Legislative Reform: Significant Achievements with More to Come*, 53 TEX. TECH L. REV. ONLINE ED. 1 (2020), http://texastechlawreview.org/wp-content/uploads/ShannonTexasMentalHealthLegislative2020.pdf.

[143] TEXAS JUDICIAL COMMISSION ON MENTAL HEALTH, 86TH LEGISLATIVE SUMMARY: MENTAL HEALTH AND IDD BILLS BY SEQUENTIAL INTERCEPT (2019), http://texasjcmh.gov/media/1640/legislative-summary.pdf.

Chapter 7A: Early Identification through CCP 16.22

Article 16.22 of the Texas Code of Criminal Procedure[144] details a procedure for identifying a person's possible MI or ID at the earliest stages of—and throughout—a criminal proceeding. Under article 16.22, a magistrate must, under certain circumstances discussed below, order an expert to interview the defendant and otherwise collect information regarding whether the defendant has a MI or ID in order to alert the necessary stakeholders if the resulting report indicates possible MI or ID.

QUICK SECTION OVERVIEW

7.1 A 16.22 Report

Since the passage of article 16.22 of the Texas Code of Criminal Procedure in 1993, much confusion has surrounded the question of what a report (before the 2019 legislative change this was called an "assessment") under article 16.22 is, particularly in light of other, similar-sounding concepts in mental health and ID law. It is thus helpful to consider what a 16.22 report is, and what a 16.22 report is not.

JCMH 16.22 GUIDE

Procedural process flow charts are also available for the 16.22 process in the Appendix of this bench book.

7.1.1 What a 16.22 Report Is

A report provided to the magistrate under article 16.22 is a limited-purpose tool: it is a report of information collected in an interview regarding a person's possible MI or ID. Tex. Code Crim. Proc. art. 16.22(a)(1). The interview, collection of information, and written report must be performed by a "qualified professional," which is described in section 7.2 below.

7.1.1.1 Information the Report Must Include

The written report must include:

[144] The 85th Legislature passed two bills in 2017 amending article 16.22, the statute affecting procedures in this intercept (S.B. 1326 and S.B. 1849), which resulted in substantive changes made by one bill but not the other. The first edition of this Bench Book highlighted the subsequent issues related to those changes. However, the 86th Legislature passed H.B. 4170 in 2019, which reenacted article 16.22. This Bench Book reflects the current version of the statute.

- information from any previous interview of the defendant, if applicable;[145]
- previously recommended treatment, if applicable;
- a description of the procedures used in the collection of information; and
- the provider's observations and findings regarding:
  - whether the person has MI or ID,
  - whether there is clinical evidence to support a belief that the person may be incompetent and should undergo a competency exam under Chapter 46B of the Texas Code of Criminal Procedure; and
  - **appropriate or recommended treatment or service (which is key to creating bond conditions under article 17.032 of the Texas Code of Criminal Procedure as discussed in Intercept 2, Part II of this Bench Book).**

Tex. Code Crim. Proc. art. 16.22(a)(1)(A), (b-1).

7.1.1.2 Form that the Provider Must Use

The written report must be submitted on the form approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) entitled "COLLECTION OF INFORMATION FORM FOR MENTAL ILLNESS AND INTELLECTUAL DISABILITY." Tex. Code Crim. Proc. art. 16.22(a)(1)(B).

TCOOMMI must approve and make generally available in electronic format a statutory form for use by a person providing a written report under article 16.22(a)(1)(B) of the Code of Criminal Procedure.

JCMH Officially Approved Forms

Tex. Health & Safety Code § 614.0032.

The statutory form is available here: https://www.tdcj.texas.gov/documents/rid/article_16.22.pdf. ***See the appendix* of this Bench Book.**

Reflection Point

Ask yourself, as a judge:

- Has a previous or current diagnosis of MI or IDD been overlooked?
- Are there education or other records that document diagnoses?
- Has any party previously sought evaluations for MI or IDD?
- If not, could the profession or previous experiences of the person be clouding their appropriateness or access to services for MI or IDD?
- Has trauma affected this person's ability to access services in any system, including education or the LMHA?

7.1.1.3 16.22 Reports Are Required

16.22 reports are critical to proper case management. Early identification can affect case management in a variety of ways over the course of a criminal proceeding, including but not limited to the following:

- bail decisions;
- appointment of counsel;

[145] Note, depending on who conducts the interview, there may be records readily available. For example, the sheriff's office medical staff may have records from a previous incarceration or an LHMA may have records if the defendant is a client. Article 16.22 does not require obtaining records that other entities may maintain.

- early involvement of local health provider (e.g., crisis stabilization, provision or continuation of treatment and services);
- charging decisions;
- diversion of the person from the criminal justice system;
- flagging potential incompetency issues or initiating incompetency proceedings;
- initiation of civil-commitment proceedings (with or without dismissing charges);
- consideration during punishment or as a basis for imposing treatment conditions as part of community supervision; and
- creating a record for future use and information sharing.

7.1.1.4 16.22 Reports Are Confidential

A written report submitted to a magistrate under article 16.22(a)(1)(B) is confidential and not subject to disclosure under Chapter 522 of the Texas Government Code but may be used or disclosed as provided by article 16.22. Tex. Code Crim. Proc. art. 16.22(f).

7.1.2 What a 16.22 Report Is Not

A 16.22 report is not a diagnosis of MI or ID and neither the interview nor the report need to be completed by a licensed medical or mental health professional. This is a common misconception and one that may make magistrates hesitant to order a 16.22 interview. *See* Intercept 2, Part I, section 2 of this Bench Book for information on who may perform an interview. Further, a magistrate does not need evidence that the person has been previously diagnosed with MI or ID before the magistrate may order a 16.22 interview.

7.1.2.1 A 16.22 Interview Is NOT a Full Competency Evaluation

A 16.22 interview should not be confused with forensic evaluations in Chapters 46B (Incompetency to Stand Trial)[146] and 46C (Insanity Defense) of the Texas Code of Criminal Procedure.

The type of evaluation that is most frequently confused with a 16.22 interview is a competency examination under Chapter 46B of the Texas Code of Criminal Procedure. Under Chapter 46B, a person is incompetent to stand trial if the person does not have (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person. Tex. Code Crim. Proc. § 46B.003(a).

A 16.22 interview may flag the need for a full competency evaluation under Chapter 46B: "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." Tex. Code Crim. Proc. § 46B.004(b).[147] However, the court may have reasonable cause to believe that a person has MI or ID but not have evidence suggesting that the person may be incompetent to stand trial.

A Person Can Have MI or ID and Still be Competent Under Chapter 46B

It is important to understand that a magistrate may receive information that may not suggest that a person is incompetent to stand trial under Chapter 46B of the Texas Code of Criminal Procedure, but that may suggest that the person has a MI or ID. Such a condition may not render the person incompetent to stand trial, but it may warrant special consideration and management of the person's criminal case.

[146] *See* Intercept 3, section 7 of this Bench Book for procedures related to competency under Chapter 46B of the Texas Code of Criminal Procedure.

[147] Note that a competency examination may not be performed until the case is filed with the trial court. *See* Tex. Code Crim. Proc. art. 46B.004.

7.1.2.2 A 16.22 Interview Is NOT the Mandatory Jail Screening

A 16.22 interview is not an "approved mental disabilities/suicide prevention screening instrument" under Texas Administrative Code, Title 37, Part 9, Chapter 273, section 273.5, which must be completed by a jail employee for all inmates immediately upon intake as discussed in Intercept 2, Part I, section 5.1.3 of this Bench Book.

7.1.2.3 A 16.22 Interview Is NOT a Full Clinical Assessment

A 16.22 interview is not an assessment under Texas Administrative Code, Title 25, Part I, Chapter 441, Subchapter A, section 441.101, which contemplates a more rigorous and ongoing clinical evaluation for purposes of developing a treatment plan and measuring progress.

7.2 Who May Perform a 16.22 Interview and Collection of Information

7.2.1 Article 16.22 Requirements

The statute provides that the interview and collection of information must be performed by:

- the service provider that contracts with the jail to provide mental health or IDD services,
- the LMHA,
- the LIDDA, or
- another qualified mental health or IDD expert.

Tex. Code Crim. Proc. art. 16.22(a)(1).

7.2.2 Article 16.22 Does Not Define "Another Qualified Mental Health or Intellectual and Developmental Disability Expert"

Article 16.22 does not define "another qualified mental health or intellectual and developmental disability expert" either expressly or by reference or incorporation. Definitions of other similar terms may offer guidance but note that they are not expressly incorporated into article 16.22. A discussion of those terms follows.

7.2.2.1 QMHP-CS

Qualified Mental Health Professional

- 26 Texas Administrative Code section 301.303(48) defines "QMHP-CS" as a person who works or provides services for a LMHA/LBHA or provider as an employee, contractor, intern, or volunteer, who:
- is credentialed as a QMHP-CS;
- has demonstrated and documented competency in the work to be performed; and
  - has a bachelor's degree in psychology, social work, medicine, nursing, rehabilitation, counseling, sociology, human growth and development, physician assistant, gerontology, special education, educational psychology, early childhood education, or early childhood intervention;
  - is a registered nurse; or
  - completes an alternative credentialing process as determined by the LMHA or MCO.

26 Tex. Admin. Code § 301.303(48).

7.2.2.2 Non-physician Mental Health Professional

Section 571.003(15) of the Texas Health and Safety Code defines "non-physician mental health

professional" as a licensed professional. Examples include:

- psychologist,
- registered nurse,
- clinical social worker,
- licensed professional counselor, or
- physician assistant who has expertise in psychiatry or is working in a mental health facility.

Tex. Health & Safety Code 571.003(15).

7.2.2.3 Qualified Intellectual Disability Professional

Title 25, section 416.78(18) of the Texas Administrative Code adopts the definition of a qualified intellectual disability professional in 42 Code of Federal Regulations (CFR) section 483.430(a). The CFR defines a "qualified intellectual disability professional" as one who:

- has at least one year of experience working directly with persons with ID or other developmental disabilities; and
- is one of the following:
  - a doctor of medicine or osteopathy;
  - a registered nurse or
  - an individual who holds at least a bachelor's degree described in CFR 483.430(b)(5).

42 CFR § 483.430.

7.2.3 "Qualified Professional"

For simplicity, this Bench Book uses the term "qualified professional" to describe a person who may perform an interview under article 16.22.

Not an "Expert" as that Term Is Typically Used

The letter and spirit of article 16.22 suggest that the person who performs a 16.22 interview need not qualify as an "expert" as that term is used in other contexts, such as article 46B.022 (Competency Evaluation) or 46C.102 (Insanity Evaluation) of the Texas Code of Criminal Procedure, or under the Texas Rules of Evidence and interpreting case law.

7.3 Where May a 16.22 Interview be Performed

7.3.1 Location

A 16.22 interview may be conducted in person in the jail, by telephone, or through a telemedicine medical service or telehealth service. Tex. Code Crim. Proc. art. 16.22(a-4).

7.4 The Standard for Ordering a 16.22 Interview

7.4.1 Reasonable Cause

The magistrate must determine whether there is reasonable cause to believe that the person has MI or ID. Magistrates might consider requesting the TCJS mandatory jail screening form if it was not included with the 16.22 notice. *See* Tex. Health & Safety Code 614.017(a)(2) (requiring disclosure of such information for purposes of continuity of care and services). Note again that a specific diagnosis is not

required. See Bench Cards at the end of Intercept 2, Part I of this Bench Book for information on observations that indicate a defendant may have a MI or ID.

7.4.1.1 If Reasonable Cause Is NOT found, a 16.22 Interview Is Not Required

If the magistrate determines that there is not reasonable cause, the magistrate is not required to order an interview. But note that jail conditions frequently trigger decompensation of mental health conditions, so additional 16.22 interviews may be necessary over time.

Substance Use

Be aware that, because many persons with MI also use substances, the need for an interview may not come to light until the person is sober or has detoxed. Each county jail's health service plan should include a detoxification protocol for supporting withdrawal from alcohol, opioids, benzodiazepines, and other commonly used substances, in conformance with current national standards.[148]

7.4.1.2 If Reasonable Cause Is Found, a 16.22 Interview Is Required

If the magistrate determines that there is reasonable cause, the magistrate must order a qualified professional to (1) interview the defendant and otherwise collect information regarding whether the person has MI or ID and (2) provide to the magistrate a written report of the interview and other information collected on the TCOOMMI-approved form.[149] Tex. Code Crim. Proc. art. 16.22(a)(1). See Tex. Health & Safety Code 614.0032.

Exception 1: The magistrate is not required to order the interview under 16.22 if the defendant is no longer in custody. Tex. Code Crim. Pro. Art. 16.22(a)(2)(a). A magistrate, however, is not prohibited from ordering a new interview and collection of information.

Exception 2: If reasonable cause is found, a magistrate need not order an interview and collection of other information if the defendant in the year preceding the defendant's applicable date of arrest has been determined to have a MI or to be a person with an ID and thereby had an interview and report in the preceding year. In the event of an exception, the magistrate may use with the results of the prior interview captured in the previous written report. Tex. Code Crim. Pro. Art. 16.22(a)(2)(b). A magistrate, however, is not prohibited from ordering a new interview and collection of information.

Exception 3: The magistrate is not required to, but may, order the interview and report under 16.22 if the defendant has been charged with only a class C misdemeanor. Tex. Code Crim. Pro. Art. 16.22(a)(2)(c).

Legislative Change

S.B. 2479 (88th Reg. Sess. (2023)) amended Texas Code of Criminal Procedure article 16.22(a) to allow judges to order a 16.22 interview and report for arrestees jailed on charges of only Class C misdemeanors.

Previously, CCP art. 16.22 mandated an interview & report only for individuals charged with a Class B misdemeanor or higher who are suspected of having a mental illness or intellectual disability.

Courts hearing Class C offenses often first see people with severe mental illness in the justice and

[148] University of Texas School of Law Civil Rights Clinic, Preventable Tragedies: How to Reduce Mental Health Related Deaths in Texas Jails 3 (November 2016).

[149] The 16.22 standard form is available here: https://www.tdcj.texas.gov/documents/rid/article_16.22.pdf.

municipal courts before their mental health deteriorates to a point where the individual is arrested on a higher-level misdemeanor or felony offense.

SB 2479 amended Texas Code of Criminal Procedure article 16.22 to allow for the inclusion of Class C misdemeanors in the early identification process. The aim of this amendment is to give the judges, who frequently interact with this population of defendants, access to the tools to identify potential issues and connect these individuals to mental health services. This law now gives the judge the additional discretion to order a 16.22 interview and report on persons charged with Class C misdemeanors.

Article 16.22 Does Not Limit When the Magistrate May Order an Interview

Because the statute does not expressly limit when the magistrate may order an interview, article 16.22 suggests that the magistrate may determine whether to order an interview at any time—during magistration, arraignment, or any other time the magistrate receives credible information suggesting MI or ID. This is important to note, because jail conditions and the stress of criminal proceedings may cause a person to decompensate over time and demonstrate signs of MI that were not initially present.

7.5 Who Pays for an Interview and Collection of Information

If a magistrate orders a LMHA, LIDDA, or another qualified mental health or IDD expert to conduct an interview or collect information under article 16.22(a)(1), the commissioners court for the county in which the magistrate is located must reimburse the respective authority or expert for the cost of performing those duties. Tex. Code Crim. Proc. art. 16.22(a-1).

The amount of reimbursement depends on whether the commissioners court adopts a fee schedule authorized in article 16.22(a-2). If so, it must consider the generally accepted reasonable cost in that county of performing the duties described by article 16.22(a)(1). The fee schedule must also be adopted in a public hearing and periodically reviewed by the commissioners court.

- If the commissioners court adopts a fee schedule described by article 16.22(a-2), the amount of reimbursement is dictated by that fee schedule.
- If the cost of performing the duties described by article(a)(1) exceeds the amount provided by the applicable fee schedule, the authority or expert who performed the duties may request that the judge who has jurisdiction over the underlying offense determine the reasonable amount for which the authority or expert is entitled to be reimbursed. That amount must be determined no later than the 45th day after the date of the request and may not be less than the amount provided by the fee schedule.
- If the commissioners court has not adopted a fee schedule, the authority or expert may request that the judge who has jurisdiction over the underlying offense determine the reasonable amount of reimbursement. Such determination must be made no later than the 45th day after the date of the request.

Tex. Code Crim. Pro. Art. 16.22(a-1), (a-2), (a-3).

Note: This reimbursement is distinct from the reimbursement required under article 16.22(a)(1)(B)(3).

7.6 Types of Information that Can Prompt a Magistrate to Order a 16.22 Interview

7.6.1 Notice from Sheriff or Jailer of Possible MI or ID

For defendants in custody, sheriffs and municipal jailers must provide written or electronic notice of credible information that may establish reasonable cause to believe that a defendant is a person with MI or ID. Tex. Code Crim. Proc. art. 16.22(a)(1).

7.6.1.1 The Notice Must Include

The notice must include any information related to the sheriff's or jailer's determination, such as:

- information regarding the defendant's behavior immediately before, during, and after the defendant's arrest; and
- the results of any previous assessment, if applicable (note that the statute still uses the term "assessment" in this subsection but could refer to a previous 16.22 interview and collection of information).

Tex. Code Crim. Proc. art. 16.22(a)(1).

The sheriff or jailer may include with the notice other documents containing related information, such as the TCJS-mandated screening form discussed at section 7.6.1.3.a below.

7.6.1.2 Deadline for Providing Notice

The sheriff or jailer must provide notice to the magistrate within 12 hours of receiving the credible information. Tex. Code Crim. Proc. art. 16.22(a)(1).

Duration of Article 16.22 Sheriff/Jailer Notice Requirement

Article 16.22 does not specify the duration of this notice requirement. Rather, it states broadly that the sheriff or jailer must provide notice within 12 hours when "the sheriff or municipal jailer [has] custody of a defendant for an offense punishable as a Class B misdemeanor or any higher category of offense . . ." In the absence of an express limitation, the requirement should be read as extending beyond booking and magistration so that a sheriff or jailer must provide notice anytime he or she receives credible information under this provision. *See* Tex. Code Crim. Proc. art. 16.22(a)(1). This includes decompensation while in custody.

7.6.1.3 Possible Sources of "Credible Information"

7.6.1.3.a Mandatory Screening of Inmates for Suicide and MI and ID

The Texas Commission on Jail Standards (TCJS) requires that the TCJS-approved mental disabilities/suicide prevention screening instrument must be completed immediately for all inmates admitted (***see* appendix of this Bench Book**). That screening is part of a mental disabilities/suicide prevention plan that all sheriffs and operators must develop and implement to address various statutorily enumerated principles and procedures.[150] *See* 37 Tex. Admin. Code § 273.5.

[150] The owner/operator of each facility must also provide medical, mental, and dental services in accordance with the approved health services plan, which may include, but may not be limited to, the services of a licensed physician, professional and allied health personnel, hospital, or similar services. 37 Tex. Admin. Code § 273.1.

Texas Commission on Jail Standards IDDAC report

In the 87th Regular Session (2021), House Bill 2831 required the Texas Commission on Jail Standards (TCJS) to establish a 13-member Intellectual and Developmental Disabilities Advisory Committee (IDDAC) to "advise the commission and make recommendations on matters related to the confinement in county jail of persons with intellectual or developmental disabilities."

The Intellectual and Developmental Disability Advisory Committee was required to gather and review data regarding the confinement in county jails of individuals with intellectual or developmental disabilities, and then use that data to make recommendations and guidelines to county sheriffs and other officials.

This committee's report[151] was published in December 2022 and includes a full list of recommendations from the committee. Below is the Summary of Recommendations:

- The IDDAC will continue to explore data from the TLETs CCQ system and its ability to correctly identify those with IDD in the jail setting. Additional research and evaluation is needed to determine what additional changes could be made to improve the correct identification of inmates with IDD using the TLETs CCQ system.
- IDDAC recognizes that additional data collection may be useful in better understanding the needs of those with IDD in the jail setting and will continue to explore potential methods of data collection for this purpose.
- IDDAC, TCJS and relevant stakeholder groups should continue to research and evaluate the screening processes for those that are incarcerated to identify the best combination of methods needed to consistently and accurately identify those with an IDD in the jail setting.
- The IDDAC recommends additional updates to the current training for jailers on IDD as well as expanding the groups of people within the criminal justice system who are able to complete this training and increase their knowledge of the special concerns for those with IDD in the jail setting.
- Identify and increase the support to LIDDAs, other community organizations supporting those with IDD, and Texas jails with providing care and resources to those with IDD in the jail setting.
- TCJS recommends that IDD treatment data be maintained indefinitely, so all inmates with a history of IDD can be properly identified. IDD is a lifelong disorder but TLETs CCQ data only identifies persons with IDD who received services in Texas in the past three years; thus, persons treated prior to three years will not be identified as IDD.
- TCJS recommends a monthly (or quarterly report) be produced by HHSC detailing the number of positive CCQ matches or IDD inmates in Texas's County Jails. Currently, there is no widespread data available to the public, 4 or other governmental agencies, regarding the number of positive CCQ matches or IDD inmates in Texas's County Jail system.
- TCJS recommends extending the work of the IDD Advisory Committee for an additional two years. Continuation of The IDD Advisory Committee is necessary to evaluate the problem's scope, determine best practices, and make modifications to the IDD screening form as necessary.

The committee is continuing to work on this mission; the next report from IDDAC is expected in Dec. 2024.

[151] INTELLECTUAL AND DEVELOPMENTAL DISABILITY ADVISORY COMMITTEE TO THE TEXAS COMMISSION OF JAIL STANDARDS LEGISLATIVE REPORT (Dec. 2022). https://www.tcjs.state.tx.us/wp-content/uploads/2022/12/IDDAC_Legislative_Report_2022.pdf.

7.6.1.3.b Mandatory Continuity of Care Query (CCQ)

With limited exceptions, every jail is required to conduct a CCQ check on each inmate upon intake into the jail.[152] The CCQ is originated through the Department of Public Safety's Texas Law Enforcement Telecommunications System (TLETS), which initiates a data exchange with the HHSC's Clinical Management for Behavioral Health Services system to determine if the inmate has previously received state mental healthcare. 37 Tex. Admin. Code § 273.5.

TLETS CCQ Includes LIDDA and SSLC Services

As of August 14, 2020, a TLETS CCQ (Texas Law Enforcement Telecommunications System Continuity of Care Query) will now reflect whether a person has received LIDDA or SSLC services in the last three years.[153] In addition to providing information to support ordering a 16.22 interview, TLETS CCQ process provides a system to identify inmates with a history of receiving intellectual disability services.[154]

Since the IDD information has only recently been incorporated, the system continues to be monitored and updated to ensure accuracy. As previously done, if a person is suspected of having ID, or states that they are or have received services, but that information is not in the TLETS CCQ system, contact the LIDDA to determine whether the person has received or is receiving services. These additional contacts may be able to recommend appropriate treatment of the person and help to develop a case-management plan.

7.6.1.3.c Mandatory Prescription Review

TCJS requires that a qualified medical professional review as soon as possible any prescription medication a prisoner is taking when the prisoner is taken into custody. Tex. Gov't Code § 511.009(d); 37 Tex. Admin. Code Ch. 273.2(12).

Continuing Medication is Critical to Continuity of Care

Continuing a person's prescription medication is critical to preventing mental health deterioration. Intake officials should consult the person, family members, LMHA/LBHA, or a prior provider regarding current medications. Not all medications may be available in jail due to costs, availability, and concerns regarding possible abuse.

Jails generally do not accept prescriptions provided by family members. However, it is not uncommon for family members to communicate mental health diagnoses with the jail, magistrate, or bond offices. This information may be considered, and the magistrate should order an interview (or check for prior interviews) if the information is credible.

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[152] Municipal jails that are operated by the local government do not have access to the CCQ because DPS cannot grant access to jails that do not operate under TCJS (note that jail standards do apply to privately operated municipal jails but not to municipal jails operated by the local government). As a result, magistrates at some municipal jails do not know whether an inmate has previously received state mental healthcare unless that information comes from the inmate, defense counsel, or another source.

[153] The 86th Texas Legislature provided rider funding to HHSC to incorporate IDD service history into the CCQ system. Texas Commission on Jail Standards, Detention of Persons with IDD Comprehensive Study 14, https://www.tcjs.state.tx.us/wp-content/uploads/2020/12/Detention_of_Persons_with_IDD.pdf.

[154] Texas Commission on Jail Standards, Detention of Persons with IDD Comprehensive Study 13, https://www.tcjs.state.tx.us/wp-content/uploads/2020/12/Detention_of_Persons_with_IDD.pdf.

7.6.1.3.d Mandatory that Jail Provide Prescription to Inmate

Tex. Gov't Code § 511.009(d) requires that a **prisoner with a mental illness be provided with each prescription medication** that a qualified medical professional or mental health professional determines is necessary for the care, treatment, or stabilization of the prisoner. Tex. Gov't Code § 511.009(d).

7.6.2 Notice from Another Source

If the magistrate receives written or electronic notice of credible information that may establish reasonable cause to believe that a person brought before the magistrate has MI or ID, the magistrate must conduct proceedings under article 16.22 or bond proceedings under article 17.032, as appropriate. Tex. Code Crim. Proc. art. 15.17(a-1).

7.6.3 When the Magistrate Observes Behavior Suggesting MI or ID

Although not expressly provided in the statute, the spirit of the statutory scheme suggests that the magistrate should order an interview upon the magistrate's own observations of behavior that establishes reasonable cause to believe that a person has MI or ID, such as during magistration,[155] a probable cause hearing, or arraignment.

7.7 When a Defendant Refuses to Submit to an Interview

If the defendant fails or refuses to submit to the interview and collection of other information as required under article 16.22(a)(1), the magistrate may order the person to submit to an examination in a jail or in another place determined to be appropriate by the LMHA or LIDDA for a reasonable period not to exceed 72 hours.[156] Tex. Code Crim. Proc. art. 16.22(a)(3).

When a Person Refuses to be Interviewed

Some example strategies for obtaining an interview and collection of other information from an unwilling person include:

- requesting the appropriate personnel to contact the person to discuss noncompliance, such as the:
  - LMHA, LIDDA, other mental health or ID provider,
  - case manager, or
  - peace officer;
- ordering the person to appear in court to discuss noncompliance; or
- ordering an emergency detention under Chapter 573 of the Texas Health and Safety Code as described in Intercept 1, section 2 of this Bench Book, if appropriate.

[155] "Magistration" is not a statutorily defined term but is a term that is widely used in the criminal justice system. It refers to the event in which the magistrate performs the duties set forth in article 15.17 of the Texas Code of Criminal Procedure after the arrest of an individual. It is also referred to as an "initial appearance" and "15.17 warnings." Magistration is not an arraignment. An arraignment occurs when formal charges are read to the defendant and the defendant enters a plea.

[156] The LMHA or LIDDA is entitled to reimbursement from the county for mileage and per diem expenses for transporting the defendant. Tex. Code Crim. Proc. art. 16.22(a)(3).

7.8 What to Do with the Written Report

7.8.1 The Magistrate

7.8.1.1 When the Qualified Professional Must Submit the Report to the Magistrate

Unless good cause is shown, once the magistrate orders the interview and collection of other information, the qualified professional must submit a written report of an interview and other information collected to the magistrate:

- within 96 hours if the person is in jail; or
- within 30 days if the person has been released from custody;

Tex. Code Crim. Proc. art. 16.22(b).

7.8.1.2 The Magistrate Must Send Copies

Regardless of whether the interview and collection of information indicate MI or ID, the magistrate must send copies of the written report to the:

1. defense counsel;
2. prosecutor;
3. the trial court with jurisdiction;[157]
4. the sheriff or other person responsible for the defendant's medical records while the defendant is confined in jail; **and**
5. as applicable:
   A. any personal bond office established under article 17.42 for a county in which the defendant is being confined; **or**
   B. the director of the office or department that is responsible for supervising the defendant while the defendant is released on bail and receiving mental health or IDD services as a condition of bail.

Tex. Code Crim. Proc. art. 16.22(b-1).

Note: Effective September 1, 2019, upon receipt of the written report from the magistrate, the trial court may, among other things, if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person, release the defendant on bail while charges against the defendant remain pending and enter an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services under Chapter 574 of the Texas Health and Safety Code. Tex. Code Crim. Proc. art. 16.22(c)(5).

Multiple Interviews May Be Necessary

Depending on an inmate's behavior, multiple orders for an interview and collection of other information may be necessary over the course of a criminal case. Consider leaving a copy of the written report in the person's inmate file, along with the TCJS mandatory inmate screening form. *See* 37 Tex. Admin. Code § 273.4 (governing maintenance of inmate health records). Note that nothing expressly prohibits the trial court from ordering additional interviews, if appropriate.

[157] If the case has not been filed when the magistrate receives the written report, the magistrate must hold the report and send a copy to the trial court once the case is filed. However, magistrates often do not receive notice when the case is filed, which makes this requirement a challenge. A related issue is that magistrates who are municipal judges without authority to appoint attorneys are likely unable to meet the requirement to provide a copy to defense counsel.

7.8.2 Reporting the Number of Written Reports to OCA

In 2019, the Legislature tasked the Texas Judicial Council with adopting rules to require the reporting of the number of written reports provided to a court under article 16.22.[158] Tex. Code Crim. Proc. art. 16.22(e). Prior law required the magistrate to submit to OCA the number of written reports provided to a court. Because magistrates had no formal mechanism of reporting to OCA, legislation was needed.

Until the Texas Judicial Council adopts new rules, the magistrate should send the report to the custodian of the district or county court records—the district clerk or county clerk—for inclusion in the defendant's case file. The number of written reports will be captured from district and county courts on Judicial Council Monthly District and County Court Activity Reports, submitted by district clerks and county clerks.

Please note that OCA requires only the 16.22 written report (as of the writing of this Bench Book, the form uses the old term "assessment") and NOT the mandatory TCJS jail screening form (form available in appendix of this Bench Book).

Other Considerations

Promptly appoint counsel. Consider appointing counsel with specialized MI or ID legal training.

Court-ordered services. Release the defendant on bail while charges against the defendant remain pending and enter an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services under Chapter 574 of the Texas Health and Safety Code (if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person). Tex. Code Crim. Proc. art. 16.22(c)(5).

Note that the only instance in which a criminal court has jurisdiction to order civil commitment is following an incompetency determination under Texas Code of Criminal Procedure Chapter 46B, Subchapter E (*see* Intercept 3, section 7 of this Bench Book). Otherwise, only a court with probate jurisdiction may order commitment (*see* Intercept 0, section 3 of this Bench Book). *See also* Tex. Health & Safety Code § 574.008(a); Tex. Code Crim. Proc. arts. 46B.101-103.

Keep a record of the written report. Ensure that a copy of the written report is kept in a sealed court file for potential future use and for purposes of OCA reporting (*see* article 16.22(f) for confidentiality of written reports submitted to a magistrate).

7.9 Information Sharing Is Mandatory

Considerable confusion has surrounded the issue of sharing personal health information in proceedings involving persons who may have MI or ID. This subsection identifies some of the key state-law provisions governing that issue.

7.9.1 Information Regarding Special Needs Offenders

State law requires that agencies share information for purposes of continuity of care and services for "special needs offenders," which includes individuals:

- for whom criminal charges are pending; or
- who, after conviction or adjudication, are in custody or under any form of criminal justice supervision.

Tex. Health & Safety Code § 614.017(a), (c)(2).

[158] H.B. 601, 86th Reg. Sess. (2019). Note that article 16.22(e) requires reporting of the number of written reports "provided to a court under subsection (a)(1)(B)." That provision requires an expert to provide a written report of the interview to the magistrate. Article 16.22(b-1) requires the magistrate to provide copies of the written report to the trial court. Find the OCA Reporting website here: https://www.txcourts.gov/reporting-to-oca/.

16.22 Report Goes in The Pen Packet to TDCJ

Texas Code of Criminal Procedure article 42.09 requires a written report provided to a court under Article 16.22(a)(1)(B) to accompany a defendant transferred by a county to the Texas Department of Criminal Justice (TDCJ) in the pen packet. In addition, a copy of any mental health records, mental health screening reports, or similar information must be delivered to TDCJ as well.

7.9.2 What an Agency Is Required to Do

Specifically, an agency must:

- accept information relating to a special needs offender or a juvenile with a mental impairment that is sent to the agency **to serve the purposes of continuity of care and services** regardless of whether other state law makes that information confidential; and
- disclose information relating to a special needs offender or a juvenile with a mental impairment, including information about the offender's or juvenile's identity; needs; treatment; social, criminal, and vocational history; supervision status and compliance with conditions of supervision; and medical and mental health history, **if the disclosure serves the purposes of continuity of care and services**.

Tex. Health & Safety Code § 614.017(a).

7.9.3 Agencies Must Safeguard Confidentiality

An agency must manage confidential information accepted or disclosed under this section prudently to maintain, to the extent possible, the confidentiality of that information. A person commits an offense if the person releases or discloses confidential information obtained under section 614.017 for purposes other than continuity of care and services, except as authorized by other law or by the consent of the person to whom the information relates. Tex. Health & Safety Code § 614.017(d), (e).

7.9.4 Not for Use as Evidence

Information obtained under this section may not be used as evidence in any juvenile or criminal proceeding, unless obtained and introduced by other lawful evidentiary means. Tex. Health & Safety Code § 614.017(b).

7.9.5 Agencies Required to Comply

An "agency" includes any of the following, a person with an agency relationship with one of the following, and a person who contracts with one or more of the following:

- the Texas Department of Criminal Justice and the Correctional Managed Health Care Committee;
- the Board of Pardons and Paroles;
- the Department of State Health Services;
- the Texas Juvenile Justice Department;
- the Department of Assistive and Rehabilitative Services;
- the Texas Education Agency;
- the Texas Commission on Jail Standards;
- the Department of Aging and Disability Services;
- the Texas School for the Blind and Visually Impaired;
- community supervision and corrections departments and juvenile probation departments;

- personal bond pretrial release offices established under article 17.42 of the Texas Code of Criminal Procedure;
- jails regulated by the Commission on Jail Standards;
- a municipal or county health department;
- a hospital district;
- a judge of this state with jurisdiction over juvenile or criminal cases;
- an attorney who is appointed or retained to represent a special needs offender or a juvenile with a mental impairment;
- the Health and Human Services Commission;
- the Department of Information Resources;
- the Bureau of Identification and Records of the Department of Public Safety, for the sole purpose of providing real-time, contemporaneous identification of individuals in the Department of State Health Services client data base; and
- the Department of Family and Protective Services.

Tex. Health & Safety Code § 614.017(c)(1).

7.9.6 Exempt from the Texas Medical Records Privacy Act (TMRPA)

TMRPA, the state law governing privacy of medical records, expressly excludes an agency described by section 614.017 (set forth above) with respect to the disclosure, receipt, transfer, or exchange of medical and health information and records relating to individuals in the custody of an agency or in community supervision.[159] Tex. Health & Safety Code § 181.057.

[159] Note that pre-booking diversion programs might not be included in this exemption if the individual is not in the custody of an agency or in community supervision.

Information to Assist with a Reasonable Cause Determination for ID

An individual with ID may have significant limitations both in intellectual functioning and in adaptive behavior.

- Deficits in **intellectual functioning**:
  - reasoning
  - problem solving
  - planning
  - abstract thinking
  - judgment
  - academic learning
  - experiential learning

- Deficits in **adaptive functioning**:
  - communication
  - social skills
  - personal independence at home or in community settings
  - school or work functioning

Further examples of adaptive skills that might be affected by ID are as follows:

Conceptual	Social	Practical
• Receptive and expressive language • Reading and writing • Money concepts • Self-direction	• Interpersonal Responsibility • Self-esteem • Gullibility (likelihood of being tricked or manipulated) • Naiveté • Following rules • Obeying laws • Avoiding victimization	• Personal activities of daily living such as eating, dressing, mobility, and using the restroom • Instrumental activities of daily living such as preparing meals, taking medication, using the telephone, managing money, using transportation, and doing housekeeping activities

American Psychiatric Association (2013). Diagnostic and Statistical Manual of Mental Disorders (5th ed.). Arlington, VA: Author; *see also* American Association on Intellectual and Developmental Disabilities, "Frequently Asked Questions on Intellectual Disability and the AAIDD Definition," available at https://aaidd.org/docs/default-source/sis-docs/aaiddfaqonid_template.pdf?sfvrsn=9a63a874_2.

Communicating with Individuals with an Intellectual and/or Developmental Disability (IDD)[160]

"If you've met one person with a disability, you've met one person with a disability."

Communicating with an individual with an intellectual and/or developmental disability (IDD) is just like communicating with anyone else. Know that everyone communicates differently and comprehends in their own way.

- **Address the individual directly.** Treat persons who are adults as adults. Show individuals with IDD the same respect you would any other client. Do not patronize or condescend when communicating with the person. Address the individual before speaking to their companion or supporter.
- **Consider how the individual communicates AND receives communication**. Understanding how a person with IDD communicates and how they receive communication is top priority. Do they use spoken language? Do they use a communication device? Do they use sign-language? Do they use a combination of these? Consider body language and movement. Behavior is also communication.

  When communicating in writing, ensure that a screen reader can be used. (Note: a scanned document cannot be read by a screen reader.) If an individual cannot read, ensure that you or someone they trust, such as a supporter in a Supported Decision-Making Agreement, is able to explain the document to the individual.
- **Be patient.** It may take the person extra time to understand the conversation, comprehend questions, and respond. Do not predict responses, speak for the person, or complete the person's sentences, because often people with IDD "people please" in an effort to gain approval.
- **Use simple language** or language that is universally understood by people of all ages. Use concrete language instead of abstract language. For example, instead of "How do you feel?," use specific adjectives and ask if the person is happy, sad, upset, angry, etc. Remember to ask one question at a time and allow extra time for processing. If the topic is complicated, break it into smaller, understandable sections.
- **Adjust your method of communication** as necessary and be prepared to repeat yourself more than once in various ways. You can use visual cues such as gestures, diagrams, or demonstrations. Consider reframing sentences or topics in a variety of ways so an individual has multiple opportunities to comprehend.
- **Ask for clarification.** Some individuals' communication styles may be hard to understand. Do not pretend to understand if you do not. Ask the person to repeat themselves. Be patient, flexible, and supportive. If they have a friend or supporter with them, ask the individual if their friend or supporter can assist. Do not wholly rely on the friend or support.
- **Clear explanations or questions.** Be sure to phrase questions without suggesting desired or preferred responses, as some individuals may tell you what they think you want to hear.

Things to remember:

- It is not uncommon for a person with IDD to pretend to know or understand more than they do to gain approval or acceptance.
- Some individuals with IDD cannot read, count money, or tell time.
- Some individuals with IDD may be more likely to "people please" and may agree with anything that is said to or asked of them.

Individuals may have difficulty with: social interactions; verbal or nonverbal communications; sensory processing; cognitive processing, including rules, regulations, expectations; social behaviors (*i.e.*, interactions & cues); and following directions (note: this may not be defiance; they just may not be able to easily follow directions).

[160] Alex Cogan, LMSW, Manager of Public Policy & Advocacy, Communicating with Individuals with an Intellectual and / or Developmental Disability (IDD), The Arc of Texas (2021).

Judges' Guide to Mental Illnesses in the Courtroom

OBSERVATIONS THAT INDICATE A DEFENDANT MAY HAVE A MENTAL ILLNESS

When Mental Illness Seems to be a Factor, Consider:

Prevalence:

- **Serious Mental Illness:** 17% of adults booked into jails (31% of women; 15% of men)
- **Substance Use Disorder:** 65% of adults in U.S. corrections systems
- **Co-Occurring Mental Illness/Substance Use Disorder:** 72% of adults with serious mental illnesses in jail also had co-occurring substance use disorders

Contextualizing Observations: *While these categories of observation are provided to alert judges that an individual may have a mental illness that requires different judicial action and/or attention by a mental health professional, they are not definitive signs of mental illness. Certain contextual elements are important to remember:*

- Appearing in court is an anxiety-provoking experience for most people.
- Individuals may not be prepared to navigate a system as complex and demanding as the criminal justice system.
- Individuals may bring to court skills that have allowed them to survive in their communities but are poor fits for interacting with the court (e.g., toughness, argumentativeness, silence).

Categories of Observation: *Do you see something in one of the following areas that does not make sense in the court context?*	**Courtroom Observations:** *Examples of how behaviors in the observational areas can indicate that the individual may have a mental illness:*
Appearance: Age, hygiene, attire, ticks/twitches	• Looks older/younger than the listed date of birth • Wears inappropriate attire (e.g., multiple layers of clothing in the summertime) • Trembles or shakes, is unable to sit or stand still
Cognition: Understanding/appreciation of situation, memory, concentration	• Does not understand where s/he is • Seems confused or disoriented • Has gaps in memory of events • Answers questions inappropriately
Attitude: Cooperativeness, appropriate participation in court hearing	• Stays distant from attorney or bench • Acts belligerent or disrespectful • Is not attentive to court proceedings
Affect/Mood: Eye contact, outbursts of emotion/indifference	• Does not make eye contact with judge or court staff • Appears sad/depressed, or too high-spirited • Switches emotions abruptly • Seems indifferent to severity of proceedings
Speech: Pace, continuity, vocabulary *(Note: Can this be explained by discomfort with English language?)*	• Speaks too quickly or too slowly • Misses words • Uses vocabulary inconsistent with level of education • Stutters or has long pauses in speech
Thought Patterns and Logic: Rationality, tempo, grasp of reality	• Seems to respond to voices/visions • Expresses racing thoughts that may not be connected to each other • Expresses bizarre or unusual ideas

JUDICIAL INTERACTIONS

Before Interacting with a Defendant, Consider:

- **How the courtroom environment is affecting the defendant:**
  - Are there noises or distractions in the courtroom that are negatively affecting the defendant?
  - Is there a family member or defense attorney who can help calm the person?
- **Safety** for yourself, the court staff, and the individual.
- **What is being asked and said in open court** and how this may affect future proceedings.

While Interacting with a Defendant, Consider:

Courtroom Situations: *Examples of commonly-observed scenarios*	**Immediate Reponses:** *Recommendations for immediate situation management*

When a mental illness is affecting a defendant's courtroom participation	• Speak slowly and clearly
	• Avoid jargon
	• Explain what's happening
	• Write instructions down if dates/address are involved
	• Treat individual with the respect you would give other adults
	• If appropriate, use principles of Motivational Interviewing:*
	  • Express empathy
	  • Point out discrepancies between goals and current behavior
	  • Roll with resistance
	  • Support self-efficacy

Loss of Reality:** *When the defendant appears confused or disoriented*	• Ground defendant in the here and now**
Loss of Hope: *When the defendant appears sad, desperate*	• As appropriate, instill hope in positive end result • To extent possible, establish a personal connection
Loss of Control: *When the defendant appears angry, irritable*	• Listen, defuse, deflect • Ask defendant about why s/he is upset • Avoid threats and confrontation
Loss of Perspective: *When defendant appears anxious, panicky*	• Seek to understand • Reassure and calm defendant • Deflect concerns

When Taking Action, Consider:

- **Having defendant approach the bench:** Would this de-escalate the situation or create a safety risk?
- **Re-calling the case later in the session/calendar:** Could this help the defendant calm down?
- **Determining whether to proceed:** Is a fitness or competency evaluation appropriate?
- **Setting conditions of release:**
  - Does defendant have capacity to understand conditions?
  - Does defendant have ability to adhere to conditions?
  - What effect will these conditions have on regularity of treatment?
  - What effect will time in jail have on mental health, access to medication, benefits maintenance, etc.?
  - How will conditions/time in jail affect the defendant's access to a primary caregiver?
- **Requesting mental health information:** What exactly do you need to make the decision facing you?
- **Making a referral (to mental health services provider or other services):**
  - What are the goals of the referral?
  - How might the defendant's cultural background and linguistic needs impact access to services?
  - What are the expectations for reporting back to the court?

* Motivational Interviewing is a counseling approach initially developed by William R. Miller and Stephen Rollnick.
**The Loss of Reality, Hope, Control, and Perspective and the immediate responses are based on the LOSS Model developed by Paul Lilley.

AMERICAN PSYCHIATRIC ASSOCIATION FOUNDATION
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Chapter 7B: Mental Health Bonds

In 1993, the Texas Legislature added articles 16.22 and 17.032 to the Texas Code of Criminal Procedure to encourage diversion of defendants from jail and into mental health treatment when appropriate.[161] Analysis of the original bill noted that, at that time, "Texas Law ha[d] no codified procedure allowing the transfer of suspected mentally ill . . . defendants who are in jail. These individuals await[ed] trial without the benefit of any treatment." The bill analysis also stated that this creates "a grave injustice."[162]

Article 17.032 provides courts an opportunity to pursue Policy Statement #11 from The Criminal Justice/Mental Health Consensus Project of the Council of State Governments: Maximize the use of pretrial release options in appropriate cases of defendants with mental illness so that no person is detained pretrial solely for the lack of information or option to address the person's mental illness.[163]

QUICK SECTION OVERVIEW

Legislative Change

H.B. 1712 (88th Leg., R.S. (2023)), effective September 1, 2023, amended Texas Code of Criminal Procedure by adding Article 2.101, which directs that any signed order issued by a magistrate pertaining to a criminal matter must include the magistrate's name in **legible writing** along with the magistrate's signature on the order.

Legislative Background: According to the House Committee Bill Analysis Criminal Jurisprudence Committee Report: "in the 84th Regular Session, the legislature enacted H.B. 644, which required a magistrate's name to be written legibly on a search warrant, yet parties still report difficulties in finding the originating courts for some court orders. H.B. 1712 seeks to address this issue by requiring every court order to include the applicable magistrate's full name in legible handwriting, legible typewritten form, or legible stamp print." [164]

7.10 Personal Bond Under Article 17.032 of the Texas Code of Criminal Procedure

7.10.1 When A Personal Bond Is Required

Unless good cause is shown, the magistrate must release the person on personal bond if all of the

[161] W. Clay Abbott & Ryan Kellus Turner, The Municipal Judges Book 4-31 (7th ed., Texas Municipal Courts Education Center 2018).

[162] Texas Appleseed, Judicial Options: Personal Bond Statutes and Defendants with Mental Illness or Mental Retardation, 2006, quoting original bill language for articles 16.22 and 17.032, HOUSE COMM. ON CRIM. JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 1605, 73rd Leg. (1993), https://www.texasappleseed.org/sites/default/files/216-Monograph-JudicialOptions-PersonalBondStatutesandDefendantsMentalIllness.pdf.

[163] The Council of State Governments, The Criminal Justice/Mental Health Consensus Project 90 (2002), https://csgjusticecenter.org/wp-content/uploads/2013/03/consensus-project-full-report.pdf.

[164] H.B. 1712, Criminal Jurisprudence Committee Report, Bill Analysis (2023) https://capitol.texas.gov/tlodocs/88R/analysis/pdf/HB01712H.pdf.

following criteria are met:[165]

- the person is not charged with and has not been previously convicted of certain violent offenses:[166]
  - murder, capital murder [Tex. Penal Code §§ 19.02, 19.03];
  - aggravated robbery [Tex. Penal Code § 29.03];
  - kidnapping, aggravated kidnapping [Tex. Penal Code §§ 20.03, 20.04]
  - assault [Tex. Penal Code § 22.01(a)(1)] (but only if the offense involved family violence as defined by section 71.004 of the Texas Family Code);
  - aggravated assault [Tex. Penal Code § 22.02];
  - injury to a child, elderly, or disabled individual [Tex. Penal Code § 22.04];
  - indecency with a child [Tex. Penal Code § 21.11];
  - sexual assault aggravated sexual assault [Tex. Penal Code §§ 22.011, 22.021];[167]
  - continuous sexual abuse of young child [Tex. Penal Code § 21.02]; or
  - continuous trafficking of persons [Tex. Penal Code § 20A.03];
- a qualified professional[168] has examined the person under article 16.22;
- the qualified professional in an article 16.22 report:
  - concluded that the person has MI or ID;
  - concluded that the person is competent to stand trial;[169] and
  - recommended treatment or services, as applicable;
- after consulting with the LMHA or LIDDA, the magistrate determines that appropriate services are available through:

HHSC under section 534.053 or 534.103 of the Texas Health and Safety Code; or

through another mental health or ID services provider; and

- the magistrate finds that release on personal bond would reasonably ensure:
  - the person's appearance in court; and
  - the safety of the victim and the community.

Tex. Code Crim. Proc. art. 17.032(b).

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[165] This is the duty of the magistrate notwithstanding article 17.03(b) of the Texas Code of Criminal Procedure, a bond schedule, or a standing order. Take special note, however, of the 2021 legislative changes to article 17.03, which added more offenses for which personal bond is disallowed.

[166] Tex. Code Crim. Proc. art. 17.032(a). A "conviction" as used here includes imposition of sentence, placement on community supervision, or deferred adjudication or disposition. Tex. Code Crim. Proc. art. 17.032(e). Further, although significant overlap exists, this list of offenses is different than the list of offenses in article 42A .054 of the Texas Code of Criminal Procedure (formerly known as the "3g offenses"). Note that this list is also different from article 17.03, amended by S.B. 6, 87th Leg., 2d C.S. (2021). *See* legislative update and statutory comparison chart, page 118.

[167] A magistrate may not release on personal bond a defendant who, at the time of the commission of the charged offense, is civilly committed as a sexually violent predator under Chapter 841 of the Texas Health and Safety Code. Tex. Code Crim. Proc. art. 17.03(b-1).

[168] *See* section 7.2 of this Bench Book for an explanation of "qualified professional."

[169] Although article 17.032(b)(3)(A) refers to a person who is "nonetheless competent to stand trial," that language, when read together with article 16.22, does not require a finding of competency after a full evaluation under Chapter 46B. Rather, that phrase likely refers to the requirement in article 16.22(b-1)(2) that the qualified professional determine "whether there is clinical evidence to support a belief that the defendant may be incompetent to stand trial and should undergo a complete competency examination under Subchapter B, Chapter 46B." Presumably, the "competent to stand trial" requirement in article 17.032 simply means that the qualified professional found no such evidence to support a belief of incompetency.

Bond Terminology

"Personal Recognizance Bond." The Texas Code of Criminal Procedure defines a "personal bond" as a bail bond with no sureties. Tex. Code Crim. Proc. art. 17.04. Texas courts have recognized that although "personal recognizance bond" is a commonly used term, the relevant statutes use the term "personal bond." *Ex parte Castellano*, 321 S.W.3d 760, 765 (Tex. App.—Fort Worth 2010, no pet.) (citing Tex. Code Crim. Proc. arts. 17.03, .031, .032, .04); *see also Lee v. State*, 641 S.W.2d 533, 534 n.1 (Tex. Crim. App. 1982) ("There is no form of bail known as a 'personal recognizance bond' in Texas criminal practice.").

"Mental Health Bond." Note that personal bonds under article 17.032 of the Texas Code of Criminal Procedure are commonly referred to as "mental health bonds."

Reflection Point

Practitioners should examine the factors that influence release, bond amount, diversions, and alternatives to detention. For example, people with substantial financial resources may be able to pay for electronic leg monitoring (ELM) devices or have access to a car. It is important not to mistake inability to pay for noncompliance.

Pretrial Justice: Core Principles

Effective responses for people with mental illnesses at the pretrial stage build on many of the same principles as effective responses for any defendants. The following set of principles about pretrial practice is foundational to the essential elements.

- The practices should be fair and evidence-based.
- The practices should address two key goals: (1) protecting against the risk that the individual will fail to appear for scheduled court dates; and (2) protecting against risks to the safety of the community or to specific persons.
- Unnecessary pretrial detention should be minimized. Detention is detrimental to the individual who is detained, costly to the jurisdiction, and can be counter-productive in terms of its impact on future criminal behavior.
- To make sound decisions about release or detention, judicial officers need to have (1) reliable information about the potential risks posed by release of the individual; and (2) confidence that resources are available in the community to address or minimize the risks of nonappearance or danger to the community if the decision is made to release the individual.

From *Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement* by William. F. Dressel & Barry Mahoney, National Judicial College (2013).

Legislative Change

S.B. 2479 (88th Leg., R.S. (2023)), effective September 1, 2023, amended Texas Code of Criminal Procedure article 17.03 to reconcile the conflicts created regarding offenses that are eligible for personal bonds and offenses that allow for a mental health personal bond. This law resolves the conflict and allows for the clear resumption of the release of individuals who are charged with certain non-violent offenses and are eligible for a mental health personal bond.

Specifically, the law amends article 17.03 by adding 17.032 (*Release on Personal Bond of Certain Defendants with Mental Illness or Intellectual Disability*) to the list of statutes excluded from 17.03's prohibitions of release on personal bonds for certain offenses.

Meaning, that when releasing someone on a mental health bond, the list of "violent offenses" for which and individual is not eligible for personal bond is governed by the list in CCP art. 17.032.

7.10.2 What the Magistrate Must Consider when Setting Bail

The magistrate must consider:

- all the circumstances;
- a pretrial risk assessment, if applicable; and
- any other credible information provided by defense counsel or the prosecutor.

Tex. Code Crim. Proc. art. 17.032(b)(5).

When all of the above requirements are not met, ordinary bail provisions apply.

Reflection Point

Ask yourself, as a judge:

- Has release or evaluation by a mental health provider been overlooked by the arresting officer or jail staff?
- What assumptions have I made about this person and their family?
- Have I made assumptions about who is present in the courtroom, overlooking transportation or other concerns in favor of shortcuts and assumptions about whether the person will return to court if released?
- How might my assumptions (or the assumptions of those involved at prior intercept points) influence my decision-making?

7.11 Setting and Enforcing Bond Conditions

Waiver of Oath

The promise to appear is not an enforceable bond condition for certain individuals

Keep in mind that a legislative change in 2021 removed the requirement that certain individuals with mental illness or intellectual disabilities "swear under oath" that they will appear in court as part of their release on personal bond.

This oath is waived as the qualifying individuals, which include a defendant 1) who a magistrate has determined, using 16.22, has mental illness or is a person with ID, 2) released under 17.032, or 3) has been found incompetent to stand trial under 46B. Tex. Code Crim. Proc. art. 17.04(b).

The inclusion of the oath and promise to appear is inherently problematic for individuals released on bond with treatment conditions or competency restoration requirements, due to their mental illness or intellectual disability they may not comprehend the significance of their oath yet might face a contempt charge for failing to appear.

7.11.1 When the Magistrate Must Order Treatment as a Condition of Bond

Unless good cause is shown, if the above criteria are met for setting a personal bond under article 17.032 of the Texas Code of Criminal Procedure, the magistrate must require inpatient[170] or outpatient treatment or services[171] as a condition of bond as recommended by the qualified professional if:

- the person's MI or ID is chronic; or
- the person's ability to function independently will continue to deteriorate if the person does not receive the recommended treatment or services.

Tex. Code Crim. Proc. art. 17.032(c).

7.11.2 Other Conditions That May Be Imposed

The magistrate may impose other conditions to ensure:

- the person's appearance; and
- the safety of the victim and the community.

Tex. Code Crim. Proc. art. 17.032(d).

[170] Note that requiring inpatient treatment or services as a condition of bond may not be practicable unless the person is committed. State hospitals might not take voluntary patients because of the shortage of beds.

[171] When outpatient mental health treatment is ordered as a condition of bond, it is not a commitment. In Tarrant County, the LMHA will make referrals to programs or set up an appointment at one of the MHMR clinics for the defendant. Once there is a plan and the magistrate knows the defendant will be accepted into the program or clinic they have been referred to, the magistrate will give the defendant a PR bond and enter the specific programs, appointment date/time/location, etc. as conditions of bond. This is explained to the defendant by his or her attorney and by the magistrate. If the defendant violates the conditions, a warrant can be issued for their arrest.

Enforcing Bond Conditions

Some examples of strategies for enforcing bond conditions include:

- Requesting the appropriate personnel to contact the person to discuss noncompliance, such as the:
  - LMHA, LIDDA, or other mental health or IDD provider;
  - case manager; or
  - peace officer;
- ordering the person to appear in court to discuss noncompliance;
- revoking bond and ordering treatment to be provided in a place other than jail;
- revoking bond and ordering treatment to be provided in jail; or
- ordering an emergency detention under Chapter 573 of the Texas Health and Safety Code.

7.11.3 Reporting Bond Conditions to TCIC

As soon as practicable, but not later than the next day after the date a magistrate issues an order imposing a condition of bond on a defendant on bond for a violent offense, the magistrate shall notify the sheriff of the condition and provide to the sheriff a list of pertinent information (including the identifying information of any protected party, the date and the court order the conditions).

Then, the sheriff has one day after receiving notice to update this information on TCIC (the Texas Crime Information Center) and make a good faith effort to notify the protected person and/or the victim of the alleged offense that the defendant has been released on bond.

If a judge revokes a bond, modifies, or removes a condition of bond, or disposes of the underlying criminal charges, the court must notify the sheriff and the sheriff must enter those changes into TCIC. The clerk of the court must also send a copy of the order to the person whom the condition of bond was intended to protect.

Tex. Code Crim. Proc. art. 17.50.

Practical Example

The 988 Suicide & Crisis Lifeline

The 988 Suicide and Crisis Lifeline a national network of local crisis centers that provides free and confidential emotional support to people in suicidal crisis or emotional distress 24 hours a day, 7 days a week in the United States. By calling or texting 988, or chatting online at 988lifeline.org, people are connected with trained crisis counselors who can provide support in the moment, and if appropriate, connect with them resources in their community.

Additional Resources available here:

TEXAS SUICIDE PREVENTION RESOURCE LIBRARY

SUICIDE PREVENTION BEST PRACTICE TRAININGS

LMHA/LBHA Required Services for Incarcerated Persons

It is a common misunderstanding that LMHAs/LBHAs are required to provide mental health services to individuals in jail facilities. Owners/operators of facilities are responsible for providing medical, mental, and dental services to inmates. Some counties have contracted with their LMHA/LBHA to provide additional services, but if there is no such agreement, LMHAs/LBHAs are only required to provide the following:

Crisis Services

- The LMHA/LBHA must have a crisis screening and response system in operation 24/7 that is available to individuals throughout its contracted service delivery area. The telephone system to access the crisis screening and response system must include a toll-free crisis hotline number. Calls to the crisis hotline are answered by a hotline staff member who is trained in mental health community services.
- When the crisis hotline is called, the crisis hotline staff member provides a crisis screening, and determines if the crisis requires deployment of the LMHA/LBHA Mobile Crisis Outreach Team (MCOT). If the crisis is determined to be emergent or urgent, at least one trained MCOT member shall respond to the site of the crisis situation and conduct a crisis assessment. After the crisis assessment is conducted, the LMHA/LBHA will make a recommendation about the treatment necessary to resolve the crisis.
- Nationally, the 988 Suicide & Crisis Lifeline launched in July 2022, which is an easy to remember number that connects citizens to their local crisis hotline. If the local hotline is not available, the number will connect the person to immediate, live help.

16.22 Interviews and Collection of Other Information

- The LMHA/LBHA shall interview the defendant and collect other information regarding whether the defendant has a MI or ID and provide to the magistrate a written report of the interview and other information collected under article 16.22 of the Texas Code of Criminal Procedure.

17.032 Recommendations

- The LMHA/LBHA will consult with the magistrate to help determine if there are appropriate and available services for the defendant.

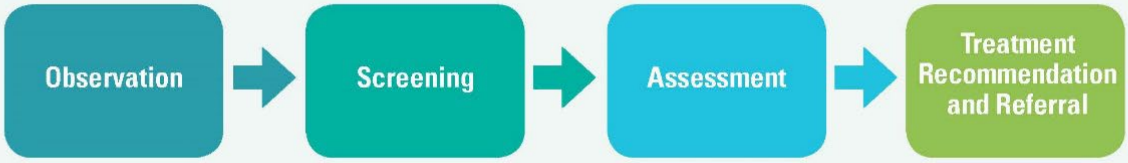
Judges Psychiatrists Leadership Initiative

Practical Considerations Related to Release and Sentencing for Defendants Who Have Behavioral Health Needs

A JUDICIAL BENCH CARD

Determining Behavioral Health Treatment Needs

Judges can benefit from information on treatment needs gleaned through four steps:



- Make **observations** from the bench based on several categories—the defendants' appearance, cognition, thought patterns/processes, attitudes, speech, facial expressions—which may point to the presence of a behavioral health need.
- Refer people who may have a mental illness or substance use-related need for a formal **screening** conducted by a person trained to use a validated screening instrument.
- Have a trained clinician conduct full **assessments** of people who screen positive for a mental illness or substance use-related need in order to develop a diagnosis and treatment recommendations.
- Receive **recommendations for treatment and referrals** from the clinician that are tailored to the needs of the defendant.

Practical Considerations for Judicial Decision-Making Related to Conditions of Release and Sentencing for Defendants Who Have Behavioral Health Needs

Collaborate with court staff, behavioral health treatment providers, defendants, and their family members.

DO

- Allow defendants to have a voice in treatment decisions, when possible
- Gather information from defendants' support systems to inform decisions about release and sentencing
- Ask defendants what has worked for them in the past
- Consider calling complicated or time-consuming cases for people with known behavioral health needs at the beginning or end of the docket to minimize stress for defendants and court staff
- Call defendants to the bench to discuss sensitive personal information quietly, after first alerting your bailiff and court staff of your plan to alleviate their security concerns

DON'T

- Question a defendant about sensitive behavioral health-related information in open court when the courtroom is filled with other litigants and attorneys

Engage with the defendant to promote treatment participation and compliance.

DO

- Set a calm and consistent tone in your courtroom, even when disruptive behavior occurs
- Use inclusive and respectful language on the bench
- Consider engaging peer specialists to assist with engagement and treatment connection

DON'T

- Use language on the bench that could be perceived as threatening, confrontational, or disrespectful
- Use legal jargon that may not be understood by the defendant

American Psychiatric Association Foundation | Justice Center, The Council of State Governments, Collaborative Approaches to Public Safety

Use reliable information provided by qualified professionals, as well as defendants and their support systems to inform decision making.

DO
- Set a reasonable deadline for clinicians to submit treatment recommendations to the court that ensures sufficient time for their review and clarification (if needed) with minimal or no disruption to the expected case processing schedule
- Incorporate assessments of criminogenic, mental health, and substance use-related needs prior to setting release conditions and/or sentencing
- Consider what services are available in the community that match the specific needs of the defendant

DON'T
- Rely on instinct alone to guide decision making

Individualize release and sentencing decisions to the defendant's unique needs and the resources that are available and accessible in the jurisdiction of residence.

DO
- Identify defendants' specific needs prior to setting treatment-related conditions of release or making sentencing decisions
- Maximize potential for success by setting treatment conditions that are relevant, reasonable, and achievable

DON'T
- Set conditions that are difficult for defendants to achieve due to lack of resources, treatment availability, health insurance coverage, or other barriers
- Adopt a "one-size-fits-all" approach to decision making

Adapt treatment and supervision requirements as needed based on changing legal circumstances and clinical recommendations.

DO
- Set treatment conditions and sentencing parameters that are commensurate with the duration and severity of possible jail/prison case dispositions and community supervision expectations
- Understand that behavioral health treatment is a dynamic process, rarely perfect, and temporary setbacks or relapses are part of the stabilization and recovery process

DON'T
- Overcomplicate conditions or mandate the defendant attend many appointments in a short timeframe, which may lead to confusion or non-compliance from the defendant
- Assume that a recommended change in treatment means that a defendant isn't being compliant

Suggested Considerations and Tips at Judicial Points of Contact

First appearance/arraignment/bail setting:

Considerations:
- Typically, this is the judicial point of contact where the least background information about the defendant is available.
- During first contact, the defendant may be under the influence of substances, withdrawing from substances, psychiatrically unstable, and/or under significant stress due to a recent arrest.

Tips:
- Review initial screening information, if available.
- Consider ordering a behavioral health evaluation, if behavioral health needs are suspected.
- After first appearance, attempt to access information about prior treatment.
- After first appearance, seek more information related to jail housing, observation, and possibly the results of a pre-trial risk assessment.
- After first appearance, utilize court staff and/or clinicians to contact and involve members of the defendant's family and support system.
- Be creative and flexible with condition setting during this pre-adjudication phase.

Sentencing/Update/Hearing Appearances:

Considerations:
- You may be able to access treatment progress and compliance information and updates from community-based treatment providers if a behavioral health evaluation was conducted inside the correctional facility or has been conducted recently by court- or community-based treatment personnel.

Tips:
- Manage the logistics of the transition to mandated behavioral health treatment in the community to ensure that the defendant is successfully engaged in services.
- Rely on trained clinicians to provide assessment information.
- Consider input from clinicians to guide decision making related to treatment.

AMERICAN PSYCHIATRIC ASSOCIATION FOUNDATION
JUSTICE CENTER
The Council of State Governments
Collaborative Approaches to Public Safety

7.12 Risk Assessments

7.12.1 What is a Risk Assessment

Risk assessments use an actuarial evaluation to guide decision making at various points across the criminal justice continuum by approximating a person's likelihood of reoffending and determining what individual criminogenic needs must be addressed to reduce that likelihood.[172]

"A Risk assessment is used across various stages of the legal process to assess an individual's risk of reoffending (or noncompliance with justice requirements) and identify areas for intervention."[173]

Risk assessments take various forms and require differing sets of information and systematically quantify an individual's risk of reoffending. These quantified "risk scores" help practitioners make operational decisions regarding the classification, management, and treatment of justice-involved populations.[174]

7.12.2 What Does a Risk Assessment Measure?

General criminogenic risk assessment tools consist of questions that are designed to ascertain someone's history of criminal behavior, attitudes and personality, and life circumstances.[175]

It is important to emphasize that while risk assessment tools assess for risk of reoffence, they cannot predict with certainty that someone will or will not reoffend. Labeling someone as "high-risk" to reoffend does not mean that individual will definitely reoffend; rather, it means that a large number of people sharing these characteristics have reoffended in the past.[176]

Risk assessments that assess for risk of reoffending should be differentiated from specialized clinical risk assessments that measure for risk of specific outcomes, such as violence, sexual offending, and intimate partner violence. These risk assessments are conducted by trained and licensed clinicians.

7.12.3 Criminogenic Factors: Risks and Needs

Criminogenic factors are risks and needs that research has demonstrated increase an individual's likelihood of re-offense. There are eight major risk and need factors, and each factor is associated with both a static risk and a changeable need that should be addressed through treatment, services, and targeted programming.

7.12.3.1 Eight Criminogenic Risk Factors

There are eight central risk factors (i.e., the Central Eight) that increase one's risk for criminal behavior (see Andrews & Bonta, 2016). These risk factors include: (1) history of antisocial behavior, (2) antisocial personality, (3) antisocial attitudes, (4) antisocial peers, (5) family/marital problems, (6) school/employment difficulties, (7) absence of positive leisure/recreational activities, and (8) substance abuse. Additionally, the first four of these risk factors (i.e., the Big Four) are the most impactful risk factors for criminal involvement."[177]

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[172] CSG Justice Center Staff, *In Brief: Understanding Risk and Needs Assessment*, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (Jan. 13, 2017), https://csgjusticecenter.org/2017/01/13/in-brief-understanding-risk-and-needs-assessment/#:~:text=Risk%20and%20needs%20assessments%20use%20an%20actuarial%20evaluation,criminal%20behavior%2C%20attitudes%20and%20personality%2C%20and%20life%20circumstance [hereinafter *CSG Risk Assessment].*

[173] What is Risk Assessment, *Public Safety Risk Assessment Clearinghouse*, THE BUREAU OF JUSTICE ASSISTANCE, https://bja.ojp.gov/program/psrac/basics/what-is-risk-assessment (last visited May 14, 2021) [hereinafter *BJA Risk Assessment*].

[174] *Id.*

[175] *CSG Risk Assessment.*

[176] *BJA Risk Assessment.*

[177] JAMES BONTA ET AL., THE PSYCHOLOGY OF CRIMINAL CONDUCT (6th ed. 2016).

Central Eight Risk Factors for Criminal Recidivism	
D. A. ANDREWS & JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT 58-60 (5th ed. 2010) (1994).	
Risk Factor	**Need**
History of Antisocial Behavior	Build alternative behaviors and self-efficacy beliefs
Antisocial Personality Pattern	Build problem-solving, anger management, and self-control skills
Antisocial Cognition	Build and practice less risky thinking to reduce antisocial thinking and feeling
Antisocial Associates	Reduce association with procriminal others and enhance association with anticriminal others
Family and/or Marital Discord	Reduce conflict, build positive relationships, enhance monitoring and supervision
Poor School and/or Work Performance	Enhance performance, involvement, and rewards and satisfactions
Few Leisure or Recreational Activities (pro-social activities)	Enhance outside involvement
Substance Abuse	Reduce substance use

7.12.3.1.a Static versus Dynamic Factors

Static factors are past activities or events that cannot be changed. Examples of static factors include age at the time of first arrest, criminal history, residing in a single-parent home, and so forth.

Dynamic factors are present conditions that can be changed or addressed by treatment, services, and targeted programming. Examples of dynamic factors can include anti-social behavior or attitudes, lack of literacy or job skills, lack of leisure or recreational activities, or other expressed behaviors, values, and attitudes that are correlated with criminal activity.

7.12.3.1.b Risk-Need-Responsivity Model

The risk-need-responsivity (RNR) model is a theoretical framework developed in the late 1980s and formally introduced in 1990 that underlies offender programming in prisons and in community correctional settings. The RNR model can assist clinicians, case managers, and corrections professionals in identifying and prioritizing individuals for the appropriate treatments to reduce their likelihood of re-offense. The three principles that underlie the RNR model—risk, needs, and responsivity—guide the assessment and treatment of individuals with criminal justice involvement. The risk principle matches the intensity of individuals' treatment to their level of risk for re-offending; the need principle targets criminogenic needs; and the responsivity principle addresses individuals' obstacles to learning (learning styles, reading abilities, cognitive impairments, and motivation) in the design of treatment interventions. Responsivity is addressed through two routes: general and specific. General responsivity involves addressing pro-criminal attitudes and use of cognitive behavioral intervention strategies, while specific responsivity involves "use of styles and modes of treatment that are matched with the client need and learning styles." Both approaches to responsivity have been found effective. Community providers and criminal justice professionals may address the same Central Eight risk and need factors in their interventions, treatment, and supervision plans, which is why the RNR model is effective across

both systems. For example, both community providers and criminal justice professionals may address antisocial cognition through cognitive behavioral interventions.[178]

7.12.3.2 Factors That Do Not Heighten the Risk of Recidivism

Equally important is being aware of the factors not included in the list of criminogenic factors—which means, according to the research literature, these factors do not generally predict a high risk of returning to crime:

- Low self-esteem
- Mental-health issues
- Low education status
- Lack of employment options

7.12.3.3 Does having a Mental Illness Automatically Increase Risk?

No, not according to June 2020 publication out of Texas Tech University: *A Comparison of Criminogenic Risk Factors and Psychiatric Symptomatology Between Psychiatric Inpatients with and without Criminal Justice Involvement*.[179] As their abstract explains:

> People have often assumed persons with mental illness become criminal justice-involved because of symptoms associated with their illness or lack of mental health treatment; however, criminal risk factors (the Big Four and Central Eight), not severity of psychiatric symptomatology, most accurately classified psychiatric inpatients with and without a history of criminal justice involvement. Thus, psychotherapeutic interventions should target criminal risk factors, such as antisocial personality, attitudes toward criminal associates, and job-seeking behavior. In other words, to be most successful, when treating criminal justice-involved persons with mental illness, practitioners should assess and treat not only symptoms associated with their mental illness, but their criminal risk as well.[180]

In other words, the Big Four and Central Eight factors, not mental illness or the severity there of, are more closely aligned with risk of recidivism. For individuals with mental illness, research indicates that treatment alone does not reduce recidivism, and conversely, interventions that address only criminogenic risk and need factors do not improve behavioral health outcomes.[181]

7.12.4 Using Risk Assessments

7.12.4.1 Importance of Using Risk Assessments

Risk assessments are data-driven decision-making support tools that systematically synthesize information about justice populations and support more efficient distribution of limited justice resources. Criminal justice systems lack the resources to provide intense supervision and treatment to everyone who comes into contact with the justice system and must instead decide on whom to target available resources. Risk assessments allow practitioners to strategically target programming for

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[178] SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, PRINCIPLES OF COMMUNITY-BASED BEHAVIORAL HEALTH SERVICES FOR JUSTICE-INVOLVED INDIVIDUALS: A RESEARCH-BASED GUIDE (2019), https://store.samhsa.gov/sites/default/files/d7/priv/sma19-5097.pdf.

[179] Angelea Balanos et al., *A Comparison of Criminogenic Risk Factors and Psychiatric Symptomatology Between Psychiatric Inpatients with and without Criminal Justice Involvement*, 44 L & HUM. BEHAV. 336 (2020), https://www.researchgate.net/profile/Sean-Mitchell-10/publication/341919392_A_comparison_of_criminogenic_risk_factors_and_psychiatric_symptomatology_between_psychiatric_inpatients_with_and_without_criminal_justice_involvement/links/5edd3e80299bf1c67d504d5d/A-comparison-of-criminogenic-risk-factors-and-psychiatric-symptomatology-between-psychiatric-inpatients-with-and-without-criminal-justice-involvement.pdf.

[180] *Id*.

[181] Jennifer Skeem et al., *Offenders with Mental Illness Have Criminogenic Needs, too: Toward Recidivism Reduction*, 38 L. & HUM. BEHAV. 212 (2014).

individuals based on their risks and needs. It is important to note that research has shown that individuals at low risk of reoffending can be successfully managed with minimum or no supervision and *may even be harmed by more intensive monitoring and treatment*. Programming should focus on those with the greatest risks and needs. Ultimately, the importance of using actuarial risk assessment tools across criminal justice settings and stages is defined by improved consistency, efficiency, and effectiveness.[182]

7.12.4.1.a Consistency

Risk assessments improve the consistency of data informing criminal justice decisions and the processes by which such decisions are made. In this way, decisions guided by risk assessments can be viewed as more defensible and credible than more subjective and less transparent decision-making processes.

7.12.4.1.b Efficiency

Data-driven risk assessments can help practitioners make more efficient use of limited justice resources. Actuarial risk assessments consistently emerge as superior to professional judgment in predicting reoffending risk, yielding more efficient decision-making heuristics.

7.12.4.1.c Effectiveness

Detailed risk assessments using empirically valid tools can help practitioners more effectively improve criminal justice outcomes (e.g., reduce reoffending, improve compliance). Risk assessment scores also provide a richer picture of individual variation in program effectiveness, helping practitioners determine what works for whom and why.[183]

7.12.4.2 Uses of a Risk Assessment Instrument in the Sequential Intercept Model

Risk assessments can be administered at any time during a person's contact with the criminal justice system—during the pretrial period, while on probation, after admission to a correctional facility, prior to release, and during post-release supervision.

Risk assessments have been shown to be more reliable than a professional's individual judgment. They should be used at multiple decision points to direct the supervision intensity, case planning and management, programming requirements, and treatment referrals.[184] While risk assessment should not be the sole factor in making these decisions, it is currently the best available method for ensuring that research-based data helps inform the decision-making process.[185]

Once risk and needs are properly and timely identified, criminal justice agencies can then be more effective in ensuring public safety through the appropriate management and rehabilitative programming of justice-involved individuals." [186]

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[182] *BJA Risk Assessment*.

[183] *Id*.

[184] *CSG Risk Assessment* (citing Christopher Lowenkamp et al., *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders,* TOPICS IN COMMUNITY CORRECTIONS 3 (2004)); Edward Latessa, *The Challenge of Change: Correctional Programs Analysis and Policy Framework and Evidence-Based Practices* 3 CRIMINOLOGY & PUBLIC POL'Y, 547 (2004)).

[185] *CSG Risk Assessment*.

[186] *BJA Risk Assessment*.

Texas Risk Assessment System (TRAS)

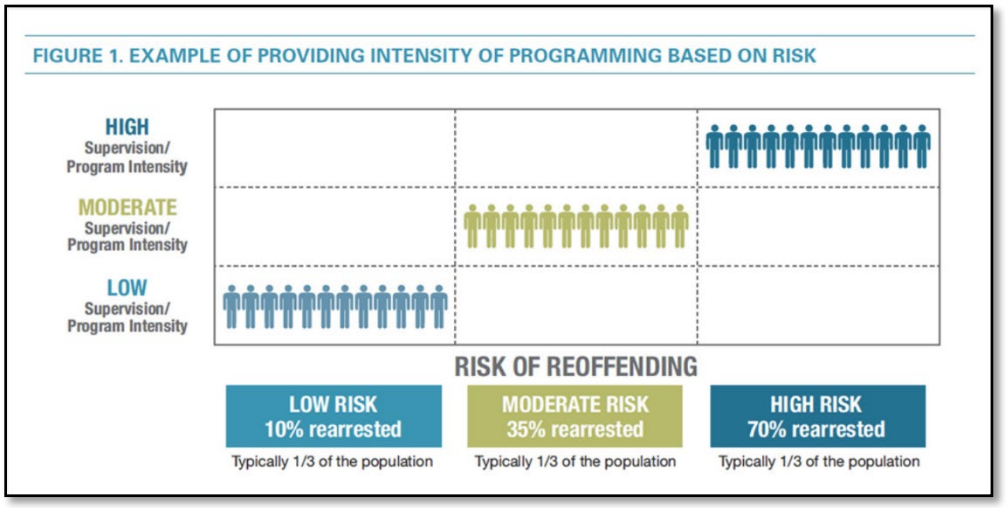
The Texas Department of Criminal Justice, in collaboration with local CSCDs and other criminal justice stakeholders, developed and validated the Texas Risk Assessment System (TRAS), a dynamic risk assessment consistent with current evidence-based research on the predictors of criminality and recidivism. The TRAS contains both screening and assessment components that can be applied to offenders on any form of community supervision, along with versions specific to the prison, parole, and reentry populations in Texas. The validated TRAS instrument replaced the community supervision version of the Wisconsin Risk/Needs Assessment and the Strategies for Case Supervision case management instrument previously used in Texas.[187]

When selecting a risk assessment, be sure that the assessment measures the data specific to that point in the case. Which assessment to use will likely depend on the intercept in which your county is administering the assessment.

The cornerstone of usable risk assessment instruments is reliability and validity. Validated and reliable risk assessment instruments have been verified to ensure practitioners get the same risk score on the same client (reliability), and that it is truly reflect risk when outcome is examined (predictive validity).[188] The U.S. Department of Justice's Bureau of Justice Assistance has created a website to assist agencies in selecting a validated and reliable risk assessment instrument that can be accessed at: Tool Selector | Bureau of Justice Assistance (ojp.gov).

7.12.4.2.a Intercept 2 – Initial Detention / Court Hearings

A pretrial risk assessment instrument can be used to help inform decisions about release pending adjudication or jail detention, as well as help guide decisions on pretrial release conditions.[189] A pretrial risk assessment instrument should measure two risks for the time before trial: (i) risk of failing to appear in court, and (ii) and risk of being arrested for a new crime.[190]



[187] *Texas Dept. of Crim. Justice,* TEXAS PROGRESSIVE INTERVENTIONS AND SANCTIONS BENCH MANUAL 2 (2020) https://www.tdcj.texas.gov/documents/cjad/CJAD_Bench_Manual.pdf.

[188] *National Drug Court Institute,* DRUG COURT PRACTIOTNER FACT SHEET (2015), https://www.ndci.org/wp-content/uploads/Fact%20Sheet%20Risk%20Assessment.pdf, (last visited July 15, 2021).

[189] *BJA Risk Assessment*.

[190] Pretrial, *Public Safety Risk Assessment Clearinghouse*, THE BUREAU OF JUSTICE ASSISTANCE, https://bja.ojp.gov/program/psrac/implementation/structured-decision-making/pretrial (last visited August 25, 2021).

7.12.4.2.b Intercepts 3, 4, and 5 – Sentencing, Re-Entry, and Community Corrections

Risk assessment instruments can be used at sentencing to inform decisions on whether a person can be diverted safely to a specialized program, specialty court, community supervision, or options other than incarceration. The risk assessment instrument should measure for risk to reoffend in the community and possible risk and need factors that can be addressed with services and/or targeted programming. [191]

Risk assessments are also used by correctional departments to determine the appropriate programming for incarcerated individuals,"[192] and they can also be used at re-entry. A risk assessment instrument focused on transitions from prison can be used to reduce the risk of re-offense for those returning to the community. The tool is also guided by the risk and needs principle and highlights specific intervention pathways that address criminogenic needs dependent on the level of risk a person has. The tool should be able to assist in the creation of case plans and transition plans that inform treatment matching to level of criminogenic need. [193]

Risk assessment instruments can also support transitions from jail with the same goal to reduce the risk to reoffence for those returning to the community. Risk assessments instruments for jail populations establish level of risk to reoffend and then further assess people in target populations to guide reentry interventions. The tool can also be used to inform treatment matching to level of criminogenic need.[194]

Probation and parole departments should use risk assessments to set the level of supervision, including home confinement and electronic monitoring. Further, risk assessments can be used by case managers and treatment providers to identify needs, deliver evidence-based treatment and interventions, and link individuals to appropriate services as part of re-entry and supervision plans.[195]

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[191] Diversion, *Public Safety Risk Assessment Clearinghouse*, THE BUREAU OF JUSTICE ASSISTANCE, https://bja.ojp.gov/program/psrac/implementation/structured-decision-making/diversion (last visited July 6, 2021).

[192] *BJA Risk Assessment*.

[193] Transition from Prison, *Public Safety Risk Assessment Clearinghouse,* THE BUREAU OF JUSTICE ASSISTANCE, https://bja.ojp.gov/program/psrac/implementation/structured-decision-making/transition-prison (last visited July 6, 2021).

[194] *Id*.

[195] *BJA Risk Assessment*.

NIC National Institute of Corrections

CCCN Community Corrections Collaborative Network

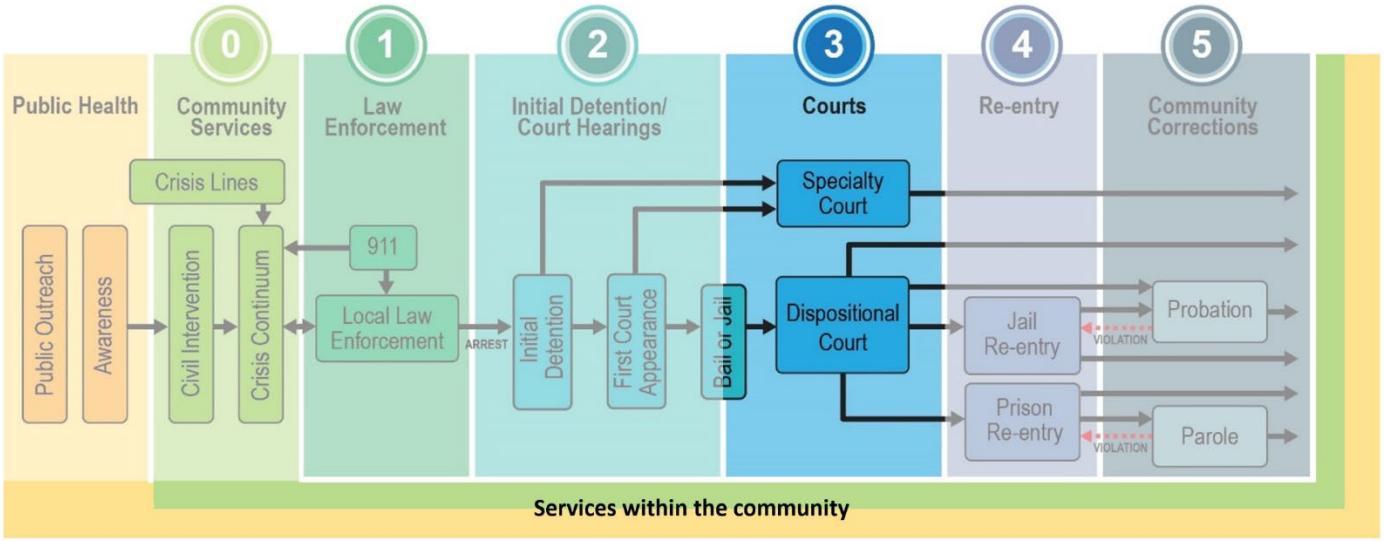
myths & facts

Using Risk and Need Assessments to Enhance Outcomes and Reduce Disparities in the Criminal Justice System

	Myths...	...and facts
1	Professional judgment is more accurate than risk and need assessments when predicting the risk to recidivate.	Actuarial risk and need assessments have consistently been found to be more accurate than professional judgment alone in risk prediction.
2	Risk and need assessments exacerbate racial bias within the criminal justice system.	Risk and need assessments can reduce racial bias in criminal justice decisions if objectively used as designed and are specifically validated in the jurisdictions where they are applied.
3	Eliminating risk and need assessments would help to eliminate racial bias in criminal justice decision making.	Eliminating actuarial risk and need assessments would decrease accuracy in risk prediction and increase bias by relying solely on professional judgment.
4	The use of risk and need assessments increases the likelihood that justice-involved individuals are incarcerated.	Risk and need assessments used to make front-end decisions are typically used to identify and safely divert individuals who are more appropriate for supervision and treatment in the community.
5	Risk and need assessments should be used to make sentencing decisions more punitive.	Actuarial risk and need assessments were designed to predict risk, identify areas of criminogenic need, and guide decisions for treatment, not for punitive purposes.
	The bottom line:	Risk and need assessments currently provide the most accurate, objective prediction of the risk to recidivate. While risk and need assessments do not predict with perfect accuracy, they guide practitioners in the field towards the most accurate and equitable decisions available for safely managing justice-involved individuals.

The Community Corrections Collaborative Network (CCCN) is comprised of the leading associations representing 90,000-plus probation, parole, pretrial, and treatment professionals around the country, including the American Probation and Parole Association (APPA), the Association of Paroling Authorities International (APAI), the Federal Probation and Pretrial Officers Association (FPPOA), the International Community Corrections Association (ICCA), the National Association of Drug Court Professionals (NADCP), the National Association of Pretrial Services Agencies (NAPSA), and the National Association of Probation Executives (NAPE). View our position paper, "Using Risk and Need Assessments to Enhance Outcome and Reduce Disparities in the Criminal Justice System" at nicic.gov/library/032859.

Chapter 8: Intercept 3—Courts



8.0 Intercept 3: Courts

Step three is historically where the majority of criminal justice responses to mental health issues occur. At this intercept, the legal, practical, and health consequences for individuals with MI and ID are detrimental and life-changing. As a result, judicial support of community-based mental health responses and court-based interventions such as specialty courts and dockets are critical.

QUICK SECTION OVERVIEW

8.1 Court-ordered Mental Health Services When a Criminal Case Is Pending

8.1.1 Options after the Trial Court Receives the Article 16.22 Report from the Magistrate

After the trial court receives from the magistrate the applicable expert's written report under article 16.22(b-1),[196] regardless of whether the written report indicates MI or ID, the trial court may, as applicable:

- continue criminal proceedings against the defendant, including considering a personal bond (*See* 16.22(c)(1));
- resume or initiate competency proceedings if required by Chapter 46B of the Texas Code of Criminal Procedure (*see* 16.22(c)(2) and Intercept 3, section 7 of this Bench Book);
- refer the person to an appropriate specialty court (*see* 16.22(c)(4) and Intercept 3, section 2 of this Bench Book);
- consider the written report during the punishment phase (*see* 16.22(c)(3));
- consider the written report as part of the presentence investigation report (*see* 16.22(c)(3));
- consider the written report in setting conditions of community supervision, including deferred adjudication community supervision (*see* article 42A.506 of the Texas Code of Criminal Procedure authorizing outpatient or inpatient mental health or ID treatment as a condition of community supervision under certain circumstances and 16.22(c)(3)); or
- if the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person, release the defendant on bail while charges against the defendant remain pending and enter an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services under Chapter 574 of the Texas Health and Safety Code. (*See* 16.22(c)(5)).

Tex. Code Crim. Proc. art. 16.22(c).

8.1.2 Diversion from the Criminal Justice System to Court-ordered Mental Health Services

If the court enters an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services[197] under Chapter 574 of the Texas Health and Safety Code, an attorney representing the state must file the application for court-ordered outpatient mental health services. Tex. Code Crim. Proc. art. 16.22(c-1).

On the motion of an attorney representing the state, if the court determines the defendant has complied with appropriate court-ordered outpatient treatment, the court may dismiss the charges pending against the defendant and discharge the defendant. Tex. Code Crim. Proc. art. 16.22(c-2).

However, on the motion of an attorney representing the state, if the court determines the defendant has failed to comply with appropriate court-ordered outpatient treatment, the court must proceed with the trial of the offense or as otherwise applicable under Chapter 16 of the Texas Code of Criminal Procedure. Tex. Code Crim. Proc. art. 16.22(c-3).

If the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person, the trial court can release the defendant on bail and enter an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services without dismissing the

[196] The trial court may also have elected to use the results of a previous determination as described by article 16.22(a)(2).

[197] See This book, section 5.4.3 on Court Ordered Mental Health Services, and the blue box on AOT Courts. TREATMENT ADVOCACY CENTER, TEXAS AOT PRACTITIONER'S GUIDE 37 (2022) https://www.treatmentadvocacycenter.org/storage/tac%20texas%20aot%20guide_final_6-2022.pdf.

underlying criminal charge. If the defendant complies with the court-ordered treatment, the court may dismiss the charge (on the motion of the prosecutor), thus diverting the individual from the criminal justice system. Tex. Code Crim. Proc. art. 16.22(c-5). In counties that do not have a statutory probate court, it is possible for some courts, for example a court at law, to have both a criminal docket and a probate docket. Accordingly, that court can consider an Article 16.22(c-5) diversion without involving a second court.

8.1.3 Article 16.22 Does Not Prevent Release or a Competency Examination

Article 16.22 does not prevent the applicable court before, during, or after the collection of information regarding the defendant from:

- releasing a defendant who has a mental illness or is a person with IDD from custody on personal or surety bond, including imposing as a condition of release that the defendant submit to an examination or other assessment; or
- ordering an examination regarding the defendant's competency to stand trial.

Tex. Code Crim. Proc. art. 16.22(d).

Reflection Point

Ask yourself, as a judge:

- Has any party sought a pretrial diversion in favor of outpatient treatment in the community?
- Have past experiences created obstacles to accessing services by the person in any system including education or probation?
- Are there financial, transportation, communication issues that are affecting this person's ability to access services?
- Has any party filed a motion for competency examination?
- Have I helped to destigmatize mental health and intellectual and developmental disability?
- Have I made assumptions about who is present in the courtroom, overlooking transportation or other concerns in favor of shortcuts and assumptions about whether this person has a family that cares about their well-being?
- What assumptions am I making without asking this person who are the important people in their life and who could help them?
- Have I made assumptions based on the social media accounts, pictures, or posts of this person? How might my assumptions influence my decision-making?
- How have I challenged any assumptions I might have made based on profession or background?

Collaboration Is Key

Because, with limited exceptions, only a court with probate jurisdiction may hear proceedings for court-ordered mental health services, collaboration between those courts and courts with criminal-matter jurisdiction is critical to ensuring that civil commitment may effectively serve as a diversionary tool. It is also essential for the local courts to collaborate with the LMHA/LBHA and LIDDA to assure that services are available.

8.2 Specialty Courts

Specialty courts focus on treating the underlying issues that may be causing criminal behavior. Mental health courts are a type of specialty court. They combine accountability through judicial supervision with treatment and other support services to prevent recidivism and improve the lives of their participants.

Reflection Point

Consider whether financial resources impact which individuals are provided with opportunities to participate in diversion programs or services.

People with mental illness and intellectual and developmental disabilities (IDD) cycle repeatedly through the courts but often lack the tools to address their needs or access adequate treatment. Judges can use a Mental Health Court (MHC) program to connect people with appropriate treatment, community resources, and ongoing judicial monitoring to address these issues. MHC programs can be used in various court settings, including, but not limited to, criminal, civil, and family law. MHC programs can also have varying goals, target participants, program conditions, treatment options, and can address mental health challenges in criminal courts either pre- or post-adjudication.

8.2.1 Statutory Requirements of a Mental Health Court Program

A "mental health court program" has the following essential characteristics:

- integrates and provides access to MI and ID treatment services in processing cases in the court system;
- uses a non-adversarial approach involving prosecutors and defense attorneys to (1) promote public safety and (2) protect the due process rights of program participants;
- promotes early identification and prompt placement of eligible participants in the program;
- requires ongoing judicial interaction with program participants;
- diverts people with MI or ID to needed services in lieu of prosecution;
- monitors and evaluates program goals and effectiveness;
- facilitates continuing interdisciplinary education on effective program planning, implementation, and operations; and
- develops partnerships with public agencies and community organizations, including LMHAs/LBHAs.

Tex. Gov't Code § 125.001.

Counties with a population of more than 200,000 must establish a mental health court program under section 125.002 of the Texas Government Code. The commissioners court must direct the judge, magistrate, or coordinator to provide to OCA: (1) written notice of the program; (2) any resolution or other official declaration under which the program was established; and (3) a copy of the applicable strategic plan that incorporates duties related to supervision that will be required under the program. Tex. Gov't Code § 125.005(a).

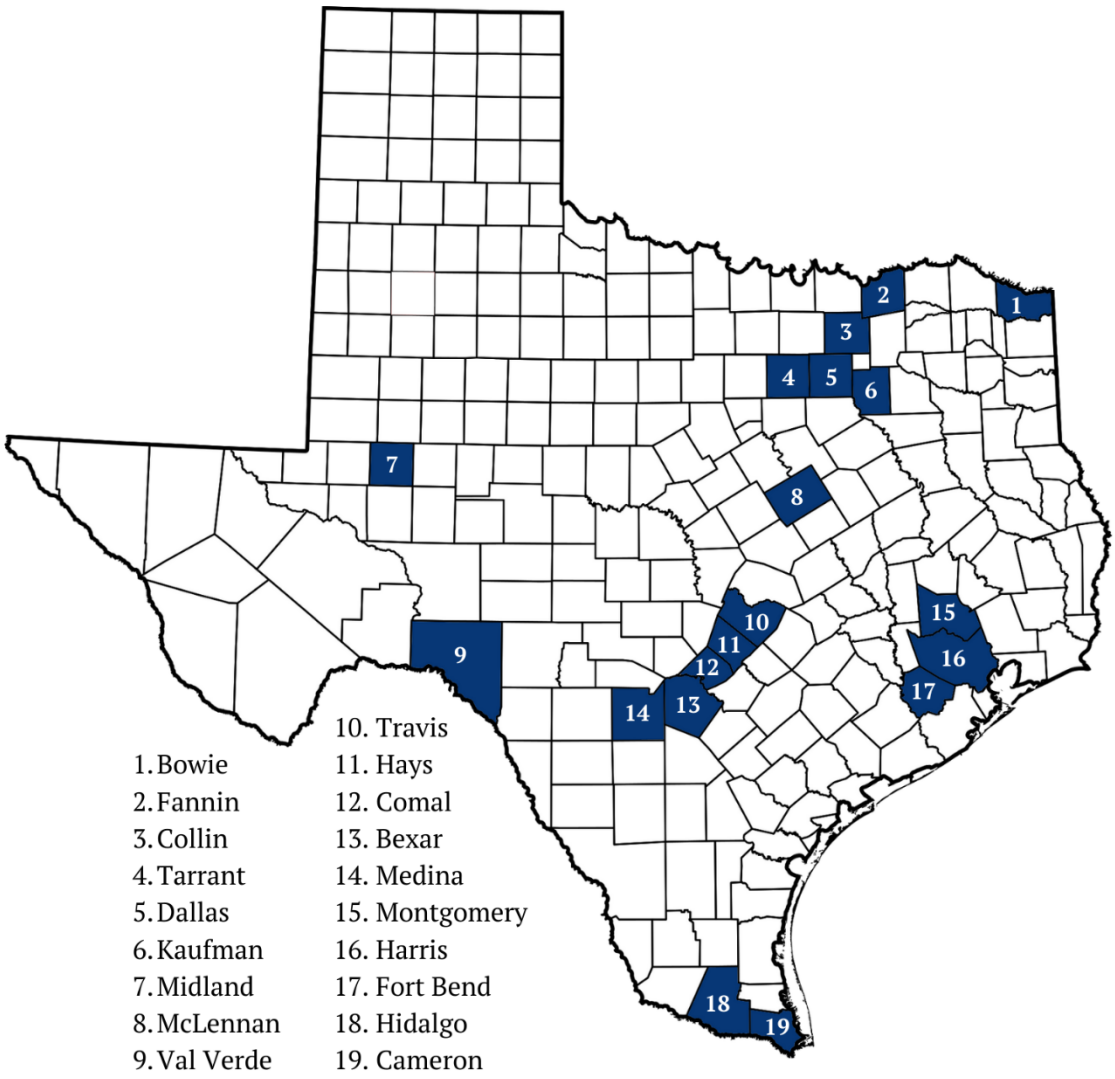
A county required to establish a mental health court program must apply for federal and state funds available to pay the costs of the program. The criminal justice division of the Governor's Office may assist a county in applying for federal funds as required. However, if the county does not receive federal or state funding specifically for that purpose in an amount sufficient to pay the fund costs of the mental health court program; or if the judge, magistrate, or coordinator does not receive the verification described by section 121.002(c)(2) of the Government Code, the county is not required to establish a mental health court program. Tex. Gov't Code § 125.005(b), (c).

A county that is required to establish a mental health court program and fails to establish or to maintain that program is ineligible to receive grant funding from this state or any state agency. Tex. Gov't Code § 125.005(d).

The commissioners' courts of two or more counties may elect to establish a regional mental health court program under this chapter for the participating counties. Tex. Gov't Code § 125.0025.

The Office of Court Administration (OCA) oversees specialty court programs. Previously the Office of the Governor held this role. Tex. Gov't Code § 121.002.

Active Adult Mental Health Courts as of February 2023[198]



Note: This map does not include mental health court programs that are not officially registered with the Office of the Governor/Office of Court Administration.

[198] *Tex. Dept. of Crim. Justice,* TEXAS PROGRESSIVE INTERVENTIONS AND SANCTIONS BENCH MANUAL 104 (2020) (*citing* information published by the Office of the Governor - Criminal Justice Division, July 2019), https://www.tdcj.texas.gov/documents/cjad/CJAD_Bench_Manual.pdf.

8.2.2 Resources

The Judicial Commission on Mental Health created a 10-step guide[199] on how to create a Texas Mental Health Court program along with a video[200] to walk viewers through the steps.

The JCMH website also includes resources on how to apply for a grant for a specialty court.

MENTAL HEALTH COURT 10-STEP GUIDE

HOW TO START A MENTAL HEALTH COURT VIDEO

Judges should consult with their local LMHAs/LBHAs, CCBHC Care Coordination Programs, LIDDA Service Coordination Programs, and TCOOMMI for available options for specialty courts.

8.3 Pretrial Intervention Programs

8.3.1 Pretrial Intervention Program

A community supervision and corrections department established under Chapter 76 of the Texas Government Code ("department") may operate programs for:

- the supervision and rehabilitation of persons in pretrial intervention programs;
- the supervision of persons released on bail under:
  - Chapter 11 of the Texas Code of Criminal Procedure;
  - Chapter 17 of the Texas Code of Criminal Procedure;
  - article 44.04 of the Texas Code of Criminal Procedure; or
  - any other law;
- the supervision of a person subject to, or the verification of compliance with, a court order issued under:
  - article 17.441 of the Texas Code of Criminal Procedure, requiring a person to install a deep-lung breath analysis mechanism on each vehicle owned or operated by the person;
  - Chapter 123 of the Texas Government Code or former law, issuing an occupational driver's license;
  - section 49.09(h) of the Texas Penal Code, requiring a person to install a deep-lung breath analysis mechanism on each vehicle owned or operated by the person; or
  - section 521.2462 of the Texas Transportation Code, requiring supervision of a person granted an occupational driver's license; and
- the supervision of a person not otherwise described by section 76.011(a)(1), (2), or (3), if a court orders the person to submit to the supervision of, or to receive services from, the department.

Tex. Gov't Code § 76.011(a).

Except as otherwise provided by subsection 76.011(b), programs operated by the department under subsection 76.011(a) may include reasonable conditions related to the purpose of the program, including testing for controlled substances. If this subsection conflicts with a more specific provision of another law, the other law prevails. Tex. Gov't Code § 76.011(b).

A person in a pretrial intervention program operated by the department under subsection 76.011(a) may

[199] TEXAS JUDICIAL COMMISSION ON MENTAL HEALTH, CREATING A TEXAS MENTAL HEALTH COURT PROGRAM: THE 10-STEP GUIDE (2022) https://texasjcmh.gov/media/czaoapye/mhc-the-10-step-guide.pdf.

[200] Texas Judicial Commission on Mental Health, *Creating a Texas Mental Health Court*, YOUTUBE (2023) https://texasjcmh.gov/technical-assistance/mental-health-courts/.

be supervised for a period not to exceed two years. Tex. Gov't Code § 76.011(c).

The department may use money deposited in the special fund of the county treasury for the department under article 103.004(d) of the Texas Code of Criminal Procedure, only for the same purposes for which state aid may be used under Chapter 76. Tex. Gov't Code § 76.011(d).

8.4 Deferred Adjudication and Deferred Disposition

8.4.1 Requiring Treatment as a Condition of Community Supervision, Class B Misdemeanors and Higher

The judge may order a person placed on community supervision to submit to outpatient or inpatient MI or ID treatment if the following criteria are met:

- the person is determined to have a MI or ID in
  - a report under article 16.22 of the Texas Code of Criminal Procedure
  - incompetency proceedings under Chapter 46B of the Texas Code of Criminal Procedure,[201] or
  - a psychological evaluation as part of a PSI report under article 42A.253(a)(6) of the Texas Code of Criminal Procedure;
- the person's
  - mental impairment is chronic or
  - ability to function independently will deteriorate if the person does not receive MI or ID services; and
- the judge consults with a local mental health or intellectual disability services provider and determines that services are available through:
  - HHSC under section 534.053 of the Texas Health and Safety Code, or
  - another mental health or intellectual disability services provider, such as the LMHA or LIDDA.

Tex. Code Crim. Proc. art. 42A.506.

Note that supervision conditions can (and should) be tailored to the probationer, and that a previous possible supervision condition to "avoid persons or places of disreputable or harmful character" has been removed, in part to allow probationers to attend Alcoholics Anonymous or similar programs. Chapter 42A.303(e) also allows developing a continuum of care treatment plan when an individual is released from SAFPF.

8.4.2 Deferred Disposition of Class C Misdemeanors

Article 45.051(b) of the Texas Code of Criminal Procedure allows a justice of the peace or municipal judge to require the defendant to:

- submit to professional counseling;
- submit to a psychosocial assessment;
- present to the court satisfactory evidence that he or she has complied with each requirement imposed by the court; and
- comply with any other reasonable condition.

Tex. Code Crim. Proc. art. 45.051(b).

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[201] Because placement of a defendant on community supervision involves a conviction or entering a plea, a defendant determined to have MI or ID under Chapter 46B of the Code of Criminal Procedure could not be placed on community supervision if found incompetent. This statute highlights that a defendant with MI is not necessarily incompetent. *See* section 7.1.1 of this Bench Book.

At the time the defendant is placed on deferred disposition, the court can impose requirements to continue treatment, participate in any assessments reasonably related to providing mental health/IDD services, and to comply with all prescribed medications and recommendations under the sections outlined above.

8.5 Determination of Undue Hardship for Discharge of a Fine

8.5.1 Waiver of Payment of Fines and Costs for Certain Defendants

Judges are permitted, but not required, to waive payment of all or part of a fine imposed on a defendant if the court determines that the defendant

- is a child, is indigent, or does not have sufficient resources or income to pay all or part of the fine; and
- each alternative method of discharging the fine (community service, payment at a later date, or installment payments) would impose an undue hardship on the defendant.

Tex. Code Crim. Proc. arts. 43.091; 45.049.

8.5.2 Significant Mental Impairment or Disability Considered

In making the determination of undue hardship, the court may consider, among other things, the defendant's significant physical or mental impairment or disability.

Tex. Code Crim. Proc. art. 43.091(b).

Challenges for Justice and Municipal Courts

Diversion from the criminal justice system of individuals with MI is especially challenging for justice and municipal courts. Despite lacking a robust statutory scheme for diverting individuals with MI with cases involving Class C misdemeanors, most individuals with MI enter the criminal justice system through those courts. This is due to the volume of cases filed and the nature of certain Class C offenses like disorderly conduct, public intoxication, and city ordinances criminalizing camping or sleeping outdoors, which may be manifestations of MI. While plea agreements, conditions of deferred disposition, and community service are viable options for connecting individuals with mental health services, without a clear statutory scheme, those courts are left with only creativity.

8.6 TCOOMMI Programs and Services

The Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) funds programs through the 39 LMHAs to provide pre-release screening and referral to aftercare treatment services for special needs offenders referred from pre-trial supervision, local jails, the Texas Department of Criminal Justice (TDCJ), and other referral sources.

Levels of outpatient services include, but are not limited to, Intensive Case Management, Transitional Case Management, and Continuity of Care. Components of case management include case management services, rehabilitation/psychological services, psychiatric services, medication monitoring, and linkage to wraparound services that may include substance abuse treatment, available community medical services, state or federal benefit entitlement application processing Continuity of Care services are short term connections and linkages into traditional LMHA service offerings through an expedited timeframe of intake and admissions. Through Continuity of Care services clients eligible for case management are identified.

All services offer collaborative partnerships between a mental health caseworker and criminal justice

supervision partner to enhance access to care while promoting medication and supervision compliance at no cost to the client. All TCOOMMI mental health services are community-based and individualized.

Target populations for community mental health services include those on pre-trial supervision, probation, and parole who have moderate to higher criminogenic risk and higher clinical needs. See *infra* Intercept 4, section 2 of this Bench Book for a more detailed look at TCOOMMI.

TCOOMMI also operates a Medical Continuity of Care program outside of the 39 LMHA funded programs. Medical Continuity of Care services include linkages and referrals to community -based services to meet a client's needs upon referral from the criminal justice supervision partner and/or pre-release planning for release from the TDCJ.

8.7 Incompetency to Stand Trial

Competence to stand trial is the legally determined capacity of a criminal defendant to proceed with criminal adjudication. A criminal defendant may not be subjected to trial if he or she lacks the capacity to understand the proceedings against him or her, to consult with counsel, and to assist in preparing a defense.[202] Likewise, the court may not accept a plea of guilty or nolo contendere unless it appears to the judicial officer that the defendant is mentally competent and the plea is free and voluntary. Tex. Code Crim. Proc. art. 45A.153; 42.07. This prohibition is fundamental to an adversary system of justice.[203] Failure to use procedures that protect the defendant's right not to be tried or convicted while incompetent to stand trial is a violation of due process and the right to a fair trial.[204]

This chapter covers Texas procedures related to competency, which are generally found in Chapter 46B of the Code of Criminal Procedure. Chapter 46B applies to a defendant charged with a felony or with a misdemeanor punishable by confinement.[205] Tex. Code Crim. Proc. art. 46B.002.

Justice and Municipal Courts

Despite the inapplicability of the procedures in Chapter 46B to defendants charged with Class C misdemeanors in municipal and justice courts, the prohibition against trying and convicting defendants who lack competency applies to all defendants. For individuals charged with any level of misdemeanor, diversion to treatment and services is the best practice. One suggested legislative solution is to move section 8.08 of the Penal Code (Child with Mental Illness, Disability, or Lack of Capacity) to Chapter 45 of the Code of Criminal Procedure (Justice and Municipal Courts) and make that provision applicable to adults as well. This would expressly permit municipal judges and justices of the peace to dismiss the complaint when a defendant lacks capacity. However, connecting defendants to appropriate services and education is an important prerequisite to dismissal. Problem-solving courts such as the Downtown Austin Community Court and Dallas Community Courts are good models for addressing issues related to MI and homelessness involving defendants charged with Class C misdemeanors.

Before placing a defendant in that system, judges should understand the gravity inherent in a determination of incompetency. The proceedings involved are costly and lengthen an individual's involvement in the criminal justice system.[206] Nationally, courts order an estimated 60,000 competency

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[202] *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

[203] *Id.* at 172.

[204] *Id.* (citing *Pate v. Robinson*, 383 U.S. 375 (1966)).

[205] Note that when a person is held in jail on probable cause pending an indictment by a grand jury, and the issue of competency arises, ordering a competency evaluation prior to a formal charge can be problematic. It can result in a facility holding a person beyond the maximum period of restoration allowed by law (*see* section 8.7.2.5 below) and may prevent civil commitment that would have otherwise been permitted under article 46B.151. Floyd L. Jennings, *Procedural Choke Points in 46B Competency Issues*, Voice for the Defense Online (March 12, 2016), http://www.voiceforthedefenseonline.com/image/procedural-choke-points-46b-competency-issues.

[206] Because the defendant gets credit for time served in competency restoration (Tex. Code Crim. Proc. art. 46B.009), an incompetency finding provides some delay to proceedings, but has little additional effect, other than costs to the county mental health authority for the state hospital bed. Floyd L. Jennings, *Procedural Choke Points in 46B Competency Issues*, Voice for the Defense Online (March 12, 2016), http://www.voiceforthedefenseonline.com/image/procedural-choke-points-46b-competency-issues.

evaluations each year.[207] Of those evaluations, only about 20 percent lead to a finding of incompetency.[208]

Judges should first consider whether competency is the real issue and the effect the competency system will have on an individual's ultimate outcome. For example, dismissal may be more appropriate. Article 46B.004(e) permits the court, upon the motion of the prosecutor, to dismiss all charges pending against the defendant at any time during 46B proceedings after the issue of the defendant's incompetency to stand trial is first raised. The court may then proceed with civil commitment under Subchapter F, if there is evidence to support a finding of incompetency, or discharge the defendant.

After all, the goal of the competency system is different from the goals of treatment and services. The competency system is not the ideal pathway into behavioral health treatment, though it is one. The procedures that follow are appropriate in some cases involving individuals with MI and intellectual disabilities; however, generally, the best practice in such cases is early diversion to treatment and services, avoiding competency restoration altogether.[209]

Reflection Point

Consider how one's prior experiences can affect their ability to achieve competency restoration. Treatment considerations may need to include understanding of values, traditions, and customs of the individual.

Overview of the Competency Process

- Criminal Charge (Felony or Misdemeanor Punishable by Confinement)
- Competency Issue Raised by Any Party or the Court (Suggestion)
- Informal Inquiry by the Court
- Examination of Defendant
- Findings
  - Competent to Stand Trial
  - Incompetent to Stand Trial, but Restorable in the Foreseeable Future
  - Incompetent to Stand Trial, but Not Restorable in the Foreseeable Future
- Disposition
  - Order for Treatment
  - Civil Commitment

8.7.1 Determining Incompetency to Stand Trial

All states, including Texas, have a statutory standard for determining whether a person is incompetent to stand trial. This standard comes from *Dusky v. U.S.*, a 1960 U.S. Supreme Court Case, which held that the test of a defendant's competency to stand trial is whether he or she has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he [or she] has a rational as well as factual understanding of the proceedings against him [or her]."[210]

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[207] *Mental Competency in the Court Room*, NATIONAL JUDICIAL COLLEGE http://www.mentalcompetency.org/ (last visited October 29, 2019).

[208] *Id.*

[209] Since September 1, 2019, article 16.22 of the Texas Code of Criminal Procedure provides a mechanism for diversion to court-ordered outpatient mental health services while a criminal charge remains pending. If the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person, the trial court may, after receiving the applicable expert's written report, release the defendant on bail while charges remain pending and enter an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services under Chapter 574 of the Texas Health and Safety Code. If the defendant complies, the court may, on the motion of the prosecutor, dismiss the charges. S.B. 362, 86th Leg., Reg. Sess. (2019).

[210] *Dusky v. U.S.*, 362 U.S. 402 (1960).

8.7.1.1 Standard

A person is presumed competent to stand trial unless he or she proves otherwise.[211] The court shall find the defendant competent unless proved incompetent by a preponderance of the evidence. Tex. Code Crim. Proc. art. 46B.003(b). The defendant has the burden of proof regarding incompetency.[212] The relevant point in time for determining a person's competency is at the time of the proceedings, not the time of the alleged offense.[213]

Exception to the Rule that the Defendant is Presumed Competent and has the Burden of Proof (and the exception to the exception!)

A person is presumed competent to stand trial unless he or she proves otherwise—unless:

The defendant has an unvacated adjudication of incompetency (i.e., was found incompetent and sent for restoration or found unlikely to be restored to competency in the foreseeable future and now faces a subsequent charge), the defendant is presumed incompetent. *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987). The State then bears the burden to prove beyond a reasonable doubt that the defendant is competent. *Id*.

However, if the head of a facility or outpatient treatment provider to which the defendant was committed as a result of a finding of incompetency to stand trial has provided an opinion that the defendant has regained competency, competency is presumed and continuing incompetency must be proved by a preponderance of the evidence by the defendant. Tex. Code Crim. Proc. art. 46B.113(d)(5). *Moralez v. State,* 450 S.W.3d 553, 559-60 (Tex. App.—Houston, 2014, pet. ref'd)

A person is incompetent to stand trial if the person does not have:

- sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or
- a rational as well as factual understanding of the proceedings against the person.

Tex. Code Crim. Proc. art. 46B.003(a).

Note: A person who is incompetent to stand trial is also incompetent to plead guilty. *See Ex parte Lewis*, 587 S.W.2d 697, 700 (Tex. Crim. App. [Panel Op.] 1979). A defendant with MI who is competent to proceed may not be sufficiently competent to proceed without counsel. *See Indiana v. Edwards*, 554 U.S. 164 (2008). After all, the *Drope* competency standards assume representation by counsel.[214] The requirement that a justice or judge (including a justice of the peace or a municipal judge) may not accept a plea of guilty or plea of nolo contendre from a defendant in open court unless it appears to the justice or judge that the defendant is mentally competent, and the plea is free and voluntary was codified in article 45.0241 to the Texas Code of Criminal Procedure by H.B. 3774 (87th Reg. Sess. (2021)).

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[211] *Schaffer v. State*, 583 S.W.2d 627, 630 (Tex. Crim. App. 1979). However, if the defendant has an unvacated adjudication of incompetency (i.e., was found incompetent and sent for restoration or found unlikely to be restored to competency in the foreseeable future and now faces a subsequent charge), the defendant is presumed incompetent. *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987). The State then bears the burden to prove beyond a reasonable doubt that the defendant is competent. *Id. But see Moralez v. State,* 450 S.W.3d 553, 559-60 (Tex. App.—Houston, 2014, pet. ref'd) (holding that the burden shifts back to the defendant if the head of the treatment facility is of the opinion that the defendant has regained competency).

[212] *Owens v. State*, 473 S.W.3d 812 (Tex. Crim. App. 2015).

[213] Code of Criminal Procedure Article 46B.003 provides that a person is incompetent if lacking a sufficient *present ability* to consult with a lawyer. *See also Morris v. State*, 214 S.W.3d 159, 168-169); (Tex. App.—Beaumont 2007), aff'd, 301 S.W.3d 281 (Tex. Crim. App. 2009), *Lasiter v. State*, 283 S.W.3d 909, 925 (Tex. App.—Beaumont 2009, pet. ref'd).

[214] *Drope v. Missouri*, 420 U.S. 162 (1975).

Making the Distinction: Competency, Insanity, and Mental Illness

Competency to Stand Trial: Relates to a defendant's mental state and present capacity to stand trial at the time of trial (should not be confused with a general finding of incapacity by a civil court related to guardianship); incompetency is not a defense to the crime charged.

Insanity: Relates to a defendant's mental state at the time the alleged crime was committed and is an affirmative defense to prosecution.

Mental Illness: Relates to impairment of thought, perception of reality, emotional process, judgment, or behavior; a person may have a mental illness, but still be competent to stand trial (though maybe not without counsel).

8.7.1.2 Raising the Issue

8.7.1.2.a Timing

The issue of the defendant's incompetency to stand trial may be raised at any time before the sentence is pronounced. Tex. Code Crim. Proc. art. 46B.005(d).[215] Though making this determination before trial best serves the interests of justice, issues with the defendant's competency may not manifest until after trial has begun.

If the issue of the defendant's incompetency is raised after the trial begins, the court may determine the issue at any time before the sentence is pronounced. If the determination is delayed until the return of a verdict, the court shall make the determination as soon as reasonably possible after the return. Upon a verdict of not guilty, the court may not determine the issue. Tex. Code Crim. Proc. art. 46B.005(d).

8.7.1.2.b Who May Raise the Issue

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. This motion may be supported by affidavits. Tex. Code Crim. Proc. art. 46B.004(a).

8.7.1.2.c Suggestion

A suggestion of incompetency is the threshold requirement for an informal inquiry and may consist solely of a representation from any credible source that the defendant may be incompetent. This includes the defendant, defense counsel, a family member, law enforcement, jail staff, a prosecutor, a mental health care worker, or other interested person.

This is a very low threshold. A further evidentiary showing is not required to initiate the inquiry, and the court is not required to have a bona fide doubt about the competency of the defendant. [216] Evidence suggesting the need for an informal inquiry may be based on any indication that the defendant is incompetent, including observations made in relation to one or more of the factors an expert is required to consider under article 46B.024, discussed below. *See* section 8.7.1.5f. Tex. Code Crim. Proc. art. 46B.004(c-1).

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[215] When determining whether a trial court should have held a competency hearing, an appellate court will not typically consider evidence brought to the attention of the trial court for the first time after sentencing, but only the evidence actually known up until the point of sentencing. *Rodriguez v. State*, 329 S.W.3d 74, 78 (Tex. App.—Houston [14th Dist.] 2010, no pet.). However, at least one court of appeals has found that new evidence on competency may be considered in a motion for new trial. *Lasiter v. State*, 283 S.W.3d 909, 926 (Tex. App.—Beaumont 2009, pet. ref'd).

[216] Caselaw interpreting former article 46.02 (the predecessor to Chapter 46B) required a judge to have a "bona fide doubt" before conducting an informal inquiry. *See Montoya v. State*, 291 S.W.3d 420, 425 (Tex. Crim. App. 2009). The Legislature responded to *Montoya* by adding subsection (c-1) to article 46B.004 in 2011. The revised statute was intended to lower that threshold, making it easier to raise the issue of incompetency before trial. BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 49-50 (6th ed. 2019).

If information 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. Tex. Code Crim. Proc. art. 46B.004(b).

8.7.1.2.d Informal Inquiry

On suggestion that the defendant may be incompetent to stand trial, the court shall determine by informal inquiry whether there is some evidence[217] from any source that would support a finding of incompetency. Tex. Code Crim. Proc. art. 46B.004(c).

Informal Inquiry

An informal inquiry will look different depending on the volume of cases the court handles, the source of the information provided, and when it occurs in the process. In practice, it ranges from a conversation to a hearing. Note that it is intended to be informal and that the standard is so low, that any suggestion will suffice to trigger it. The suggestion may come from defense counsel, family members of the defendant, mental health records, jail staff, or the LMHA. Some judges (or magistrates if the issue is raised early in the process) have a conversation with the defendant; for some judges, it is a determination based on the information brought to the judge. In determining whether there is some evidence from any source that would support a finding of incompetency, "better safe than sorry" may be a wise approach.

8.7.1.2.e Experts

If after the informal inquiry the court determines that there is some evidence that the defendant may be incompetent to stand trial, the court may appoint one or more disinterested experts to:

- examine the defendant and report to the court on the competency or incompetency of the defendant; and
- testify as to the issue of competency or incompetency at any trial or hearing involved in that issue.

Tex. Code Crim. Proc. art. 45B.021(a).

8.7.1.3 If There Is Some Evidence of Incompetency

First Consider a Diversion Option for Non-Violent Cases

When the issue of competency is broached in nonviolent (and particularly misdemeanor) cases an attorney or the court should first consider using Art. 16.22(c)(5) diversion, as opposed to moving directly to competency proceedings.

Tex. Code Crim. Proc. art. 16.22(c)(5) allows the court to release the defendant on bail while charges against the defendant remain pending and enter an order *transferring the defendant to the appropriate court for court-ordered outpatient mental health services* under Chapter 574 of the Texas Health and Safety Code. This subsection is specifically for offenses that do not involve an act, attempt, or threat of serious bodily injury to another person.

[217] Under prior law, the court was required to conduct further competency proceedings upon the introduction of some probative evidence, more than a scintilla, regarding the defendant's incompetency. *Id.* In enacting Chapter 46B, there was no intent by the Legislature to change the requisite evidentiary threshold for establishing "some evidence." *Id.*, citing *Turner v. State*, 422 S.W.3d 676 (Tex. Crim. App. 2013) (In making the determination, a trial court must consider only that evidence tending to show incompetency, putting aside all competing indications of competency, to find whether there is some evidence, a quantity more than none or a scintilla, that rationally may lead to a conclusion of incompetency.).

8.7.1.3.a Determination of Incompetency after Informal Inquiry

If the court determines there is evidence to support a finding of incompetency, the court shall:

- Stay all other proceedings in the case, unless (1) the issue was raised after the trial on the merits began,[218] or (2) the state has dismissed all pending charges against the defendant (Tex. Code Crim. Proc. art. 46B.004(d));
- order an examination under Subchapter B (Examination) of Chapter 46B to determine whether the defendant is incompetent to stand trial in a criminal case (Tex. Code Crim. Proc. art. 46B.005(a)) (*see* section 8.7.1.5 below);
- appoint one or more experts to examine the defendant and report to the court on the defendant's competency or incompetency and testify as to that issue at any trial or hearing involving that issue (Tex. Code Crim. Proc. art. 46B.021(b)); and
- hold a trial under Subchapter C (Incompetency Trial) of Chapter 46B (*see* section 8.7.1.6 below) unless:
  - neither party's counsel requests a trial on the issue of incompetency;
  - neither party's counsel opposes a finding of incompetency; and
  - the court does not, on its own motion, determine that a trial is necessary to determine incompetency.

Tex. Code Crim. Proc. art. 46B.005(b).

Absent this narrow statutory exception, when the trial court determines that there is some evidence that the defendant may be incompetent to stand trial, the court must conduct a competency trial.[219]

See further discussion of this concept in section 8.7.1.6 Incompetency Trial.

Standards of Evidence in the Competency Process[220]	
What is required to raise the issue of incompetence and trigger an informal inquiry by the court?	A suggestion from any credible source.
What is required to be obtained in an informal inquiry that would be enough to warrant an order for a competency evaluation?	Some evidence; more than none.
What is required to defeat the presumption of competency and order competency restoration services?	A preponderance of the evidence.
If charges are pending, what is required for a criminal court to order a mental health civil commitment (article 46B.102) for a person either found unlikely to be restored to competency in the foreseeable future or ordered to competency restoration, but unrestored?	Clear and convincing evidence.

[218] If the issue of the defendant's incompetency is raised after the trial begins, the court may determine the issue at any time before the sentence is pronounced. If the determination is delayed until the return of a verdict, the court shall make the determination as soon as reasonably possible after the return. Upon a verdict of not guilty, the court may not determine the issue. Tex. Code Crim. Proc. art. 46B.005(d).

[219] *Turner v. State*, 570 S.W.3rd 250, 262 (Tex. Crim. App. 2018); *Bluntson v. State*, No. AP-77,067, 2021 WL 2677462, at *14 (Tex. Crim. App. 2021).

[220] Adapted from Floyd L. Jennings, *Procedural Choke Points in 46B Competency Issues*, Voice for the Defense Online (March 12, 2016).

8.7.1.3.b No Interlocutory Appeal

Neither the state nor the defendant is entitled to make an interlocutory appeal relating to a determination of incompetency under article 46B.005. Tex. Code Crim. Proc. 46B.011.

8.7.1.4 Appointment of Counsel

A defendant is entitled to representation by counsel before any court-ordered competency evaluation and during any proceeding at which it is suggested that the defendant may be incompetent to stand trial. If the defendant is indigent and the court has not appointed counsel to represent the defendant, the court shall appoint counsel as necessary to comply with such entitlement. Tex. Code Crim. Proc. art. 46B.006.

8.7.1.5 Competency Examination

8.7.1.5.a Defendant Maintained Under Same Custody or Status Before Examination

During a competency examination, except as otherwise ordered by the court, the defendant shall be maintained under the same custody status as the defendant was maintained under immediately before the examination began. Tex. Code Crim. Proc. art. 46B.023. This does not mean the examination is required to be conducted at the jail. The court can also order that the defendant be transported to a facility designated by the LMHA for the competency examination. *See* articles 46B.021, 46B.005, 46B.022 and 46B.027(b). Absent a separate court order, the mere fact that the court has ordered a competency examination does not affect the status of the defendant, whether in custody or not.

8.7.1.5.b Which Experts May and May Not Be Appointed

Appointed experts may include qualified psychiatrists or psychologists employed by the LMHA or LIDDA. The LMHA or LIDDA is entitled to compensation and reimbursement. Tex. Code Crim. Proc. art. 46B.021(e).

An expert involved in the treatment of the defendant may not be appointed to examine the defendant. Tex. Code Crim. Proc. art. 46B.021(c).

8.7.1.5.c Expert of Defendant's Own Choice

If a defendant wishes to also be examined by an expert of the defendant's own choice, the court on timely request shall provide the expert with reasonable opportunity to examine the defendant. Tex. Code Crim. Proc. art. 46B.021(f).

8.7.1.5.d Qualifications of Experts

Judges should critically vet the experts they appoint. This minimally entails verifying that an expert meets the statutory qualifications prior to appointment. A psychiatrist or psychologist appointed to examine a defendant and/or testify regarding competency must generally:

- be a psychiatrist who is a physician licensed in Texas or a psychologist licensed in Texas who has a doctoral degree in psychology;
- have the following certification or training:
  - if a psychiatrist, certification by the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or
  - if a psychologist, certification by the American Board of Professional Psychology in forensic psychology; or
  - training consisting of:
    - at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations; and
    - at least eight hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment; and

- have completed six hours of required continuing education in courses in forensic psychiatry or psychology, respectively, in either of the reporting periods in the 24 months preceding the appointment.

Tex. Code Crim. Proc. art. 46B.022(a)-(b).

Appointment of an expert psychiatrist or psychologist who does not meet the above requirements may only occur if exigent circumstances require the court to base the appointment on professional training or experience of the expert that directly provides the expert with a specialized expertise that would not ordinarily be possessed by a psychiatrist or psychologist who meets the above requirements. Tex. Code Crim. Proc. art. 46B.022(c). This is a narrow exception. One example is a case in which the defendant not only appeared to lack competency because of either MI or IDD, but was also deaf.[221] Therefore, the court needed an expert who was knowledgeable about the defendant's hearing disability, but that expert might not have met the statutory requirements for an expert.[222]

8.7.1.5.e Information Provided to Appointed Expert(s)

The movant or other party as directed by the court shall provide to the appointed experts relevant information, including copies of the indictment or information, any supporting documents used to establish probable cause in the case, and previous mental health evaluation and treatment records. Tex. Code Crim. Proc. art. 46B.021(d).

Competency Exam when a Defendant has, or may have, IDD

One thing to keep in mind for a competency examination, is that if it is believed that the defendant has, or may have, IDD, then the type of competency exam given to the defendant must be validated on a subject population that also has IDD. Make sure the expert is aware that the defendant has or may have IDD, and when reading the report or examining the expert witness, make sure that the property scaled test was used during the examination. Using an improperly scaled or validated test may produce an inaccurate result.

8.7.1.5.f Factors Considered in Examination

In addition to other issues determined to be relevant by the expert, the following factors must be considered during a competency examination and in any report based on that examination:

- the capacity of the defendant during criminal proceedings to:
  - rationally understand the charges against the defendant and the potential consequences of the pending criminal proceedings;
  - disclose to counsel pertinent facts, events, and states of mind;
  - engage in a reasoned choice of legal strategies and options;
  - understand the adversarial nature of criminal proceedings;
  - exhibit appropriate courtroom behavior; and
  - testify;
- whether the defendant is a person with a MI or an ID, as supported by current indications and the defendant's personal history;
- the degree of impairment resulting from the MI or ID, if existent, and the specific impact on the defendant's capacity to engage with counsel in a reasonable and rational manner; and
- if the defendant is taking psychoactive or other medication:

[221] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 65 (6th ed. 2019).

[222] *Id.*

- whether the medication is necessary to maintain the defendant's competency; and
- the effect, if any, of the medication on the defendant's appearance, demeanor, or ability to participate in the proceedings.

Tex. Code Crim. Proc. art. 46B.024.

Beyond 46B: "*Miranda* Competency"

- The standard for competency to stand trial may look different from the competency needed to "knowingly, intelligently, and voluntarily, and waive Miranda rights."[223]
- This use of the word "intelligently" suggests a cognitive appreciation for what it means to talk to police officers and to talk without a lawyer, etc.[224]

Professor Brian Shannon, Horn Distinguished Professor, Texas Tech University School of Law, suggests the level of competency required to competently waive *Miranda* rights is different from the typical competency to stand trial standard. This could potentially be brought up in a motion to suppress a client's statement for not intelligently waiving Miranda, and counsel should consider seeking to have the defendant examined not only for competence to stand trial, but also for competence to waive *Miranda*.[225]

8.7.1.5.g Expert's Report

The court shall direct an expert to provide the expert's report to the court and the appropriate parties in the form approved by TCOOMMI under section 614.0032(b) of the Health and Safety Code (***see* appendix of this Bench Book or located online titled "Certification of Competency Evaluator Credentials and Template for Competency Evaluations"**).[226]

Additional Required Information in the Expert's Report

In addition to the factors in article 46B.024 that must be considered during an examination and in any report based on that examination, article 46B.025 requires specific, detailed information in the expert's report. An expert's report must:

- state an opinion on a defendant's competency or incompetency to stand trial (or explain why the expert is unable to do so);
- identify and address specific issues referred to the expert for evaluation;
- document that the expert explained to the defendant
  - the purpose of the evaluation,
  - the persons to whom a report on the evaluation is provided, and
  - the limits on rules of confidentiality applying to the relationship between the expert and the defendant;
- specifically describe procedures, techniques, and tests used in the examination, the purpose of each of those, and the conclusions reached;

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[223] *Miranda v. Arizona,* 384 U.S. at 444, 475 (1966); *Hill v. State,* 429 S.W.2d 481, 486 (Tex. Crim. App. 1968); *Joseph v. State,* 309 S.W.3d 20, 24 (Tex. Crim. App. 2010); *Moran v. Burbine,* 475 U.S. 412, 421 (1986).

[224] "Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the **requisite level of comprehension** may a court properly conclude that the *Miranda* rights have been waived." *Joseph v. State*, 309 S.W.3d 20 (Tex. Crim. App. 2010) (emphasis added). *See* Paul R. S. Burton & John R. Chamberlain, *Competence to Waive Miranda Rights*, 38 J. of the Am. Acad. of Psych. & the Law 280, 282 (2010), http://jaapl.org/content/jaapl/38/2/280.full.pdf (suggesting a need to differentiate between "knowingly (the capacity to understand that rights are being waived) from intelligently (understanding the significance of the rights being waived").

[225] Brian Shannon, *Sanity, Competency, and "Civil" Commitment*, State Bar of Texas 47th Annual Advanced Criminal Law, July 21, 2021, San Antonio. *See* Paul R. S. Burton & John R. Chamberlain, *supra*, n. 2 at 282 (stating that if "more than one type of competence is questioned, each competency must be separately assessed").

[226] This form is available online at http://www.txcourts.gov/media/518971/templatecompetencyeval.pdf (last visited May 9, 2019).

- state the expert's clinical observations, findings, and opinions on each specific issue referred to the expert by the court;
- state the specific criteria supporting the expert's diagnosis; and
- state specifically any issues on which the expert could not provide an opinion.

Tex. Code Crim. Proc. art. 46B.025(a).

In addition, if it is the opinion of the expert that the defendant is incompetent to proceed, the expert shall state in the report:

- the symptoms, exact nature, severity, and expected duration of the deficits resulting from the defendant's MI or ID, if any;
- the impact of the identified condition on the factors listed in article 46B.024;
- an estimate of the period needed to restore the defendant's competency, **including whether the defendant is likely to be restored to competency in the foreseeable future**; and
- prospective treatment options, if any, appropriate for the defendant.

Tex. Code Crim. Proc. art. 46B.025(b).

Note: Judges should know what to look for in an expert's report. The court does not have to accept a report that does not meet the statutory requirements and/or is of poor quality, but instead can enforce those requirements (i.e., by ordering amendment of the report). It is also important to note that the determination of competency or incompetency is the role of the judge, a role that should not be abdicated to the expert.[227]

Beyond Statutory Requirements: Marks of a Quality Expert's Report[228]

- Conveys all relevant information concisely, unambiguously, and clearly, including the facts and reasoning the expert used in formulating the opinion.
- Goes beyond describing signs and symptoms of mental illness and discusses how those signs and symptoms affect functional abilities relevant to the legal construct of competence. *See* section 8.7.1.1 above.
- Describes the defendant's abilities and deficits concerning the tasks that the defendant must perform during a criminal defense.
- Is it a stand-alone document in that it provides or reproduces the data needed to support the opinions the expert expresses?
- States clearly any limitations or qualifications of which the expert is aware.
- Contains clinical data regarding the nature of the defendant's mental and emotional condition that are specifically relevant to the competency analysis.
- Comments on any contradictions or inconsistencies.
- Provides specific examples that illustrate the defendant's strengths or weaknesses with respect to reasoning and understanding, based on a competence-assessment instrument as well as other types of data.
- Opines concerning restorability and the appropriate setting for restoration.
- Is free of gratuitous comments about the defendant's behavior, need for incapacitation, dangerousness, lack of remorse, or other legal matters.

[227] For an example of a poor examination and report, see *Turner v. State*, 422 S.W.3d 676 (Tex. Crim. App. 2013).

[228] Adapted from Douglas Mossman, MD, et al., AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial, Vol. 35, No. 4, 2007 Supplement.

Expert's Opinion on Sanity

If it is the opinion of the expert that the defendant is incompetent to proceed to trial, the expert's report may not state the expert's opinion on the defendant's sanity at the time of the offense. Tex. Code Crim. Proc. art. 46B.025(c). Though the court may have appointed the expert to examine the defendant for both competency and sanity (if the defendant is pursuing the insanity defense), upon a determination of incompetency, the expert must stop the examination and not determine sanity. This requirement is rooted in a lack of probative value and ethical requirements of psychiatrists and psychologists.[229]

Basis of Expert's Opinion

The expert's opinion on the defendant's competency or incompetency may not be based solely on the defendant's refusal to communicate during the examination. Tex. Code Crim. Proc. art. 46B.025(a-1).

Timeline for Expert's Report

Unless good cause is shown, the expert is required to provide the report on the defendant's competency or incompetency to the court, the prosecutor, and the defendant's attorney not later than the 30th day after the date on which the expert was ordered to examine the defendant and prepare the report.[230] Tex. Code Crim. Proc. art. 46B.026(a)-(b).

Monthly Reporting of Competency Reports Provided to the Court

Monthly, the court shall submit to the Office of Court Administration the number of competency reports provided to the court. Tex. Code Crim. Proc. art. 46B.026(d).[231]

8.7.1.5.h Compensation and Reimbursement by the County

The county in which the indictment was returned or information was filed shall pay for the services of an appointed expert described by article 46B.021(a)(1) and (2). If the expert is an employee of the LMHA or LIDDA, the county shall pay the authority for the services. The county shall also reimburse a facility that accepts a defendant for examination for expenses incurred that are reasonably necessary and incidental to the proper examination of the defendant. Tex. Code Crim. Proc. art. 46B.027.

8.7.1.6 Incompetency Trial

Under article 46B.005(c), the court does not have to hold a trial at all if:

1. neither party's counsel requests a trial,
2. neither party's counsel opposes a finding of incompetency, or
3. the court does not decide on its own motion that a trial is necessary.

The parties and court can agree, based on an expert's report, that the defendant lacks competency to stand trial. In that event, the court shall proceed in the same manner as if a jury had been impaneled and had found the defendant incompetent to stand trial. Tex. Code Crim. Proc. art. 46B.054.

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[229] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 69-70 (6th ed. 2019).

[230] Consider asking the court administrator to keep a database of competency orders, including the date it is issued, date the expert report is received, name of examiner, and the examiner's opinion in order to track these cases for docket management. Floyd L. Jennings, *Procedural Choke Points in 46B Competency Issues*, Voice for the Defense Online (March 12, 2016), http://www.voiceforthedefenseonline.com/image/procedural-choke-points-46b-competency-issues. Courts should also review the procedure followed upon receipt of experts' reports. If the case is appealed, such reports should be part of the record. *Id.* Such records contain personal information, and though they are public records (not confidential or protected by privilege), should be filed with restricted access or sealed. *Id.*

[231] This requirement is effective for reports involving defendants charged with an offense committed on or after September 1, 2017.

2021 *Bluntson* Decision and Exceptions

Absent the above narrow statutory exceptions, when the trial court determines that there is some evidence that the defendant may be incompetent to stand trial, the court must conduct a competency trial even if the court-appointed expert has concluded that the defendant is competent.[232]

Note the 2021 Texas Court of Criminal Appeals opinion on this very issue, where the defendant requested a jury trial on the issue of competency and the motion was granted by the trial court:

> The use of the word 'whether' [in art. 46B.005(b)] indicates that the trial court must have a competency trial before determining that the defendant is incompetent to stand trial *or* before determining that the defendant is competent to stand trial. Under Article 46B.051, the trial may be before the court or a jury. But irrespective of who the factfinder is, the trial court must have a competency trial. . . . The statute's plain language indicates that the three-part exception in Article 46B.005(c) applies only when the parties and the trial court agree that the defendant is incompetent. In other words, after the trial court has made the threshold evidentiary determination of "some evidence" of incompetence, the statutory language allows the trial court to forgo a competency trial when both parties and the court agree that the defendant is incompetent but not when they agree that he is competent.[233]

8.7.1.6.a Evidence

Notwithstanding Rule 101 of the Texas Rules of Evidence, the Texas Rules of Evidence apply to an incompetency trial or other proceeding under Chapter 46B. This is true whether the proceeding is before a jury or the court.

A defendant may be committed to a jail-based competency restoration program, mental health facility, or residential care facility only on competent medical or psychiatric testimony provided by an expert qualified under article 46B.022. The court may allow an expert to substitute the expert's report under article 46B.025 for such required competent testimony. Tex. Code Crim. Proc. art. 46B.074.

8.7.1.6.b Admissibility of Statements Made During Examination

A statement made by a defendant during an incompetency trial and evidence obtained as a result of that statement may not be admitted in evidence against the defendant in any criminal proceeding other than at an incompetency trial or if the defendant first introduces the statement into evidence. Tex. Code Crim. Proc. art. 46B.007.

8.7.1.6.c Trial Before Judge or Jury

If a court holds a trial to determine whether the defendant is incompetent to stand trial, a jury trial is only required upon the request of either party or on the motion of the court. If no request or motion is made, the court shall make the determination of incompetency. If a jury determination is required, the jury that will determine the issue of incompetency must be a different jury from the one selected to determine guilt or innocence. Tex. Code Crim. Proc. art. 46B.051.

8.7.1.6.d Jury Verdict

The court shall require the jury determining the issue of incompetency to state in its verdict whether the defendant is incompetent to stand trial. The verdict must be concurred in by each juror. Tex. Code

[232] *Bluntson v. State*, No. AP-77,067, 2021 WL 2677462, at *14 (Tex. Crim. App. June 30, 2021).

[233] *Bluntson v. State*, No. AP-77,067, 2021 WL 2677462, at *13-14 (Tex. Crim. App. June 30, 2021) (citing *See Turner v. State*, 422 S.W.3d 676 at 693 n.35 (Tex. Crim. App. 2014)); *see Turner v. State*, 570 S.W.3d 250, 262 (Tex. Crim. App. 2018).

Crim. Proc. art. 46B.052.

8.7.1.6.e Procedure After Finding of Competency

If the court or jury determines that the defendant is competent to stand trial, the court shall continue the trial on the merits. If a jury determines that the defendant is competent and the trial on the merits is to be held before a jury, the court shall continue the trial on the merits with a different jury selected for that purpose. Tex. Code Crim. Proc. art. 46B.053.

7.1.6f Procedure After Finding of Incompetency

If the defendant is found incompetent to stand trial (or if the issue is uncontested, *see* article 46B.054), the court shall proceed under Subchapter D (Procedures After Determination of Incompetency). Tex. Code Crim. Proc. art. 46B.055.

Commitment Periods: Maximum Initial Restoration Periods[234]

120 Days	60 Days
Class A misdemeanor Outpatient Facility	Class B misdemeanor Outpatient Facility Jail-based Facility Inpatient Facility
Felony Outpatient Facility Jail-based Facility (60 days in JBCR and 60 at state hospital)* Inpatient Facility	Class A misdemeanor Jail-based Facility Inpatient Facility

The defendant may remain in JBCR and receive services past 60 days until a bed is available for transfer to a state hospital. Tex. Code Crim. Proc. art. 46B.091.

The court may modify an order for JBCR to outpatient competency restoration, when appropriate. Tex. Code Crim. Proc. Art. 46B.091(m).

8.7.2 Criminal Commitment for Restoration to Competency

8.7.2.1 Options on Determination of Incompetency

8.7.2.1.a Defendant is Unlikely to be Restored to Competency in the Foreseeable Future

On a determination that the defendant is unlikely to be restored to competency in the foreseeable future, the court shall either:

- proceed under Subchapter E (Civil Commitment: Charges Pending) or Subchapter F (Civil Commitment: Charges Dismissed) of Chapter 46B or
- release the defendant on bail as permitted under Chapter 17 of the Texas Code of Criminal Procedure.

Tex. Code Crim. Proc. art. 46B.071(b).

[234] The court may grant one 60-day extension in connection with the specific offense with which the defendant is charged. Tex. Code Crim. Proc. art. 46B.080. *See* section 8.7.2.6d below. This extension is subject to the maximum restoration period under article 46B.0095 (*see* section 8.7.2.5 below).

8.7.2.1.b Determination of Incompetency: Charged with Class B Misdemeanor

Absent a determination that the defendant is unlikely to be restored, if the defendant is charged with an offense punishable as a Class B misdemeanor, the court shall:

- release the defendant on bail under article 46B.0711 (see below) or
- commit the defendant (see below) to
  - a jail-based competency restoration program under article 46B.073(e) or
  - a mental health facility or residential care facility under article 46B.073(f).

Tex. Code Crim. Proc. art. 46B.071(a).[235]

Release on Bail for Class B Misdemeanor

Subject to conditions reasonably related to ensuring public safety[236] and the effectiveness of the defendant's treatment, if the court determines:

- that a defendant charged with a Class B misdemeanor and found incompetent to stand trial
  - is not a danger to others and
  - may be safely treated on an outpatient basis with the specific objective of attaining competency to stand trial, and
- an appropriate outpatient program is available for the defendant,[237]

the court shall:

- release the defendant on bail or continue the defendant's release on bail; and
- order the defendant to participate in an outpatient competency restoration program for a period not to exceed 60 days.

Tex. Code Crim. Proc. art. 46B.0711(b).

Despite the requirement for the court to order participation in an outpatient competency restoration program, it may only do so if:

- the court receives and approves a comprehensive plan that:
  - provides for the treatment of the defendant for purposes of competency restoration; and
  - identifies the person who will be responsible for providing that treatment; and
- the court finds that the treatment proposed by the plan will be available to and will be provided to the defendant.

Tex. Code Crim. Proc. art. 46B.0711(c).

The court may also require the defendant to participate in (1) an outpatient competency restoration program administered by a community center or any other entity that provides competency restoration services and an appropriate prescribed regimen of medical, psychiatric, or psychological care or treatment.[238] Tex. Code Crim. Proc. art. 46B.0711(d).

Note: Article 46B.0711 only applies to defendants who are subject to an initial restoration period based on article 46B.071.

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[235] *Id.*

[236] Note that mental illness does not equate with risk of causing harm to the community. Just because a person has a mental illness does not mean he or she presents a risk of committing future crimes.

[237] There is limited availability of outpatient competency restoration (OCR) programs in Texas. These programs are distinct from conventional outpatient mental health treatment. For a list of OCR programs in Texas, see appendix.

[238] *See* section 8.7.2.8 Medication below.

Housing and Transportation

Defendants released to the community for purposes of outpatient restoration treatment need stable housing. The court should consider verifying that the defendant has stable housing prior to ordering commitment. Consideration needs to be made for defendants who are homeless or are unable to live independently as to what kind of setting would provide stability. If a defendant lacks the willingness and/or ability to manage his or her medications, he or she needs to reside where a responsible person can manage medications. (Note that for persons ordered to outpatient restoration, the law is inconsistent related to whether a court is authorized to order forced medication (i.e., article 46B.086(a)(2)(D) of the Texas Code of Criminal Procedure and section 574.106(a) of the Texas Health and Safety Code.))[239] To ensure timely arrival at treatment, defendants also need transportation to the facility. This could be provided by a family member or facility staff.

Floyd L. Jennings, Statutory Changes Regarding Mentally Ill Defendants, Voice for the Defense Online (October 31, 2017).

Commitment for Restoration to Competency: Charged with Class B Misdemeanor

For defendants not released on bail, the court shall commit a defendant charged with a Class B misdemeanor to a jail-based competency restoration program for a period of not more than 60 days. Such commitment is for purposes of further examination and competency restoration services with the specific objective of the defendant attaining competency to stand trial. It is also dependent on the determination of the program provider that the defendant will begin to receive competency restoration services within 72 hours of arriving at the program.[240] If a jail-based competency restoration program is not available or a licensed or qualified mental health professional determines that a jail-based competency restoration program is not appropriate, then the defendant may be committed to a mental health facility or residential care facility determined to be appropriate by the LMHA or LIDDA. Tex. Code Crim. Proc. art. 46B.073.

Note: Article 46B.073 only applies to defendants who are subject to an initial restoration period based on article 46B.071.

Jail-Based Competency Restoration Programs

Article 46B.091 authorizes counties to operate a jail-based competency restoration (JBCR) program. Chapter 307, Subchapter C, Title 26 of the Texas Administrative Code provides the rules for such programs. Article 46B.091 requires counties seeking to operate a jail-based program to do so in a designated space that is separate from the space used for the general population of the jail and to provide services similar to other competency restoration programs (among other requirements).[241]

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[239] Under Texas law, there are two provisions authorizing a court to compel a defendant to take medication: article 46B.086 of the Texas Code of Criminal Procedure and section 574.106 of the Texas Health and Safety Code. *See* section 8.7.2.8b and section 5.4.2.3 of this Bench Book respectively. Beware that section 574.106 does not authorize such orders for defendants receiving treatment or services on an outpatient basis (including outpatient competency restoration). Article 46B.086(a)(2)(D), however, makes such orders applicable to defendants charged with a Class A misdemeanor or felony and committed to an outpatient competency restoration program (note that article 46B.086(a)(3) also mentions an outpatient restoration program). Practically, enforcement of that order would likely require modification of the order to an inpatient or jail-based setting and trigger concerns related to clinical impropriety and constitutional safeguards. Note that *Sell v. U.S.*, 539 U.S. 166 (2003) requires a hearing that addresses certain factors prior to ordering forcible administration of medication to a criminal defendant found incompetent to stand trial (*see also* article 46B.086(e) and section 574.106(b)). For a detailed discussion of these provisions and the history of the forced medication statutes, *see* Brian D. Shannon, *Prescribing a Balance: The Texas Legislative Responses to* Sell v. United States, 41 ST. MARY'S L.J. 309 (2009).

[240] Inherent in this requirement is the desire to quickly begin competency restoration services in lieu of waiting for a bed in a state hospital. Delaying such services after the court orders commitment to a JBCR is inconsistent with the statute and the intent of the program itself.

[241] A list of the Texas Jail Based Competency Restoration Programs can be found in the appendix.

8.7.2.1.c Determination of Incompetency: Charged with Felony or Class A Misdemeanor

Absent a determination in 2.1.1., if the defendant is charged with an offense punishable as a Class A misdemeanor or any higher category of offense, the court shall:

- release the defendant on bail under article 46B.072 (see below) or
- commit the defendant to a facility or a jail-based competency restoration program under article 46B.073(c) or (d) (see below).

Tex. Code Crim. Proc. art. 46B.071(a).

Release on Bail for Felony or Class A Misdemeanor

Subject to conditions reasonably related to ensuring public safety[242] and the effectiveness of the defendant's treatment, if the court determines:

- that a defendant charged with a felony or a Class A misdemeanor and found incompetent to stand trial
  - is not a danger to others, and
  - may be safely treated on an outpatient basis with the specific objective of attaining competency to stand trial, and
  - an appropriate outpatient competency restoration program is available for the defendant,[243]
- the court:
  - may release the defendant on bail with respect to an offense punishable as a felony or may continue the defendant's release on bail; and
  - shall release the defendant on bail with respect to an offense punishable as a Class A misdemeanor or shall continue the defendant's release on bail; and
  - shall order the defendant to participate in an outpatient competency restoration program for a period not to exceed 120 days (but see below).

Tex. Code Crim. Proc. art. 46B.072(a-1), (b).

Despite the requirement for the court to order participation in an outpatient competency restoration program, it may only do so if:

- the court receives and approves a comprehensive plan that:
  - provides for the treatment of the defendant for purposes of competency restoration; and
  - identifies the person who will be responsible for providing that treatment to the defendant; and
- the court finds that the treatment proposed by the plan will be available to and will be provided to the defendant.

Tex. Code Crim. Proc. art. 46B.072(c).

The court may also require the defendant to participate in an outpatient competency restoration program administered by a community center or any other entity that provides competency restoration services and an appropriate prescribed regimen of medical, psychiatric, or psychological care or treatment involving the administration of psychoactive medication, including those required under

[242] Note that mental illness does not equate with risk of causing harm to the community. Just because a person has a mental illness does not mean he or she presents a risk of committing future crimes.

[243] There is limited availability of outpatient competency restoration (OCR) programs in Texas. These programs are distinct from conventional outpatient mental health treatment. Appendix for the list of OCR programs in Texas.

article 46B.086.[244] Tex. Code Crim. Proc. art. 46B.072(d).

Note: Article 46B.072 only applies to defendants who are subject to an initial restoration period based on article 46B.071.

Commitment for Restoration to Competency: Charged with Felony or Class A Misdemeanor

For defendants not released on bail, the court shall commit a defendant to a mental health facility or residential care facility determined to be appropriate by the LMHA or LIDDA, or a jail-based competency restoration program for a period of not more than

- 60 days if the defendant is charged with a Class A misdemeanor; or
- 120 days if the defendant is charged with a felony.

Such commitment is for purposes of further examination and competency restoration services with the specific objective of the defendant attaining competency to stand trial. It is also dependent on the determination of the program provider that the defendant will begin to receive competency restoration services within 72 hours of arriving at the program. Tex. Code Crim. Proc. art. 46B.073.

The initial restoration period for a defendant under Article 46B.0711, 46B.072, or 46B.073 begins on the latest date they are ordered to participate in an outpatient competency restoration program, are committed to a mental health facility, residential care facility, or jail-based competency restoration program, or the date competency restoration services actually began. Tex. Crim Proc. art. 46B.075.

The timeline for an extension of competency restoration orders begins on the later of the date the court enters the extension order, or the date services actually began pursuant to such an order. Tex. Crim Proc. art. 46B.080.

If a defendant is charged with an offense listed in Article 17.032(a) or if the indictment alleges an affirmative finding under article 42A.054 (c) or (d) (use or exhibition of a deadly weapon or that the deadly weapon was a firearm), the court shall enter an order committing the defendant for competency restoration services to a facility designated by HHSC.[245]

Tex. Crim Proc. art. 46B.073(c).

[244] *See* section 8.7.2.8 Medication below.

[245] For the commitment of a defendant under Chapter 46B, new article 46B.0021 provides that HHSC may only designate a facility operated by HHSC or under a contract with HHSC for that purpose.

Practical Issues in Ordering Competency Restoration

Some judges have asked what the order should say to give HHSC authority to designate which facility to send a defendant to. Consider tracking the language of the statute (i.e., "to a facility designated by HHSC"). Doing so comports with the legislative intent of the statute and also allows greater flexibility for HHSC with defendants initially required to go to a MSU. Another suggestion is including language that HHSC will designate a facility within three days after receiving the information required by article 46B.076 (*see* section 8.7.2.4 below). The order could also designate a specific person to email HHSC with that information at forensicadmissions@hhsc.state.

Though some judges have indicated a desire to wait for the designation prior to ordering commitment, it is important to remember that a person is not placed on HHSC's waiting list until they receive an order, so waiting would create a delay in the defendant's transfer to an inpatient facility and in the case itself. However, it is incumbent on the state hospital system to keep the courts and other parties informed as to where the defendant is to be taken for initial admission as well as keeping them informed of any internal transfer within the state hospital system.

The waiting list for MSU beds creates another issue. Before the 2019 legislative changes, some judges would order a defendant committed to a MSU as required by article 46B.073 and subsequently ordered that defendant to a JBCR program while he or she waited in jail for a bed at the MSU. Article 46B.073 neither authorizes nor prohibits this practice. The amended language in 46B.073 is likewise silent as to whether a judge may, after ordering a defendant to a facility designated by HHSC, order a defendant to a JBCR while he or she waits for transfer to the designated facility.

8.7.2.2 Transportation to Facility or Program

An order issued under article 46B.0711, 46B.072, or 46B.073 must place the defendant in the custody of the sheriff or sheriff's deputy for transportation to the facility or program, as applicable, in which the defendant is to receive competency restoration services. Tex. Code Crim. Proc. art. 46B.075.

8.7.2.3 Immediate Restoration

At any time after the defendant's incompetency trial, but before the defendant is transported to the facility or program, if the court receives credible evidence indicating that the defendant has been restored to competency, the court may appoint disinterested experts to reexamine the defendant (see section 8.7.1.5 above). The court is not required to appoint the same expert who performed the initial examination. Tex. Code Crim. Proc. art. 46B.0755(a).

Note: HHSC State Hospital's Forensic Services has two clinicians on staff that can be appointed as the expert on the re-examination of a defendant.

If after reexamination, the expert's report states an opinion that the defendant remains incompetent, the court's order (to release the defendant on bail and order outpatient services or commit the defendant) remains in effect and the defendant shall be transported to the facility or program. If after reexamination, the report states an opinion that the defendant has been restored to competency, the court shall withdraw its order and shall either:

- find the defendant competent to stand trial and proceed as if the defendant had been found restored to competency at a hearing if:
  - both parties agree that the defendant is competent to stand trial; and
  - the court concurs; and
- hold a hearing to determine whether the defendant has been restored to competency if any party fails to agree or if the court fails to concur.

Tex. Code Crim. Proc. art. 46B.0755(b).

If the court holds a hearing, incompetency is presumed, and the defendant's competency must be proved by a preponderance of the evidence. If requested by either party, or upon the court's motion, a jury shall make the competency determination. If after the hearing, the defendant is again found to be incompetent, the court shall issue a new order under article 46B.0711, 46B.072, or 46B.073 (to release the defendant on bail and order outpatient services or commit the defendant). Tex. Code Crim. Proc. art. 46B.0755(c), (d).

8.7.2.4 Copy of Order and Transcript of Medical Testimony to Applicable Facility or Program

Not later than the date of the order of commitment or of release on bail, the court shall send a copy of the order to the applicable facility or program as well as the following documents made available to the court during the incompetency trial:

- reports of each expert;
- psychiatric, psychological, or social work reports that relate to the mental condition of the defendant;
- documents provided by the prosecutor or the defense attorney that relate to the defendant's current or past mental condition;
- copies of the indictment or information and any supporting documents used to establish probable cause in the case;
- the defendant's criminal history record; and
- the addresses of the prosecutor and defense attorney.

Tex. Code Crim. Proc. art. 46B.076(a).

The court shall also order that the transcript of all medical testimony received by the jury or court be promptly prepared by the court reporter and forwarded to the applicable facility or program Tex. Code Crim. Proc. art. 46B.076(b).

8.7.2.5 Maximum Period of Commitment or Program Participation Determined by Maximum Term for Offense

8.7.2.5.a Maximum Restoration Period Under Chapter 46B

The total time a defendant can spend in incompetency proceedings and related pre-trial transfers is limited. Under Chapter 46B, a defendant generally may not be:

- committed to a mental hospital or other inpatient or residential facility or to a jail-based competency restoration program,
- ordered to participate in an outpatient competency restoration or treatment program, or
- subjected to any combination of inpatient treatment, outpatient competency restoration or treatment program participation, or jail-based competency restoration for a cumulative period that exceeds the maximum term[246] provided by law for the offense for which the defendant was to be tried.

If the defendant is charged with a misdemeanor and has been ordered only to participate in an outpatient competency restoration or treatment program under Subchapter D (Procedures After

[246] The court must credit to the cumulative period any time that a defendant, following arrest for the offense for which the defendant was to be tried, is confined in a correctional facility, as defined by section 1.07 of the Texas Penal Code, before the initial order of commitment or initial order for outpatient competency restoration or treatment program participation is entered under Chapter 46B. Tex. Code Crim. Proc. art. 46B.0095(d). In addition to this time credit, the court has discretion to credit to the cumulative period any good conduct time the defendant may have been granted under article 42.032 in relation to the defendant's confinement as described by article 46B.0095(d). Tex. Code Crim. Proc. art. 46B.0095(e). Maximum term is determined by punishment range of the offense charged **not including enhancements** due to prior convictions. *Ex Parte Reinke*, 370 S.W.3d 387 (Tex. Crim. App. 2012).

Determination of Incompetency) or E (Civil Commitment: Charges Pending) of Chapter 46B, the maximum period of restoration is two years (but *see also* section 8.7.2.5d below regarding mandatory dismissal of misdemeanor charges). Tex. Code Crim. Proc. art. 46B.0095.

8.7.2.5.b Expiration of the Maximum Restoration Period[247]

On expiration of the maximum restoration period (*see* section 8.7.2.5a above), the mental hospital, facility, or program provider identified in the most recent order of commitment or order of outpatient competency restoration under Chapter 46B shall assess the defendant to determine if civil proceedings under Subtitle C (Texas Mental Health Code) or D (Persons with Intellectual Disability Act), Title 7 of the Texas Health and Safety Code are appropriate. Tex. Code Crim. Proc. art. 46B.0095(b).

If the defendant is still in need of commitment for mental health treatment after the maximum restoration period expires, that can only happen through civil commitment proceedings. The criminal court can no longer be involved. Specifically, the defendant may be confined for an additional period in a mental hospital or other facility or may be ordered to participate for an additional period in an outpatient treatment program, as appropriate, only pursuant to proceedings conducted under Subtitle C (Texas Mental Health Code) or D (Persons with Intellectual Disability Act), Title 7 of the Texas Health and Safety Code, by a court with probate jurisdiction. Tex. Code Crim. Proc. art. 46B.0095(b).

Probate Jurisdiction in Texas

In Texas, probate jurisdiction varies from county to county. The following are general guidelines:

- If the county has a statutory probate court, that court generally has original and exclusive jurisdiction over any probate proceeding (exceptions exist not relating to mental health civil commitments). Tex. Estates Code §§ 32.002(c), 32.005.
- If the county has no statutory probate court but has a county court at law exercising probate jurisdiction, that court and the county court have concurrent original jurisdiction, unless otherwise provided by law. Tex. Estates Code § 32.002(b).
- If the county neither has a statutory probate court nor a county court at law exercising probate jurisdiction, the county court has original probate jurisdiction. Tex. Estates Code § 32.002(a). However, that court can (or may be required to) transfer contested cases to a district court or request assignment of a probate judge. Tex. Estates Code § 32.003.

See Title 2, Subtitle A, Chapter 25, Subchapter C of the Texas Government Code to see if your county has any county courts at law or a statutory probate court. Confer with the judge presiding over the court to determine if that court is the appropriate one for civil commitment proceedings. *See also* Intercept 0, section 3.1 of this Bench Book.

8.7.2.5.c Cumulative Period[248]

The cumulative period that cannot exceed the maximum restoration period (*see* section 7.2.5a above):

- begins on the date the initial order of commitment or initial order for outpatient competency restoration or treatment program participation is entered under Chapter 46B and
- includes

[247] *Id.*

[248] *Id.*

- any inpatient or outpatient competency restoration periods or program participation periods ordered under Chapter 46B and additional periods pursuant to civil proceedings conducted under Subtitle C (Texas Mental Health Code) or D (Persons with Intellectual Disability Act), Title 7 of the Texas Health and Safety Code, and
- any time that, following the entry of an order of commitment or program participation under Chapter 46B, the defendant is confined in a correctional facility,[249] or is otherwise in the custody of the sheriff during or while awaiting:
  - the defendant's transfer to:
    - a mental hospital or other inpatient or residential facility; or
    - a jail-based competency restoration program;

- the defendant's release on bail to participate in an outpatient competency restoration or treatment program; or
- a criminal trial following any temporary restoration of the defendant's competency to stand trial.

Tex. Code Crim. Proc. art. 46B.0095(c).

The court shall credit to the cumulative period any time that a defendant following arrest for the offense for which the defendant was to be tried, is confined in a correctional facility[250] before the initial order of commitment or initial order for outpatient competency restoration or treatment program participation under Chapter 46B. Tex. Code Crim. Proc. art. 46B.0095(d).

The court may credit to the cumulative period any good conduct time the defendant may have been granted under article 42.032 of the Texas Code of Criminal Procedure in relation to the defendant's confinement in a correctional facility[251] before the initial order of commitment or initial order for outpatient competency restoration or treatment program participation under Chapter 46B. Tex. Code Crim. Proc. art. 46B.0095(e).

8.7.2.5.d Mandatory Dismissal of Misdemeanor Charges

If both of the following occur, and the prosecutor files a motion to dismiss the charge, the court shall dismiss the charge:

- a court, under Chapter 46B, orders that a defendant charged with a misdemeanor punishable by confinement be
  - committed to a mental hospital or other inpatient or residential facility or to a jail-based competency restoration program,
  - ordered to participate in an outpatient competency restoration or treatment program, or
  - subjected to any combination of inpatient treatment, outpatient competency restoration or treatment program participation, or jail-based competency restoration, and
- the defendant is not tried before the expiration of the maximum restoration period (*see* section 8.7.2.5b above).

Alternatively, if the prosecutor does not file a motion to dismiss and the defendant's attorney files a motion for a hearing, the court shall, after sending notice to the prosecutor, hold a hearing not later than the 10th day after the date of filing of the motion, and may dismiss the charge on a finding that the defendant was not tried before the maximum restoration period expired. Tex. Code Crim. Proc. art. 46B.010.

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[249] This is a correctional facility as defined by section 1.07 of the Texas Penal Code.

[250] *Id.*

[251] *Id.*

8.7.2.6 Post-Release-on-Bail and Post-Commitment Procedures

8.7.2.6.a Charges Subsequently Dismissed

If the charges pending against a defendant are dismissed, the court that issued the order under article 46B.0711, 46B.072, or 46B.073 (to release the defendant on bail and order outpatient services or commit the defendant) shall send a copy of the order of dismissal to the sheriff of the county in which the court is located and to the head of the facility, provider of the jail-based competency restoration program, or provider of the outpatient competency restoration program. Once received, the facility or program shall discharge the defendant into the care of the sheriff or sheriff's deputy for transportation back to the court in the same manner as article 46B.082.[252] Tex. Code Crim. Proc. art. 46B.078 (*see* section 8.7.2.6f below).

8.7.2.6.b Individual Treatment Program and Reporting by Facility or Program

The facility or jail-based competency restoration program to which the defendant is committed or the outpatient competency restoration program to which the defendant is released on bail shall:

- develop an individual program of treatment;
- assess and evaluate whether the defendant is likely to be restored to competency in the foreseeable future; and
- report to the court and the LMHA or LIDDA on the defendant's progress toward achieving competency.

The above reporting requirements (under article 46B.077) are different depending on the type of facility the defendant is in. If the defendant is in an inpatient mental health facility, residential care facility, or jail-based competency restoration program, the facility or program shall report to the court at least once during the commitment period. If the defendant is in an outpatient competency restoration program, the program shall report to the court:

- not later than the 14th day after the date services begin; and
- at least once during each 30-day period following the date of that first report, until the defendant is no longer released to the program.

Tex. Code Crim. Proc. art. 46B.077.

For jail-based competency restoration programs, this reporting requirement is distinct from and in addition to the requirement in article 46B.090(i) that the psychiatrist for the provider (1) conduct at least two full psychiatric evaluations of the defendant during the period the defendant receives competency restoration services in the jail (one not later than the 21st day and one not later than the 55th day after the date the defendant begins to participate in the program) and (2) submit to the court a report concerning each evaluation.

Note: If issues with treatment arise, consider utilizing defense counsel and the provider to encourage the defendant to comply with the treatment plan.

[252] This provision may be problematic in practice. Upon dismissal of charges, the court will no longer have jurisdiction. A sheriff may be hesitant to transport a defendant, possibly from a different county, with no charges pending. The use of restraints would also be an issue. Additionally, if the person was returned and the court was not open, there would be no basis for booking such person into the jail. If the person is still incompetent, article 46B.151 permits the court to retain jurisdiction after dismissal to transfer the matter to a court with mental health jurisdiction and hold the defendant in jail briefly pending initiation of civil commitment proceedings. This would not apply to a person who has not been ordered to civil commitment proceedings (for example, a person restored to competency after the maximum period for restoration has expired). For a person not so ordered, consider transporting the defendant to the county of origin before charges are dismissed. Floyd L. Jennings, *Statutory Changes Regarding Mentally Ill Defendants* (October 31, 2017), http://www.voiceforthedefenseonline.com/story/statutory-changes-regarding-mentally-ill-defendants.

8.7.2.6.c Notice to Court Before Expiration of Initial Restoration Period

Not later than the 15th day before the date the initial restoration period expires according to the terms of the order, the maximum restoration period (*see* section 8.7.2.5 above), or other applicable provisions of Chapter 46B, the head of the facility or program provider shall notify the applicable court that the period is about to expire.[253]

If the defendant is in an inpatient mental health facility, residential care facility, or jail-based competency restoration program, the head of the facility or program provider shall promptly notify the court upon belief that:

- the defendant is clinically ready and can be safely transferred to a competency restoration program for education services but has not yet attained competency to stand trial;
- the defendant has attained competency to stand trial; or
- the defendant is not likely to attain competency in the foreseeable future.

If the defendant is in an outpatient competency restoration program, the provider shall promptly notify the court when the program provider believes that:

- the defendant has attained competency to stand trial; or
- the defendant is not likely to attain competency in the foreseeable future.

Along with any of the above notices, the head of the facility or program provider also shall file a final report with the court stating the reason for the proposed discharge or transfer under Chapter 46B and including a list of the types and dosages of medications prescribed for the defendant while the defendant was receiving competency restoration services in the facility or through the program.

The court shall provide to the prosecutor and defense attorney copies of the final report, unless the report is based on notice that the defendant is clinically ready and can be safely transferred to a competency restoration program for education services but has not yet attained competency to stand trial. This enables any objection to the findings of the report to be made in a timely manner as required under article 46B.084(a-1).

Tex. Code Crim. Proc. art. 46B.079.

8.7.2.6.d Extension of Order

If the head of the facility or program provider notifies the court that the initial restoration period is about to expire, the notice may contain a request for an extension of the period for an additional period of 60 days and an explanation for the basis of the request, which must include a description of any evidence indicating a reduction in the severity of the defendant's symptoms or impairment. Tex. Code Crim. Proc. art. 46B.079(d).

On such a request, the court may enter an order extending the initial restoration period for an additional period of 60 days, but only if the court determines that:

- the defendant has not attained competency; and
- an extension of the initial restoration period will likely enable the facility or program to restore the defendant to competency within the period of the extension.

The court may grant only one 60-day extension in connection with the specific offense with which the defendant is charged. Tex. Code Crim. Proc. art. 46B.080.

Note: This extension is subject to the maximum restoration period under article 46B.0095 (*see* section 8.7.2.5 above).

[253] There has been confusion regarding when the term of a restoration begins, i.e., the date of the order or the date of transfer. This issue was recently clarified with S.B. 49 (87th Reg. Sess. (2021)).

8.7.2.6.e Competency Restoration Education Services

If the court receives notice that the defendant is clinically ready and can be safely transferred to a competency restoration program for education services but has not yet attained competency to stand trial (*see* section 8.7.2.6c above), the court shall order the defendant to receive competency restoration education services in a jail-based competency restoration program or an outpatient competency restoration program, as appropriate and if available.

If the defendant was not committed to a jail-based competency restoration program, the court shall send a copy of the order for education services to:

- the sheriff of the county in which the court is located;
- the head of the facility to which the defendant was committed for competency restoration; and
- the LMHA or LIDDA.

Once the head of facility receives the copy of the order, as soon as practicable, but not later than the 10th day after such receipt, the facility shall discharge the defendant into the care of the sheriff of the county in which the court is located or into the care of the sheriff's deputy. The sheriff or sheriff's deputy shall transport the defendant to the jail-based competency restoration program or outpatient competency restoration program, as appropriate.

A jail-based competency restoration program or outpatient competency restoration program that receives a defendant for competency restoration education services shall give to the court:

- notice regarding the defendant's entry into the program for purposes of receiving competency restoration education services; and
- subsequent notice as otherwise required under article 46B.079.

Tex. Code Crim. Proc. art. 46B.0805.

8.7.2.6.f Transportation of Defendant to Court

If the sheriff receives notice that the charges have been dismissed (*see* section 8.7.2.6b above), the sheriff of the county in which the court is located or the sheriff's deputy shall transport the defendant to the court.

If the court receives notification under article 46B.079(a), (b)(2), (b)(3), or (b-1) (*see* section 8.7.2.6c above), and before the 15th day after receiving such notice, a defendant committed to a facility or jail-based competency restoration program or ordered to participate in an outpatient competency restoration program has not been transported back to the court, the head of the facility or program provider shall cause the defendant to be promptly transported to the court and placed in the custody of the sheriff of the county in which the court is located.[254]

The county in which the court is located shall reimburse HHSC or the program provider, as appropriate, for the mileage and per diem expenses of the personnel required to transport the defendant, calculated in accordance with rates provided in the General Appropriations Act for state employees.

Tex. Code Crim. Proc. art. 46B.082.

8.7.2.6.g Supporting Commitment Information Provided by Facility or Program

If the head of the facility, the jail-based competency restoration program provider, or the outpatient competency restoration program provider believes that the defendant is a person with MI and meets the criteria for court-ordered mental health services under Subtitle C, Title 7 of the Texas Health and Safety Code (Texas Mental Health Code), the head of the facility or the program provider shall submit to the court a CME for mental illness.

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[254] In practice, this provision is problematic. State hospitals might not have personnel to transport a defendant to the committing county. Additionally, a sheriff might not accept the defendant into custody without a warrant.

If the head of the facility, the jail-based competency restoration program provider, or the outpatient competency restoration program provider believes that the defendant is a person with an ID, the head of the facility or the program provider shall have submitted to the court an affidavit stating the conclusions reached as a result of the examination.

Tex. Code Crim. Proc. art. 46B.083.

8.7.2.6.h Proceedings After the Defendant Returns to Court

Timelines for Notice and Competency Determination After the Defendant Returns to Court

After the defendant returns to court, the court is required to send notice to the prosecutor and defense attorney and again make a determination regarding the defendant's competency to stand trial. The timeline for each of those requirements depends on the population of the county.

The court must send notice:

- no later than the next business day following the date of the defendant's return if the county has a population of 1.2 million or more and less than four million.
- as soon as practicable following the date of the defendant's return if the county has a population of less than 1.2 million or four million or more.

Tex. Code Crim. Proc. art. 46B.084(a).

Legislative Change

H.B. 4559 (88th Reg. Sess. (2023)) sections 10-11, effective September 1, 2023, amended Code of Criminal Procedure art. 46B.084, to increase the population requirement from one million to 1.2 million.

For counties over 1.2 million (as of 9/1/23) and less than four million (currently Bexar, Dallas, Tarrant, and Travis) there are specific, short timelines. For less populous counties and Harris County (over four million), the statute is not as rigid and instead uses phrases like "as soon as practicable."

The court must make the competency determination:

- not later than the 20th day after the date on which the court received the applicable notice under article 46B.079, or not later than the fifth day after the date of the defendant's return to court, whichever occurs first if the county has a population of 1.2 million or more and less than four million.
- not later than the 20th day after the date on which the court received notification under article 46B.079 if the county has a population of less than one million or four million or more.

Tex. Code Crim. Proc. art. 46B.084(a-1).

Case Management

In addition to creating a mental health or competency docket, one important action a judge can take in managing cases involving competency is to advance the date for hearings at every stage of the process. As soon as the competency examination is complete and the report is filed, it is a best practice for the court to hear the matter. Likewise, once a defendant is restored to competency, it is best for the court to set the hearing. Court staff can flag such cases to facilitate this. Promptly address the matter if the defendant begins to decompensate or stops taking his or her medications.

Judge William F. Dressel (Ret.) and Daphne A. Burns, The National Judicial College and the Mental Competency Best Practices Model, The Judges' Journal, Vol. 51 No. 2 (Spring 2012).

Defense Attorney Confers with Defendant

Upon receiving notice from the court, the defense attorney must meet and confer with the defendant to evaluate whether there is any suggestion that the defendant has not yet regained competency. This must be done:

- within three business days of the date he or she receives the notice, or a later date specified by the court on a showing of good cause, if the county has a population of 1.2 million or more and less than four million.
- as soon as practicable after the date of receipt of that notice, if the county has a population of less than one million or four million or more.

Tex. Code Crim. Proc. art. 46B.084(a).

Working with Clients with Diminished Capacity

The Texas Disciplinary Rule of Professional Conduct 1.16—Clients with Diminished Capacity—was updated in 2021 to require that the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client, even if that client has diminished capacity.

Before the 2021 changes, the rule titled *Client Under a Disability*, did not recognize a legitimate attorney client relationship between an attorney and an individual with a disability.[255]

> *The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect" and maintain communication with the client. Additionally, although the client may wish to have other individuals participate in conversations with the lawyer, this rule "(a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf.* Texas Disciplinary Rule of Professional Conduct 1.16

Note that even if the lawyer believes the client is not competent and is receiving competency restoration services, the lawyer must continue to endeavor to communicate with the client regarding the case.

Basis of Competency Determination After Defendant Returns to Court

When the court makes its competency determination, it may only be based on:

- the most recent report from the facility or provider (see article 46B.079(c));
- notice under article 46B.079 (except notice that the defendant is clinically ready and can be safely transferred to a competency restoration program for education services but has not yet attained competency to stand trial); and
- other medical information or personal history information relating to the defendant.

Tex. Code Crim. Proc. art. 46B.084(a-1)(1).

Objection to Report and Hearing

A party may object in writing or in open court to the findings of the most recent report not later than the 15th day after the date on which the court received the applicable notice under article 46B.079. Tex. Code Crim. Proc. art. 46B.084(a-1)(1). If a party objects, the court shall hold a hearing on the issue, which shall be before the court unless the defendant, defense counsel, or prosecutor makes a motion for a jury

[255] Previous Rule stated: "Client Under a Disability 12. Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule."

trial. Tex. Code Crim. Proc. art. 46B.084(b).

If the hearing is before the court, the hearing may be conducted by means of an electronic broadcast system as provided by article 46B.013. Notwithstanding any other provision of Chapter 46B, the defendant is not required to be returned to the court for the hearing. Tex. Code Crim. Proc. art. 46B.084(b-1).

An objection and hearing do not affect the timelines for the court's determination of competency after the defendant returns to court. Tex. Code Crim. Proc. art. 46B.084(a-1).

Note: Though Chapter 46B does not authorize a new evaluation under these circumstances, it is something the court may want to consider; however, doing so may prevent the court from making the determination of competency within the time constraints in article 46B.084(a-1).

Defendant Determined Competent to Stand Trial

If the defendant is found competent to stand trial, on the court's own motion criminal proceedings in the case against the defendant shall be resumed:

- not later than the 14th day after the date of the court's determination that the defendant's competency has been restored, if the county has a population of 1.2 million or more and less than four million.
- as soon as practicable after the date of the court's determination that the defendant's competency has been restored, if the county has a population of less than one million or four million or more.

The criminal case itself does not have to be finally resolved within any specified period.

Tex. Code Crim. Proc. art. 46B.084(d), (d-1).

Trial Preference

The trial of a criminal action against a defendant who has been determined to be restored to competency under article 46B.084 shall be given preference over other matters before the court, whether civil or criminal (except the trial of a criminal action in which the alleged victim is younger than 14 years of age). Tex. Code Crim. Proc. art. 32A.01.

Defendant Determined Incompetent to Stand Trial

If the defendant is found incompetent to stand trial and if all charges pending against the defendant are not dismissed, the court shall proceed under Subchapter E (Civil Commitment: Charges Pending). Tex. Code Crim. Proc. art. 46B.084(e).

If the defendant is found incompetent to stand trial and if all charges pending against the defendant are dismissed, the court shall proceed under Subchapter F (Civil Commitment: Charges Dismissed). Tex. Code Crim. Proc. art. 46B.084(f).

8.7.2.7 Subsequent Restoration Periods and Extensions Prohibited

The court may order only one initial period of restoration and one extension under Subchapter D in connection with the same offense. After an initial restoration period and an extension are ordered, any subsequent court orders for treatment must be issued under Subchapter E (Civil Commitment: Charges Pending) or F (Civil Commitment: Charges Dismissed). Tex. Code Crim. Proc. art. 46B.085.

Restored Defendants Who Decompensate

Defendants restored to competency often decompensate after returning to jail due to refusal to take medications, denial of medications, or provision of less effective substitute medications (*see* section 8.7.2.8a regarding the requirement to provide the types and dosages of medication prescribed for the defendant). In light of the prohibition of subsequent restoration periods or extensions, courts and counsel may consider instituting forced medication proceedings (*see* section 8.7.2.8b; however this would not address the problem of providing less effective substitute medications and assumes a court has not already issued an order compelling medication under section 574.106 of the Health and Safety Code, which would continue to be in effect at the jail as provided by section 574.110, or under article 46B.086 of the Texas Code of Criminal Procedure, which has no statutory expiration date). If that fails, civil commitment under article 46B.102 is the only option. Therefore, it is important to adhere to the timelines in article 46B.084 (*see* section 8.7.2.6h above).

There are other relatively common situations in which a restored defendant decompensates either before a judicial determination under article 46B.084 or following a judicial determination of restoration to competency but prior to trial given delays in adjudicating the defendant's case. Unfortunately, for example, lengthy delays occurred during the COVID pandemic. Article 46B.084 is largely silent regarding these possibilities. Nonetheless, an incompetent defendant cannot be tried or plead under Constitutional principles.

Prior to the 2023 legislative session, the JCMH recommended amendments to Chapter 46B that would have (1) added language to Article 46B.084 to address the situation in which a defendant decompensates after returning to the court following competency restoration services and prior to being adjudicated as restored or not under Article 46B.084, and (2) created additional language to address a situation of a defendant who after being found restored to competency under Article 46B.084 later decompensates prior to adjudication of the criminal case by trial or plea.

Although the JCMH legislative recommendations were introduced as part of S.B. 2479 as filed, those sections ultimately were not enacted. Nonetheless, given Constitutional requirements, we recommend the following as best practices. First, if there has not yet been a judicial determination regarding the restored defendant under Article 46B.084 and a party has objected to the most recent report about the defendant's competency, the court should determine whether there is evidence from a credible source that the defendant may no longer be competent. If so, the court should order a further examination under Subchapter B to determine whether the defendant has deteriorated and is again incompetent to stand trial. After receiving the expert's report, the court should proceed with the hearing contemplated by Article 46B.084(b) and thereafter make the findings contemplated by Article 46B.084(d), (e), or (f).

If, however, the defendant was initially determined to be competent under Article 46B.084(d)(1) or (d)(2) following competency restoration treatment, but then later decompensates prior to resolution of the criminal case, the court should, on motion of either party suggesting that the defendant may no longer be competent to stand trial (or on the court's own motion), follow the procedures provided under Subchapters A and B of Article 46B, except any subsequent court orders for treatment must be issued under Subchapter E or F. (As required by Article 46B.085, there can be only one competency restoration commitment order and one possible extension under Subchapter D.)

8.7.2.8 Medication

The law requires that a prisoner with a mental illness be provided with each prescription medication that a qualified medical professional or mental health professional determines is necessary for the care, treatment, or stabilization of the prisoner. Tex. Gov't Code § 511.009(d).

8.7.2.8.a Administration of Medication While in Custody of the Sheriff

A sheriff or sheriff's deputy having custody of a defendant for transportation as required by article 46B.0805 or 46B.082 or during proceedings described by article 46B.084 (*see* section 8.7.2.6h above) shall, according to information available at the time and unless directed otherwise by a physician treating the defendant, ensure that the defendant is provided with the types and dosages of medication prescribed for the defendant.

As enacted this requirement was dependent on whether funds are appropriated for that purpose. If funds are appropriated, the sheriff is required to provide the medication as described and is entitled to reimbursement from the state for providing it. According to the text of Article 46B.0825(c), if funds are not appropriated to reimburse the sheriff, the sheriff is not required to provide medication. However, subsequently enacted legislation in 2021, as described above, created a different statutory obligation for jails to provide prescription medications determined necessary for the care, treatment, or stabilization of the prisoner. Tex. Gov't Code § 511.009(d)(2).

Tex. Code Crim. Proc. art. 46B.0825.

8.7.2.8.b Court-Ordered Medications (COMs)

If a defendant, after being restored to competency at a treatment facility, refuses to take the medication prescribed as part of the defendant's individualized plan after returning to the jail to await further criminal proceedings, the defendant may again become incompetent. Article 46B.086 provides procedure for a court to compel a defendant to take medication to maintain competency for trial.[256] In addition, since 2009 the statute has permitted judicial consideration of court-ordered medications for a defendant who has remained in jail for more than 72 hours following a finding of incompetency to stand trial, but before a transfer to a facility or program for competency restoration services.[257] Tex. Code Crim. Proc. art. 46B.086(a)(2)(A).

Court-ordered medications for 46B defendants are a bifurcated, two-step process. Before a criminal court can conduct a medication hearing under article 46B.086, there must first be a threshold medication hearing by a court with probate jurisdiction under Chapter 574, Subchapter G (MI) or Chapter 592, Subchapter F (IDD) of the Texas Health and Safety Code, as appropriate. If the probate court determines that the defendant does not meet the criteria for court-ordered medication (in sections 574.106 or 592.156 of the Texas Health and Safety Code), the prosecutor may then seek an order for the administration of medication under article 46B.086.

[256] For a detailed discussion of the history of the forced medication statutes, *see* Brian D. Shannon, *Prescribing a Balance: The Texas Legislative Responses to* Sell v. United States, 41 ST. MARY'S L.J. 309 (2009).

[257] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 102-03 (6th ed. 2019).

Why are COMs so complicated for criminal cases?

The History behind the Texas Two-Step for Court-Ordered Medications in Competency Cases

In 2003, the U.S. Supreme Court considered the case of *Sell v. United States*. In its holding, the Supreme Court set forth four areas for trial courts to consider when analyzing and balancing the competing interest as part of considering whether to order the administration of antipsychotic medication for the sole purpose of rendering a defendant competent to stand trial.

"[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."[258]

Accordingly, the Court in *Sell* concluded that the foregoing "standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances."[259] The Court, however, indicated that "those instances may be rare."[260]

The Court, however, emphasized that prior to applying the foregoing test, a trial court should first consider whether forced medication would be permissible or warranted on other grounds.[261] Elaborating that a "court need not consider whether to allow forced medication" for the purpose of rendering a criminal defendant competent to stand trial "if forced medication is warranted for a different purpose, such as . . . the individual's dangerousness, or . . . where refusal to take drugs puts his health gravely at risk."

In this regard, the Court observed that "courts typically address involuntary medical treatment as a civil matter, and justify it" on grounds such as when it is "in the best interests of a patient who lacks the mental competence to make such a decision" or "where the patient's failure to accept treatment threatens injury to the patient or others."[262] Accordingly, the Court opined that a **criminal court "should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other . . . grounds" before approving "forced administration of drugs for purposes of rendering a defendant competent to stand trial**[.]"[263]

The Texas Legislature worked repeatedly and deliberately to codify *Sell's* principles into Texas Law.[264] For more information on the legislative history, see Brian D. Shannon's article, Prescribing a Balance: The Texas Legislative Responses to *Sell v. United States*.[265]

Hence, we have the "Texas Two-Step" for Court-ordered medications in criminal cases.

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[258] *Sell v. United States*, 539 U.S. 166, 179 (2003)

[259] *Sell*, 539 U.S. at 180.

[260] *Id.*

[261] *Id.* at 182.

[262] *Id.*

[263] *Id.* at 183.

[264] Brian D. Shannon, *Prescribing a Balance: The Texas Legislative Responses to Sell V. United States*, 41 ST. MARY'S L. J. 309, 317 (2009) Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol41/iss2/3.

[265] *Id.*

Required Criteria of Defendant for Applicability of Article 46B.086

Article 46B.086 (Court-ordered Medications) applies to a defendant:

- who is determined under Chapter 46B to be incompetent to stand trial;
- who is one of the following:
  - remains confined in a correctional facility, as defined by section 1.07 of the Texas Penal Code, for a period exceeding 72 hours while awaiting transfer to an inpatient mental health facility, a residential care facility, or an outpatient competency restoration program;[266]
  - is committed to an inpatient mental health facility, a residential care facility, or a jail-based competency restoration program for the purpose of competency restoration;
  - is confined in a correctional facility while awaiting further criminal proceedings following competency restoration; or
  - is subject to article 46B.072, if the court has made the determinations required by subsection (a-1) of that article;
- for whom a correctional facility or jail-based competency restoration program that employs or contracts with a licensed psychiatrist, an inpatient mental health facility, a residential care facility, or an outpatient competency restoration program provider has prepared a continuity of care plan that requires the defendant to take psychoactive medications; and
- who, after a hearing held under section 574.106 or 592.156 of the Texas Health and Safety Code, as applicable, has been found to not meet the criteria prescribed by sections 574.106(a) and (a-1) or 592.156(a) and (b) of the Texas Health and Safety Code, for court-ordered administration of psychoactive medications.[267]

Tex. Code Crim. Proc. art.46B.086(a).

Note: The following procedures assume that article 46B.086 applies and thus, a hearing was held by the probate court under section 574.106 or 592.156 of the Texas Health and Safety Code, and the defendant has been found to not meet the criteria prescribed by subsections 574.106(a) and (a-1) or 592.156(a) and (b) for court-ordered administration of psychoactive medications.

Refusal and Notice to the Court, Prosecutor, and Defense Counsel

If a defendant that meets the criteria in article 46B.086(a) refuses to take psychoactive medications as required by the continuity of care plan, the director of the facility or the program provider, as applicable, shall notify the court in which the criminal proceedings are pending of that fact not later than the end of the next business day following the refusal. The court shall promptly notify the prosecutor and defense counsel of the defendant's refusal. Tex. Code Crim. Proc. art.46B.086(b).

Motion to Compel Medication

The prosecutor may file a written motion to compel medication. The motion to compel medication must be filed not later than the 15th day after the date a probate judge issues an order stating that the defendant does not meet the criteria for court-ordered administration of psychoactive medications under sections 574.106 or 592.156, Texas Health and Safety Code, except that, for a defendant in an outpatient competency restoration program, the motion may be filed at any time. Tex. Code Crim. Proc. art.46B.086(b).

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[266] For a defendant meeting this criterion, an order issued under article 46B.086: (1) authorizes the initiation of any appropriate mental health treatment for the defendant awaiting transfer; and (2) does not constitute authorization to retain the defendant in a correctional facility for competency restoration treatment. Tex. Code Crim. Proc. art.46B.086(g).

[267] This hearing is conducted by the probate court and is separate from the 46B.086 hearing conducted by the criminal court.

Notice and a Hearing Provided to Defendant

The court, after notice and after a hearing held not later than the 10th day after the motion to compel medication is filed, may authorize the director of the facility or the program provider, as applicable, to have the medication administered to the defendant, by reasonable force if necessary. The hearing may be conducted using an electronic broadcast system as provided by article 46B.013. Tex. Code Crim. Proc. art.46B.086(c).

Testimony of Two Physicians

The court may issue an order for forced medication only if the order is supported by the testimony of two physicians, one of whom is the physician at or with the applicable facility or program who is prescribing the medication as a component of the continuity of care plan and another who is not otherwise involved in proceedings against the defendant. The court may require either or both physicians to examine the defendant and report on the examination to the court. Tex. Code Crim. Proc. art.46B.086(d).

A statement made by a defendant to a physician during such examination may not be admitted against the defendant in any criminal proceeding, other than at:

- a hearing on the defendant's incompetency; or
- any proceeding at which the defendant first introduces into evidence the contents of the statement.

Tex. Code Crim. Proc. art.46B.086(f).

Practitioner Questions

Court Ordered Medications Frequently Asked Questions

Physician Issues

Can the physician who, when acting as a qualified expert, rendered an opinion regarding the defendant being incompetent to stand trial (CCP art. 46B.021) also be the applicant physician under 574.104 (Physician's Application for Order to Authorize Psychoactive Medications) / 574.106 (Hearing and Order Authorizing Psychoactive Medications)? (and/or 592.102, for IDD)?

No.

- Per CCP 46B.021(a), the expert appointed to evaluate the defendant's competency is supposed to be "disinterested."
- Per CCP 46B.021(c), the expert appointed to evaluate the defendant's competency cannot be appointed if they are "involved in the treatment of the defendant."
- Health and Safety Code 574.104(a) *(Physician's Application for Order to Authorize Psychoactive Medications)* requires the applicant physician to be one who is "treating a patient."
- Accordingly, the 46B.021 competency expert should not also serve as the applicant in a 574.106 proceeding because he or she would not have been involved in the treatment of the defendant.

Can the physician who, when acting as a qualified expert, rendered an opinion regarding the defendant being incompetent to stand trial (CCP art. 46B.021) also be one of the testifying physicians under CCP 46B.086 (Court-Ordered Medications)?

No.

- Per CCP 46B.021(a), the expert appointed to evaluate the defendant's competency is supposed to be "disinterested."
- Per CCP 46B.021(c), the expert appointed to evaluate the defendant's competency cannot be appointed if they are "involved in the treatment of the defendant."
- CCP 46B.086(d) (Court Ordered Medications) calls for testimony by two doctors: (1)"one of whom is the physician at or with the applicable facility or program who is prescribing the medication as a component of the defendant's continuity of care plan" and (2) "another who is not otherwise involved in proceedings against the defendant."
- So, in a proceeding for court ordered medications (COMs) under 46B.086, the 1st doctor must be involved in the defendant's treatment. The 2nd doctor should be someone neutral, but that latter language of being "not otherwise involved in proceedings against the defendant" would appear to knock out the 46B.021 appointed expert (the *physician who found the defendant incompetent to stand trial)*.

Bonus Information:

- The physician who issued a report related to the defendant being incompetent to stand trial (under 46B.021) **can**, if they determine the defendant to be incompetent and not restorable in the foreseeable future, provide *one* of the two Certificates of Medical Examination (CMEs) for CCP art. 46B.102 purposes (as they are an examining physician but not a treating one). 46B.102 directs you to Title 7 Subtitle C of the Health and Safety Code (*see* 574.009 -.011).

Clear and Convincing Evidence

The court may issue an order authorizing forced medication if the court finds by clear and convincing evidence that:

- the prescribed medication is medically appropriate, is in the best medical interest of the defendant, and does not present side effects that cause harm to the defendant that is greater than the medical benefit to the defendant;
- the state has a clear and compelling interest in the defendant obtaining and maintaining competency to stand trial;
- no other less invasive means of obtaining and maintaining the defendant's competency exists; and
- the prescribed medication will not unduly prejudice the defendant's rights or use of defensive theories at trial.

Tex. Code Crim. Proc. art.46B.086(e).

Compare the Hearing Criteria

Probate Court Criteria for COMs under Health & Safety § 574.106

Court finds by Clear & Convincing Evidence that:

1) the patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment with the proposed medication is in the best interest of the patient; or
2) if the patient was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient, that treatment with the proposed medication is in the best interest of the patient and either:
   a. the patient presents a danger to the patient or others in the inpatient mental health facility in which the patient is being treated as a result of a mental disorder or mental defect; or
   b. the patient:
      i. has remained confined in a correctional facility for a period exceeding 72 hours while awaiting transfer for competency restoration treatment; and
      ii. presents a danger to the patient or others in the correctional facility as a result of a mental disorder or mental defect.

Criminal Court Criteria for COMs under CCP 46B.086

Court finds by Clear & Convincing Evidence that:

1) the prescribed medication is medically appropriate, is in the best medical interest of the defendant, and does not present side effects that cause harm to the defendant that is greater than the medical benefit to the defendant;
2) the state has a clear and compelling interest in the defendant obtaining and maintaining competency to stand trial;
3) no other less invasive means of obtaining and maintaining the defendant's competency exists; and
4) the prescribed medication will not unduly prejudice the defendant's rights or use of defensive theories at trial.

8.7.3 Civil Commitment by the Criminal Court: Extended Commitment

The criminal court's role in civil commitment following criminal commitment depends on whether the underlying charges are pending or have been dismissed. Both scenarios are addressed below.

8.7.3.1 Charges Pending

8.7.3.1.a Applicability of Subchapter E of Chapter 46B

If the charges against the defendant are still pending and the court is either required to proceed according to article 46B.084(e) (competency has not been attained or restored after the initial restoration period and one possible extension period) or has determined it is appropriate to proceed under article 46B.071 (based on the expert's report that the defendant is both incompetent and unlikely to be restored to competency in the foreseeable future), then Subchapter E (Civil Commitment: Charges Pending) applies. Tex. Code Crim. Proc. art. 46B.101.

8.7.3.1.b Civil Commitment Hearing: Mental Illness

If it appears to the criminal court that the defendant may be a person with MI, the court shall hold a hearing to determine whether the defendant should be court-ordered to mental health services under Subtitle C, Title 7 of the Texas Health and Safety Code. Tex. Code Crim. Proc. art. 46B.102(a). The judge of the criminal court will preside over and make the determinations that a county judge or other court with probate jurisdiction would normally make in the civil commitment process (the criminal court may be the county court for certain offenses).

Proceedings Governed by the Texas Mental Health Code

Proceedings for commitment of the defendant to court-ordered mental health services are governed by Subtitle C, Title 7 of the Texas Health and Safety Code (to the extent that subtitle applies and does not conflict with Chapter 46B), except that the criminal court is the court conducting the proceedings. This is true whether or not the criminal court is also the county court. Tex. Code Crim. Proc. art. 46B.102(a).

Besides the criminal court conducting the proceedings, some other key differences exist between court-ordered mental health services under Subchapter E of Chapter 46B and court-ordered mental health services under Subtitle C, Title 7 of the Texas Health and Safety Code.[268] An application for court-ordered temporary or extended mental health services is not required. The provisions of Subtitle C, Title 7 of the Texas Health and Safety Code relating to notice of hearing do not apply. Tex. Code Crim. Proc. art. 46B.102(d).

Note: The provisions in Chapter 574 of the Health and Safety Code use the terms "proposed patient" and "patient." References below to "the defendant" are used to reflect that charges remain pending; however, the defendant is the proposed patient or the patient for purposes of the provisions in Chapter 574.

[268] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 111 (6th ed. 2019).

General Hearing Procedures

- Before a Subchapter E hearing may be held, there must be on file with the court at least two CMEs for mental illness completed by different physicians, each of whom has examined the defendant in the past 30 days. Tex. Health & Safety Code § 574.009.
- The CME for mental illness must be sworn to, dated, signed by the examining physician and contain certain information. Tex. Health & Safety Code § 574.011.
- The hearing should be held in a physical setting that is not likely to have a harmful effect on the defendant. Tex. Health & Safety Code § 574.031(a).
- The defendant is entitled to be present at the hearing, unless the defendant or the defendant's attorney waive that right. Tex. Health & Safety Code § 574.031(c).
- The hearing must be open to the public unless otherwise requested by the defendant and good cause is shown for closing the hearing. Tex. Health & Safety Code § 574.031(d).
- The Texas Rules of Evidence apply unless inconsistent with Subtitle C, Title 7 of the Texas Health and Safety Code. Tex. Health & Safety Code § 574.031(e).
- The court may consider the testimony of a nonphysician mental health professional in addition to medical or psychiatric testimony. Tex. Health & Safety Code § 574.031(f).
- The hearing is on the record, and the state must prove each element of the applicable criteria by clear and convincing evidence. Tex. Health & Safety Code § 574.031(g).
- Whether the hearing is before the court or the jury depends on the type of mental health services (temporary or extended) and whether the right to a jury, if applicable, has been waived. Tex. Health & Safety Code § 574.032.
- The criteria for mental health services are found in sections 574.034 (temporary inpatient), 574.0345 (temporary outpatient), 574.035 (extended inpatient), and 574.0355 (extended outpatient) of the Texas Health and Safety Code.
- If the court orders outpatient mental health services, the judge must designate a person responsible for those services. That person must submit a general program of treatment to the court. Tex. Health & Safety Code § 574.037.
- The court must direct the court clerk to issue to the person authorized to transport the defendant two writs of commitment requiring the person to take custody of and transport the defendant to the designated mental health facility. Tex. Health & Safety Code § 574.046.
- A certified transcript must be prepared and sent to the designated facility. Tex. Health & Safety Code § 574.047.
- An acknowledgement of delivery of the defendant must be provided by the facility administrator and a copy filed with the clerk of the committing court.

Court-Ordered Mental Health Services

Proceedings for Court-Ordered Mental Health Services are divided into four parts, one for each procedure:

- Order for Temporary Inpatient Mental Health Services. Tex. Health & Safety Code § 574.034.
- Order for Temporary Outpatient Mental Health Services. Tex. Health & Safety Code § 574.0345.
- Order for Extended Inpatient Mental Health Services. Tex. Health & Safety Code § 574.035.
- Order for Extended Outpatient Mental Health Services. Tex. Health & Safety Code § 574.0355.

An order for temporary mental health services is generally authorized for not longer than 45 days; however, if a judge finds a longer period is necessary, the order may specify a period not to exceed 90 days. Tex. Health & Safety Code §§ 574.034(g); 574.0345(c). An order for extended mental health services must provide for a period of treatment not to exceed 12 months. Tex. Health & Safety Code §§ 574.035(h), 574.0355(d).

Each type of mental health services has its own criteria that must be met before a judge may order a defendant to receive that service (*see* sections 574.034, 574.0345, 574.035, and 574.0355 of the Texas Health and Safety Code). In addition to the commitment criteria, which type of services the court orders depend on the circumstances, i.e., the stability of the defendant, the intent of the prosecutor regarding the charge, and the recommendation of the treatment provider.

Assuming the criminal court granted the full restoration period (initial restoration period plus one extension), a defendant receiving a Subchapter E hearing will likely have been committed for either 120 or 180 days depending on the underlying offense. Therefore, if the defendant otherwise meets the criteria for extended mental health services in sections 574.035 (extended inpatient) or 574.0355 (extended outpatient) of the Texas Health and Safety Code, the criminal court may apply those provisions rather than the provisions in section 574.034 or 574.0345 related to temporary inpatient mental health services for up to 45 days or 90 days.[269] *See* Intercept 0, section 3 of this Bench Book for detailed procedures.

Alternatively, the court can consider extended outpatient mental health services if the statutory criteria are met.[270] *See* section 574.0355. *See also* Intercept 0, section 3 of this Bench Book for detailed procedures.

If the court is proceeding under Subchapter E because of a finding that the defendant is both incompetent and not likely to be restored in the foreseeable future, then the defendant will not have been committed under Subchapter D of Chapter 46B. Instead, the court must turn directly either to Subchapter E (if charges remain pending) or Subchapter F (if the charges are dropped). Therefore, there typically will not have been the requisite inpatient hospitalization under Chapter 46B for 60 consecutive days in the preceding 12 months to be able to pursue an extended inpatient commitment under section 574.035.[271]

Such a defendant also likely will not meet the requirements for consideration of an extended outpatient commitment under section 574.0355 (receiving court-ordered inpatient mental health services for at least 60 days during the preceding 12 months or court-ordered outpatient services during the preceding 60 days). Therefore, the criminal court will need to proceed with the temporary inpatient commitment provisions in section 574.034 of the Texas Health and Safety Code (not to exceed 45 days, but the period

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[269] *See* BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 113 (6th ed. 2019). For an extended 12-month commitment hearing, the Texas Health and Safety Code requires live expert testimony and a jury (unless the defendant or the defendant's attorney waive the right to a jury). Tex. Health & Safety Code §§ 574.031, 574.032. *See* Intercept 0, section 3 of this Bench Book for detailed procedures.

[270] Although a court may not ordinarily order an outpatient civil commitment if there are charges pending against the person that involves an act, attempt, or threat of serious bodily injury to another person, those exceptions should not apply to outpatient commitment orders under Subchapter E of Article 46B. Compare Article 46B.102(b) with Tex. Health & Safety Code § 574.0355(e). Subchapter E actually contemplates the potential use of outpatient commitment orders in several situations.

[271] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 111-12 (6th ed. 2019).

can be up to 90 days if the judge finds the longer period to be necessary).[272] *See* Intercept 0, section 3 of this Bench Book for detailed procedures.

Alternatively, in appropriate cases, the court may consider ordering temporary outpatient services for the same time periods under section 574.0345. *See* Intercept 0, section 3 of this Bench Book for detailed procedures.

Commitment Criteria

The commitment criteria for temporary inpatient, temporary outpatient, extended inpatient, and extended outpatient mental health services are discussed in Intercept 0, section 3 of this Bench Book.

Note, however, that the exclusion in the Health and Safety Code regarding persons who face charges involving acts, attempts, or threats of serious bodily injury is not controlling for Subchapter E outpatient commitment matters when there are conflicts with provisions in Subchapter E that authorize an outpatient commitment. See Tex. Code Crim. Proc. art. 46B.102(b).

Appeals

Appeals from the criminal court proceedings are to the court of appeals as in the proceedings for court-ordered inpatient mental health services under Subtitle C, Title 7 of the Texas Health and Safety Code. Tex. Code Crim. Proc. art. 46B.102(d).

Commitment to a Mental Health Facility[273]

If the court enters an order committing the defendant to a mental health facility, the defendant shall be:

- treated in conformity with Subtitle C, Title 7 of the Texas Health and Safety Code, except as otherwise provided by Chapter 46B; and
- released in conformity with article 46B.107.

Tex. Code Crim. Proc. art. 46B.102(c).

[272] *Id*. Note: In the event the defendant was returned to court after criminal commitment, but spent so many months in jail that section 574.035 does not apply (specifically, the defendant has not received court-ordered inpatient mental health services under Chapter 46B for at least 60 consecutive days during the previous 12 months because the defendant has been in jail for longer than 12 months since returning to court after those services), the criminal court must then conduct the temporary commitment proceedings under section 574.034 (inpatient) or 574.0345 (outpatient). *Id*. Professor Shannon also notes that, though rare, it is possible for the mental health treatment provider to return the defendant back to the court as not likely to attain competency within the foreseeable future before the defendant has been hospitalized for 60 days. Then, the Texas Health and Safety Code would also require the court to follow the 45-day (or 90-day) "temporary" commitment provisions.

[273] *See* sections 574.034, 574.0345, 574.035, and 574.0355 of the Texas Health and Safety Code for the criteria that must be met before a judge may order a defendant to receive temporary inpatient, temporary outpatient, extended inpatient, and extended outpatient services respectively.

General Post-Commitment Procedures

- Not later than the 30th day after the defendant is committed to the facility, the facility administrator must assess the appropriateness of transferring the defendant to outpatient mental health services. The administrator may recommend that the court modify the order to require such services. Tex. Health & Safety Code § 574.061.
- If the court ordered outpatient services, the judge may set a hearing on its own motion or on a motion for modification to determine whether the order should be modified in a way that substantially deviates from the original program of treatment in the order. Tex. Health & Safety Code § 574.062.
- The court may modify an order (or refuse to modify an order) for outpatient services at the modification hearing if the court determines that the patient meets the applicable criteria for court-ordered inpatient mental health services. Tex. Health & Safety Code § 574.065.
- A county or district attorney or other adult may file an application to renew an order for extended mental health services. Certain information is required in the application (for example, two CMEs for mental illness) and a hearing may be requested or held on the court's own motion. The court must apply certain criteria and make certain findings. A renewed order authorizes treatment for not more than 12 months. A renewed order may be modified to provide for outpatient mental health services. Tex. Health & Safety Code § 574.066.
- The court on its own motion may set a status conference with the defendant, the defendant's attorney, and the person designated to be responsible for the court-ordered outpatient services under section 574.037. Tex. Health & Safety Code § 574.0665.

8.7.3.1.c Civil Commitment Hearing: Intellectual Disability

The following procedures govern a civil commitment hearing for a person with an ID when charges remain pending and the person remains incompetent to proceed to trial or was determined unlikely to be restored to competency in the foreseeable future. *See* Intercept 0, section 3.5 of this Bench Book for detailed procedures, including the commitment criteria in section 593.052 of the Texas Health and Safety Code.

Hearing

If it appears to the court that the defendant may be a person with an ID, the court shall hold a hearing to determine whether the defendant is a person with an ID. Tex. Code Crim. Proc. art. 46B.103(a). The judge of the criminal court will preside over and make the determinations that a county judge or other court with probate jurisdiction would normally make in the civil commitment process (the criminal court may be the county court for certain offenses).

Proceedings Governed by Persons with Intellectual Disability Act

Proceedings for commitment of the defendant to a residential care facility are governed by Subtitle D, Title 7 of the Texas Health and Safety Code (to the extent that Subtitle D applies and does not conflict with Chapter 46B), except that the criminal court shall conduct the proceedings whether or not the criminal court is also a county court. Tex. Code Crim. Proc. art. 46B.103(b).

Besides the criminal court conducting the proceedings, some other key differences exist between civil commitment under Subchapter E of Chapter 46B and civil commitment under Subtitle D, Title 7 of the Texas Health and Safety Code. An application to have the defendant declared a person with an ID is not required. The provisions of Subtitle D, Title 7 of the Texas Health and Safety Code, relating to notice of hearing do not apply. Tex. Code Crim. Proc. art. 46B.103(d).

Note: Unlike the burden of proof for civil commitments for MI (clear and convincing evidence), the burden of proof in commitment proceedings for persons with intellectual disabilities is beyond a reasonable doubt. Tex. Health and Safety Code § 593.050.

Appeals

Appeals from the criminal court proceedings are to the court of appeals as in the proceedings for commitment to a residential care facility under Subtitle D, Title 7 of the Texas Health and Safety Code. Tex. Code Crim. Proc. art. 46B.103(d).

Commitment to Residential Care Facility

If the court enters an order committing the defendant to a residential care facility, the defendant shall be:

- treated and released in accordance with Subtitle D, Title 7 of the Texas Health and Safety Code, except as otherwise provided by Chapter 46B; and
- released in conformity with article 46B.107.

Tex. Code Crim. Proc. art. 46B.103(c).

8.7.3.1.d Civil Commitment Placement

If either the jury or court finds that the defendant meets the commitment criteria in the Texas Health and Safety Code, where the defendant will be placed depends on the underlying offense.

No Finding of Violence

If the underlying charges are for non-violent offenses (i.e., there is no finding of violence under article 46B.104, see above), article 46B.106 requires the commitment to be to:

- a facility designated by HHSC;[274] or
- an outpatient treatment program.

Tex. Code Crim. Proc. art. 46B.106(a).

The facility or program cannot refuse the placement on grounds that criminal charges remain pending. Tex. Code Crim. Proc. art. 46B.106(b).

Finding of Violence

A defendant shall be committed to a facility designated by HHSC[275] if:

- the defendant is charged with an offense listed in article 17.032(a); or
- the indictment charging the offense alleges an affirmative finding under article 42A.054(c) or (d).

Tex. Code Crim. Proc. art. 46B.104.

A defendant required to be committed to a maximum security unit (MSU) by HHSC may be assessed, at any time before the defendant is restored to competency, by the review board established under section 46B.105 to determine whether the defendant is manifestly dangerous. If the review board determines the defendant is not manifestly dangerous, HHSC must transfer the defendant to a non-maximum security facility designated by the HHSC. Tex. Code Crim. Proc. art. 46B.0831.

A finding of violence does not preclude a step-down modification to outpatient treatment after an order of civil commitment. Tex. Code Crim. Proc. art. 46B.1055.

[274] For the commitment of a defendant under Chapter 46B, article 46B.0021 provides that HHSC may only designate a facility operated by HHSC or under a contract with HHSC for that purpose.

[275] *Id.*

Transfer Following Civil Commitment Placement – Step-Down from MSU

If HHSC requires that the defendant is placed in an MSU, no later than the 60th day after the date the defendant arrives at the MSU, the defendant shall be assessed by a review boards to see if they can safely be treated in a non-MSU setting and transferred to:

- a unit of an inpatient mental health facility other than a MSU;
- a residential care facility; or
- a program designated by a LMHA or LIDDA.

Tex. Code Crim. Proc. art. 46B.105(a).

However, the defendant will not be transferred if the defendant is determined by a review board appointed by the executive commissioner of HHSC to be manifestly dangerous, and as a result of the danger the defendant presents, requires continued placement in a MSU. Tex. Code Crim. Proc. art. 46B.105(b).

This determination is not a medical determination that the defendant no longer meets commitment criteria under either Subtitle C or D of Title 7 of the Texas Health and Safety Code, but merely permits the transfer to a less restrictive setting for further treatment. Tex. Code Crim. Proc. art. 46B.105(d). Nor may the review board make a determination as to the defendant's need for treatment. Tex. Code Crim. Proc. art. 46B.105(c). If the superintendent of the facility at which the MSU is located disagrees with the review board's determination, he or she shall refer the matter to the executive commissioner, who will make the determination of manifest dangerousness. Tex. Code Crim. Proc. art. 46B.105(e).

Transfer Following Civil Commitment Placement – Step-Down from Inpatient

For an individual who has been transferred from a MSU to any facility other than MSU, the defendant, the head of the facility where the defendant is committed, or the attorney representing the state may request the court to modify the order of inpatient/residential treatment and instead order the defendant to participate in an outpatient treatment program.

If the head of the facility makes the request, the court is required to hold a hearing within 14 days of the request to determine whether the court should modify placement. Tex. Code Crim. Proc. art. 46B.1055(c).

If the defendant or attorney representing the state makes the request, within 14 days after the request the court must: grant the request, deny the request, or hold a hearing on the request to determine whether the court should modify the other. The court is not required to hold a hearing on a request made by the defendant or the state unless the request and supporting materials provide a basis for believing modification of the order may be appropriate. Tex. Code Crim. Proc. art. 46B.1055(d).

The LMHA or LBHA is required to submit a statement regarding whether treatment and supervision for the defendant can be safely and effectively provided on an outpatient basis, and where services are available to the defendant. Tex. Code Crim. Proc. art. 46B.1055(e).

If the head of the facility where the defendant is committed believes the defendant meets the criteria for court-ordered outpatient services, the head of the facility shall submit a CME stating so. Tex. Code Crim. Proc. art. 46B.1055(f).

If the defendant requests to be transferred to outpatient within 90 days after the date the court made the determination on the previous request, the court is not required to act until the earlier of:

the expiration of the current order for inpatient treatment or residential care; or
the 91st day after the date of the court's previous determination.

Tex. Code Crim. Proc. art. 46B.1055(g).

The court shall rule on the request as soon as practicable after a hearing on the request, but not later than the 14th day after the date of the request. Tex. Code Crim. Proc. art. 46B.1055(i).

An outpatient treatment program may not refuse to accept a placement ordered under this article on the grounds that criminal charges against the defendant are pending. Tex. Code Crim. Proc. art.

46B.1055(j).

Proceedings for commitment of the defendant to a court-ordered outpatient treatment program are governed by Subtitle C, Title 7, Health and Safety Code, to the extent that Subtitle C applies and does not conflict with this chapter, except that the criminal court shall conduct the proceedings regardless of whether the criminal court is also the county court. Tex. Code Crim. Proc. art. 46B.1055(h).

8.7.3.1.e Redetermination of Competency

Release After Commitment

Once a defendant becomes a patient in a mental health facility, an outpatient treatment program, or a residential facility pursuant to Subchapter E, if the head of the facility or provider determines that the patient should be released, the head of the facility or outpatient treatment provider shall notify the court and the sheriff of the county from which the defendant was committed in writing of the release not later than the 14th day before the date on which the facility or outpatient treatment provider intends to release the defendant. The notice must be accompanied by a written statement that states an opinion as to whether the defendant to be released has attained competency to stand trial. Tex. Code Crim. Proc. art. 46B.107(b), (c).

However, such release is subject to disapproval by the committing court if the court or the attorney representing the state has notified the head of the facility or outpatient treatment provider, as applicable, to which the defendant has been committed that a criminal charge remains pending against the defendant. Tex. Code Crim. Proc. art. 46B.107(a).

Upon receiving notice of release from the facility or provider, the court shall hold a hearing (at the facility or by means of an electronic broadcast system) to determine whether release is appropriate under the applicable criteria in Subtitle C or D, Title 7 of the Texas Health and Safety Code. Even if the court does not receive notice of intent to release the defendant, the court may, on motion of the attorney representing the state or on its own motion, hold a hearing to determine whether release is appropriate under the applicable criteria in Subtitle C or D, Title 7 of the Texas Health and Safety Code. Tex. Code Crim. Proc. art. 46B.107(d).

If the court determines that release is not appropriate, the court shall enter an order directing the head of the facility or the outpatient treatment provider to not release the defendant. If the court enters such an order, any subsequent proceeding to release the defendant must follow this same process. Tex. Code Crim. Proc. art. 46B.107(e).

Inquiry into Restoration of Competency

Upon receipt of the above notice from the facility or provider that the defendant is ready for release, or at any time, the trial court may determine whether the defendant has been restored to competency. Tex. Code Crim. Proc. art. 46B.108.

In addition, the head of the facility or provider, the defendant, defense counsel, or prosecutor may make an inquiry into competency restoration at any time. Tex. Code Crim. Proc. arts. 46B.109; 46B.110.

A request to the court made by the head of the facility or provider must be accompanied by a written statement that in their opinion the defendant is competent to stand trial. Tex. Code Crim. Proc. art. 46B.109. A motion by the defendant, defense attorney, or prosecutor made to the court may be accompanied by affidavits supporting the moving party's assertion that the defendant is competent. Tex. Code Crim. Proc. art. 46B.110.

Expert Determination of Competency

Upon a request or motion to determine that the defendant has been restored to competency or on the court's decision on its own motion to inquire into restoration of competency, the court may appoint disinterested experts to examine the defendant in accordance with Subchapter B. Tex. Code Crim. Proc. art. 46B.111.

Determination of Restoration with Agreement

Upon a request or motion to determine that the defendant has been restored to competency or on the court's own motion to inquire into restoration of competency, the court shall find the defendant competent to stand trial and proceed in the same manner as if the defendant had been found restored to competency at a hearing if:

- both parties agree that the defendant is competent to stand trial; and
- the court concurs.

Tex. Code Crim. Proc. art. 46B.112.

Determination of Restoration Without Agreement

Upon a request by the head of facility or provider, the court shall hold a hearing to determine whether the defendant has been restored to competency. Upon a motion by a party to determine whether the defendant has been restored to competency or on the court's own motion to inquire into restoration of competency, the court may hold a hearing. However, if a motion and any supporting materials establish good reason to believe the defendant may have been restored to competency, the court shall hold a hearing. Tex. Code Crim. Proc. art. 46B.113(a), (b).

If the court holds such a hearing, a jury shall make the determination on the request of the counsel for either party or the motion of the court. If no request is made, the court shall make the competency determination, and may conduct the hearing at the facility or by electronic broadcast. Tex. Code Crim. Proc. art. 46B.113(c).

At the hearing, if the head of the facility or provider supplied an opinion that the defendant has regained competency, competency is presumed and continuing incompetency must be proved by a preponderance of the evidence. However, if the head of the facility or provider did not provide an opinion, incompetency is presumed and competency must be proved by a preponderance of the evidence.[276] Tex. Code Crim. Proc. art. 46B.113(d), (e).

Disposition on Determination of Competency

If the defendant is found competent to stand trial, the proceedings on the criminal charge may proceed. Tex. Code Crim. Proc. art. 46B.116.

Disposition on Determination of Incompetency

If the defendant is found incompetent to stand trial, the court shall remand the defendant pursuant to the order of commitment, and, if applicable, order the defendant placed in the custody of the sheriff or the sheriff's designee for transportation back to the facility or outpatient treatment program. Tex. Code Crim. Proc. art. 46B.117.

Subsequent Redeterminations of Competency

If the court has determined that a defendant has not been restored to competency under Subchapter E, a subsequent request or motion for a redetermination of competency filed before the 91st day after the date of that determination must:

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[276] Historically, in Texas, when a person is found to be incompetent, is sent for competency restoration, and is not restored, then there has been an "unvacated adjudication of incompetency" and the burden of proof shifts to the State to "prove the accused's competency to stand trial beyond a reasonable doubt." *Manning v. State*, 730 S.W. 744, 748 (Tex. Crim. App. 1987). However, under article 46B.113, for Subchapter E commitments, when the facility head or outpatient treatment provider has opined that the defendant's competency has been restored, competency is presumed, and continuing incompetency must be proved by a preponderance of the evidence. If the facility head or outpatient treatment provider has not provided an opinion that the defendant has regained competency, incompetency is presumed, and competency must be proved by a preponderance of the evidence. For more discussion of this issue, *see Moralez v. State*, 450 S.W.3d 553, 559-60 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). Note that the statute does not directly address a situation in which the facility head or outpatient treatment provider instead provides an opinion that the defendant's competency has not been restored. Presumably, then, per *Manning*, the State would have to prove competency beyond a reasonable doubt in such a case, although there are no reported cases on point. BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 120-121 (6th ed. 2019).

- explain why the person making the request or motion believes another inquiry into restoration is appropriate; and
- provide support for the belief.

Tex. Code Crim. Proc. art. 46B.115(a).

Upon such a request, the court may hold a hearing, but only if the court first finds reason to believe the defendant's condition has materially changed since the prior determination that the defendant was not restored to competency. Tex. Code Crim. Proc. art. 46B.115(b). If the competency determination will be made by the court, the court may conduct the hearing at the facility to which the defendant has been committed or may conduct the hearing by means of an electronic broadcast. Tex. Code Crim. Proc. art. 46B.115(c).

Involvement by the Criminal Court Expires

Remember that the total time a defendant can spend in incompetency proceedings is limited. *See* section 8.7.2.5 above. Under Chapter 46B, a defendant generally may not be criminally committed (regardless of the facility or program) for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried. This maximum term includes all time the defendant was held in jail before they were determined incompetent to stand trial. If the defendant is still in need of commitment for mental health treatment after the maximum restoration period expires, that can only happen through civil commitment proceedings. The criminal court can no longer be involved. The defendant may be confined for an additional period in a mental hospital or other facility or may be ordered to participate for an additional period in an outpatient treatment program, as appropriate, only pursuant to proceedings conducted under Subtitle C (Texas Mental Health Code) or D (Persons with Intellectual Disability Act), Title 7 of the Texas Health and Safety Code, by a court with probate jurisdiction. Tex. Code Crim. Proc. art. 46B.0095.

Cumulative Period	=	Maximum Term Provided by Law	=	All the Time Defendant Was Held in Jail Before & After Being Determined Incompetent	+	Time The Defendant Confined for Competency Restoration Services	+	Good Time Credit (at Judge's Discretion)

See section 8.7.2.5 for more a more detailed explanation.

8.7.3.2 Charges Dismissed

8.7.3.2.a Determination of Mental Illness or Intellectual Disability

If the charges are dismissed and a court is required by article 46B.084(f) or by its appropriate determination under article 46B.071 to proceed under Subchapter F of Chapter 46B, or if the court is permitted by article 46B.004(e) to proceed under Subchapter F, the court shall determine whether there is evidence to support a finding that the defendant is either a person with MI or a person with an ID. Tex. Code Crim. Proc. art. 46B.151(a).

8.7.3.2.b Order Transferring Defendant to Appropriate Court for Civil Commitment Proceedings

If it appears to the court that there is evidence to support a finding of MI or an ID, the court shall enter an order transferring the defendant to the appropriate court for civil commitment proceedings and stating that all charges pending against the defendant in that court have been dismissed. The criminal court may order the defendant:

- detained in jail or any other suitable place pending the prompt initiation and prosecution by the prosecutor or other person designated by the court of appropriate civil proceedings to determine whether the defendant will be committed to a mental health facility or residential care facility; or
- placed in the care of a responsible person on satisfactory security being given for the defendant's proper care and protection.

Tex. Code Crim. Proc. art. 46B.151(b).

However, a defendant placed in a state hospital or state supported living center pending a civil hearing may be detained in that facility only with the consent of the head of the facility and pursuant to an order of protective custody issued under Subtitle C, Title 7 of the Texas Health and Safety Code. Tex. Code Crim. Proc. art. 46B.151(c).

If the court does not detain the defendant or place the defendant in the care of a responsible person, the court shall release the defendant. Tex. Code Crim. Proc. art. 46B.151(d).

Note that Maximum Term Provided by Law does not include enhancements
Maximum term provided by law is determined by punishment range of the offense charged not including enhancements due to prior convictions. *Ex Parte Reinke*, 370 S.W.3d 387 (Tex. Crim. App. 2012).

8.7.3.3 Transcripts and Other Records

The court shall order that:

- a transcript of all medical testimony received in both the criminal proceedings and the civil commitment proceedings under Subchapter E or F be prepared as soon as possible by the court reporters; and
- copies of documents listed in article 46B.076 accompany the defendant to the mental health facility, outpatient treatment program, or residential care facility.

Tex. Code Crim. Proc. art. 46B.171(a).

On the request of the defendant or defense attorney, a mental health facility, an outpatient treatment program, or a residential care facility shall provide to the defendant or the attorney copies of the facility's records regarding the defendant. Tex. Code Crim. Proc. art. 46B.171(b).

Incompetency and Subsequent Charges

A defendant who (1) was found incompetent, (2) was either committed for restoration or was found not likely to be restored in the foreseeable future, and (3) is charged with a subsequent offense will not repeat the same competency process. At the outset, he or she is presumed to be incompetent. *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987). The State has the burden to prove beyond a reasonable doubt that the defendant is competent. The court may not again commit such a defendant for restoration unless there is a finding that the defendant is likely to be restored in the foreseeable future. If such a defendant is re-examined, the court should consider including this contrasting presumption and burden of proof in the order.[277]

[277] Floyd L. Jennings, *Procedural Choke Points in 46B Competency Issues*, Voice for the Defense Online (March 12, 2016).

8.7.4 Miscellaneous Provisions

8.7.4.1 Compliance with Chapter

The failure of a person to comply with Chapter 46B does not provide a defendant with a right to dismissal of charges. Tex. Code Crim. Proc. art. 46B.012.

8.7.4.2 Time Credits

A court sentencing a person convicted of a criminal offense shall credit to the term of the person's sentence each of the following periods for which the person may be confined in a mental health facility, residential care facility, or jail:

- any period of confinement that occurs pending a determination under Subchapter C as to the defendant's competency to stand trial; and
- any period of confinement that occurs between the date of any initial determination of the defendant's incompetency under that subchapter and the date the person is transported to jail following a final judicial determination that the person has been restored to competency. Tex. Code Crim. Proc. art. 46B.009.

8.7.4.3 Electronic Broadcast System

A hearing may be conducted using an electronic broadcast system as permitted by Chapter 46B and in accordance with the other provisions of that code if:

- written consent to the use of an electronic broadcast system is filed with the court by the defendant or defense attorney and the prosecutor;
- the electronic broadcast system provides for a simultaneous, compressed full motion video, and interactive communication of image and sound between the judge, the prosecutor, the defense attorney, and the defendant; and
- on request of the defendant or the defense attorney, the defendant and the defense attorney are able to communicate privately without being recorded or heard by the judge or the prosecutor.

Tex. Code Crim. Proc. 46B.013(a).

On the motion of the defendant, the defense attorney, or the prosecutor or on the court's own motion, the court may terminate an appearance made through an electronic broadcast system at any time during the appearance and require an appearance by the defendant in open court. Tex. Code Crim. Proc. 46B.013(b).

A recording of the communication shall be made and preserved until any appellate proceedings have been concluded. The defendant may obtain a copy of the recording on payment of a reasonable amount to cover the costs of reproduction or, if the defendant is indigent, the court shall provide a copy to the defendant without charging a cost for the copy. Tex. Code Crim. Proc. 46B.013(c).

Beyond Criminal and Civil Commitment

Challenges exist beyond the scope of criminal and civil commitment for individuals who are:

- Incompetent, but not restorable; or
- Incompetent, but not committable.

8.8 Insanity

This section covers the issues and procedures related to the Texas insanity defense, which are generally found in Chapter 46C of the Code of Criminal Procedure and section 8.01 of the Texas Penal Code.

8.8.1 Determining Insanity

Making the Distinction:
Competency, Insanity, Mental Illness, and Intellectual Disability

Competency to Stand Trial: Relates to a defendant's mental state and present capacity to stand trial at the time of trial (should not be confused with a general finding of incapacity by a civil court related to guardianship); incompetency is not a defense to the crime charged.

Insanity: Relates to a defendant's mental state at the time the alleged crime was committed and is an affirmative defense to prosecution.

Mental Illness: Relates to impairment of thought, perception of reality, emotional process, judgment, or behavior. Sometimes archaically referred to as a "mental disease" in statutory text. *Note that a person may have a mental illness but still be competent to stand trial (though maybe not without counsel). Similarly, a person may have a mental illness but not meet the legal standard for the insanity defense.*

Intellectual Disability: Relates to subaverage general intellectual functioning with deficits in adaptive behavior. Sometimes archaically referred to as a "defect" in statutory text. *Note that a person may have an intellectual disability but still be competent to stand trial (though maybe not without counsel). Similarly, a person may have an intellectual disability but not meet the legal standard for the insanity defense.*

8.8.1.1 Standards

The procedures for determining if someone is not guilty by reason of insanity (NGRI) are outlined in Code of Criminal Procedure, Chapter 46C, which provides that a Defendant is acquitted of the crime they are charged with and determined to be NGRI if:

a) The prosecution has established, beyond a reasonable doubt, that the defendant committed the charged offense; and
b) The defense establishes, by a preponderance of the evidence, that the defendant was *insane at the time of the offense*.

Tex. Code Crim. Proc. art. 46C.153(a).

8.8.1.2 Texas Penal Code Statutory Language

Insanity

(a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.

(b) The term "mental disease or defect" does not include an abnormality manifested by repeated criminal or otherwise antisocial conduct.

Tex. Penal Code § 8.01.

8.8.1.3 Statutory Language Broken Down

8.8.1.3.a Affirmative Defense

An affirmative defense provides an excuse or justification for why certain conduct or action (the charged criminal offense) occurred. An affirmative defense is one that the defendant must allege and prove by a preponderance of the evidence.

When a defendant uses an affirmative defense, the defendant acquiesces to the alleged conduct but then asserts the affirmative defense as to why the conduct occurred.

The jury charge will only include the issue of an affirmative defense if the Defendant admits supporting evidence. "Hence, a defendant desiring to use the insanity defense must both raise that issue and present evidence in support of it. The jury is instructed that the terminology 'preponderance of the evidence' means the greater weight of the credible evidence."[278]

Tex. Penal Code § 2.04.

8.8.1.3.b Severe

The term "severe" is not defined in Texas or federal statutes. In *Texas Criminal Procedure and the Offender with Mental Illness*, Professor Brian Shannon discusses that the legislative purpose for inclusion of the word severe "was to ensure that minor disorders or personality defects will not provide a basis for a successful insanity defense."[279]

The Texas Court of Criminal Appeals has commented that "[i]ntroducing [the term] 'severe' seems quite superfluous."[280] The Court reasoned, "[I]f as a *result* of mental disease or defect an accused does not know his conduct is wrong when he engages in it, then surely his mental disease or defect is severe."[281]

The federal test for insanity also includes the phrase, "severe mental disease or defect."[282] As one federal district court explained: "The legislative history states that the term 'severe' was added to the term 'mental disease or defect' specifically to exclude antisocial personality 'tendencies' from the purview of the insanity defense."[283] The court added: "The concept of severity was added to emphasize that non-psychotic behavior disorders or neuroses such as an 'inadequate personality,' 'immature personality,' or a pattern of 'antisocial tendencies' do not constitute the defense."[284]

"Serious mental illness" is defined in the Insurance code and may be the closest that the legislature has ever gotten to defining "severe mental disease." That definition states:

"Serious mental illness" means the following psychiatric illnesses as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM):

(A) bipolar disorders (hypomanic, manic, depressive, and mixed);

(B) depression in childhood and adolescence;

(C) major depressive disorders (single episode or recurrent);

(D) obsessive-compulsive disorders;

(E) paranoid and other psychotic disorders;

(F) schizo-affective disorders (bipolar or depressive); and

(G) schizophrenia.

Insurance Code § 1355.001(1).

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[278] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 160 (6th ed. 2019).

[279] *Id.*

[280] *Pacheco v. State,* 757 S.W. 2d 729, 735 n.7 (Tex. Crim. App. 1988).

[281] *Id.*

[282] 18 U.S.C. § 17(a).

[283] *United States v. Henley,* 8 F. Supp. 2d 503, 506 (E.D.N.C. 1998).

[284] *Id.* at 506-07.

8.8.1.3.c Mental Disease or Defect

Although there is no statutory definition for either "mental disease" or "defect," the terms generally are understood to include mental illness and intellectual and developmental disabilities. Compare, for example, the language in the insanity defense for juveniles found in Section 55.51(a), Tex. Family Code, which has been modernized to include the terms "mental illness or an intellectual disability."

> . . . "Mental illness" means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that:
>
> (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or
>
> (B) grossly impairs behavior as demonstrated by recent disturbed behavior.

Tex. Health & Safety Code § 591.003(14); Tex. Code Crim. Proc. art. 46C.001(3).

Likewise, there is no current statutory definition of "mental defect," which is primarily an obsolete term that is associated with what we now refer to as Intellectual or Developmental Disability (IDD). Further, the term mental retardation, although still cited within Texas Code of Criminal Procedure, Chapter 46C, is defined in Art. 46C.001(4) as having meaning assigned by Section 591.003, Health and Safety Code; that section circularly defines mental retardation as meaning intellectual disability.

Tex. Health & Safety Code § 591.003(13).

"**Intellectual disability**" means significantly subaverage general intellectual functioning[285] that is concurrent with deficits in adaptive behavior[286] and originates during the developmental period.

Tex. Health & Safety Code § 591.003(7-a).

8.8.1.3.d Repeated Criminal Conduct of Otherwise Antisocial Conduct

"**Manifested by repeated criminal . . . conduct**" means that a defendant cannot claim insanity when the mental disease is demonstrated by the crime itself. For example: Pyromania is manifested though committing arson, but Texas Penal Code section 8.01(b) works to preclude a successful justification of insanity to the crime of arson simply because the defendant is diagnosed with pyromania (and only, pyromania).

"**Otherwise antisocial conduct**" also means that an individual cannot claim insanity based on a mental disease or defect that resulted from drug use.

The purpose of subsection (b) was to "exclude psychopaths from the insanity defense for fear that recidivists would qualify if they could be characterized as psychopaths."[287] Of course, as Searcy and Patterson pointed out in their practice commentary, "no psychopath manifests his psychopathy solely by repeated criminal conduct and … [such persons] invariably show some other symptom."[288]

8.8.1.3.e Cognition of the Legal Wrong

The jury must be convinced by a preponderance of the evidence that the **defendant did not know that their conduct was legally wrong.** *This is opposed to not knowing the conduct was morally wrong.*[289]

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[285] "Subaverage general intellectual functioning" refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used. TEX. HEALTH & SAFETY CODE § 591.003(20).

[286] "Adaptive Behavior" means how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. TEX. HEALTH & SAFETY CODE § 591.003(1).

[287] Seth S. Searcy III & James R. Patterson, Practice Commentary, Tex. Penal Code ann. § 8.01, at 179, 181 (Vernon 1974).

[288] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 163 (6th ed. 2019) (citing Seth S. Searcy III & James R. Patterson, Practice Commentary, Tex. Penal Code ann. § 8.01, at 179, 181 (Vernon 1974)).

[289] *Bigby v. State of Texas,* 892 S.W.2d 864, 878 (Tex. Crim. App. 1994).

Knowing
Cognition is a narrow exclusive test, regardless of whether a defendant's mental illness impairs the ability to control one's conduct and no matter how serious the defendant's mental illness may be.[290]

Legal Wrong
A defendant that knows his act is prohibited by law will be viewed as having understood that others believed his or her conduct was wrong, and therefore such a defendant knows that his or her conduct is "wrong" within the meaning of Section 8.01(a) of the Texas Penal Code.[291]

"Thus, the question for deciding insanity is this: **Does the defendant factually know that society considers this conduct against the law, even though the defendant, due to his mental disease or defect, may think that the conduct is morally justified?** if a defendant knows that his or her conduct is prohibited by law, then he or she is legally 'sane' under Texas criminal law."[292]

8.8.1.3.f "As a Result" of the Mental Disease or Defect

Note that the language of the statute states there must be direct link between the defendant's mental disease or defect and the lack of understanding that the crime was legally wrong. Tex. Penal Code § 8.01(a).

What if the Defendant was Unconscious or Semi-Conscious?

"The insanity defense is not available to a defendant who was unconscious or semi-conscious at the time of the alleged offense, so that it might be said of him that he did not know his conduct was wrong only because he did not consciously know of his conduct at all."[293]

In rendering this opinion, the CCA "carefully reviewed the legislative history of [the insanity defense] and nothing in it suggests that any legislators intended for the insanity defense to apply to persons who were unconscious or semi-conscious at the time of the alleged offense" Also, persons who were unconscious or semi-conscious at the time of the alleged offense may argue other defenses, either that they lacked the mens rea necessary for criminal liability, or that they did not engage in a voluntary act under Texas Penal Code §§ 6.02 and 6.01.[294]

[290] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 161 (6th ed. 2019).

[291] *See Reyna v. State,* 116 S.W. 3d 362, 368 (Tex. App.—El Paso 2003, no pet.). In *Ruffin v. State*, the court stated the following: Under Texas law, "wrong" in this context means "illegal." *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008).

[292] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 162 (6th ed. 2019).

[293] *Mendenhall v. State*, 77 S.W.3d 815 (Tex. Crim. App. 2002) (citing *Boykin v. State,* 818 S.W.2d 782 (Tex. Crim. App. 1991).

[294] *Id.* See also, *Alford v. State,* 866 S.W.2d 619, 625 (Tex. Crim. App. 1993) (Clinton, J., concurring) ("voluntary" act means conscious act).

8.8.2 Raising the issue of insanity

8.8.2.1 Who can raise it?

Unlike the issue of competency, the defense must raise the issue of insanity and prove it by a preponderance of the evidence. Defense counsel is the "sole hope" that the issue will be brought before the court.[295] Furthermore, failure to investigate the possibility of raising an insanity defense as a trial strategy can rise to the level of ineffective assistance of counsel where there is reason to believe an investigation is warranted.[296] The insanity defense can be investigated ex parte (by one side without involving the other side) until a decision is made to formally pursue the insanity defense and offer notice.

8.8.2.2 Notice requirements

A defendant who wants to offer evidence of an insanity defense must file notice with the court of their intention to offer that evidence and include a certification that the notice was served to the prosecuting attorney. The notice must be filed at least 20 days prior to the trial date. Note, however, that if a pretrial hearing is set prior to 20-days out from trial, the defendant must give notice at that earlier hearing. Tex. Code Crim. Proc. art. 46C.051.

If the Notice of Insanity Defense is not filed at least 20 days prior to the trial date, or filed at a Pre-Trial Hearing, evidence of an insanity defense is not admissible, unless the court finds that there is a good reason for the failure to give notice. Tex. Code Crim. Proc. art. 46C.052.

8.8.3 Experts

8.8.3.1 Appointment of Experts

If notice of intention to raise the insanity defense is filed under Texas Code of Criminal Procedure 46C.051, the court may, on its own motion or motion by the defendant, the defendant's counsel, or the attorney representing the state, appoint one or more disinterested experts to:

a) Examine the defendant with regard to the insanity defense; and
b) Testify as to the issue of insanity at any trial or hearing involving that issue.

Tex. Code Crim. Proc. art. 46C.101.

8.8.3.2 Qualifications

The court may appoint qualified psychiatrists or psychologists as experts. To qualify for appointment as an expert a psychiatrist or psychologist must:

- Be a licensed physician or licensed psychologist, who has doctoral degree in psychology and have the following certification or training;
- Certification by the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or
- Certification by the American Board of Professional Psychology in forensic psychology; or
- Training consisting of at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations; and
- At least eight hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment.

Tex. Code Crim. Proc. art. 46C.102(a).

[295] *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990).

[296] *Id.* at 596-97. Case out of Lubbock, Texas, where defense counsel was found ineffective for failing to investigate defendant's competency, despite extensive evidence of mental health history, hospitalizations, and current medications, because "it was difficult to prove an insanity defense in Lubbock, Texas." *Id.* at 596.

There is no longer an "experience exception" for psychiatrists or psychologists for psychiatrists to conduct insanity evaluations, making it consistent with the qualifications to conduct competency evaluations.

8.8.3.3 Who chooses the expert(s)?

8.8.3.3.a The Court

If a notice of intention to raise an insanity defense is filed, the court may appoint one or more impartial experts to examine the defendant with regard to the insanity defense. The expert may also testify during the trial or hearing to the issue of insanity. The expert is appointed either through the court's own motion or by a motion made by the defendant or the prosecution. The expert will be advised by the court of the facts and circumstances of the offense that the defendant is accused of committing as well as the elements of an insanity defense. Tex. Code Crim. Proc. art. 46C.101.

8.8.3.3.b The Defendant

If a defendant wishes to be examined by an expert of the defendant's own choice, the court on timely request shall provide the examiner with reasonable opportunity to examine the defendant.[297] Tex. Code Crim. Proc. art. 46C.107.

8.8.3.3.c The State

By raising the NGRI issue, the State is given the right to have their own expert examine the defendant.[298]

Qualifications of an Appointed vs. Hired Expert

Note that at least one Texas appellate court has held that the expert qualifications required under 46C.102 only apply to ***court-appointed*** experts.[299] Therefore, an expert ***hired*** by the state or defense (i.e. an expert of the Defendant's/State's own choice) need not meet the statutory qualifications.[300] The trial court may, however, give much less weight to any expert who does not meet the minimum statutory requirements and could potentially exclude that expert's testimony under Texas Rule of Evidence 702.

8.8.3.4 Information Provided to Experts

The Court shall advise an expert appointed under this article of the facts and circumstances of the offense with which the defendant is charged and the elements of the insanity defense. Tex. Code Crim. Proc. art. 46C.101(b).

The State and/or Defense will typically provide the expert with police reports, witness accounts of the alleged offense, or information that would give insight into the defendant's mental state at the time of the alleged offense.[301] Also typically provided are the defendant's MH/IDD records from any past admission or treatment for their condition. Records that predate the alleged event are especially

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[297] *See Ake v. Oklahoma*, 470 U.S. 68 (1986) (holding that due process requires the state to pay for an expert on insanity if the defendant is indigent). This requirement, however, has been limited by the Court of Criminal Appeals after one expert has already been appointed. *See Gonzalez v. State*, 616 S.W.3d 585, 594 (Tex. Crim. App. 2020), *reh'g denied* (Mar. 3, 2021) ("If the trial judge appoints an expert, and the defendant requests another or a different expert, the trial judge may deny further expert assistance unless the defendant proves that the original appointed expert could not adequately assist the defendant.") (quoting *Ex parte Jimenez*, 364 S.W.3d 866, 877 (Tex. Crim. App. 2012)).

[298] *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997).

[299] *Pham v. State*, 463 S.W.3d 660, 670 (Tex. App—Amarillo 2015, *pet. ref'd*).

[300] *Id.* at 668.

[301] The circumstances of the crime itself are important in determining the mental state of the accused at the time of the commission of the offense, and evidence indicating knowledge of wrongful conduct, such as an attempt to conceal incriminating evidence or elude law enforcement, may be considered. *Graham v. State*, 566 S.W.2d 941, 950 to 951 (Tex. Crim. App. 1978).

pertinent, as they may show the person had a mental health condition that may have impaired their thinking as to know their conduct was wrong at the time of the event.

If the State or Defense has hired an "expert of their choice," that expert is also provided with information from the hiring counsel. Unlike a court-appointed expert, the right to have a mental health professional employed under the *Ake* procedure is part of the defendant's right to counsel. Unless the expert testifies at trial, the State is not entitled to the expert's report or even access to the expert. Remember that all information given to this expert is subject to cross-examination if the expert testifies, therefore the information should be carefully examined before being provided to the expert. This becomes especially important for defense counsel, as the State may not have known or had access to this information otherwise.

Ideally, the expert would have the following items available for review:

- Police reports;
- Police videos;
- Any other video of the incident or time around the alleged offense;
- Statements from the defendant or video of the defendant;
- Witness statements;
- The defendant's mental health history;
- Situational history of the defendant in the time leading up to the offense;
- Video of the defendant around the time of the event (possibly made by defense counsel if defendant is in psychosis when first meeting counsel);
- Contact information of friends or family members who can provide accurate historical data on the defendant; and
- The opportunity to meet the defendant as close to the time of the incident as possible if there is a very evident psychotic event occurring.

Benefits of Providing Information Upfront

The more information provided up front to the expert can expedite the insanity evaluation and report timeline. It can take months to request and receive all the necessary information that the expert requires to complete the insanity report. If the State or Defense already have records, providing them to the expert, instead of making the expert request the records for themselves, will save time and money. Alternatively, some experts use a release of information signed by the defendant and get a list of mental health providers or prior hospitalizations to expedite records requests.

8.8.3.5 If the Defendant will not Comply

The court may order a defendant to submit to an examination to determine the issue of insanity.

Penalties may be applied for a defendant's failure to cooperate with a state expert, including exclusion of the defense expert's testimony from trial.[302] Tex. Code Crim. Proc. art. 46C.104.

[302] *Soria v. State,* 933 S.W.2d 46 at 59 (citing *Karstetter v. Cardwell, 526 F.2d 1144, 1145 (9th Cir. 1975)*)(holding that in the context of an insanity exam, "once a defendant indicates his intention to invoke the insanity defense and present expert testimony on the issue, he may be ordered to submit to a psychiatric examination by psychiatrists available to testify for the government, and his refusal to talk to the State's psychiatrists may be sanctioned by the court at the least by exclusion of defendant's own experts' testimony on the insanity issue"); see *Estelle v. Smith, 451 U.S. 454 (1981)*; *Buchanan v. Kentucky, 483 U.S. 402, at 422-23 (1987)*; *Lagrone v. State*, 942 S.W.2d 602, 611 (Tex. Crim. App. 1997).

8.8.3.5.a Defendant's Right to Elect NOT to use an Insanity Defense

The previous subsection (8.8.3.5) pertains to the situation when the defendant wants to use the insanity defense for his benefit but doesn't want to cooperate with the state's expert. The current subsection examines when the defendant does not want to use the insanity defense in the case at all; when the defendant would rather plead not guilty and pursue innocence or plead guilty and face traditional punishments.

The question of whether a lawyer can insist on an insanity defense against a client's wishes has been addressed by case law in a variety of ways:

- In *Godinez v. Moran*,[303] the U.S. Supreme Court held that if a defendant was competent to stand trial, they were automatically competent to plead guilty, and thereby waive the panoply of trial rights, including the right to counsel.

The question then becomes, do we infer from this that if a client is competent, they can competently waive the use of the insanity defense?

- In 2018, the U.S. Supreme Court held, in *McCoy v. Louisiana*, that defense counsel may not admit the defendant's guilt over the defendant's express objection to the contrary.[304]
- A recent Dallas Court of Appeals case held that when a client expressly asserts that the objective of "his defen[s]e is to maintain innocence of the charged criminal acts, his lawyer must abide by the objective and may not override it by conceding guilt."[305] *Note, however, that a petition for discretionary review was granted by the CCA in July 2021.*

And because insanity is an affirmative defense, it requires admitting the charged conduct occurred.

See also federal case law on the topic:

- In 2019, a three-judge panel of the 9th U.S. Circuit Court of Appeals ruled it was a violation of the Sixth Amendment for counsel to present an insanity defense against the will of the defendant, even if the defendant shows clear signs of insanity. *United States v. Read*, 918 F.3d 712 (9th Cir. 2019).
- *Frendak v. United States*, 408 A.2d 364 (D.C. 1979). If the defendant appears to be intelligently and voluntarily waiving the insanity defense, the trial court should not deny this. However, the trial court should look into whether the defendant has been properly informed of the effects of their decision as well as the alternatives available to them. Thus, the nature of such an evaluation would be similar to a competency to stand trial evaluation.

8.8.3.6 Examination When Out on Bail

A defendant, who is free on bail, may also be compelled to submit to an examination. If the defendant fails to attend the examination or refuses to submit to the examination, the court may order that the defendant be held in custody. Custody ***may include*** a facility operated by HHSC, however, it is significantly more likely that the defendant would be taken into custody at the local jail to await examination.

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[303] *Godinez v. Moran*, 509 U.S. 389 (1993).

[304] *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

[305] *Rubio v. State*, 596 S.W.3d 410, 423 (Tex. App.—Dallas 2020, pet. granted July 2021) (citing *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018)).

Legal vs. Practical

In the circumstance where the court compels a defendant to submit to an examination by ordering the defendant into custody, legally, the defendant may be held for examination at a State Hospital, State Supported Living Center, or any other facility operated by the Health and Human Services Commission (HHSC). By statute, however, the court *may not* order a defendant to a facility operated by HHSC for examination without the consent of the head of that facility. Tex. Code Crim. Proc. art. 46C.104.

Practically speaking, HHSC has NOT consented to this type of admission in over 20 years. With State Hospital wait lists already full, due to 46B or 46C commitment orders, there is no reason to order (or the State Hospital to consent to admitting) a person into a State Hospital for an evaluation that can adequately take place in a host of other available settings, including local county jails.

8.8.3.7 One Expert May Evaluate for Insanity and Competency

An expert appointed to examine the defendant regarding sanity may also examine the defendant for competency to stand trial, but the appointing court and parties should be aware of the limitation described in the next subsection. If an expert is evaluating for both, and the expert determines that the defendant is competent, then the expert may proceed with an insanity evaluation. In such a case, the expert must file with the court separate reports concerning the defendant's insanity defense and competency to stand trial.

8.8.3.7.a Defendant Must be Competent to Be Examined for Insanity

If the expert determines that the defendant is not competent to stand trial, the expert must halt their examination and may not examine the defendant for the purposes of determining the defendant's sanity. In this case, the expert may not file a report regarding the defendant's sanity.[306] Tex. Code Crim. Proc. art. 46C.103.

For this reason, it is good practice to have the expert conduct a competency evaluation before evaluating for insanity.

8.8.3.8 Insanity Exam

8.8.3.8.a What Tests Do the Experts Conduct?

[306] *See also* TEX. CODE OF CRIM. PRO. art. 46B for incompetency issue.

Limitations on Performance Validity Measures

Validation of Malingering & Effort Tests for an IDD population

A variety of standardized tests exist to examine whether an individual is malingering or failing to put forth full effort when being tested for mental illness or insanity. These types of tests are sometimes called *Neurocognitive performance validity measures.* If the results of the test indicate that a defendant is malingering or failing to put forth effort on the psychological tests, the State will likely use this information to refute a claim of insanity in a criminal case.

According to DSM-5, "the essential feature of ***malingering*** is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as . . . evading criminal prosecution." Malingering is not a psychiatric disorder; DSM-5 includes it in the section "Other Conditions That May Be a Focus of Clinical Attention."[307]

One thing to keep in mind for these tests, is that if it is believed that the defendant has, or may have, IDD, then the type of test that the person is given to determine malingering/effort, must be validated on a subject population that also has IDD. Neurocognitive performance validity measures may produce a result that falsely indicates the person is malingering or not putting forth full effort for an individual who has a low intelligence level if the test was scaled using typical intelligence individuals.

8.8.3.8.b Factors Considered During the Insanity Examination

Three basic questions the sanity evaluator must answer, and which should be clearly discussed in the expert's report:[308]

1) "Did the defendant suffer from a mental disorder at the time of the alleged crime? (retrospective mental state evaluation)?
2) "Was there a relationship between the mental disorder and the criminal behavior?
3) "If so, were the criteria met for the jurisdiction's legal test for being found not criminally responsible?"

A sanity evaluator engages in a thorough face-to-face examination, to include a psychiatric history and possibly psychological testing. This time spent face-to-face with the defendant will allow the expert to build a rapport, or a sense of trust, with the defendant so the defendant feels comfortable telling the expert the truth; and gather information and form their official opinion.

Psychiatric and/or psychological records, medical records, and school/occupational records, along with the criminal charges and any available discovery, confession and/or interrogation statements, are routinely reviewed.

Collateral information from family and friends, especially those with access to the defendant during the time surrounding the offense, and witnesses may allow for a more accurate evaluation of their mental state and could be used to compare/contrast information gleaned from the examination.

The clinical interview generally includes inquiries into:

- the defendant's account of the crime,
- their state of mind (including orientation, and the presence of any psychotic symptoms – delusions or hallucinations – affecting their behavior),[309]

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[307] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-5 (American Psychiatric Publishing 5th ed. 2013).

[308] *Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 J. AM. ACAD. PSYCHIATRY LAW (4th Supp.) *S3, S3-76* (2014), *available at* http://jaapl.org/content/42/4_Supplement/S3.

[309] ERIC DROGIN, ET AL., HANDBOOK OF FORENSIC ASSESSMENT: PSYCHOLOGICAL AND PSYCHIATRIC PERSPECTIVES (John Wiley & Sons, Inc., 2011).

- motive for the act,
- planning and preparation, and
- any attempts to conceal the crime after the fact.

Psychological testing and structured assessments may assist the sanity evaluator in their case formulation and could include:

- IQ testing [Wechsler Adult Intelligence Scale (WAIS-IV); Wechsler Memory Scale (WMS-IV)]
- Personality testing [Minnesota Multiphasic Personality Inventory (MMPI-2); Millon Clinical Multiaxial Inventory (MCMI-IV)]
- Rogers Criminal Responsibility Assessment Scales (R–CRAS)
- Malingering testing [Malingering Probability Scale (MPS); Structured Interview of Reported Symptoms (SIRS-2); Test of Memory Malingering (TOMM); Validity Indicator Profile (VIP)]
- Psychopathy Checklist-Revised (PCL-R)

8.8.3.8.c Hypotheses that Should be Assessed in a Valid Insanity Evaluation

Following the scientific method, the expert will need to consider and find evidence to prove or disprove the following hypotheses:

> Hypothesis 1: The person has a mental disease or defect, but such impairment did not result in an inability to understand their behavior was wrong at the time of the offense, and therefore does not meet legal criteria for insanity.
>
> Hypothesis 2: The person has a mental disease or defect, and the mental impairment was severe enough to prevent him/her from understanding their conduct was wrong and thus meets legal criteria for insanity.
>
> Hypothesis 3: The person does not have a mental disease or defect and is attempting to feign impairment and therefore does not meet criteria for legal insanity.
>
> Hypothesis 4: The person was under the influence of mind-altering substances and any mental impairment that was present at the time of the offense is a direct result of intoxication and therefore does not meet legal criteria for insanity.
>
> Hypothesis 5: The person's motivation for the offense has a rational motive that is separate from mental illness, such as the conduct can be attributed to an antisocial motivation, monetary gain, revenge, or personality factors related to sadism.

8.8.3.9 Right to Counsel During Examination

The Defendant does not have a constitutional right to have counsel present during the psychiatric examination.[310]

The Texas Court of Criminal Appeal reasoned that "[b]ecause of the intimate, personal and highly subjective nature of a psychiatric examination, the presence of a third party in a legal or non-medical capacity would severely limit the efficacy of the examination."[311]

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[310] *Bennett v. State,* 766 S.W.2d 227, 231 (Tex. Crim. App.), *cert. denied,* 492 U.S. 911 (1989).

[311] *Id.*

8.8.3.10 Compensation or Reimbursement by the County

The county in which the indictment was returned, or information was filed is responsible for paying the appointed experts and that county is also responsible for reimbursing the examining facility for any reasonable expenses that were incurred during the examination. Tex. Code Crim. Proc. art. 46C.106.

8.8.3.11 Report on Insanity

The report must include a description of the procedures used in the examination, and the examiner's observations and findings pertaining to the insanity defense. Tex. Code Crim. Proc. art. 46C.105(b).

Beyond Statutory Requirements: Marks of a Quality Expert's Report

- Conveys all relevant information concisely, unambiguously, and clearly, including the facts and reasoning the expert used in formulating the opinion.
- It is a stand-alone document in that it provides or reproduces the data needed to support the opinions the expert expresses?
- States clearly any limitations (e.g., limited access to the defendant or to requested records, defendant's lack of cooperation) of which the expert is aware.
- Contains clinical data regarding the nature of the defendant's mental and emotional condition that are specifically relevant to the insanity analysis, individually addressing criminal responsibility for each charge (if more than one offense was committed).
- Comments on any contradictions or inconsistencies, including reporting on alternative scenarios and opinions.
- Is free of gratuitous comments about the defendant's behavior, need for incapacitation, dangerousness, lack of remorse, or other legal matters.

8.8.3.12 Second Report from Expert

The examiner must also submit a separate report stating their observations and findings concerning whether the defendant is a person with a mental illness and requires court-ordered mental health services, pursuant to the Health and Safety Code. The report can also include observations and findings concerning whether the defendant is a person with an intellectual and developmental disability (IDD).[312] Tex. Code Crim. Proc. art. 46C.105(c).

8.8.3.13 Timeline

The expert's written report is due 30 days after the examination is ordered. Tex. Code Crim. Proc. art. 46C.105(a). In reality, reports are rarely returned in this 30-day period. This delay is typically due to delays in receiving mental health records, as well as the issues listed in the box below.

[312] *See also* Subtitle C, Title 7, Texas Health and Safety Code regarding court-ordered mental health services.

Practical Issues in Credible Insanity Evaluations[313]

- The complexity of the case determines how long it will take to complete the evaluation. For example, misdemeanor cases usually have limited discovery to review. However, a murder case/aggravated assault case may have thousands of pages of discovery, videotaped police interviews, bodycam videos, etc. Watching the police interview is imperative as it gives the most accurate assessment of a defendant's mental state at the time of the offense (if the interview occurred soon after offense). This holds true for bodycam videos as well. Police interviews can be lengthy and generally require watching them more than once to catch all that is being said and to observe the defendant.
- While a full competency evaluation may not have been requested, a defendant's mental state and competence at the time of the sanity evaluation must be considered as they may influence the defendant's ability to adequately engage in the examination and may negatively impact their case. Concerns of incompetence should be communicated to the requesting party(ies).
- Reviewing witness interviews (if there are any witnesses) can provide additional information about whether the defendant was observed to be exhibiting psychotic symptoms around the offense. The time it takes to review witness interviews depends on the case. Some cases have none, some have one or two, and some have several.
- Interviewing family/friends who had interactions with the defendant around the time of the offense also provides information concerning whether the defendant was showing signs of a mental illness. These interviews also provide historical information about diagnoses and outpatient/inpatient mental health treatment of the defendant.
- Past mental health records (especially if the defendant was found incompetent prior to the insanity evaluation) are informative as records may provide information on whether the defendant has a history of malingering, medication compliance, and diagnoses. If the defendant was found incompetent on the instant offense, state hospital records are often helpful as they contain statements the person made about their mental state at the time of the offense, as well as diagnoses and if there were observations of malingering.
- While psychological testing and structured assessments may assist the sanity evaluator in their case formulation, the appointed expert may not be trained in the use of a specific test, thus needing to rely on a third party for the test administration and interpretation.
- Obtaining mental health records can take up to 3 to 4 months once they are requested.
- The time with direct contact with the defendant is highly variable. A delusional and guarded person may take several hours and multiple evaluation sessions before a full accounting of their mental state and motivations for behavior is obtained.
- Malingering/credibility assessment must be conducted to ensure the accused if not exaggerating or outright feigning symptoms to avoid prosecution. Otherwise, the integrity and validity of the evaluation is questionable. It also takes significant time to score and analyze malingering assessments.
- The time it takes to write an insanity evaluation is dependent upon the case. A simple insanity evaluation is usually around 8 pages. A complicated insanity case can be up to 40 pages in length. It is generally estimated that it takes 30 minutes to write one page (without editing). Thus, writing the report can take 4 to 20 hours.

[313] Insight provided by: Maureen S. Burrows, M.D., M.P.H., Forensic Psychiatrist and Neurologist, Austin, Texas; Kristi Compton, Ph.D., Clinical and Forensic Psychologist, Dallas, Texas; and Felix Torres, M.D., M.B.A., D.F.A.P.A, Clinical and Forensic Psychiatrist, Austin, Texas.

8.8.4 Procedure Following the Examination

8.8.4.1 Exchange of the Evaluations

The court will give copies of the expert report to the prosecuting attorney and the defendant's attorney. Tex. Code Crim. Proc. art. 46C.105(a).

Typically, the defense does not have to turn over the forensic examination completed by the "expert of the defense's own choice" expert until or unless it is determined that the defense expert will testify.

Ex Parte Investigation of Insanity

The Defense has no obligation to provide notice or a copy of the report to the State during the period of time when they are merely investigating the possibility of insanity. Subject, of course, to the statutory notice requirements. This remains true even if the defense received funding ex parte from the court under *Ake* to hire an expert for an indigent defendant to investigate insanity.

If insanity is investigated ex parte and it is determined the insanity defense will be pursued, then the defense will provide the notice and report to the state.

8.8.4.2 Agreed Results

8.8.4.2.a Agreed: Defendant *Sane* at Time of the Commission of the Offense

The case then proceeds as a typical criminal case, as if the issue if insanity was not raised.

8.8.4.2.b Agreed: Defendant *Insane* at the Time of the Commission of the Offense

8.8.4.2.c Agreed Dismissal of Charging Document or Stipulation to NGRI

Even though an agreed dismissal with an entry of a judgment of dismissal due to the defendant's insanity has the same effect as a judgment stating that the defendant has been found not guilty by reason of insanity, some prosecutors may request the finding of NGRI instead of a dismissal, and the parties each stipulate to the facts and have the judge enter a formal judgment under 46C.152(c). Tex. Code Crim. Proc. arts. 46C.152(b)-(c), 46C.153(c).

A stipulation should strictly state the facts that are stipulated by the party. Suggested language includes:

- The Defendant is waiving the right to trial by jury and admitting that the State can meet each element of its case beyond a reasonable doubt.
- The State is waiving its right to a jury trial and admitting that the defense can meet its burden of proving insanity by a preponderance of the evidence.[314]

Court's Jurisdiction Continues with Agreed Dismissal or Stipulation to NGRI

In the situation where there is an agreed dismissal due to insanity or an agreed stipulation to NGRI, depending on the type of case, the Court can still have continued jurisdiction over the case, just as if the jury returned a verdict of NGRI. Code Crim. Proc. art. 46C.158. *See infra* Section 8.9: Continued Jurisdiction of the Court Based on Dangerousness.

[314] Bradford Crockard, et al., Texas District & County Attorney's Association, Mental Health Law for Prosecutors 66 (1st ed. 2020).

8.8.4.3 Disputed Result:

When the parties cannot agree, the case moves forward to a trial on the issue of insanity.

8.8.5 Insanity Trial

8.8.5.1 Evidence

A Defendant is acquitted of the crime they are charged with and determined to be NGRI if:

- The prosecution has established, beyond a reasonable doubt, that the defendant committed the charged offense; and
- The defense establishes, by a preponderance of the evidence, that the defendant was *insane at the time of the offense*. Tex. Code Crim. Proc. art. 46C.153(a).
- Note that if the defendant had previously been adjudicated NGRI, this defense burden may shift to the state to prove by a preponderance of the evidence that the defendant was sane at the time of the offense. *See infra* Section 8.10: Burden Shift.

The court, the attorney representing the state, or the attorney for the defendant may not inform a juror or a prospective juror of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned. Tex. Code Crim. Proc. art. 46C.154.

8.8.5.1.a Admissibility of Statements Made During Examination

The insanity defense is an affirmative one, initiated by the Defendant. The Texas Court of Criminal Appeals has likened initiating psychiatric examination, and then presenting psychiatric testimony in court, to the defendant taking the stand: "a defendant waives his Fifth Amendment rights to a limited extent by presenting psychiatric testimony on his behalf."[315]

Statements made by a defendant during an insanity evaluation/examination are admissible and do not enjoy Fifth Amendment protections against self-incrimination.[316]

Also, Sixth Amendment protections only require defendant's counsel to be notified of any psychiatric evaluation or examination and do not require counsel's presence.[317]

8.8.5.2 Determination of Sanity Issue by Jury

The issue of the defendant's insanity is submitted to the jury and considered by the jury only if the issue is supported by competent evidence. Tex. Code Crim. Proc. art. 46C.151(a).

If the issue is submitted to the jury, then the jury shall determine and specify in their verdict whether the defendant is guilty, not guilty, or not guilty by reason of insanity. Tex. Code Crim. Proc. art. 46C.151(b).

An entry of judgment entered in this manner has the same effect as a judgment stating that the defendant has been found not guilty by reason of insanity. Tex. Code Crim. Proc. art. 46C.153.

8.8.5.3 Determination of Sanity Issue by Judge

If a jury trial is waived, and if the issue is supported by competent evidence, then the judge will determine the issue of the defendant's sanity. Tex. Code Crim. Proc. art. 46C.152(a).

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[315] *Lagrone v. State*, 942 S.W.2d 602, 611-12 (1997) (citing *Soria v. State,* 933 S.W.2d 46, 58–60 (Tex. Crim. App. 1996)).

[316] *Id*.

[317] *Lagrone v. State*, 942 S.W.2d 602, 12 (1997) (citing *Bennett v. State*, 766 S.W.2d 227, 231 (Tex. Crim. App. 1989), *cert. denied,* 492 U.S. 911 (1989).

The parties may also, with consent of the judge, agree to have the judge determine the issue of the defendant's sanity on the basis of introduced or stipulated competent evidence, or both. Tex. Code Crim. Proc. art. 46C.152(b).

If the judge determines the issue of the defendant's sanity, the judge shall enter a finding of guilty, not guilty, or not guilty by reason of insanity. Tex. Code Crim. Proc. art. 46C.152(c).

Threshold Requirement of Competent Evidence

To obtain a jury instruction concerning the insanity defense, the defendant must produce some credible evidence (also called "competent evidence") of his insanity at the time of the offense.

In *Kelly v. State*,[318] the court held that none of the testimony given in the case established a "definite opinion" regarding the defendant's insanity at the time of the offense. There was testimony by the victim, members of the defendant's family, as well as that of first responders and a physician alluding to the fact that defendant wasn't "himself," his behavior that day was "significantly abnormal," and that, afterwards, he seemed to suffer from some "mental disease or defect." Despite this testimony regarding the defendant's behavior, none of the witnesses expressed a "definite opinion" or "conclusion" regarding the defendant's insanity and the court of appeals upheld the trial court's decision that the defendant was not entitled to a jury instruction on the insanity defense.[319]

8.8.6 Finding of NGRI

8.8.6.1 NGRI is Considered an Acquittal

A person who is found not guilty by reason of insanity stands acquitted of the charged offense and may not be considered a person charged with an offense. Tex. Code Crim. Proc. art. 46C.155(a). For this reason, this judgment cannot be used against the defendant for future enhancement purposes.

Additionally, double jeopardy protections prevent another attempt by the prosecution to convict the defendant of the same offense.

That being said, a defendant found not guilty by reason of insanity is not considered acquitted for the purposes of expunction.

Tex. Code Crim. Proc. art. 46C.155.

8.8.6.2 Written Judgment

A formal written judgment "adjudicates" the defendant as acquitted (NGRI), thus making them the acquitted person. Tex. Code Crim. Proc. art. 46C.156.

8.8.6.3 Necessary Findings in Judgment

In each case in which the insanity defense is raised, the judgment must reflect whether the defendant was found guilty, not guilty, or not guilty by reason of insanity.

If the defendant was found not guilty by reason of insanity, the judgment must:

- specify the offense of which the defendant was found not guilty,
- State and the determination made by the Judge regarding whether the offense involved

[318] *Kelly v. State*, 195 S.W.3d 753, 757 (Tex. App.—Waco 2006, pet. ref'd).

[319] 43 George E. Dix et al., Texas Practice Series: Criminal Practice and Procedure § 44 (3d ed. 2020).

Dangerous Conduct (as statutorily defined).

Tex. Code Crim. Proc. art. 46C.156, 46C.157.

The finding of whether the conduct involved dangerous conduct determines whether the court retains jurisdiction (and the defendant stays under the trial court's supervision) or loses jurisdiction (and the defendant is placed in civil court proceedings). Tex. Code Crim. Proc. art. 46C.158; 46C.201.

8.8.7 Procedures and Proceedings Following a finding of NGRI

8.8.7.1 Use of a Jury in Chapter 46C Proceedings

The following proceedings under 46C must be before the court, and the underlying matter determined by the court, unless the acquitted person or the state requests a jury trial or the court on its own motion sets the matter for jury trial:

1) a hearing on disposition under Article 46C.253;
2) a proceeding for renewal of an order under Article 46C.261;
3) a proceeding on a request for modification or revocation of an order under Article 46C.266; and
4) a proceeding seeking discharge of an acquitted person under Article 46C.268.

The following proceedings may not be held before a jury:

1) a proceeding to determine outpatient or community-based treatment and supervision under Article 46C.262; or
2) a proceeding to determine modification or revocation of outpatient or community-based treatment and supervision under Article 46C.267.

If a hearing is held before a jury and the jury determines that the person has a mental illness or mental retardation and is likely to cause serious harm to another, the court shall determine whether inpatient treatment or residential care is necessary to protect the safety of others.

Tex. Code Crim. Proc. art. 46C.255.

8.8.7.2 Detention Pending Further Proceedings

Upon determination of NGRI, the court may order the acquitted person detained in jail or any other suitable place for a period not to exceed 14 days pending further proceedings under Chapter 46C.

The Court may order a defendant held in an HHSC Facility only if the head of that facility consents.

Tex. Code Crim. Proc. art. 46C.160.

8.8.7.3 Determination Regarding Dangerous Conduct of Acquitted Person

After a defendant is acquitted as NGRI the court must determine if the offense for which the defendant was acquitted involved Dangerous Conduct. Dangerous Conduct means that the offense which the person was acquitted involved conduct that:

- caused serious bodily injury (SBI) to another person;
- placed another person in imminent danger of SBI; or
- consisted of a threat of SBI through use of a deadly weapon.

Tex. Code Crim. Proc. art. 46C.157.

8.8.7.4 Continued Jurisdiction of the Court Based on Dangerousness

Chapter 46C treats differently individuals who committed acts that involved dangerous conduct from those who did not. Tex. Code Crim. Proc. art. 46C.158; 46C.201.

8.8.7.4.a Offense Involved Dangerous Conduct

If the acquitted offense involved Dangerous Conduct, the criminal court retains jurisdiction over the acquitted person until either:

- the court discharges the person and terminates its jurisdiction under Art. 46C.268; (*see infra* 8.10.2j Discharge section of this chapter)
  or
- the cumulative total period of institutionalization and outpatient or community-based treatment and supervision under the court's jurisdiction equals the maximum term provided by law for the offense of which the person was acquitted by reason of insanity and the court's jurisdiction is automatically terminated under Art. 46C.269.

Tex. Code Crim. Proc. art. 46C.158.

Note that enhancements cannot be used to determine the length of the court's jurisdiction over the acquitted person.[320]

8.8.7.4.b Offense Did Not Involve Dangerous Conduct

If the acquitted offense did not involve dangerous conduct, the criminal court must then determine if there is evidence to support a finding of mental illness or ID. If the court makes this finding, then the criminal court SHALL enter an order transferring the person to the appropriate court for civil commitment proceedings. Tex. Code Crim. Proc. art. 46C.201(a).

The Civil Commitment proceedings are to determine whether the person should receive court-ordered mental health services under Subtitle C, Title 7, Health and Safety Code, or be committed to a residential care facility to receive IDD services under Subtitle D, Title 7, Health and Safety Code. Tex. Code Crim. Proc. art. 46C.201(b).

The civil court may also order the person either detained in jail or any other suitable place pending the prompt initiation and prosecution of appropriate civil proceedings or placed in the care of a reasonable person on satisfactory security being given for the acquitted person's proper care and protection. Tex. Code Crim. Proc. art. 46C.201(b).

The acquitted person may be placed in a commission facility pending a civil hearing only with the consent of the head of the facility and an order of protective custody issued under Subtitle C or D, Title 7, Health and Safety Code. Tex. Code Crim. Proc. art. 46C.202.

If the court does not detain or place the person as specified in art. 46C.201(b), explained above, then the court shall release the person. Tex. Code Crim. Proc. art. 46C.202(b).

[320] *Ex parte Reinke*, 370 S.W.3d 387 (Tex. Crim. App. 2012).

Burden Shift for Future NGRI Cases

A Previous Adjudication of NGRI or Incompetency

The Texas Court of Criminal Appeals has held that if a defendant has a prior adjudication for incompetency or a prior adjudication of insanity, the burden of proof shifts to the State to prove beyond a reasonable doubt that a defendant was competent to stand trial or sane at the time of the commission of the offense.[321]

"Where there has been a prior adjudication of insanity that has not been vacated, the burden falls upon the State to prove beyond a reasonable doubt that the subject was sane at the time of the commission of the offense."[322]

What Triggers this Burden Shift?

- A prior, unvacated adjudication of incompetency or insanity.
- Entry of a judgment of dismissal due to the defendant's insanity. Tex. Code Crim. Proc. art. 46C.153.
- Entry of judgment stating that the defendant has been found not guilty by reason of insanity. Tex. Code Crim. Proc. art. 46C.153.
- A prior judgment of NGRI where the defendant received services and was subsequently discharged.[323]

What Does Not Triggers this Burden Shift?

- Finding that the defendant has mental illness does not trigger the burden shift described in *Manning v. State*.[324]
- Prior finding of incompetency does not trigger the burden shift with regard to insanity.[325]

8.8.8 Commitment of NGRI acquitted individuals

8.8.8.1 No Finding of Dangerous Conduct

If the court determines that the offense of which the person was acquitted did not involve dangerous conduct,[326] the court shall determine whether there is evidence to support a finding that the person is a person with a mental illness or with IDD. Tex. Code Crim. Proc. art. 46C.201.

8.8.8.1.a If the court determines that there is evidence of mental illness or IDD

If the court determines that there is evidence that the NGRI acquitted individual may have mental illness or IDD, the court shall enter an order transferring the person to the appropriate court for civil commitment proceedings.

Those proceedings will determine whether the person should receive court-ordered mental health services under Subtitle C, Title 7, Health and Safety Code, or be committed to a residential care facility to receive IDD services, under Subtitle D, Title 7, Health and Safety Code.

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[321] *Manning v. State*, 730 S.W.2d 744,747-50 (Tex. Crim. App 1987); *Riley v. State*, 830 S.W.2d 584, 585 (Tex. Crim. App 1992).

[322] *Riley v. State*, 830 S.W.2d 584, 585 (Tex. Crim. App 1992) citing *Manning v. State*, 730 S.W.2d 744,747-50 (Tex. Crim. App 1987).

[323] *See Hines v. State*, 570 S.W.3d 297, 303 (Tex. App.–Houston [1st Dist.] 2018).

[324] *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App 1987); *Thompson v. State*, 612 S.W.2d 925, 929 (Tex. Crim. App. 1981).

[325] *Thompson v. State*, 612 S.W.2d 925, 929 (Tex. Crim. App. 1981). "[A] determination of incompetency under the Probate Code is not conclusive proof of insanity, because incompetency under the Probate Code is a different concept." *Lantrip v. State*, 336 S.W.3d 343, 347 (Tex. App.—Texarkana 2011, no pet.)

[326] Conduct that caused serious bodily injury to another person, placed another person in imminent danger of serious bodily injury, or consisted of a threat of serious bodily injury to another person through the use of a deadly weapon.

A person placed in a commission facility pending the above civil hearing may be detained only with the consent of the head of the facility and under an Order of Protective Custody.[327] Tex. Code Crim. Proc. art. 46C.202.

The court may also order the person to be detained in jail pending civil proceedings or placed in the care of a responsible person on satisfactory security being given for the acquitted person's proper care and protection. Tex. Code Crim. Proc. art. 46C.201.

If the court does not detain the person or place the person in services through HHSC, then the court shall release the person. Tex. Code Crim. Proc. art. 46C.202.

8.8.8.2 Finding of Dangerous Conduct

8.8.8.2.a Commitment for Evaluation & Report

The court will order the acquitted person to be committed for evaluation of the person's current mental condition and for treatment. The commitment will occur in a facility designated by the HHSC and cannot exceed a period of 30 days. Tex. Code Crim. Proc. art. 46C.251.

HHSC has full discretion to determine the state hospital in which the acquitted person will receive the initial evaluation and the location of any inpatient care. Tex. Code Crim. Proc. art. 46C.0011.

The court will order that a report be completed regarding the evaluation of the person's current mental condition and treatment. Tex. Code Crim. Proc. art. 46C.251(c).

8.8.8.2.b Records Sent with Acquitted individual to the Treatment Facility

The court will also order that a transcript of all medical testimony received in the criminal proceeding be prepared and forwarded to the facility. The court will also order the following information about the person be forwarded to the facility:

- The complete name, race, and gender of the person;
- Any known identifying number of the person, including social security number, driver's license number, or state identification number;
- The person's date of birth; and
- The offense of which the person was found not guilty by reason of insanity and a statement of the facts and circumstances surrounding the alleged offense.

The court will also order that a report under Article 46C.252 be filed with the court 30 days after the date of acquittal the court will hold a hearing in order to determine the proper disposition of the acquitted person. Tex. Code Crim. Proc. art. 46C.251.

8.8.8.2.c Report After Evaluation

The report ordered under art. 46C.251, must be filed with the court as soon as practicable before the hearing to determine the disposition of the acquitted person, but not later than the fourth day before the hearing.

This report shall address the following issues:

1) whether the acquitted person has a mental illness or IDD and, if so, whether the mental illness or IDD is severe;
2) whether as a result of any severe mental illness or IDD the acquitted person is likely to cause serious harm to another;
3) whether as a result of any impairment the acquitted person is subject to commitment under Subtitle C or D, Title 7, Health and Safety Code;

[327] Order of Protective Custody Issued under Subtitle C or D, Title 7, Health and Safety Code.

4) prospective treatment and supervision options, if any, appropriate for the acquitted person; and

5) whether any required treatment and supervision can be safely and effectively provided as outpatient or community-based treatment and supervision.

The report must also state what procedure, techniques, and test were used in the examination of the person.

The court will receive a packet from the state hospital that should be disbursed to the parties. This packet should contain the state hospital report as well as two CMEs – there is a standard CME form used by all the state hospitals. Health and Safety Code, Section 574.011. The report must be filed at least 4 days before the hearing.

Tex. Code Crim. Proc. art. 46C.252.

Legal vs. Practical

Statutorily, the State Hospital "must" issue a report within 30 days. Practically speaking, there are many times in which an Art. 46C.252 report cannot be made to the court within 26 days of a person's acquittal. Given bed shortages and COVID complications the court may have to hold a hearing to be in compliance with Art. 46C.251 but not issue a final disposition on the matter until the required evidence can be reasonably provided. This may also result in the state hospital requesting a "hold order" so that the person may remain in the treatment/evaluation facility pending a substantive hearing and disposition under either Art. 46C.256 or 46C.257.

The other alternative for meeting the 30-day requirement is for the Court to order the completion of the evaluation locally, instead of by the State Hospital.

8.8.8.2.d Hearing on Disposition

Within 30 days of acquittal, the court must hold a hearing to determine the proper disposition of the acquitted person. At the hearing, the court will address the following:

1) Whether the person acquitted by reason of insanity has a severe mental illness or intellectual developmental disability (IDD).

2) Whether as a result of any mental illness or IDD the person is likely to cause serious harm to another.

3) Whether appropriate treatment and supervision for any mental illness or IDD rendering the person dangerous to another can be safely and effectively provided as outpatient or community-based treatment and supervision.

The hearing on disposition is to be conducted in the same manner as a hearing on an application for involuntary commitment, Tex. Health & Safety Code Title 7, Subtitles C or D, § 574.035, except that the use of the jury is governed by Tex. Code Crim. Proc. art. 46C.255.
Tex. Code Crim. Proc. art. 46C.253.

8.8.8.2.e Order of the Court

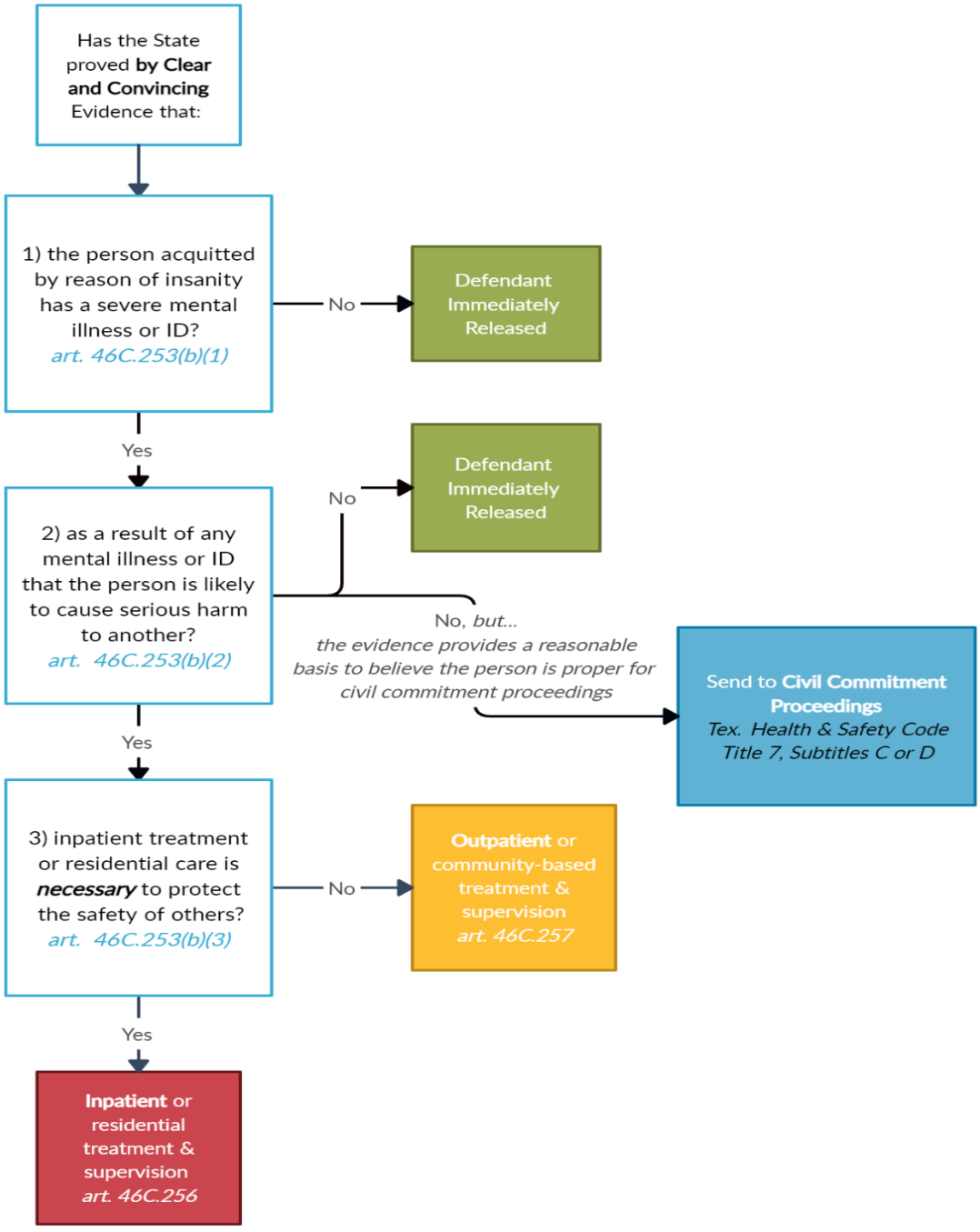
Depending on the evidence at the hearing, the court can order one of the following. That the acquitted person:

- be committed for inpatient or residential treatment and supervision, under Tex. Code Crim. Proc. art. 46C.256.
- receive outpatient or community-based treatment and supervision, under Tex. Code Crim. Proc. art. 46C.257.
- transferred to an appropriate court for proceedings under Subtitle C or D, Title 7, Health and Safety Code.
    - Note that this is ordered if the state fails to establish the grounds required for an order under Article 46C.256 or 46C.257 but the evidence provides a reasonable basis for believing the acquitted person is a proper subject for those proceedings.

- discharged and immediately released if the evidence fails to establish that disposition under any of the other options is appropriate. Tex. Code Crim. Proc. art. 46C.253.

8.8.8.2.f NGRI Hearing Disposition Flow Chart

Possible Dispositions on art. 46C.253 Hearing. For use after NGRI verdict and finding of dangerous conduct.



Inpatient treatment is not considered ***necessary***[328] if 1) an adequate treatment regimen of outpatient or community-based treatment will be available and 2) if the person will follow that regimen. Tex. Code Crim. Proc. art. 46C.256.

[328] *See* Tex. Code Crim. Proc. art. 46C.263(g) (requiring that the court shall have as its primary concern the protection of society when determining if a person should receive outpatient versus inpatient treatment).

8.8.8.2.g Period of Confinement & Additional Hearings

The order of disposition of the court under 46C.253 will then determine what happens next with the acquitted person.

Initial Order

If the person is initially ordered to inpatient or residential care commitment, under art. 46C.256, then that initial commitment is for 180 days. The order expires on the 181st day, however, it is subject to renewal under art. 46C.261 for a period of not more than a year. Tex. Code Crim. Proc. art. 46C.256.

If the person is initially ordered to outpatient or community-based services under art. 46C.257, the initial period of commitment is for one year. This too is subject to renewal under art. 46C.261 for a period of not more than a year. Tex. Code Crim. Proc. art. 46C.257.

Renewals or Recommitments

Recommitments are then governed under Tex. Code Crim. Proc. art. 46C.261. For recommitment, an application for renewal may be made by the institution to which a person is committed, the person responsible for providing outpatient or community-based treatment or supervision, or the attorney representing the state.

The request must explain in detail the reasons why the person requests renewal under this article. A request to renew an order committing the person to inpatient treatment must also explain in detail why outpatient or community-based treatment and supervision is not appropriate. Tex. Code Crim. Proc. art. 46C.261(b).

The renewal must be accompanied by one CME executed by a physician who examined the person within 30 days of the application being filed. Tex. Code Crim. Proc. art. 46C.261(c).

The request must be filed at least 30 days before the commitment will expire, and the court must act on the request for renewal before the order expires. The court must set the matter for a hearing and appoint an attorney to represent the person. Tex. Code Crim. Proc. art. 46C.261(b), (d), (e).

The person is entitled to a hearing before judge or jury, but that hearing can be waived, and the judge can make a determination from the certificate and the detailed request for renewal alone. Tex. Code Crim. Proc. art. 46C.261(g), 46C.255(a)(2), 46C.261(d)(1).

If a hearing is held, the person may be transferred from the facility to which the acquitted person was committed to a jail for purposes of participating in the hearing only if necessary but not earlier than 72 hours before the hearing begins. If the order is renewed, the person shall be transferred back to the facility immediately on renewal of the order. Tex. Code Crim. Proc. art. 46C.261(f).

A court shall renew the order only if the court finds that the party who requested the renewal has established by clear and convincing evidence that continued mandatory supervision and treatment are appropriate. A renewed order authorizes continued inpatient commitment or outpatient or community-based treatment and supervision for not more than one year. Tex. Code Crim. Proc. art. 46C.261(h).

The court, on application for renewal of an order for inpatient or residential care services, may modify the order to provide for outpatient or community-based treatment and supervision if the court finds the acquitted person has established by a preponderance of the evidence that treatment and supervision can be safely and effectively provided as outpatient or community-based treatment and supervision. Tex. Code Crim. Proc. art. 46C.261(i).

8.8.8.2.h Type of Facility

In 2019, Tex. Code Crim. Proc. art. 46C.251 was amended to give HHSC clinical discretion to decide which units will be utilized once the patients reach the state hospital.

This amendment took out the requirement under CCP 46C.260 that a person found not guilty by reason of insanity must be sent to a maximum security unit. Under the amended CCP 46C.260, a person found not guilty by reason of insanity will no longer be automatically sent to maximum security unit. If a person is sent to a maximum security unit, they must be evaluated for manifest dangerousness within 60 days or be transferred to a non-maximum-security unit.

Transfer of Committed Person to Non-Maximum-Security Facility

A person committed to a facility for the purposes of examination, treatment and supervision will be sent to a facility designated by the HHSC. If a person is initially required by HHSC to be committed to a maximum-security unit, their case will be reviewed by a review board pursuant to 25 TAC, Chapter 415, Subchapter G to determine if they continue to require treatment in that setting. If the review board indicates they are not manifestly dangerous the person will be transferred to a non-maximum-security unit within 60 days.

The HHSC executive commissioner appoints a review board that consists of five members, including one licensed psychiatrist and two people who work directly with persons with mental illnesses or with IDD. The review board determines whether the person is manifestly dangerous and requires continued placement in a maximum-security unit. If the head of the facility disagrees with the review board's determination, then the executive commissioner will make the decision.

Tex. Code Crim. Proc. art. 46C.260.

8.8.8.2.i Outpatient Treatment

The decision to authorize outpatient treatment is up to the court, not the treating physician or treatment team. Tex. Code Crim. Proc. art. 46C.253; 46C.257.

The court shall modify the commitment order to direct outpatient or community-based treatment and supervision if at the hearing the acquitted person establishes by a preponderance of the evidence that treatment and supervision can be safely and effectively provided as outpatient or community-based treatment and supervision. Tex. Code Crim. Proc. art. 46C.262(f).

In determining whether an acquitted person should be ordered to receive outpatient or community-based treatment and supervision rather than inpatient care or residential treatment, the court shall have as its primary concern the protection of society. Protection of Society. Tex. Code Crim. Proc. art. 46C.263(g).

The order for outpatient treatment must identify the person responsible for administering an ordered regimen of outpatient treatment and supervision. Tex. Code Crim. Proc. art. 46C.263(f).

The court may order a variety of conditions for the acquitted person while on outpatient treatment. These requirements may include that the acquitted person:

- participate in a prescribed regimen of medical, psychiatric, or psychological care or treatment, and the regimen may include treatment with psychoactive medication.
- be provided by the appropriate community supervision and corrections department or the facility administrator of a community center that provides mental health or IDD services.
- participate in a supervision program funded by the Texas Correctional Office on Offenders with Medical or Mental Impairments.

Tex. Code Crim. Proc. art. 46C.263(c) – (e).

8.8.8.2.j Modification or Revocation

Modification or Revocation of Order for Outpatient or Community-Based Treatment and Supervision

The court, on its own motion or the motion of any interested person and after notice to the acquitted person and a hearing, may modify or revoke court-ordered outpatient or community-based treatment and supervision. At the hearing, the court shall determine whether the state has established clear and convincing evidence that:

- The acquitted person failed to comply with the regimen in a manner or under circumstances that cause the court to conclude that the person will likely cause serious harm to another if they were allowed to continue outpatient or community-based treatment and supervision.
- The acquitted person has become likely to cause serious harm to another if provided continued outpatient or community-based treatment supervision.
- After the hearing, the court may take the following action:
- Revoke court-ordered outpatient or community-based treatment and supervision and order the person committed for inpatient or residential care.
- Impose additional or more stringent terms on continued outpatient or community-based treatment.

An acquitted person is entitled to representation by counsel at the hearing. The court will set a date for a hearing no later than 7 days after the motion is filed, but the court may grant one or more continuances of the hearing, upon a showing of good cause for delay. Tex. Code Crim. Proc. art. 46C.266.

Frequently this hearing is postponed at the request of a party so that a doctor may do an evaluation of the acquitted person to determine further treatment options in the community and whether the acquitted person can still be safely monitored in the community.

8.8.8.2.k Discharge

Advance Discharge of Acquitted Person

Who can request discharge from inpatient commitment or outpatient treatment and supervision:

- An acquitted person,
- the head of the facility to which the acquitted person is committed,
- the person responsible for providing the outpatient or community-based treatment and supervision, or
- the state.

Mandatory Hearing & Order Deadlines

If the head of the facility where the person is committed makes the request, the court must hold a hearing no later than the 14th day after the request.

If a request is made by an acquitted person, the court must act on the request not later than the 14th day after the date of the request. A hearing under this subsection is at the discretion of the court, except that the court shall hold a hearing if the request and any accompanying material indicate that modification of the order may be appropriate. If the request is made within 90 days of a previous request for discharge from the acquitted person, the court is not required to act on the request except on the expiration of the order or on the expiration of the 90-day period following the date of the hearing on the previous request.

The court shall rule on the request during or shortly after any hearing that is held and, in any case, not later than the 14th day after the date of the request.

The court shall discharge the acquitted person from all court-ordered commitment and treatment and supervision and terminate the court's jurisdiction over the person if the court finds that the acquitted person has established by a preponderance of the evidence that:

(1) the acquitted person does not have a severe mental illness or mental retardation; or

(2) the acquitted person is not likely to cause serious harm to another because of any severe mental illness or IDD.

Tex. Code Crim. Proc. art. 46C.268.

Termination of Jurisdiction

The jurisdiction of the court over a person covered by this subchapter automatically terminates on the date when the cumulative total period of institutionalization and outpatient or community-based treatment and supervision imposed under this subchapter equals the maximum term of imprisonment provided by law for the offense of which the person was acquitted by reason of insanity.

On the termination of the court's jurisdiction under this article, the person must be discharged from any inpatient treatment or residential care or outpatient or community-based treatment and supervision ordered under this subchapter.

An inpatient or residential care facility to which a person has been committed under this subchapter or a person responsible for administering a regimen of outpatient or community-based treatment and supervision under this subchapter must notify the court not later than the 30th day before the court's jurisdiction over the person ends under this article.

This subchapter does not affect whether a person may be ordered to receive care or treatment under Subtitle C or D, Title 7, Health and Safety Code.

Tex. Code Crim. Proc. art. 46C.269.

8.8.8.2.l Appeal

(a) An acquitted person may appeal a judgment reflecting an acquittal by reason of insanity on the basis of the following:

(1) a finding that the acquitted person committed the offense; or

(2) a finding that the offense on which the prosecution was based involved conduct that:

(A) caused serious bodily injury to another person;

(B) placed another person in imminent danger of serious bodily injury; or

(C) consisted of a threat of serious bodily injury to another person through the use of a deadly weapon.

(b) Either the acquitted person or the state may appeal from:

(1) an Order of Commitment to Inpatient Treatment or Residential Care entered under Article 46C.256;
(2) an Order to Receive Outpatient or Community-Based Treatment and Supervision entered under Article 46C.257 or 46C.262;
(3) an order renewing or refusing to renew an Order for Inpatient Commitment or Outpatient or Community-Based Treatment and Supervision entered under Article 46C.261;
(4) an order modifying or revoking an Order for Outpatient or Community-Based Treatment and Supervision entered under Article 46C.266 or refusing a request to modify or revoke that order; or
(5) an order discharging an acquitted person under Article 46C.268 or denying a request for discharge of an acquitted person.

(c) An appeal under this subchapter may not be considered moot solely due to the expiration of an order on which the appeal is based. Tex. Code Crim. Proc. art. 46C.270.

8.8.8.2.m Medications

- The court can order an acquitted person stay on prescribed psychoactive medication and be supervised by probation officer as well as LMHA. Tex. Code Crim. Proc. art. 46C.263(c).
- A physician at an inpatient facility may request psychoactive medication orders from the court.

As discussed in **Section 5.4.4** of this bench book, Psychoactive Medication Orders, Texas has statutory procedures for allowing the administration of psychoactive medications to a patient under court orders. The Health and Safety Code sets out how a physician can make an application for an order to authorized psychoactive medication. Within that statute, the law refers to ". . . or other law" where this would be applicable. An NGRI commitment under CCP, Chapter 46C is the ". . . or other law" that is referenced in Health and Safety Code, Section 574.102 and 574.104(a)(3). Sec. 574.104(a) set out below with emphasis added. For more information on court ordered medication, see section 5.4.4.

a) A physician who is treating a patient may, on behalf of the state, file an application in a probate court or a court with probate jurisdiction for an order to authorize the administration of a psychoactive medication regardless of the patient's refusal if:
    1) the physician believes that the patient lacks the capacity to make a decision regarding the administration of the psychoactive medication;
    2) the physician determines that the medication is the proper course of treatment for the patient;
    3) the patient is under an order for inpatient mental health services under Chapter 574 ***or other law*** or an application for court-ordered mental health services under section 574.034 or 574.035 of the Texas Health and Safety Code has been filed for the patient; and
    4) the patient, verbally or by other indication, refuses to take the medication voluntarily.

Tex. Health & Safety Code § 574.104(a).

8.8.9 Procedure for Pre-2005 Insanity Cases

8.8.9.1 Person adjudicated NGRI before 2005, but court still has jurisdiction

Most of the pre-2005 statute was incorporated into current 46B, however there are a few exceptions.

The first exception is the "old law recommitment hearings – unlike the current Article 46C.261 hearings, which only require a certificate of medical examination and allow waiver of testimony—were conducted "pursuant to the provision of the Mental Health Code, meaning standards of Health and Safety Code §574.035 applied."[329] Another difference is that under Chapter 46C, danger to others is the significant factor for recommitment. Under the old law, a person could be recommitted if he met the other two Mental Health Code criteria. 1) he is likely to cause serious harm to [himself]; or 2) if the committed person meets the "deterioration standard." This deterioration standard is the same standard used as part of in Health and Safety Code 574.035. If the acquitted person is 1) suffering severe and abnormal mental, emotional, or physical distress; 2) 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 3) unable to make a rational and informed decision as to whether or not to submit to treatment.

Pre-2005 cases also had a more relaxed standard for revocation or modification. Under the old law, it was enough that the person failed to comply with the regimen or if the person's condition was so deteriorated that out-patient care is no longer appropriate. If a court found probable cause that the person had deteriorated under former Article 46.03, he should have been taken into custody and the

[329] BRADFORD CROCKARD, ET AL., TEXAS DISTRICT & COUNTY ATTORNEY'S ASSOCIATION, MENTAL HEALTH LAW FOR PROSECUTORS 69 (1st ed. 2020).

court should have held a hearing to determine whether the person required inpatient treatment or a modification of his outpatient conditions."[330]

8.8.9.2 Pre-2005 insanity cases being prosecuted now use pre-2005 law.

Occasionally, cases from August 31, 2005 or before that went unsolved, never adjudicated, or are sent back down from the high courts for retrial arise in our courts. In the rarity that an older case becomes an insanity case, knowing which law is applicable is important.

The act that repealed Former Article 46.03 contained a savings clause, which provided as follows:

> The change in law made by this Act applies only to an offense committed on or after the effective date of this Act [Sept.1, 2005]. An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense was committed before that date.

Act effective Sept. 1, 2005, 79th Leg., R.S., ch. 831, § 5, 2005 Tex. Gen. Laws 2841, 2853-54.

Under the terms of this savings clause, Former Article 46.03 remains in effect for the defendant if the offense occurred before September 1, 2005, because it was the operative law at the time of the offense.[331]

[330] *Id*.

[331] *Rodriguez v. State*, 525 S.W.3d 734, 738 (Tex. App.—Houston [14th Dist.] 2017, no. pet.).

8.9 Expunctions & Non-Disclosures

8.9.1 Expunctions

An expunction allows for the destruction of all files and records pertaining to an arrest. Individuals who have been arrested for misdemeanor and felony offenses are entitled to expunction only if they meet certain requirements. These requirements are complex but generally can be defined as follows:

1. Acquittal after trial.
2. Pardon.
3. Expiration of statutory time to bring an indictment or information.
4. Dismissal after completion of veteran's court program, completion of mental health court program, completion of any other pre-trial intervention program.
5. Indictment or information was brought through error, false information, absence of probable cause, or is void.
6. Reaching the statute of limitations for the charged offense.

Tex. Code Crim. Proc. art. 55.01.

Justice Courts and Municipal Courts can only issue expunctions for offenses that are punishable by fine only. Tex. Code Crim. Proc. art. 55.01(b-1).

Expunction after an indictment or information has been presented and subsequently quashed or dismissed is available only when there has been no court-ordered community supervision under Chapter 42A. Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(ii).

8.9.1.1 Expunctions and How they Relate to Specialty Courts

8.9.1.1.a Mental Health Courts

An individual whose case is dismissed after the successful completion of a mental health court program is eligible for an Order of Expunction from the original trial court if there has been no community supervision. The trial court may enter an order of expunction no later than 30 days after the date of dismissal. No fees may be charged, or costs assessed, for the expunction. Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(ii)(b) and Tex. Code Crim. Proc. art. 55.02(1)(a-2).

8.9.1.1.b Veterans Courts

An individual whose case is dismissed after the successful completion of a veteran's court program is eligible for an order of expunction from the original trial court if there has been no community supervision. The trial court may enter an order of expunction no later than 30 days after the date of dismissal. No fees may be charged, or costs assessed, for the expunction. Tex. Code Crim. Proc. art. 55.01(2)(A)(iii)(b); Tex. Code Crim. Proc. art. 55.02(1)(a-1).

TexasLawHelps forms for expunction

8.9.2 Order of Non-Disclosure

An order of nondisclosure of criminal history information is another method that is used to seal an individual's case information from the public.

Non-violent defendants who complete their sentence, community supervision, or deferred adjudication community supervision are eligible to petition the court for an order of nondisclosure. An order of non-disclosure effectively seals the records pertaining to the individual's arrest and case disposition. Tex. Gov't Code § 411.074.

Overview of orders of nondisclosure

Nondisclosure orders and sealing your criminal record in Texas

8.9.2.1 Non-Disclosures and How they Relate to Specialty Courts

8.9.2.1.a Mental Health Courts

There is not a specific statutory section for nondisclosure in cases diverted to a mental health court program under Tex Gov't Code § 125. Therefore, the general provisions for nondisclosure control as set out in Tex. Gov't Code § 411:

- There has never been a conviction or deferred adjudication community supervision placement for an offense requiring registration as a sex offender or a specific offense exempted from nondisclosure (murder, trafficking of persons, injury to a child, elderly individual or disabled individual, abandoning or endangering a child, violation of court orders or conditions of bond in a family violence, sexual assault or abuse, stalking, or trafficking case, stalking, or any offense involving family violence).
- The court made an affirmative finding that an offense involved family violence.
- There is not a conviction or deferred adjudication community supervision placement for a subsequent offense (except a fine-only traffic violation)
- There is not a conviction or deferred adjudication community supervision placement during a statutory waiting period for the order of nondisclosure.

8.9.2.1.b Veterans Courts

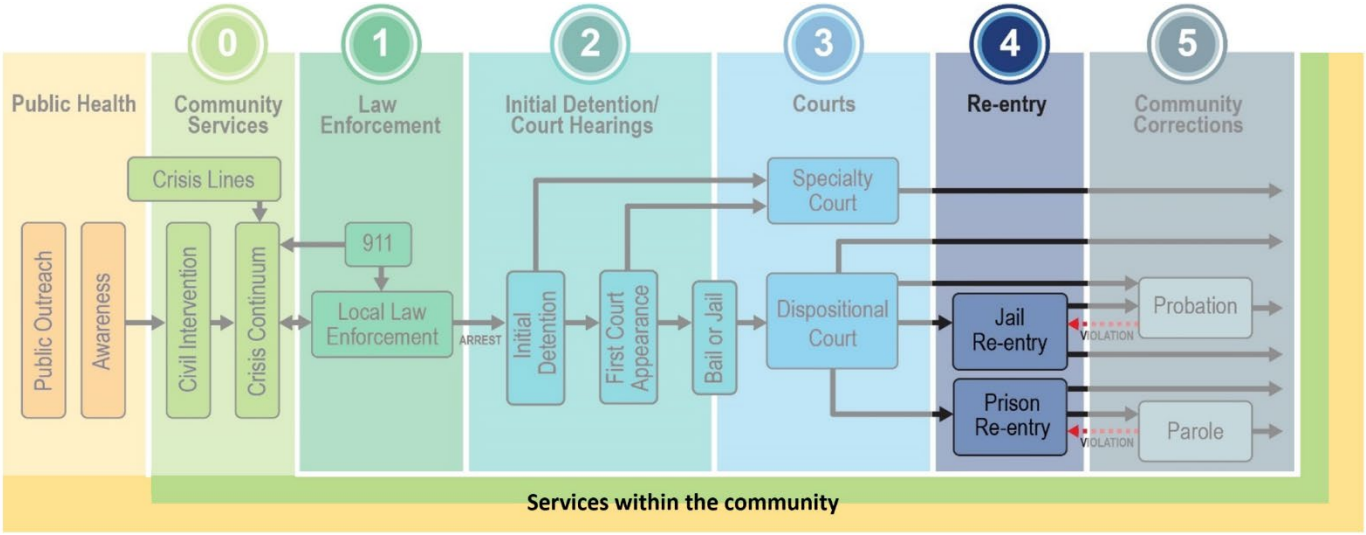
Individuals who successfully complete a veterans treatment court program under Tex Gov't Code § 124 are eligible to petition the court for an order of nondisclosure of criminal history information if they meet the following conditions:

- They satisfy all of the requirements Tex. Gov't Code § 411.074 and § 411.0727.
- They have never been previously convicted of an offense listed in Tex. Code of Crim. Procedure Article 42A.054(a) or an offense listed in Tex. Code of Crim. Procedure Article 62.001.
- Their conviction did not arise as a result of a conviction involving the operation of a motor vehicle while intoxicated.
- Their conviction did not involve or result in a finding of family violence as defined by Tex. Fam. Code § 71.004.
- They are not convicted of a felony offense within two years of the successful completion of the veteran's treatment court program.

A petition for an order of nondisclosure can be made if the individual was convicted, placed on deferred adjudication community supervision, or the case was dismissed under Section 124.001(b). The order of nondisclosure of criminal history information only pertains to the disclosure of records pertaining to the offense for which the individual entered the veteran's treatment court program.

A petition for nondisclosure is filed with the court that placed the individual in the veteran's treatment court program and can only be filed two years after the successful completion of the veteran's treatment court program. Tex. Gov't Code § 411.0727.

4 Chapter 9: Intercept 4—Re-entry



9.0 Re-Entry

Supported re-entry establishes strong protective factors for justice-involved individuals with mental illness re-entering a community. Re-entry must be well-planned, resourced, and individual-centric to help set individuals up for success and avoid lapses and recidivism. The Authors recognize that often defendants will go to probation first, but to follow the SIM, we are proceeding with re-entry first.

Re-Entry intercept focuses on an individual's post-incarceration life. Transition plans offer an opportunity to establish holistic and multi-pronged approach to mental health wellness and collaborative activities. Coordination of benefits, medication, and treatment are critical to positioning an individual with mental illness for success. Support should also extend beyond traditional treatment and services to include life skills; housing, education, and employment support; and peer support.[332]

QUICK SECTION OVERVIEW

9.1 Confinement

Mental health treatment after the defendant is convicted and sentenced to some form of incarceration, "is administered through the auspices of the prison system or through programs provided by local jails."[333]

9.1.1 County Jail

Counties are responsible for the mental health care of incarcerated individuals, whether they are being held pretrial or to serve a sentence in county jail custody.

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[332] *Behavioral Health Resource Hub*, NATIONAL CENTER FOR STATE COURTS, https://mhbb.azurewebsites.net/#intercept0 (last visited July 28, 2021).

[333] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 217 (6th ed. 2019).

9.1.2 State Jails and TDCJ Prisons

The TDCJ Correctional Institutions Division (CID) is responsible for the confinement of adult felony and state jail felony inmates who are sentenced to incarceration in a secure facility. The CID oversees state prisons, pre-release facilities, psychiatric facilities, Developmentally Disabled Offender Program, medical facilities, transfer facilities, state jails, a geriatric facility, and substance abuse felony punishment facilities (SAFPF).

The TDCJ Private Facility Contract Monitoring Oversight Division (PFCMOD) monitors contracts for privately operated secure prison facilities to include private correctional centers, private state jail facilities, and SAFPFs.

9.1.3 Correctional Managed Health Care[334]

The correctional health care system represents a collaboration between the state's prison system and two leading health science centers. This health care partnership between the TDCJ, Texas Tech University Health Sciences Center and the University of Texas Medical Branch is operated under the guidance and direction of the Texas Correctional Managed Health Care Committee. Mental Health Services are provided under applicable provisions of its Correctional Managed Health Care Policy Manual.[335] "The Manual covers the broad array of mental health services provided to inmates by the university partners, including topics such as initial mental health appraisals and evaluations and access to care.

The Manual also deals with:

- the referral of inmates to specialized treatment of various kinds, including psychiatric inpatient or crisis management, and covers consent for admission to inpatient psychiatric care;
- informed consent to mental health treatment;
- the right to refuse treatment or services;
- release of information regarding mental health services; and
- forensic information pertaining to mental health services.

The treatment provisions of the Manual cover a wide variety of topics, including:

- treatment planning,
- the prescribing of psychoactive drugs,
- psychiatric crisis management,
- use of restraints with mental health patients,
- psychiatric inpatient seclusion,
- compelled psychoactive medication for mental illness, and
- suicide prevention.

Other parts of the Manual cover topics such as outpatient sheltered housing, inpatient mental health discharge processes, and various matters related to documentation of mental health services provided by the prison system.[336]

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[334] Tex. Gov't Code, Title 4, Subtitle G., Ch. 501, Subchapter E, Managed Health Care.

[335] *Correctional Managed Health Care, Policy Manual,* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, https://www.tdcj.texas.gov/divisions/cmhc/cmhc_policy_manual.html, (last visited July 15, 2021).

[336] *Id.*

9.2 TCOOMMI

The Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI), formerly the Texas Council on Offenders with Mental Impairments, is a part of the TDCJ's Reentry and Integration Division. TCOOMMI programs align with national best-practices for reentry.

9.2.1 Purpose

Established in 1987, the purpose of TCOOMMI is to "provide a formal structure of criminal justice, health and human service and other affected organizations to communicate and coordinate on policy, legislative, and programmatic issues affecting offenders with special needs. Special needs include clients with serious, chronic and pervasive mental illnesses, intellectual disability, terminal or serious medical conditions, physical disabilities and those who are elderly."

TCOOMMI serves to BRIDGE the movement between Criminal Justice Systems and the Community

TCOOMMI reconnects referred individuals to community-based mental health interventions for long-term stability, improved community health, and public safety. Benefits of re-engaging individuals with identified needs to community services empowers the individual to take ownership of their treatment and recovery planning, reducing crisis inpatient service needs and helps keep the individual in the community thereby reducing recidivism. TCOOMMI mental health services are intended to help individuals remain within their communities; through jail diversion, probation or remaining successful while on parole supervision.

TCOOMMI encourages the judiciary to engage with their Local TCOOMMI Program Director at the LMHA for specifics about local TCOOMMI programming availability, opportunities to improve partnerships and information sharing, and to develop a relationship for "phone a friend" needs. A TCOOMMI Program Director exists within every LMHA.

9.2.2 Legal Authority

The powers and duties of the TCOOMMI are defined in Section 614, Health & Safety Code, and include responsibility for determining the status of individuals with mental impairments in the state criminal justice system, identifying needed services for offenders with mental impairments, overseeing related tasks associated with monitoring, assisting with the evaluation and implementation of various aspects of programs, disseminating information about these programs, and developing pilot projects.

In order to institute a system of care continuation for offenders with mental impairments, Section 614.013, Health & Safety Code, gives the TCOOMMI the authority and responsibility to coordinate and monitor the development and implementation of memoranda of understanding establishing the respective responsibilities of the TDCJ, HHSC, DPS, representatives of LMHA/LIDDAs, and the directors of community supervision and corrections departments. These agencies are responsible for instituting and maintaining a continuity of care and service program for offenders with mental impairments in the criminal justice system.[337]

Tex. Health & Safety Code § 614.007.

[337] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 218 (6th ed. 2019).

9.2.3 Overview

TCOOMMI funds programs in many aspects of the criminal justice continuum. The qualifying diagnoses for mental health TCOOMMI services are:

- Major Depressive Disorder;
- PTSD;
- Schizoaffective Disorder, including bipolar and depressive types;
- Psychotic Disorder;
- Anxiety Disorder;
- Delusional Disorder; or
- Any other diagnosed mental health disorder that is severe or persistent in nature.

Tex. Health & Safety Code § 614.013(b-1).

9.2.4 Contracts with LMHAs

TCOOMMI contracts with 39 LMHAs across the state of Texas. A Program Specialist is assigned to each TCOOMMI program for the purpose of contract compliance monitoring, technical assistance, and to act as a liaison between the TDCJ and the LMHA.

Contracted services include:

- Screening and assessments;
- Referral to aftercare treatment for those released from custodial institutions or other referral sources;
- Psychiatric services;
- Medication management;
- Benefit assistance; and
- Referrals to community resources. Individuals receive services based on their individual level of care needs, to include:
    - case management services,
    - continuity of care coordination,
    - court resource diversion programs, and
    - placement into dual diagnosis residential programs.

TCOOMMI also provides pre-release screening and referral to aftercare treatment services for special needs offenders referred from the TDCJ, local jails, or other referral sources.

The services available within each LMHA are based on the contracts and may vary by location. At a minimum, referred individuals will receive screening and assessment, an appointment with a mental health prescriber for medication management, as needed, and an individualized recovery treatment plan based on the outcome of screening and assessment.

Judges Can NOT Order an Offender into a Certain TDCJ Program

When a defendant is sentenced to TDCJ-CID or State Jail, the trial court does not have the authority to dictate to TCOOMMI which dorm or prison programs that an individual must partake in once a defendant is sentenced to time and sent to prison. TCOOMMI services may be a part of probation special condition(s) and in some locality's diversion conditions (see CJAD-Probation sections for further details), TCOOMMI services do not include mandated medications (see Compelled Medication sections, for additional details).

9.2.5 Service Level Designation

To determine a referred individual's TCOOMMI service level designation, the individual is assessed with the Adult Needs and Strengths Assessment (ANSA) and in tandem with the criminogenic risk level, designated by the criminal justice supervision partner, the client is connected to one of the following TCOOMMI services:

- Intensive Case Management (ICM); [338]
- Transitional Case Management (TCM); [339] or
- Continuity of Care (COC) services.[340]

9.2.6 TCOOMMI Intensive Case Management

Intensive Case Management (ICM) focuses on higher risk/higher clinical need clients with a severe and persistent mental illness. This level of service utilizes the Texas Resiliency and Recovery (TRR) approach and partners the parole or probation criminogenic risk assessment outcome with the LMHA ANSA assessment outcome. This level of service includes 3.5 hours of individualized, comprehensive community based, team-oriented services and monthly contact with a supervising officer. The caseload ratio is typically 25 to 1. The client's ANSA authorized level of care need indicates intensive services are appropriate and the client's criminogenic risk level is moderate or above. A client may be enrolled in this service level for up to 2-years.

9.2.7 TCOOMMI Transitional Case Management

Transitional Case Management (TCM) focuses on moderate risk/moderate clinical need clients with a severe and persistent mental illness. This level of service utilizes the TRR approach and partners the parole or probation criminogenic risk assessment outcome with the LMHA ANSA assessment outcome. This level of service includes 1.5 hours of individualized transitional/stepdown, community based, team-oriented services and monthly contact with a supervising officer. The caseload ratio is typically 75 to 1. The client's ANSA authorized level of care need indicates moderate services are appropriate and the client's criminogenic risk level is within the low-moderate to moderate-high range. A client may be enrolled in this service level for up to 1-year.

9.2.8 TCOOMMI Continuity of Care Services

Continuity of Care Programs (COC) services are community-based programs designed to provide a responsive system for local referrals from parole, probation, jail, family, and other related agencies. Services may include:

- Pre-release identification and provision of community referral;
- Post-release referrals from parole, probation, jails, and other agencies;
- COC appointment establishment pre-release;
- Pre-release veterans coordination;
- Psychiatric and medication services;
- Coordination and ongoing collaboration with supervision officers.

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[338] TEX. DEPT. OF CRIMINAL JUSTICE, TCOOMMI, INTENSIVE CASE MANAGEMENT, PROGRAM GUIDELINES AND PROCESSES, https://www.tdcj.texas.gov/documents/rid/TCOOMMI_PGP_0102_Adult_Intensive_Case_Managment.pdf.

[339] *Id.*

[340] TEX. DEPT. OF CRIMINAL JUSTICE, TCOOMMI, CONTINUITY OF CARE-MENTAL HEALTH SERVICES, PROGRAM GUIDELINES AND PROCESSES, https://www.tdcj.texas.gov/documents/rif/TCOOMMI_PGP_0101_Continuity_of_Care_Processes.pdf.

Services are available for up to 90-days to engage and successfully transition persons back into the community. The goal of 90-days of services is to act as a bridge to ensure a stable and successful transition between criminal justice systems and the community, while assisting the individual on their path to independent living and self-sufficiency through cost-effective community alternatives to incarceration. TCOOMMI COC services are available within every county in the state of Texas. [341]

As one of the agency's early reports to the legislature stated, "[b]y identifying offenders who are in need of aftercare treatment prior to their release, the offenders' chances for a more successful re-entry into the community are improved. This is particularly true for offenders who have a history of non-compliance due to mental health issues."[342]

To ensure that continuity of care is delivered as intended, the TCOOMMI collaborates with state agencies and other TDCJ divisions to coordinate access to services. Additionally, the TCOOMMI has entered into agreements with LMHAs across the state.[343]

Tex. Health & Safety Code § 614.013 sets forth the COC program for Offenders with Mental Impairments.

TCOOMMI Program Specifications

Most TCOOMMI programs require a memorandum of understanding between all the participating parties, (typically including: TDCJ, HHSC, DPS, and representatives of LMHAs and LIDDAs). These memorandums of understanding designate the authority, purpose, agreements, and responsibilities of the parties regarding each continuity of care program, and can be found in the Texas Administrative Code, 37 TAC § 159.19 and 37 TAC § 159.21; as required by Texas Health and Safety Code §614.013 - 614.015.

9.2.9 Early Release Due to Mental Illness

Texas Government Code Section 508.146, Medically Recommended Intensive Supervision (MRIS), authorizes the possibility of an early release from incarceration for many crimes for certain inmates with mental illness (or other medical conditions delineated in the act).

Before an inmate is released with the appropriate medical supervision, the parole panel for TDCJ-CID sentenced inmates, or sentencing judge for State Jail sentenced inmates, must determine that the inmate with mental illness does not pose a threat to public safety. Additionally, the medical supervision plan must be coordinated with TCOOMMI. Traditionally resources have focused on those with serious medical problems.[344]

9.2.9.1 Statute: Texas Government Code, Section 508.146 - Medically Recommended Intensive Supervision

a) The parole panel determines, based on inmate's condition and medical evaluation, the inmate does not constitute a threat to public safety.

b) TCOOMMI in cooperation with the parole panel and TDCJ-Parole Division have prepared a plan that requires electronic monitoring, places the inmate on super-intensive supervision or

[341] *See* 2019 TEX. CORRECTIONAL OFFICE ON OFFENDERS WITH MEDICAL OR MENTAL IMPAIRMENTS BIENNIAL REP. 7 (2019), available at https://www.tdcj.texas.gov/documents/rid/TCOOMMI_Biennial_Report_2019.pdf; BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 221 (6th ed. 2019).

[342] Tex. Council on Offenders with Mental Impairments Biennial Rep. 20 (2003).

[343] Texas Department of Criminal Justice, Texas Correctional Office on Offenders with Medical or Mental Impairments Biennial Report 4 (Feb. 2021).

[344] Brian D. Shannon & Daniel H. Benson, Texas Criminal Procedure and the Offender with Mental Illness 219 (6th ed. 2019).

otherwise ensures appropriate supervision. The plan must be approved by the TCOOMMI before release, Tex. Gov't Code Subsection 508.146(a)(3).

c) The parole panel shall require that the releasee remain under the care of a physician in a medically suitable placement. At least once each calendar quarter TCOOMMI shall report to the parole panel on the releasee's medical and placement status. From that report the parole panel may modify conditions of release and impose a condition that a releasee must reside in a halfway house or community residential facility.

d) TCOOMMI and Texas Dept. of Health and Human Services shall jointly request proposals from public and private vendors to provide services for inmates released on medically intensive supervision. The request for proposals may require services be provided in a medical facility in an urban area.

- Offense exceptions for Medically Recommended Intensive Supervision include:
  - Capital murder that carries the death penalty or life without parole; ineligible for release,
  - Offenses described in Article 42A.054 and Chapter 62, Code Criminal Procedure, additional criteria per statue for eligibility, and
  - Non-United States Citizens, as defined by federal law, may be released if additional criteria per statue is met.

Tex. Gov't Code § 508.146.

TCOOMMI's special duties related to medically recommended supervision are set out in Tex. Health & Safety Code § 614.032.

9.3 Re-Entry National Best Practices

9.3.1 Benefits Enrollment:

Physical and behavioral health benefit enrollment that sustain an individual's access to medications and treatment are critical to successful re-entry in the community. Enrollment can be facilitated by enrollment officers and case managers. Medicaid eligibility can be key to obtaining behavioral health services, and a number of states are receiving waivers related to providing increased eligibility to justice-involved individuals.[345]

9.3.1.1 Supported Housing:

Supported housing provides a key layer of stability for mental health involved individuals. Individuals may seek different housing types; from group housing (supervised and unsupervised) to rental housing and home ownership. Supportive housing is a middle ground option that features independent living with the potential for support and intervention as needed.[346]

9.3.1.2 Transitional Plan:

Transitional plans offer guidance for community re-entry. A comprehensive plan identifies expectations, resources, and services to guide individuals towards independence. Individuals should play an active role in creating their transition plan.[347]

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[345] *Behavioral Health Resource Hub*, NATIONAL CENTER FOR STATE COURTS, https://mhbb.azurewebsites.net/#intercept0 (last visited July 28, 2021).

[346] *Id.*

[347] *Id.*

9.3.1.3 Prescription Continuity:

Prescription continuity ensures an individual can continue their medication and avoid adverse outcomes during transitional time periods. Continuity is also important as medications are necessary to maintain stability and/or competency and limit side effects or interruptions in dosages. Prescription continuity also eases re-entry hurdles and disruption.[348]

9.3.1.4 Community-Based Treatment:

Community-based treatment involves the broad spectrum of services and treatment an individual with mental and behavioral health needs may access. The goal is to connect individuals with the least restrictive setting in which to receive treatment services. Treatment offerings may vary by providers and co-location can facilitate retention of treatment participation. In areas with few to no treatment providers, remote services and treatment may become an option.[349]

9.3.1.5 Educational/Employment Support:

Educational and employment support further stabilizes individuals as they re-enter communities. Employment support might include resume guidance and interview guidance, coordination of skill classes, or coordinating transportation services to job sites. Educational support can vary greatly, from GED classes to ensuring appropriate accommodations. For this population, stakeholders should consider identification of volunteer opportunities as well as the more traditional employment paths.[350]

9.3.2 Co-Location of Services

Service co-location eases the burden of seeking and providing mental health treatment for detained individuals. Even for individuals released on their own recognizance, service co-location provides an answer to transportation and resource challenges that mental health-involved individuals often experience. Service co-location also increases the likelihood of participation and service retention rates, while reducing rates of failure to appear.[351]

9.3.3 Peer Support

Peer support workers are people with a history of mental health and substance use concerns who have been successful in recovery and help others who may experience similar challenges. They share their lived experience to inspire hope in a manner that distinguishes them from the services and support provided by clinicians and case managers. SAMHSA suggests that peer workers can engage in a variety of activities, including:[352]

- Advocating for people in recovery
- Sharing resources and building skills
- Building community and relationships
- Leading recovery groups
- Mentoring and goal setting

Peer support workers can provide individualized support to people at every intercept, but may be uniquely helpful to people re-entering the community. Specifically, peer support workers are capable of helping people exiting the criminal justice system to access the appropriate community-based behavioral health care, obtain the documentation or identification required to obtain employment and

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[348] *Id.*

[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] SAMHSA, *Peer Support Workers for those in Recovery*, https://www.samhsa.gov/brss-tacs/recovery-support-tools/peers (last visited July 15, 2023).

housing, and support the development of recovery skills that can improve community stability and reduce risk of relapse or recidivism. Peer support workers are expert navigators of complex community behavioral health and social service systems, as well as community or recovery-oriented support organizations and fellowships.

In the context of Intercept 4, Re-entry, peer support workers may be most helpful prior to a person's discharge or release, especially in instances when the person lacks the skills, resources, or experiences to clearly articulate their needs or identify and access the resources that may meet those needs. However, peer support workers can also be helpful after a person returns to the community, if the person is aware of the potential benefit of working with a peer and is notified of the agencies or entities that provide peer support. The Local Mental Health Authority (LMHA) or Local Behavioral Health Authority (LBHA) often employ peer support workers in programs that support justice-involved people with behavioral health concerns.

Peer supports come in many forms, LMHAs may have Certified Mental Health Peer Specialists working within their community-based programs, this peer is stable in their mental health recovery/treatment however may or may not have prior justice involvement. Many veteran programs utilize peers to engage clients in services, fellow veterans relate to each other and share similar experiences regardless of prior criminal justice status that the rest of the population do not have. Use of peers to offer programming and support has expanded, there are different certification or licensure programs available for different support purposes[353], in 2017 Medicaid expanded their services to allow for peer services to be billable if the peer providing the service has the appropriate credentials/licensure.

Peers and their lived experiences are not interchangeable, connecting an individual to a peer that has struggled within similar challenges and overcame or has established themselves with stability and reliability is essential. [354]

9.3.4 Re-entry plans

Sometimes called Transition Plans, re-entry plans offer guidance for community reentry. A comprehensive plan identifies expectations, resources, and services to guide individuals towards independence. Individuals should play an active role in creating their transition plan.[355]

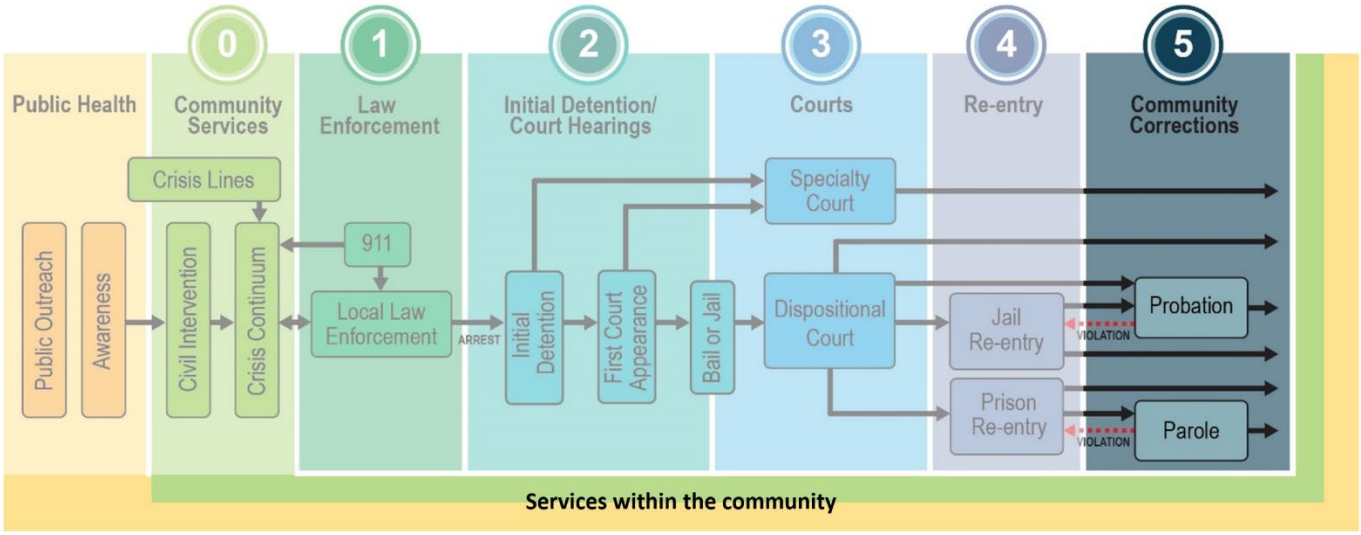
Note that CCP Art. 42A.303(e) allows the community supervision and corrections department supervising the defendant to develop a continuum of care treatment plan when an individual is released from SAFPF (substance abuse felony punishment facilities).

[353] *Mental Illness and the Criminal Justice System*, HOGG FOUNDATION FOR MENTAL ILLNESS, https://hogg.utexas.edu/what-we-do/success-stories/mental-illness-criminal-justice (an article about mental health peer services in Texas).

[354] VIAHOPE, https://www.viahope.org/programs/reentry/ (Texas based organization providing Training and credentialing for Reentry Peer Specialists and Peer Support Specialists).

[355] *Id.*

5 Chapter 10: Intercept 5—Community Corrections



10.0 Parole and Probation

Parole and Probation intercept combines justice system monitoring with individual-focused service coordination to establish a safe and healthy post-criminal justice system lifestyle. Monitoring should be guided by evidence-based practices around risk and needs responsivity. Team-based planning and supports should embrace known protective factors such as stable housing. Vigilant mental health awareness/screening embrace the dynamic nature of mental and behavioral illness while collaborative activities and peer support further support an individual on their journey to wellness.

QUICK SECTION OVERVIEW	
10.1	Probation
10.2	Parole
10.3	Community Corrections

10.1 Probation

"Community supervision" means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which: (A) criminal proceedings are deferred without an adjudication of guilt; or (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.[356] Tex. Code Crim. Proc. art. 42A.001(1).

10.1.1 Legal Authority

Texas law allows courts to impose conditions of supervision specifically related to mental health on individuals sentenced to straight probation or deferred adjudication probation. Tex. Code Crim. Proc. art. 42A.001(1), 42A.554(a), 42A.101(a), 42A.104(a).

[356] Brian D. Shannon & Daniel H. Benson, Texas Criminal Procedure and the Offender with Mental Illness 211 (6th ed. 2019).

The Code of Criminal Procedure specifically grants authority to judges to require certain offenders with mental illness to submit to outpatient or inpatient mental health treatment as a condition of community supervision stemming from probated or suspended sentences.[357]

10.1.1.1 Imposing Specific Conditions of Probation

Before a court may impose a mental health treatment condition as part of placing a defendant on community supervision, in general an appropriate mental health expert must have assessed the offender under Article 16.22 or conducted a competency evaluation under Chapter 46B.

The defendant must be competent before the court may exercise its discretion to grant community supervision and imposed mental health treatment conditions.

Moreover, the court must find either that the defendant's mental illness is chronic in nature or that his or her ability to function independently will continue to deteriorate without proper treatment.

Finally, the statute requires the judge to take steps to ensure that appropriate outpatient or inpatient mental health services are available either through a state facility or through another provider.

In turn, § 534.053(c), Texas Health & Safety Code, requires the Health and Human Services Commission, to the extent that resources are available to "ensure that services listed in this section are available for defendants required to submit to mental health treatment under Article 17.032, 42A.104, or 42A.506, Code of Criminal Procedure."[358] Tex. Health & Safety Code § 534.053(c).

The primary purpose behind CCP 42A.506 "is to divert many offenders with mental illness out of the criminal justice system and to place them in more appropriate treatment settings – particularly for nonviolent crimes. The legislative intent will be thwarted if courts decline to exercise the authority granted to them."[359]

Article 42A.506 also grants the court flexibility to require either inpatient or outpatient treatment for the offender's mental illness. Moreover, given that other sections of Chapter 42A authorize the court to modify the conditions placed on an offender's community supervision, the court retains the flexibility to amend the provisions of the mental health treatment conditions.[360]

CCP Art. 42A.655 gives the judge the ability to modify the conditions of community supervision for the purpose of "prioritizing the conditions ordered by the court according to the defendant's progress under supervision." This allows the judge to effectively tailor the supervision conditions to the probationer. The probationer's ability to pay must be taken into consideration, and the judge has flexibility for handling situations where the defendant lacks sufficient resources or income.

Reflection Point

As a judge, identify different services to address trauma and consider using them as an alternative to anger management classes.

The Relationship Between Anger and Trauma

"Anger is often a large part of a survivor's response to trauma. It is a core piece of the survival response in human beings. Anger helps us cope with life's stresses by giving us energy to keep going in the face of trouble or blocks. Yet anger can create major problems in the personal lives of those who have experienced trauma."[361]

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[357] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 213 (6th ed. 2019); Tex. Code Crim. Proc. Ann. art. 42A.506.

[358] *Id.* at 213-14.

[359] *Id.* at 213.

[360] *Id.* at 214.

[361] *Anger and Trauma*, *PTSD*, NATIONAL CENTER FOR PTSD, https://www.ptsd.va.gov/understand/related/anger.asp (last visited July 14, 2021); Kimberly Flemke, *Triggering Rage: Unresolved Trauma in Women's Lives*, 31 CONTEMP. FAM. THERAPY 123–39 (2009) (found that unresolved trauma from childhood closely linked to current levels of adult rage in women) available at: https://doi.org/10.1007/s10591-009-9084-8.

10.2 Parole

10.2.1 Legal Authority

Section 508.221, Texas Government Code grants authority to parole panels to impose mental health treatment conditions in appropriate cases for individuals with mental illness who are being released on parole. It provides that "[a] parole panel may impose as a condition of parole or mandatory supervision any condition that a court may impose on a defendant placed on community supervision under Chapter 42A, Code of Criminal Procedure…." Tex. Gov't Code § 508.221. Thus, giving the Board of Pardons and Parole the same authority as courts to impose mental health treatment conditions as part of parole as the courts do for community supervision.[362]

10.3 Community Corrections

10.3.1 Non-residential Sentencing Options

"A majority of offenders do not require the most restrictive sentencing options. In fact, the recidivism rate of low criminogenic risk and needs offenders can increase with unnecessary levels of programming and close supervision. A number of non-residential programs and supervision strategies can be applied in the community, allowing an offender to maintain effective support mechanisms (such as family and employment) while addressing the offender's risk to reoffend and criminogenic needs."[363]

10.3.2 Mental Health Criminal Justice Initiative

"In 2001, the Texas Legislature enacted the Mental Health/Criminal Justice Initiative to provide courts with a sentencing alternative for offenders with mental health disorders. Offenders with mental health disorders are disproportionally represented in the criminal justice population and are twice as likely to have their community supervision revoked. This initiative appropriated funding for both specialized probation officers and targeted treatment for mentally-impaired offenders. TDCJ-CJAD and the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) developed a program model, based on best practices, that requires a specialized CSO and a mental health provider to work together as a team to address the needs of mentally impaired offenders. A 2005 study found that offenders participating in this initiative had lower arrest rates and significantly lower incarceration rates, with high-risk offenders having the most significant reduction in recidivism."[364]

10.3.3 Post-adjudication MH Specialty Court

Specialty courts focus on treating the underlying issues that may be causing criminal behavior. Mental health courts are a type of specialty court. They combine accountability through judicial supervision with treatment and other support services to prevent recidivism and improve the lives of their participants.

Mental Health Courts were discussed previously in Intercept 3, however they are mentioned here again to point out that some specialty courts occur post-adjudication as part of the condition of a defendant's sentence.

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[362] BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 220 (6th ed. 2019).

[363] *Tex. Dep't of Crim. Justice,* TEXAS PROGRESSIVE INTERVENTIONS AND SANCTIONS BENCH MANUAL 52 (2020), https://www.tdcj.texas.gov/documents/cjad/CJAD_Bench_Manual.pdf.

[364] *Id.* at 56.

10.3.4 Other Non-residential Programs

Beyond the programs discussed above, other non-residential programs offered through probation and parole, but not specifically mental health related, include:[365]

- Cognitive Behavioral Program
- Differential Supervision and Specialized Caseloads
- Sex Offender Supervision
- Risk Management Strategies, including:
    - Electronic monitoring – house arrest, offender tracking, Offender Sanctioning
    - Drug and Alcohol Testing
    - Ignition Interlock
- Battering Intervention and Prevention Project (BIPP)
- Academic Education and Non-Academic Education Programs
- Employment Programs
- Day Resource Treatment

10.3.5 Residential Sentencing Options

"The decision to select a residential sentencing option should be based on the assessed risk and needs of the offender. A variety of local and state residential facilities can be used to address an offender's criminogenic risk and needs. These facilities can also be used as an alternative intermediate sanction to county jail, state jail, or prison."[366]

10.3.6 Community Corrections Facilities

"The term Community Corrections Facility (CCF) describes a residential facility operated by the local CSCD, either directly or through contracts with private vendors. CCFs provide a secure environment and treatment targeting specific types of offenders. These locally operated facilities allow the probationer to retain some ties to the community and remain under the supervision of the CSCD. Offenders may be placed in CCFs outside the original jurisdiction as long as space is available. The availability of treatment services discussed in this chapter varies by jurisdiction. Each local CSCD can provide detailed information on the programs available in their area."[367]

"If a judge requires as a condition of community supervision or participation in a pretrial intervention program, or a [specialty] court program, that a defendant serve a term of confinement in a community corrections facility (CCF), the term may not exceed 24 months and the judge may not impose a subsequent term within the same supervision period that would make the total time exceed 36 months. Tex. Code Crim. Proc. § 42A.602. A defendant does not earn good conduct credit for time spent in a CCF or apply time spent in the facility toward completion of a prison sentence if the supervision is revoked. Tex. Code Crim. Proc. § 42A.603."[368]

10.3.6.1 Court Residential Treatment Centers (CRTCs)

CRTCs provide offenders with substance abuse treatment and educational, vocational, and life skills training. Many CRTCs include employment during the final phase of the program. Some facilities also provide treatment and services for offenders with mental deficiencies or emotional/family problems.

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[365] *Id.* at 52-60.

[366] *Id.* at 61.

[367] *Id.*

[368] *Id.* at 37.

10.3.6.2 Substance Abuse Treatment Facilities (SATFs)

SATFs are designed specifically to provide cognitive-based substance abuse treatment. SATFs may also include educational, life skills, and supportive 12-Step orientation or modified therapeutic community treatment programs.

10.3.6.3 Intermediate Sanction Facilities (ISFs)

CSCD-operated ISFs are used as intermediate sanctions for supervision violators in an effort to give the courts an incapacitation custody option other than revocation or incarceration. Programming provided in ISFs usually includes a substance abuse component, education, and cognitive and life skills programs; some CSCD-operated ISFs have an employment component. These programs should not be confused with the state-contracted ISFs mentioned below.

10.3.6.4 Dually Diagnosed Residential Facilities (DDRFs)

DDRFs provide the courts with a sentencing alternative for offenders with demonstrated/documented mental health issues. Most of these programs address offenders with co-occurring disorders of mental health and substance abuse. Programming in the DDRF includes a broad range of mental health, substance abuse, and life skills services for offenders with mental impairments in a residential setting.

10.3.6.5 State-Contracted ISFs

"State-contracted ISFs (SC-ISFs) are secure lockdown facilities that completely remove the offender from the community and provide either substance abuse treatment or cognitive treatment to medium- or high-risk felony offenders. The Texas Department of Criminal Justice (TDCJ) operates these facilities as an alternative to incarceration for medium- and high-risk felony probationers in violation of the conditions of supervision, sanctioned at sentencing based on the nature of the offense or criminal history. These SC-ISF beds are available statewide to all CSCDs. The contractors operating the SC-ISF provide transportation service to and from the SC-ISF."[369]

The Intermediate Sanction Facility (ISF) program is presented in a 45-day format for those needing Cognitive Behavioral Treatment and a 90-day format for those needing a brief substance use treatment program. Clients enter the program referred by a Parole Officer as an alternative to being violated.[370]

10.3.6.6 Substance Abuse Felony Punishment Facility - SAFPF

"SAFPFs provide intensive substance abuse treatment in a secure setting for felony offenders (other than sex offenders) assessed as having severe substance dependence. The ideal offender for this program is one who has several arrests or a history of incarceration and whose circumstances are compounded by an unhealthy family environment and unemployment. Often, this option is applied as a direct sentence, condition, or modification of probation. SAFPFs are operated by TDCJ and are available to CSCDs when other, less intensive programs have been unsuccessful for offenders with substance abuse related issues. A number of options are available for SAFPF graduates who relapse. Contact the TDCJ-CJAD SAFPF Unit for more information.

[369] *Id.* at 68.

[370] *Rehabilitation Programs Division, Substance Use Treatment Program,* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, https://www.tdcj.texas.gov/divisions/rpd/substance_abuse.html, (last visited July 15, 2021).

Four Levels of SAFPF Continuum of Treatment	
6 - 9 months	Therapeutic community program in a secure SAFPF.
3 months	Residential Transitional Treatment Center (TTC) program for offenders beginning to make the transition back to the community; or 4C program.
9 – 12 months	Outpatient treatment in the community.
3 – 6 months	Relapse track to address relapse after completion of SAFPF
In order to complete all levels of the SAFPF program, offenders need 18 – 24 months remaining on their term of supervision.	

It is the mission of the Substance Use Treatment Program to provide evidence-based substance use treatment services appropriate to the needs of individual offenders to facilitate positive change; and to provide accountability for programming utilizing assessment tools developed specifically for this population, all of which leads to reducing recidivism and improving public safety.[371]

10.3.6.6.a Program Overview:

The Substance Abuse Felony Punishment Facility (SAFPF) / In-Prison Therapeutic Community (IPTC) provide services to qualified offenders identified as needing substance use treatment. Both are six-month in-prison treatment programs followed by up to three months of residential aftercare in a transitional treatment center* (TTC), six to nine months of outpatient aftercare and up to 12 months of support groups and follow-up supervision. A nine-month in-facility program is provided for special needs offenders who have mental health and/or medical needs, as qualified. Offenders are sentenced to a SAFPF by a judge as a condition of community supervision in lieu of prison/state jail or voted in by the Board of Pardons and Parole (BPP) BPP as a modification of parole.

The Pre-Release Substance Abuse Program (PRSAP) is a six-month program addressing substance use disorders and behavior based on the principals of a therapeutic community. The program is intended for incarcerated offenders with substance use disorders and criminal ideology issues. Offenders are placed in the program based on vote by the BPP.

The Pre-Release Therapeutic Community (PRTC) is a program consisting of two tracks: The first, is a three (3) month track focusing on cognitive behavioral model to address issues of criminality. This track seeks to reach a population of offenders in need of a more concentrated track to address behavioral change through structured activities, complimented by support services upon release. Peer Recovery Support Specialists assist the clients with preparing their re-entry plans. The second, is a six-month program addressing all substance use disorders. This track follows the evidence-based practice modality of Solution-Focused Treatment. There is added emphasis given to address particular drugs of choice of the clients. Peer Recovery Support Specialists assist the clients with additional help and contacts with agencies that may be needed by the client for successful re-integration. Offenders are placed in the PRTC program based on vote by the BPP and their substance use assessment score.[372]

Note that CCP Art. 42A.303(e) allows the community supervision and corrections department supervising the defendant to develop a continuum of care treatment plan when an individual is released from SAFPF (substance abuse felony punishment facilities).

[371] *Id.*

[372] *Id.*

SAFPF Units

Glossbrenner (Male) San Diego, Texas	**Sayle Unit** (Male) Breckenridge, Texas	**Hackberry Unit** (Special Needs / Female) Gatesville, Texas
East Texas Treatment Unit (Male) Henderson, Texas	**Halbert Unit** (Female) Burnet, Texas	**Kyle Correctional Center** (Male) Kyle, Texas
Johnston Unit (Male) Winnsboro, Texas	**Henley Unit** (Special Needs/Female) Dayton, Texas	**Estelle Unit** (Special Needs/Male) Huntsville, Texas

10.3.6.7 Texas Prison System Health Services Policy Manual

Correctional Institutions Division of the Texas Department of Criminal Justice, commonly called the Texas Prison System, provides mental health care on an inpatient basis under applicable provisions of its Correctional Managed Health Care Policy Manual.[373] "The Manual covers the broad array of health services provided to inmates by the Texas prison system, including topics such as initial mental health appraisals and evaluations and access to the care provided through the prison system's mental health services.

The Manual also deals with:

- the referral of inmates to specialized treatment of various kinds, including psychiatric inpatient or crisis management, and covers consent for admission to inpatient psychiatric care;
- informed consent to mental health treatment;
- the right to refuse treatment or services;
- release of information regarding mental health services; and
- forensic information pertaining to mental health services.

The treatment provisions of the Manual cover a wide variety of topics, including:

- treatment planning,
- the prescribing of psychoactive drugs,
- psychiatric crisis management,
- use of restraints with mental health patients,
- psychiatric inpatient seclusion,
- compelled psychoactive medication for mental illness, and
- suicide prevention.

Other parts of the Manual cover topics such as outpatient sheltered housing, inpatient mental health discharge processes, and various matters related to documentation of mental health services provided by the prison system."[374]

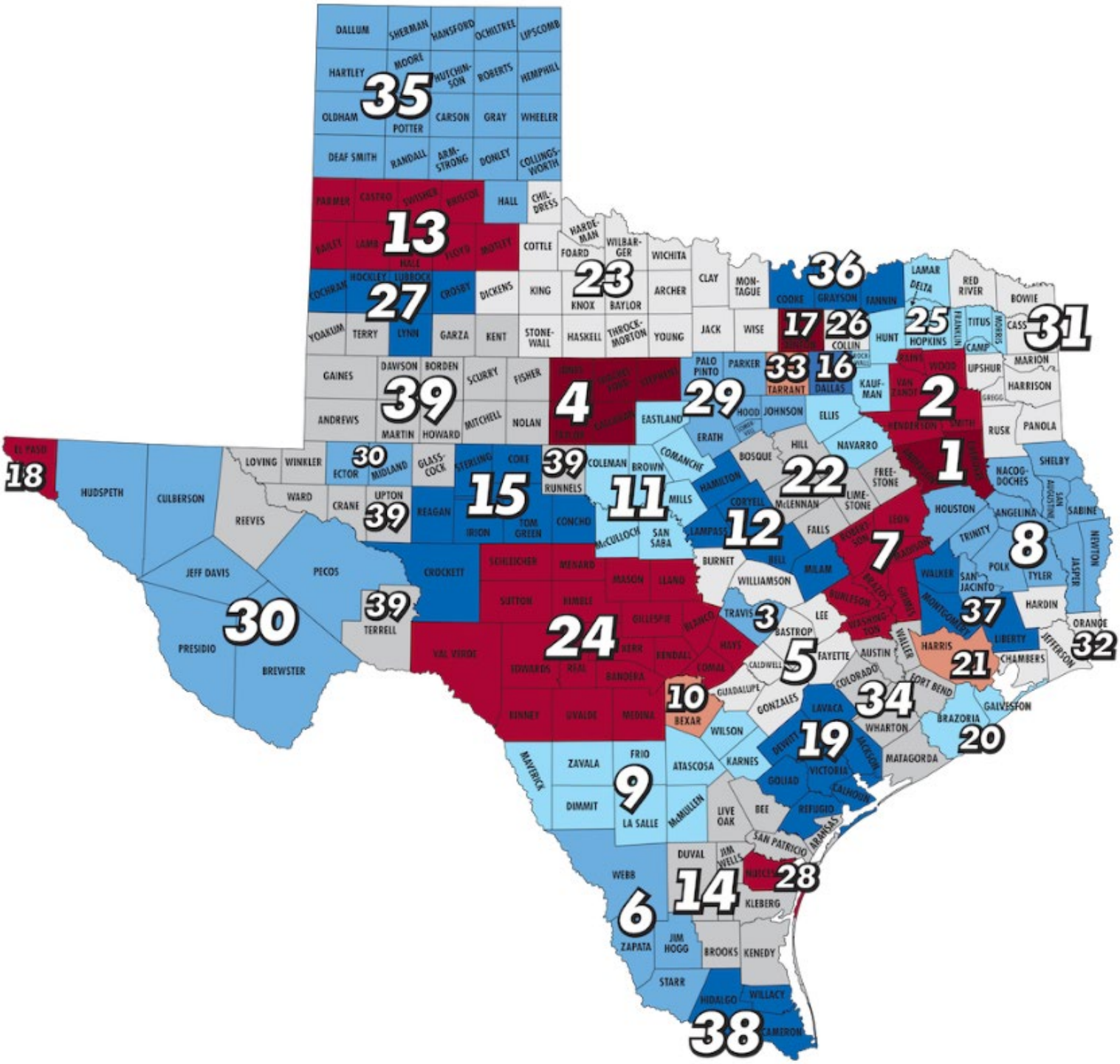
[373] *Correctional Managed Health Care, Policy Manual,* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, https://www.tdcj.texas.gov/divisions/cmhc/cmhc_policy_manual.html, (last visited July 15, 2021).

[374] *Id.*

Appendices:

A. Map of Texas HHS Service Areas

https://txcouncil.com/wp-content/themes/txc/images/txc-service-area-map.png



B. List of LMHAs/LBHAs/LIDDAs by Map Area

https://txcouncil.com/community-centers/

Map Area	LMHA/LBHA or LIDDA	Address	Main and Crisis Phone Numbers	Counties Served
1	**ACCESS** http://www.accessmhmr.org/	913 N. Jackson St., Jacksonville, TX 75766	M: 903-586-5507 C: 800-621-1693	Anderson, Cherokee
N/A	**Alamo Area Council of Governments** *Serves as Local IDD Authority for counties served*. https://www.aacog.com/IDDServices	2700 NE Loop 410 Suite 101 San Antonio, TX 78217	210-362-5200	Bexar
2	**Andrews Center Behavioral Healthcare System** http://www.andrewscenter.com/	2323 West Front St., Tyler, TX 75702	M: 903-597-1351 C: 877-934-2131	Henderson, Rains, Smith, Van Zandt, Wood
4	**Betty Hardwick Center** https://bettyhardwick.org/	2616 S. Clack St. Abilene, TX 79606	M: 325-690-5100 C: 800-758-3344	Callahan, Jones, Shackleford, Stephens, Taylor
5	**Bluebonnet Trails Community Services** http://bbtrails.org/	1009 N. Georgetown St., Round Rock, TX 78664	M: 512-255-1720 C: 800-841-1255	Bastrop, Burnet, Caldwell, Fayette, Gonzales, Guadalupe, Lee, Williamson
6	**Border Region Behavioral Health Center** http://www.borderregion.org/	1500 Pappas St., Laredo, TX 78041	M: 956-794-3000 C: 800-643-1102	Jim Hogg, Starr, Webb, Zapata
8	**Burke** https://myburke.org/	2001 S. Medford Dr., Lufkin, TX 75905	M: 936-639-1141 C: 800-392-8343	Angelina, Houston, Nacogdoches, Newton, Polk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler
9	**Camino Real Community Services** http://www.caminorealcs.org/	19965 FM 3175 N. Lytle, TX 78052	M: 210-357-0300 C: 800-543-5750	Atascosa, Dimmit, Frio, La Salle, Karnes, Maverick, McMullen, Wilson, Zavala
10	**The Center for Health Care Services** https://chcsbc.org/	6800 Park Ten Blvd. Suite 200-S San Antonio, TX 78213 Suite 200-S	M: 210-261-1000 C: 800-316-9241 or 210-223-7233	Bexar
11	**Center for Life Resources** http://cflr.us/ns/	408 Mulberry St. Brownwood, TX 76801	M: 325-646-9574 C: 800-458-7788	Brown, Coleman, Comanche, Eastland, McCulloch, Mills, San Saba
12	**Central Counties Services** https://centralcountiesservices.org/	304 S. 22nd Street Temple, TX 76501	254-298-7000 M: 254-298-7000 C: 800-888-4036	Bell, Coryell, Hamilton, Lampasas, Milam

13	**Central Plains Center** http://centralplains.org/	2700 Yonkers, Plainview, TX78072	M: 806-293-2636 C: 800-687-1300	Bailey, Briscoe, Castro, Floyd, Hale, Lamb, Motley, Parmer, Swisher
14	**Coastal Plains Community Center** https://coastalplainsctr.org/	200 Marriott Drive, Portland, TX 78374	M: 361-777-3991 C: 800-841-6467	Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, San Patricio
31	**Community Healthcore** http://www.communityhealthcore.com/	107 Woodbine Place Longview, TX 75601	M: 903-758-2471 C: 800-832-1009	Bowie, Cass, Gregg, Harrison, Marion, Panola, Red River, Rusk, Upshur
17	**Denton County MHMR Center** http://www.dentonmhmr.org/	2519 Scripture St. Denton, TX 76201	M: 940-381-5000 C: 800-762-0157	Denton
18	**Emergence Health Network** https://emergencehealthnetwork.org/	1600 Montana Ave. El Paso, TX 79902	M: 915-887-3410 C: 915-779-1800	El Paso
19	**Gulf Bend Center** https://www.gulfbend.org/	6502 Nursery Dr. Suite 100 Victoria, TX 79904	M: 361-575-0611 C: 877-723-3422	Calhoun, DeWitt, Goliad, Jackson, Lavaca, Refugio, Victoria
20	**Gulf Coast Center** https://gulfcoastcenter.org/	123 Rosenberg St. Suite 6 Galveston, TX 77550	M: 409-763-2373 C: 866-729-3848	Brazoria, Galveston
21	**The Harris Center for Mental Health and IDD** https://www.theharriscenter.org/	9401 Southwest Fwy Houston, TX 77074	M: 713-970-7000 C: 866-970-4770	Harris
22	**Heart of Texas Region MHMR Center** https://www.hotrmhmr.org/	110 S. 12th St. Waco, TX 76703	M: 254-752-3451 C: 866-752-3451	Bosque, Falls, Freestone, Hill, Limestone, McLennan
23	**Helen Farabee Centers** https://www.helenfarabee.org/	1000 Brook St., Wichita Falls, TX 76301	M: 940-397-3143 C: 800-621-8504	Archer, Baylor, Childress, Clay, Cottle, Dickens, Foard, Hardeman, Haskell, Jack, King, Knox, Montague, Stonewall, Throckmorton, Wichita, Wilbarger, Wise, Young
24	**Hill Country Mental Health & Developmental Disabilities Center** https://www.hillcountry.org/	819 Water St., Ste 300, Kerrville, TX 78028		Bandera, Blanco, Comal, Edwards, Gillespie, Hays, Kendall, Kerr, Kimble, Kinney, Llano, Mason, Medina, Menard, Real, Schleicher, Sutton, Uvalde, Val Verde
3	**Integral Care** https://integralcare.org/en/home/	1631 E. 2nd St. Building C Austin, TX 78702	M: 512-447-4141 C: 512-472-4357	Travis
25	**Lakes Regional Community Center** https://lakesregional.org/	400 Airport Rd. Terrell, TX 75160	M: 972-524-4159 C: 877-466-0660	Camp, Delta, Franklin, Hopkins, Lamar, Morris, Titus

26	**LifePath Systems** https://www.lifepathsystems.org/	1515 Heritage Dr. McKinney, TX 75069	M: 877-562-0190 C: 877-422-5939	Collin
16	**Metrocare Services** *Serves as LIDDA for Counties served.* https://www.metrocareservices.org/	1345 River Bend Drive, Suite 200 Dallas, TX 75247 *Multiple locations in Dallas Co.*	214-743-1200	Dallas
7	**MHMR Authority of Brazos Valley** https://mhmrabv.org/	1504 S. Texas Ave., Bryan, TX 77802	M: 979-822-6467 C: 888-522-8262	Brazos, Burleson, Grimes, Leon, Madison, Robertson, Washington
15	**MHMR Services for the Concho Valley** https://www.mhmrcv.org/	1501 W. Beauregard San Angelo, TX 76901	M: 325-658-7750 C: 800-375-8965	Coke, Concho, Crockett, Irion, Reagan, Sterling, Tom Green
33	**My Health My Resources (MHMR) of Tarrant County** https://www.mhmrtarrant.org/	3840 Hulen St., Fort Worth, TX 76107	M: 817-569-4300 C: 800-866-2465	Tarrant
N/A	**North Texas Behavioral Health Authority (NTBHA)** *Serves as LIDDA for Counties Served* https://ntbha.org/	9441 LBJ Freeway, Ste 350 Dallas, TX 75243	M: 877-653-6363 C: 866-260-8000	Dallas, Ellis, Hunt, Kaufman, Navarro, Rockwall
28	**Nueces Center for Mental Health and Intellectual Disabilities** https://www.ncmhid.org/	1630 S. Brownlee Blvd., Corpus Christi, TX 78401	M: 844-379-0330 C: 888-767-4493	Nueces
29	**Pecan Valley Centers for Behavioral & Developmental Healthcare** https://www.pecanvalley.org/	2101 W. Pearl St. Granbury, TX 76048	M: 817-579-4400 C: 800-772-5987	Erath, Hood, Johnson, Palo Pinto, Parker, Somervell
30	**PermiaCare** https://www.pbmhmr.com/	401 E. Illinois Ave. Suite 403 Midland, TX 79701	M: 432-570-3333 C: 844-420-3964	Brewster, Culberson, Ector, Hudspeth, Jeff Davis, Midland, Pecos, Presidio
32	**Spindletop Center** http://spindletopcenter.org/	655 S. 8th St. Beaumont, TX 77701	M: 409-784-5400 C: 800-937-8097	Chambers, Hardin, Jefferson, Orange, Jasper
27	**StarCare Specialty Health System** https://www.starcarelubbock.org/	904 Ave. O Lubbock, TX 79408	M: 806-766-0310 C: 806-740-1414 or 800-687-7581	Cochran, Crosby, Hockley, Lubbock, Lynn
34	**Texana Center** https://www.texanacenter.com/	4910 Airport Ave. Rosenberg, TX 77471	M: 281-239-1300 C: 800-633-5686	Austin, Colorado, Fort Bend, Matagorda, Waller, Wharton

35	**Texas Panhandle Centers** https://www.texaspanhandlecenters.org/	901 Wallace Blvd., Amarillo, TX 79106	M: 806-358-1681 C: 800-692-4039 or 806-359-6699	Armstrong, Carson, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Potter, Randall, Roberts, Sherman, Wheeler
36	**Texoma Community Center** https://www.texomacc.org/	315 W. McLain Dr. Sherman, TX 75092	M: 214-366-9407 C: 877-277-2226	Cooke, Fannin, Grayson
37	**Tri-County Behavioral Healthcare** http://www.tricountyservices.org/	233 Sgt. Ed Holcomb Blvd. Conroe, TX 77304	M: 936-521-6100 C: 800-659-6994	Liberty, Montgomery, Walker
38	**Tropical Texas Behavioral Health** http://www.ttbh.org/	1901 S. 24th Ave. Edinburg, TX 78540	M: 956-289-7000 C: 877-289-7199	Cameron, Hidalgo, Willacy
39	**West Texas Centers** https://www.wtcmhmr.org/	319 Runnels St. Big Spring, TX 79720	M: 432-263-0007 C: 800-375-4357	Andrews, Borden, Crane, Dawson, Fisher, Gaines, Garza, Glasscock, Howard, Kent, Loving, Martin, Mitchell, Nolan, Reeves, Runnels, Scurry, Terrell, Terry, Upton, Ward, Winkler, Yoakum

C. List of LMHAs/LBHAs/LIDDAs by County

https://txcouncil.com/community-centers/

Anderson -- ACCESS
Andrews -- West Texas Centers
Angelina -- Burke
Aransas -- Coastal Plains Community Center
Archer -- Helen Farabee Centers
Armstrong -- Texas Panhandle Centers
Atascosa -- Camino Real Community Services
Austin -- Texana Center
Bailey -- Central Plains Center
Bandera -- Hill Country Mental Health & Developmental Disabilities Centers
Bastrop-- Bluebonnet Trails Community Services
Baylor -- Helen Farabee Centers
Bee -- Coastal Plains Community Center
Bell -- Central Counties Services
Bexar -- The Center for Health Care Services
Blanco -- Hill Country Mental Health & Developmental Disabilities Centers
Borden -- West Texas Centers
Bosque -- Heart of Texas Region MHMR Center
Bowie -- Community Healthcore
Brazoria -- Gulf Coast Center
Brazos -- MHMR Authority of Brazos Valley
Brewster -- PermiaCare
Briscoe -- Central Plains Center
Brooks -- Coastal Plains Community Center
Brown -- Center for Life Resources
Burleson -- MHMR Authority of Brazos Valley
Burnet -- Bluebonnet Trails Community Services
Caldwell -- Bluebonnet Trails Community Services
Calhoun -- Gulf Bend Center
Callahan -- Betty Hardwick Center
Cameron -- Tropical Texas Behavioral Health
Camp -- Lakes Regional Community Center
Carson -- Texas Panhandle Centers
Cass -- Community Healthcore
Castro -- Central Plains Center
Chambers -- Spindletop Center
Cherokee -- ACCESS
Childress -- Helen Farabee Centers
Clay -- Helen Farabee Centers
Cochran -- StarCare Specialty Health System
Coke -- MHMR Services for the Concho Valley
Coleman -- Center for Life Resources
Collin -- LifePath Systems
Collingsworth -- Texas Panhandle Centers
Colorado -- Texana Center
Comal -- Hill Country Mental Health & Developmental Disabilities Centers
Comanche -- Center for Life Resources
Concho -- MHMR Services for the Concho Valley
Cooke -- Texoma Community Centers
Coryell -- Central Counties Services
Cottle -- Helen Farabee Centers
Crane -- West Texas Centers
Crockett -- MHMR Services for the Concho Valley
Crosby -- StarCare Specialty Health System
Culberson -- PermiaCare
Dallam -- Texas Panhandle Centers
Dallas -- Metrocare Services
Dawson -- West Texas Centers
Deaf Smith -- Texas Panhandle Centers
Delta -- Lakes Regional Community Center
Denton -- Denton County MHMR Center
DeWitt -- Gulf Bend Center
Dickens -- Helen Farabee Centers
Dimmit -- Camino Real Community Services
Donley -- Texas Panhandle Centers
Duval -- Coastal Plains Community Center
Eastland -- Center for Life Resources
Ector -- PermiaCare
Edwards -- Hill Country Mental Health & Developmental Disabilities Centers
Ellis -- Lakes Regional Community Center
El Paso -- Emergence Health Network
Erath -- Pecan Valley Centers for Behavioral & Developmental HealthCare
Falls -- Heart of Texas Region MHMR Center
Fannin -- Texoma Community Centers
Fayette -- Bluebonnet Trails Community Services
Fisher -- West Texas Centers
Floyd -- Central Plains Center
Foard -- Helen Farabee Centers
Fort Bend -- Texana Center
Franklin -- Lakes Regional Community Center
Freestone -- Heart of Texas Region MHMR Center
Frio -- Camino Real Community Services
Gaines -- West Texas Centers
Galveston -- Gulf Coast Center
Garza -- West Texas Centers
Gillespie -- Hill Country Mental Health & Developmental Disabilities Centers

Glasscock -- West Texas Centers
Goliad -- Gulf Bend Center
Gonzales -- Bluebonnet Trails Community Services
Gray -- Texas Panhandle Centers
Grayson -- Texoma Community Centers
Gregg -- Community Healthcore
Grimes -- MHMR Authority of Brazos Valley
Guadalupe -- Bluebonnet Trails Community Services
Hale -- Central Plains Center
Hall -- Texas Panhandle Centers
Hamilton -- Central Counties Services
Hansford -- Texas Panhandle Centers
Hardeman -- Helen Farabee Centers
Hardin -- Spindletop Center
Harris -- The Harris Center for Mental Health and IDD
Harrison -- Community Healthcore
Hartley -- Texas Panhandle Centers
Haskell -- Helen Farabee Centers
Hays -- Hill Country Mental Health & Developmental Disabilities Centers
Hemphill -- Texas Panhandle Centers
Henderson -- Andrews Center
Hidalgo-- Tropical Texas Behavioral Health
Hill -- Heart of Texas Region MHMR Center
Hockley -- StarCare Specialty Health System
Hood -- Pecan Valley Centers for Behavioral & Developmental HealthCare
Hopkins -- Lakes Regional Community Center
Houston -- Burke
Howard -- West Texas Centers
Hudspeth -- PermiaCare
Hunt -- Lakes Regional Community Center
Hutchinson -- Texas Panhandle Centers
Irion -- MHMR Services for the Concho Valley
Jack -- Helen Farabee Centers
Jackson-- Gulf Bend Center
Jasper -- Burke
Jeff Davis -- PermiaCare
Jefferson -- Spindletop Center
Jim Hogg -- Border Region Behavioral Health Center
Jim Wells -- Coastal Plains Community Center
Johnson -- Pecan Valley Centers for Behavioral & Developmental HealthCare
Jones -- Betty Hardwick Center
Karnes -- Camino Real Community Services
Kaufman -- Lakes Regional Community Center
Kendall -- Hill Country Mental Health & Developmental Disabilities Centers
Kenedy -- Coastal Plains Community Center
Kent -- West Texas Centers
Kerr -- Hill Country Mental Health & Developmental Disabilities Centers
Kimble -- Hill Country Mental Health & Developmental Disabilities Centers
King -- Helen Farabee Centers
Kinney -- Hill Country Mental Health & Developmental Disabilities Centers
Kleberg-- Coastal Plains Community Center
Knox -- Helen Farabee Centers
LaSalle -- Camino Real Community Services
Lamar -- Lakes Regional Community Center
Lamb -- Central Plains Center
Lampasas -- Central Counties Services
Lavaca -- Gulf Bend Center
Lee -- Bluebonnet Trails Community Services
Leon -- MHMR Authority of Brazos Valley
Liberty -- Tri-County Behavioral Healthcare
Limestone -- Heart of Texas Region MHMR Center
Lipscomb -- Texas Panhandle Centers
Live Oak -- Coastal Plains Community Center
Llano -- Hill Country Mental Health & Developmental Disabilities Centers
Loving -- West Texas Centers
Lubbock -- StarCare Specialty Health System
Lynn -- StarCare Specialty Health System
Madison -- MHMR Authority of Brazos Valley
Marion -- Community Healthcore
Martin -- West Texas Centers
Mason -- Hill Country Mental Health & Developmental Disabilities Centers
Matagorda -- Texana Center
Maverick -- Camino Real Community Services
McCulloch -- Center for Life Resources
McLennan -- Heart of Texas Region MHMR Center
McMullen -- Camino Real Community Services
Medina -- Hill Country Mental Health & Developmental Disabilities Centers
Menard -- Hill Country Mental Health & Developmental Disabilities Centers
Midland -- PermiaCare
Milam -- Central Counties Services
Mills -- Center for Life Resources

Mitchell -- West Texas Centers
Montague -- Helen Farabee Centers
Montgomery -- Tri-County Behavioral Healthcare
Moore -- Texas Panhandle Centers
Morris -- Lakes Regional Community Center
Motley -- Central Plains Center
Nacogdoches -- Burke
Navarro -- Lakes Regional Community Center
Newton -- Burke
Nolan -- West Texas Centers
Nueces -- Nueces Center for Mental Health and Intellectual Disabilities
Ochiltree -- Texas Panhandle Centers
Oldham -- Texas Panhandle Centers
Orange -- Spindletop Center
Palo Pino -- Pecan Valley Centers for Behavioral & Developmental HealthCare
Panola -- Community Healthcore
Parker -- Pecan Valley Centers for Behavioral & Developmental HealthCare
Parmer -- Central Plains Center
Pecos -- PermiaCare
Polk -- Burke
Potter -- Texas Panhandle Centers
Presidio -- PermiaCare
Rains -- Andrews Center
Randall -- Texas Panhandle Centers
Reagan -- MHMR Services for the Concho Valley
Real -- Hill Country Mental Health & Developmental Disabilities Centers
Red River -- Community Healthcore
Reeves -- West Texas Centers
Refugio-- Gulf Bend Center
Roberts -- Texas Panhandle Centers
Robertson -- MHMR Authority of Brazos Valley
Rockwall -- Lakes Regional Community Center
Runnels -- West Texas Centers
Rusk -- Community Healthcore
Sabine -- Burke
San Augustine -- Burke
San Jacinto -- Burke
San Patricio -- Coastal Plains Community Center
San Saba -- Center for Life Resources
Schleicher -- Hill Country Mental Health & Developmental Disabilities Centers
Scurry -- West Texas Centers
Shackelford -- Betty Hardwick Center
Shelby -- Burke
Sherman -- Texas Panhandle Centers
Smith -- Andrews Center
Somervell -- Pecan Valley Centers for Behavioral & Developmental HealthCare
Starr -- Border Region Behavioral Health Center
Stephens -- Betty Hardwick Center
Sterling -- MHMR Services for the Concho Valley
Stonewall -- Helen Farabee Centers
Sutton -- Hill Country Mental Health & Developmental Disabilities Centers
Swisher -- Central Plains Center
Tarrant -- MHMR Tarrant
Taylor -- Betty Hardwick Center
Terrell -- West Texas Centers
Terry -- West Texas Centers
Throckmorton -- Helen Farabee Centers
Titus -- Lakes Regional Community Center
Tom Green -- MHMR Services for the Concho Valley
Travis -- Integral Care
Trinity -- Burke
Tyler -- Burke
Upshur -- Community Healthcore
Upton -- West Texas Centers
Uvalde -- Hill Country Mental Health & Developmental Disabilities Centers
Val Verde -- Hill Country Mental Health & Developmental Disabilities Centers
Van Zandt -- Andrews Center
Victoria -- Gulf Bend Center
Walker -- Tri-County Behavioral Healthcare
Waller -- Texana Center
Ward -- West Texas Centers
Washington -- MHMR Authority of Brazos Valley
Webb -- Border Region Behavioral Health Center
Wharton -- Texana Center
Wheeler -- Texas Panhandle Centers
Wichita -- Helen Farabee Centers
Wilbarger -- Helen Farabee Centers
Willacy -- Tropical Texas Behavioral Health
Williamson -- Bluebonnet Trails Community Services
Wilson -- Camino Real Community Services
Winkler -- West Texas Centers
Wise -- Helen Farabee Centers
Wood -- Andrews Center
Yoakum -- West Texas Centers
Young -- Helen Farabee Centers
Zapata -- Border Region Behavioral Health Center
Zavala -- Camino Real Community Services

D. List of Texas OCR Locations

Updated 8/10/2023

LMHA or LBHA	Counties
Andrews Center	Henderson, Rains, Smith, Van Zandt, Wood
Bluebonnet Trails	Bastrop, Burnet, Caldwell, Fayette, Gonzales, Guadalupe, Lee, Williamson
Center for Health Care Services	Bexar
Center for Life Resources	Brown, Coleman, Comanche, Eastland McCulloch, Mills, San Saba
Community Healthcore	Bowie, Cass, Gregg, Harrison, Marion, Panola, Red River, Rusk, Upshur
Emergence Health Network	El Paso
Harris County	Harris
Heart of Texas	Bosque, Falls, Freestone, Hill, Limestone, McLennan
Integral Care	Travis
LifePath	Collin
North Texas Behavioral Health Authority	Dallas, Ellis, Hunt, Kaufman, Navarro, Rockwall
Nueces Center	Nueces
StarCare	Cochran, Crosby, Hockley, Lubbock, Lynn
Tarrant County	Tarrant
Tri-County	Liberty, Montgomery, Walker

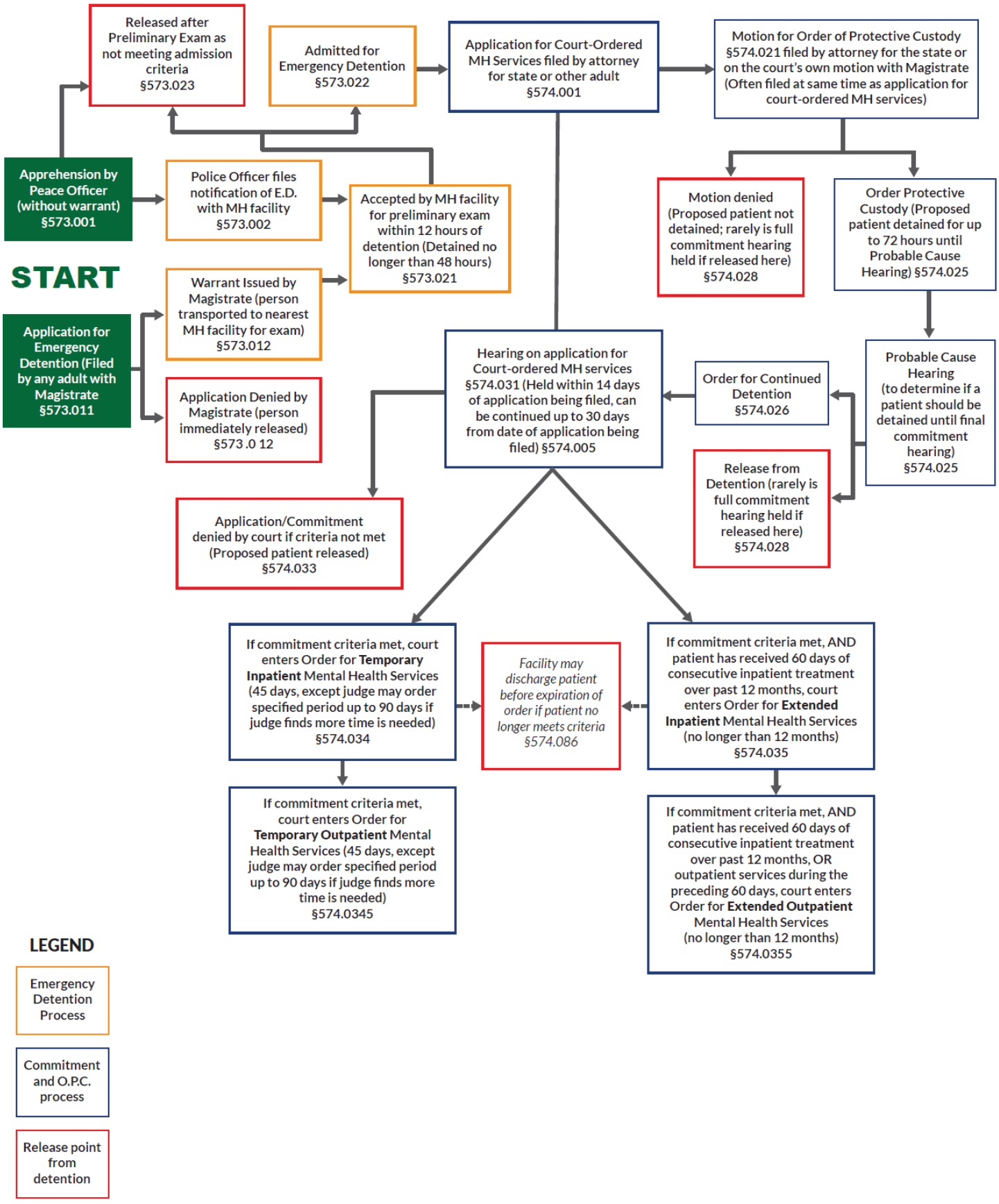
E. List of Texas JBCR Locations

Updated 8/10/2023

LMHA or LBHA	Counties
ACCESS	Cherokee
Andrews Center	Smith
Bluebonnet Trails	Williamson
Center for Health Care Services	Bexar
Center for Life Resources	Brown, Eastland
Concho Valley	Crockett, Reagan, Tom Green
Gulf Coast Center	Brazoria, Galveston
Harris Center	Harris
North Texas Behavioral Health Center	Dallas
Nueces Center	Nueces
Pecan Valley	Parker, Palo Pinto, Erath, Hood, Johnson and Somervell
PermiaCare	Ector, Midland
Spindletop Center	Chambers, Hardin, Jasper, Orange
StarCare	Lubbock
Tarrant County	Tarrant
Texana Center	Fort Bend
Texas Panhandle Centers	Potter
Texoma	Cooke, Fannin, Grayson

F. Civil Inpatient Commitment Process (HHSC)

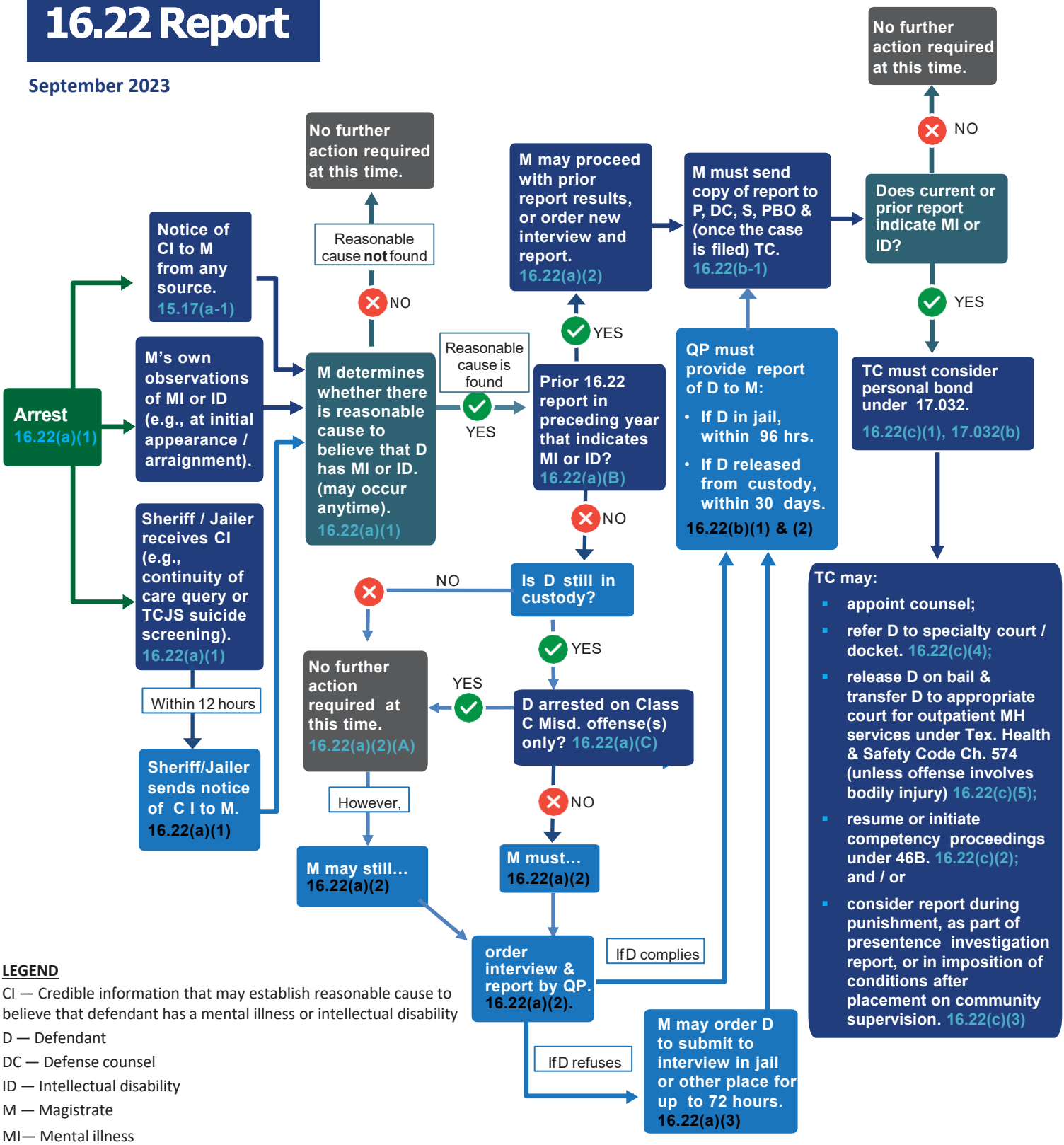
CIVIL INPATIENT COMMITMENT PROCESS UNDER CHAPTERS 573 & 574 of the TEXAS HEALTH & SAFETY CODE



G. 16.22 Process Flow Chart (JCMH)

16.22 Report

September 2023



LEGEND

CI — Credible information that may establish reasonable cause to believe that defendant has a mental illness or intellectual disability

D — Defendant

DC — Defense counsel

ID — Intellectual disability

M — Magistrate

MI— Mental illness

P — Prosecutor

PBO — Personal Bond Office (under art. 17.42) or Director of department that supervises D while on bail & receiving MH or IDD services as a condition of bail.

QP — Qualified professional (service provider that contracts with the jail to provide mental health or IDD services, LMHA, LIDDA, or another qualified mental health or IDD expert)

S — Sheriff (or other person responsible for D's medical records while in confinement)

TC — Trial court

TCJS – Texas Commission on Jail Standards

Unless otherwise noted, all citations are to the Texas Code of Criminal Procedure

Applicable Forms for Tex. CCP art. 16.22 Process

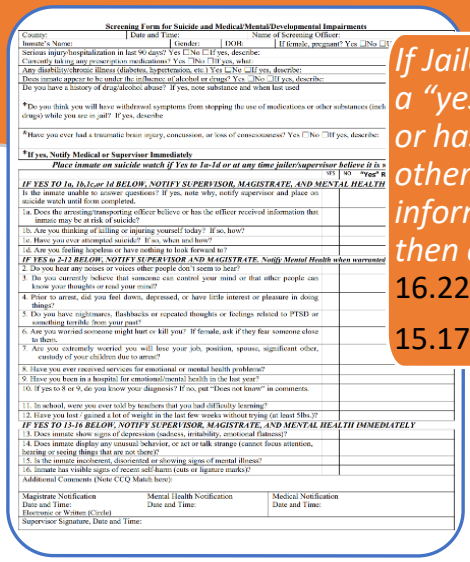
START

Police interaction / detention of defendant

Consider if Diversion under CCP 16.23 applies to situation

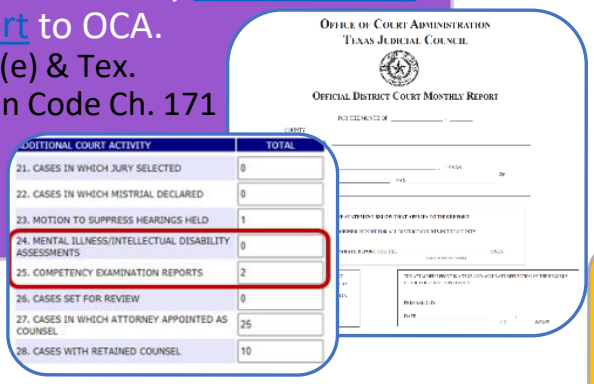
If not, & interaction becomes an arrest, Police take def. to jail

Jailer completes TCJS Screening Form


Screening Form for Suicide and Medical/Mental/Developmental Impairments

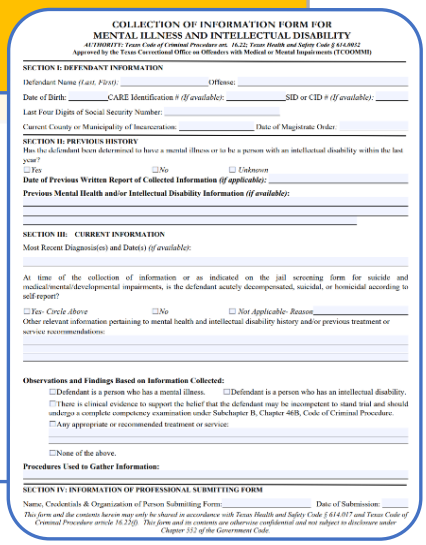
*If Jailer gets a "yes" answer or has **any** other credible information, then continue.*
16.22(a)(1) & 15.17(a-1)

Clerk documents number of 16.22 reports completed on Judicial Monthly Court Activity Report to OCA.
16.22(e) & Tex. Admin Code Ch. 171


OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
OFFICIAL DISTRICT COURT MONTHLY REPORT

ADDITIONAL COURT ACTIVITY	TOTAL
21. CASES IN WHICH JURY SELECTED	0
22. CASES IN WHICH MISTRIAL DECLARED	0
23. MOTION TO SUPPRESS HEARINGS HELD	1
24. MENTAL ILLNESS/INTELLECTUAL DISABILITY ASSESSMENTS	0
25. COMPETENCY EXAMINATION REPORTS	2
26. CASES SET FOR REVIEW	0
27. CASES IN WHICH ATTORNEY APPOINTED AS COUNSEL	25
28. CASES WITH RETAINED COUNSEL	10

LHMA / LIDDA / MH Provider returns 16.22 report (TCOOMMI form) to Magistrate


COLLECTION OF INFORMATION FORM FOR MENTAL ILLNESS AND INTELLECTUAL DISABILITY

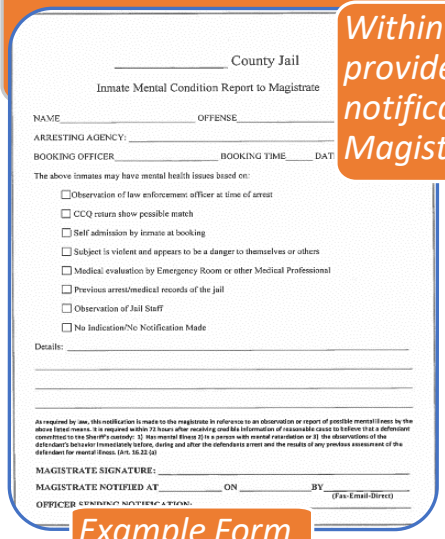
Within:
96 hours if defendant in custody;
30 days if Defendant out of custody
16.22(b)(1),(2)

Magistrate must give notice of 16.22 report to all stakeholders
16.22(b-1)

Stakeholders include:
- *Defense Counsel*
- *State's Attorney*
- *Trial Court*
- *Sheriff (or holder of medical records of D)*
- *Personal bond office/ director pretrial supervision dept.*

Police | Jail | Magistrate | LMHA | Clerk

Jailer fills out Magistrate Notification Form 16.22(a)(1)



_____ County Jail

Inmate Mental Condition Report to Magistrate

NAME_____ OFFENSE_____

ARRESTING AGENCY: _____

BOOKING OFFICER_____ BOOKING TIME_____ DAT

The above inmates may have mental health issues based on:

- ☐ Observation of law enforcement officer at time of arrest
- ☐ CCQ return show possible match
- ☐ Self admission by inmate at booking
- ☐ Subject is violent and appears to be a danger to themselves or others
- ☐ Medical evaluation by Emergency Room or other Medical Professional
- ☐ Previous arrest/medical records of the jail
- ☐ Observation of Jail Staff
- ☐ No Indication/No Notification Made

Details: _____

As required by law, this notification is made to the magistrate in reference to an observation or report of possible mental illness by the above listed means. It is required within 72 hours after receiving credible information of reasonable cause to believe that a defendant committed to the Sheriff's custody: 1) Has mental illness 2) Is a person with mental retardation or 3) the observations of the defendant's behavior immediately before, during and after the defendants arrest and the results of any previous assessment of the defendant for mental illness. (Art. 16.22 (a)

MAGISTRATE SIGNATURE: _____

MAGISTRATE NOTIFIED AT_____ ON _____ BY_____ (Fax-Email-Direct)

OFFICER SENDING NOTIFICATION: _____

Example Form

Within 12 hours, provides form as notification to Magistrate

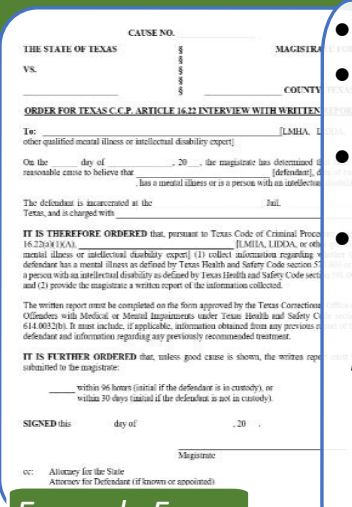
Magistrate :

- *Reviews notification form*
- *Reviews charges/ criminal history*
- *Meets with Defendant*
- *Communicates with LMHA/MH /LIDDA Provider*

If Magistrate determines there is reasonable cause to believe the Defendant has MI or is a person with IDD, then continue. 16.22(a)(1)

Note: The determination of reasonable cause to believe can arise from jailer notification or from Magistrate's own observations

Magistrate shall* order MH Provider to conduct 16.22 interview. 16.22(a)(1)



CAUSE NO. _____

THE STATE OF TEXAS § MAGISTRA

VS. §

§

§ _____ COUNTY

ORDER FOR TEXAS C.C.P. ARTICLE 16.22 INTERVIEW WITH WRITTEN

To: _____ [LMHA, L

other qualified mental illness or intellectual disability expert]

On the _____ day of _____, 20__, the magistrate has determined t

reasonable cause to believe that _____ [defendant], d

, has a mental illness or is a person with an intellectu

The defendant is incarcerated at the _____ Jail,

Texas, and is charged with _____

IT IS THEREFORE ORDERED that, pursuant to Texas Code of Criminal Proce

16.22(a)(1)(A), _____ [LMHA, LIDDA, or oth

mental illness or intellectual disability expert] (1) collect information regarding

defendant has a mental illness as defined by Texas Health and Safety Code sections 5

a person with an intellectual disability as defined by Texas Health and Safety Code sect

and (2) provide the magistrate a written report of the information collected.

The written report must be completed on the form approved by the Texas Correctiona

Offenders with Medical or Mental Impairments under Texas Health and Safety C

614.0032(b). It must include, if applicable, information obtained from any previous

defendant and information regarding any previously recommended treatment.

IT IS FURTHER ORDERED that, unless good cause is shown, the written rep

submitted to the magistrate:

_____ within 96 hours (initial if the defendant is in custody), or

within 30 days (initial if the defendant is not in custody).

SIGNED this _____ day of _____, 20__.

_____

Magistrate

cc: Attorney for the State

Attorney for Defendant (if known or appointed)

Example Form

- *Not required if:
- *D no longer in custody; OR*
- *D only arrested on Class C Misd.; OR*
- *D had 16.22 interview & report done within year prior to arrest date AND court elects to use that report.*

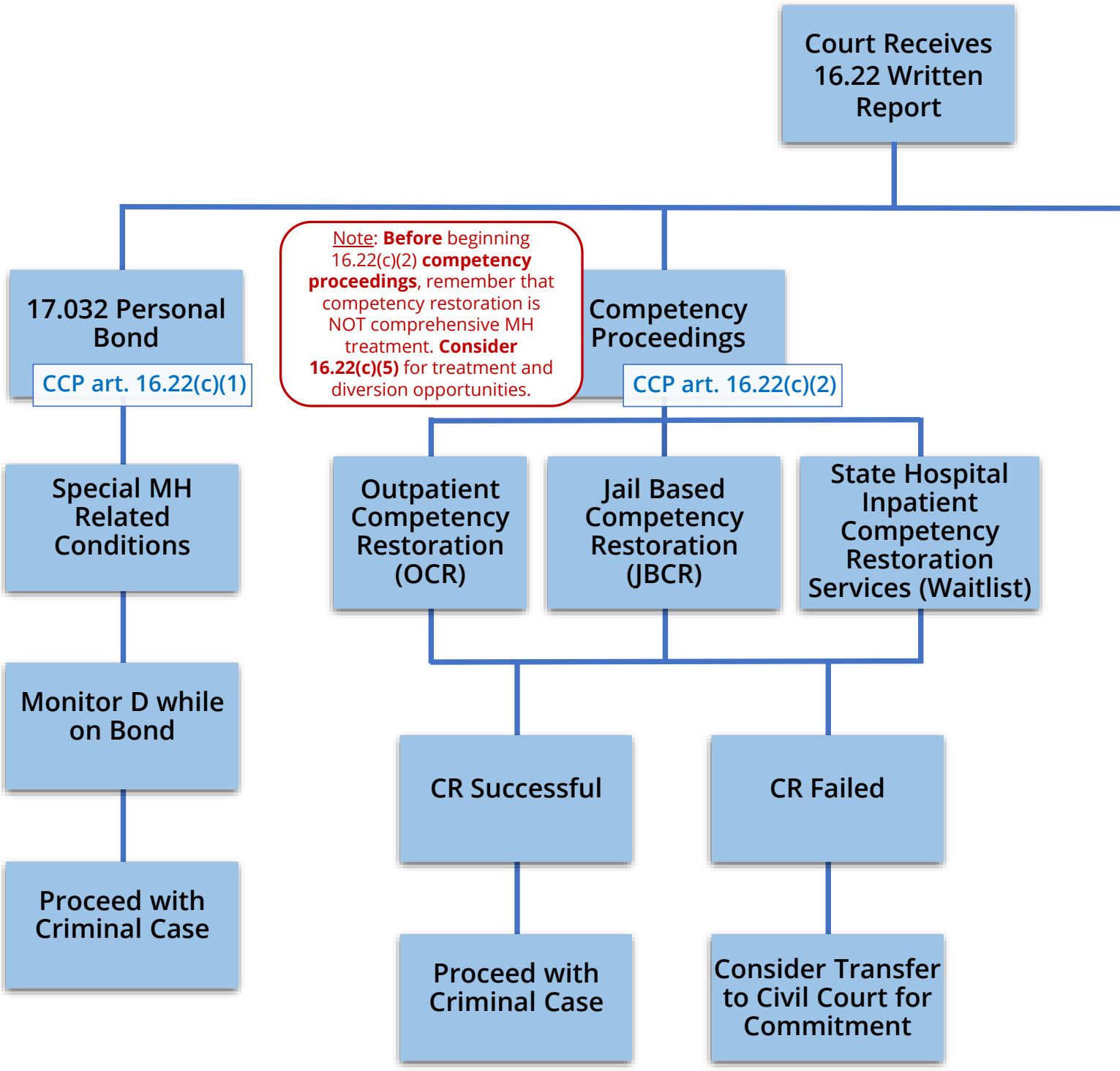
16.22(a)(2)

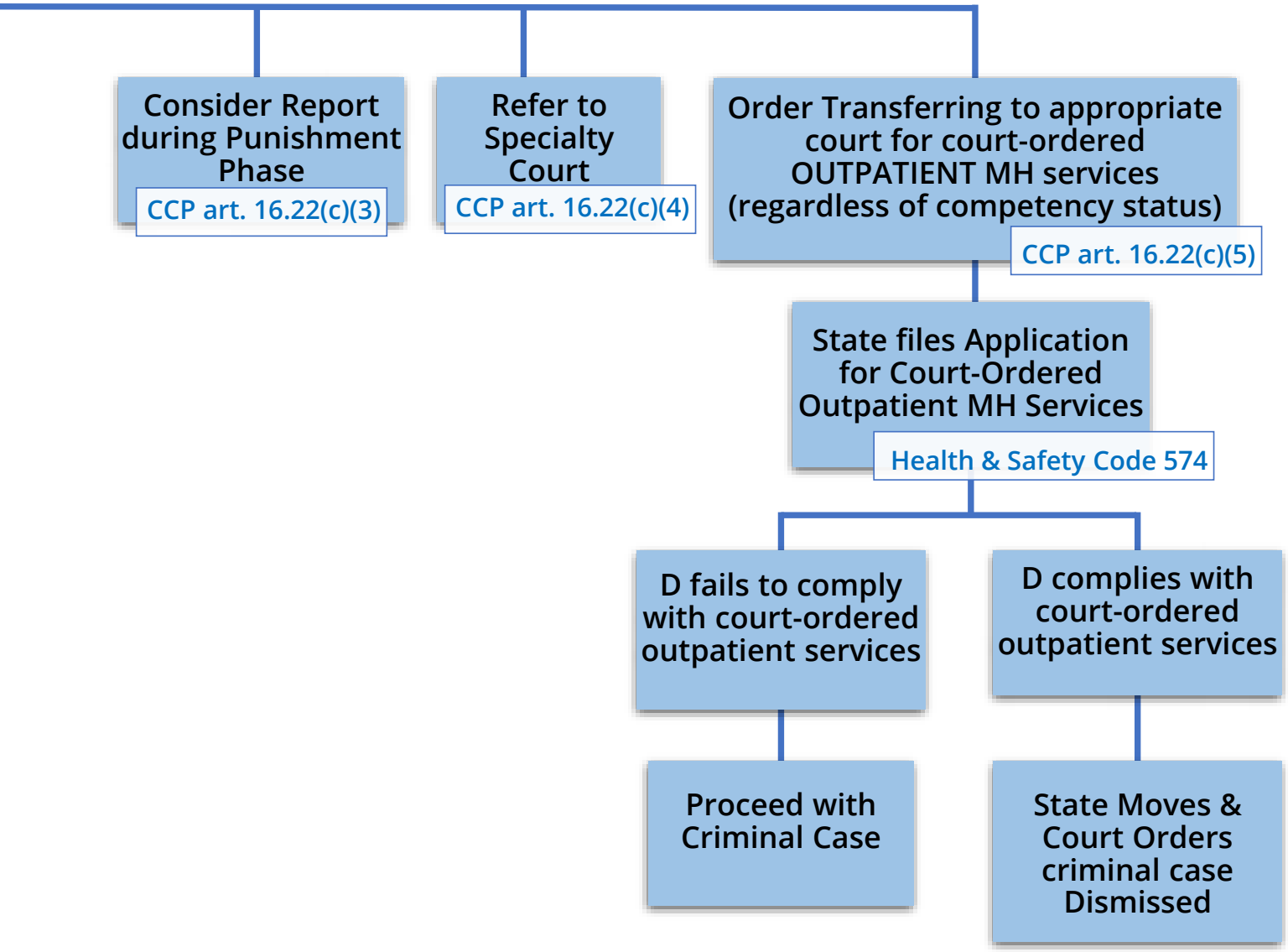
LMHA/LIDDA/MH Provider Interviews defendant and makes report

Magistrate conducts 15.17 hearing (magistration)

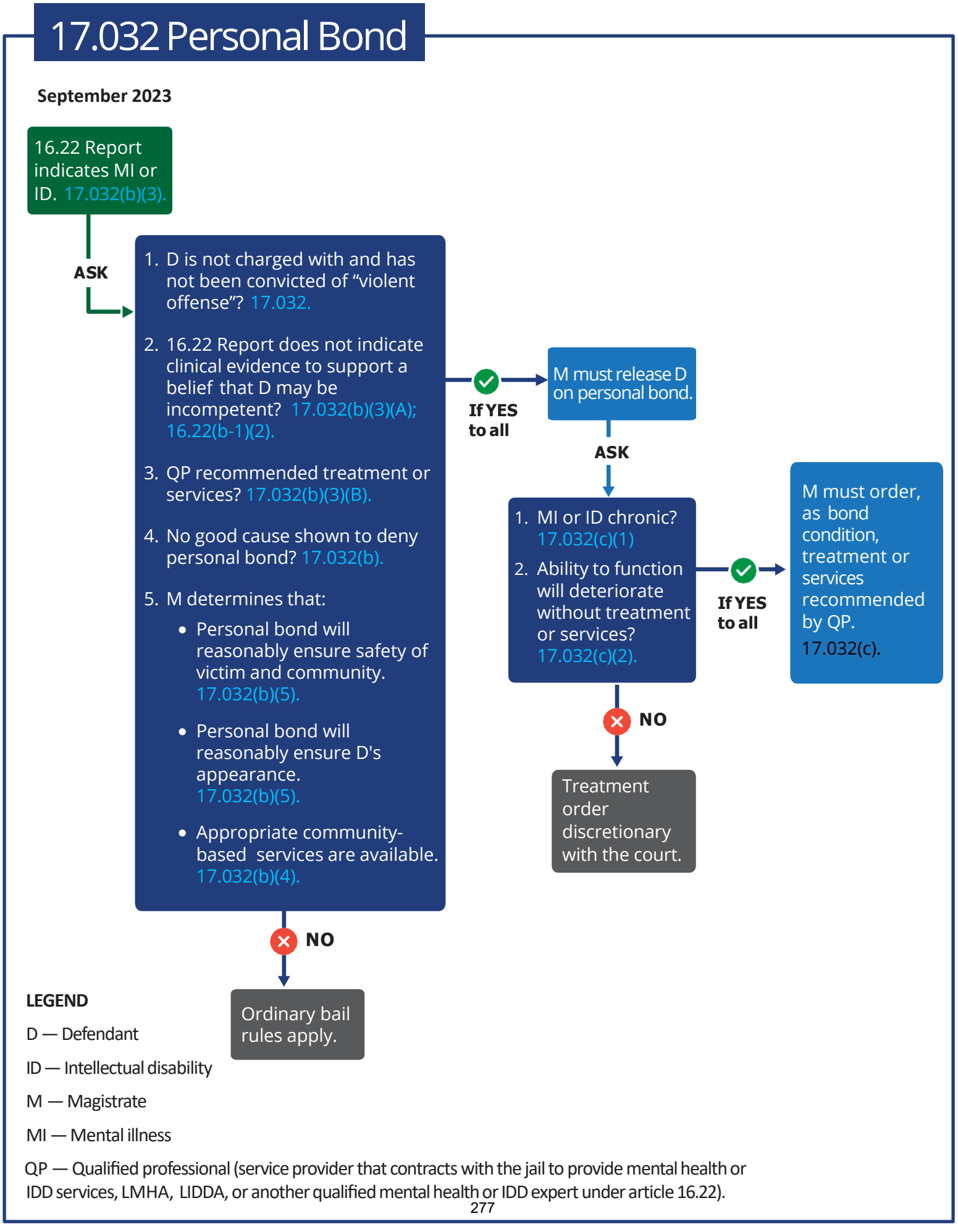
- *Consider if CCP 17.032 is applicable*
- *Set terms & conditions of bond*
- *Enter bond terms into TCIC per CCP art. 17.50*

Ways a Court can Utilize a 16.22 Report




Consider Report during Punishment Phase
CCP art. 16.22(c)(3)
Refer to Specialty Court
CCP art. 16.22(c)(4)
Order Transferring to appropriate court for court-ordered OUTPATIENT MH services (regardless of competency status)
CCP art. 16.22(c)(5)
State files Application for Court-Ordered Outpatient MH Services
Health & Safety Code 574
D fails to comply with court-ordered outpatient services
D complies with court-ordered outpatient services
Proceed with Criminal Case
State Moves & Court Orders criminal case Dismissed

J. 17.032 Personal Bonds Flow Chart (JCMH)



K. CCP 46B Competency Flow Chart (HHSC)

Code of Criminal Procedure – Chapter 46B Incompetency to Stand Trial

Flow Chart Key

- Informational
- Alternatives
- Exits from 46B

A person is incompetent to stand trial if the person does not have:

- **sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or**
- **a rational as well as factual understanding of the proceedings against the person. [46B.003(a)]**

Incompetency proceedings applicable to **D**efendants ("**D**") charged with a felony or misdemeanor punishable by confinement **[46B.002]**

↓

Competency issue raised by either party or the court on its own motion **[46B.004(a)]**

↓

Court conducts informal inquiry **[46b.004(c)]**

⇢ Court may, at any time, **dismiss criminal charges against D** and transfer proceedings to civil court under 46B - Subchapter F **[46B.004(e), 46B.084(f)]**

↓

No evidence of incompetency

⇢ **Resume criminal proceedings**

Evidence of incompetency

↓

Court orders examination **[46B.005]**

- by qualified expert **[46B.021]**
- factors to be considered **[46B.024]**
- report due in 30 days **[46B.025, 46B.026]**

↓

Competency hearing before judge or jury **[46B.005(c), 46B.051]** Defense must prove incompetency by a preponderance of the evidence **[46B.003(b)]**

⇢ Finding of competency ⇢ **Resume criminal proceedings**

No hearing required if no one requests a jury or opposes a finding of incompetency **[46B.005(c), 46B.054]** However, Court must still appoint expert and receive report **[46B.021(b), 46B.074]**

↓

Initial Trial Court Determination of Incompetency **[46B.051 - 46B.055]**

↓

Subchapter D "Restoration Commitment"

If Court Determines **D** is **likely restorable in foreseeable future commit D*** to appropriate facility for ***In*patient** *or* ***Out*patient** restoration of D's competency **[46B.071, 46B.072, 46B.073]**

♦If ***not*** *restorable in* ***forseeable future*** go to ***SubCh E***

* Court personnel please contact the Forensic Admissions Team's email at Forensicadmissions@hhsc.state.tx.us for more information about admission

Court may **release D *who is likely to be restored*** **on bail** and order available ***Out*patient treatment** for up to 120 days for the purposes of attaining competency **[46B.072] Ct can order if:**

- If Ct determines **D** not dangerous
- If Ct approves treatment plan
- If treatment is available to **D**

If **D charged w/ CCP Art. 17.032(a)** offense (***other than 17.032 (a)(6)***), or indictment alleges an affirmative finding **Art. 42A.054(c)or(d)**, **D** is **committed* to a facility designated to be appropriate for D by HHSC** for up to 120 days for restoring **D** to competency **[46B.073(b)&(c)]**

If **D is not charged with Art. 17.032(a)** offense **nor** alleged affirmative **Art. 42A.054(c)/(d) finding; D** is **committed*** to a **non-MSU HHSC facility** (**state hospital** *or* **state supported living center**) for up to ***120 days for felony*** charges or up to ***60 days for misdemeanors*** for restoration of **D** to competency **[46B.073(b)&(d)]**

Competency procedures continued on next page

Competency procedures continued from first page

Treatment Facility Responsibilities during **Subchapter D "Restoration Commitment"** apply to ***In*patient** and ***Out*patient MH treatment facilities** and **ID-State Supported Living Centers [46B.077(a)]**

- Develop individual treatment program for **D**
- Assess whether **D** will attain competency in the foreseeable future
- Report to the court and local MH/ID Authority on **D's** progress toward competency

Head of *Inpatient* or ***Jail-Based Competency Restoration*** **(JBCR)** programs sends **Notice to Court** when:

- **D** has attained competency **[46B.079(b)(2)]**
- **D**, while not competent, **is clinically ready for OCR** program **[46B.079(b)(1)]**
- **D** won't attain competency in foreseeable future **[46B.079(b)(3)]**
- Term of commitment is set to expire (≥15 days)* **[46B.079(a)]**

Head of *Outpatient* program sends **Notice to Court** when**:**

- **D** has attained competency **[46B.079(b-1)(1)]**
- **D** won't attain competency in foreseeable future **[46B.079(b-1)(2)]**

When giving **Notice to Court** the facility supplies the committing court a **Final Report** stating reasons for **D's** discharge/transfer and a list of types and dosages of medications **D** was on during treatment **[46B.079(c)]**

If the facility believes that **D** meets **civil commitment criteria** the facility supplies court with either two Certificate of Medical Examination ("CME") for mental illness *or* affidavit supporting **D's** intellectual disability (should also include IDT recommendation on least restrictive appropriate setting) **[46B.083(a)/(b)]**

***Head of facility** may request one **60-day extension** of restoration order **[46B.079(d); and 46B.080]**

D is to be **returned to court** within **15 days*** of Notice under **46B.079** and court must make determination on **D's** current competency within **20 days** of receiving Final Report **[46B.084(a-1)]**

* If **D** not returned to ct. w/in 15 days, facility shall return **D** and charge the county for costs **[46B.082(b)]**

Even if a party **objects** to the findings of the **Final Report**, the issue of **D's** current competency **must still be heard within 20 days of receiving report [46B.084(a-1)]**

If the hearing is before the court, the hearing may be by electronic broadcast system **[46B.084(b-1); 46B.013]**

If **no objection** to the **Final Report** the court can determine competency based solely on the report **without a hearing [46B.084(a)]**

D found competent

Resume criminal proceedings

D found ***in***competent

D found competent

Resume criminal proceedings

Are **criminal charges** against **D dismissed?**

Charges not dismissed [46B.084(e)] after Subchapter D commitment **or** if **D *not*** *likely to be restored in foreseeable future* **[46B.071(b)]**

Charges dismissed [46B.084(f)]

Court determines if there is evidence of mental illness or intellectual disability **[46B.102(a); 46B.103(a)]**

Court determines if there is evidence of mental illness or intellectual disability **[46B.084(f); 46B.151]**

***46B - Subchapter E* "Civil Commitment; Charges Pending"**

- **Criminal court** conducts commitment hearing (*in*patient or *out*patient) for **D** with **mental illness** pursuant to Subtitle C, Title 7, Health and Safety Code **(Mental Health Code) [46B.102(b)]**
- Commitment proceedings for **D** with **intellectual disability** are conducted pursuant to Subtitle D, Title 7, Health and Safety Code **(Persons with Intellectual Disability Act) [46B.103(b)]**

Evidence of mental illness or intellectual disability

No evidence

D released **[46B.151(d)]**

Pursuant to **Subchapter F,** court **transfers D's** case to **civil court** for commitment proceedings **[46B.151(b)]**

***Subchapter E** commitment procedures continued on next page*

(Cont'd from previous page)

Does **D** meet **Subchapter E – Commitment Procedures?**

Yes

No

CCP, 46B is silent. According to **Health and Safety Code § § 574.033 (MH) and 593.051(ID)**, **D** should be released.

If **D (MH or ID) charged w/ CCP Art 17.032(a)** offense (other than "simple assault") or indictment alleges affirmative finding Art. 42A.054(c)or(d), **D** is committed to facility designated by Health and Human Service Commission (**HHSC**) **[46B.104]**

If **D is <u>not</u> charged with specified offense: D** is committed, for the continuing purpose of restoring **D** to competency to: **[46B.106]**

- **(MH)** a **non-MSU State Hospital**;
- (**MH**) available **outpatient** restoration; or
- **(ID) D** is committed to **State Supported Living Center** under provisions of PIDA

If **D** is sent to **Maximum Security Unit (MSU)** they must be presented to **Review Board**, w/in 60 days to determine if **D is Manifestly Dangerous.** If not D is transferred:

- **(MH)** a **non-MSU HHSC facility [46B.105(a)(1)]**
- **(ID) D** is committed to **State Supported Living Center** (SSLC) under provisions of PIDA **[46B.105(a)(2)]**

Facilities continue to pursue restoring **D** to competency

Redetermination of **D's** competency is available on the request of any party, the court, or the head of facility (state hospital, outpatient restoration program or state supported living center) **[46B.108-46B.110]**

Court may appoint Expert in accordance with Subchapter B **[46B.111]**

If both parties and court **<u>agree</u>** that **D** is **competent**, court shall find **D** restored to competency without a hearing **[46B.112]**

Court shall hold competency hearing if any party **<u>disagrees</u>** that **D** is **competent** (competency is presumed if head of facility submits opinion; presumption must be overcome at hearing by preponderance of the evidence) **[46B.113]**

Resume criminal proceedings

Finding of competency

Finding of incompetency

Court remands **D** back to appropriate facility **[46B.117]**

The head of facility must notify the committing court if they determine that **D** on **Subchapter E commitment** should be **released**. This would include a release due to:

- **expiration of D's commitment** under the Mental Health Code;
- facility determination that **D no longer meets commitment criteria** under Subtitle C or D, Title 7, Health and Safety Code (Mental Health Code/ Persons with Intellectual Disability Act) **[46B.107(a)-(c)]**; or
- **D** has "Timed Out" via Maximum Term of Commitment **[46B.0095]**

The court may hold a hearing on these matters by means of an **electronic broadcast system [46B.107(d)(2), 46B.013]**

If the court determines **release is not appropriate**, the court shall enter an **order** directing **D** not be released **[46B.107(e)]**

Court-ordered Medication (COM)
Process Flowchart for a 46B Defendant

1. D found incompetent; and
2. D is either:
   - In jail waiting to go to Competency Restoration Services (CRS) (inpatient, residential, or outpatient);
   - Committed to inpatient, residential, or JBCR for CRS;
   - Out on bond for OCR; or
   - In jail after returning from CRS.
3. Psychoactive meds required by Dr. or D's continuity of care plan.
4. D refusing to take meds.

→

- State must first seek med order in the Probate Court (even in criminal/competency cases).
- Jailer, LMHA, or Physician completes Appl. to Administer Meds.
- Physician MUST sign with statements from H&S 574.104 (b).

→

Criminal Court holds Hearing 46B.086

Requires testimony of 2 physicians:
i. treating Dr. &
ii. uninvolved Dr.

COMs Granted *under 46B*

→

Transmit the Order to:
- Jail Med. Provider
- LMHA, &
- Defendant

→

Jail Medical determines whether to forcibly administer medication

COMs Denied

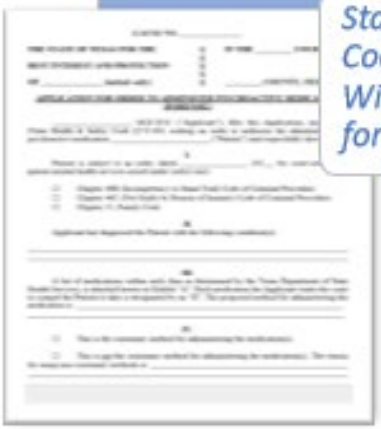
→

No Court Ordered Meds Allowed

State | Probate Court | Criminal Court | Jail

State, or treating physician on behalf of the state, may file Application for Court-Ordered Meds with Court with Probate Jurisdiction (574.105)

State Coordinates Witnesses for Hearing



Probate Court holds Hearing 574.106

Within 30 days of application

COMs Granted *under H&S Code § 574.106*

Transmit the Order to:

- Jail Med. Provider
- LMHA, &
- Defendant

COMs Denied

Director of Facility or Program Provider shall notify the Criminal Court of Defendant's Continued refusal to take medications

By end of next business day following D's refusal

Jail Medical determines whether to forcibly administer medication

Criminal Court notifies the State and Defense Attorney of the D's refusal to take meds.

The State may now file Motion in Criminal Court to Compel Meds under CCP 46B.086

Not later than the 15th day after the Order Denying COMs from Probate Court (unless D in OCR)

Medication Flow Chart for Forensic Patients: Chapter 46B (Incompetent to Stand Trial)

CAPACITY STANDARD and DANGEROUS STANDARD

DOES PATIENT REFUSE PSYCHOACTIVE MEDICATIONS?

NO → **Medications Administered**

YES

***Is Patient*:** H&S § 574.103
- Having a medication-related Emergency (as defined);
- Over 18 and a guardian has consented to the medication

→ **YES** → **Medications Administered**

→ **NO**

Physician files Application in Probate Court that states:
- Patient is on a forensic commitment (or in jail waiting);
- Patient lacks capacity and reasons for that belief;
- Each medication the physician wants court to compel;
- Physician's diagnosis of Patient; and
- Proposed method of administration (If not customary/ provides justification for departure)

H&S § 574.104(b)

↔

If Application is filed patient gets:
- representation by a court-appointed attorney;
- to meet with that attorney;
- notice of the time, place, and date of the hearing;
- to be present at the hearing;
- to request from the court an independent expert; and
- notification of the court's determination

H&S § 574.105

↓

Court Hearing on Physician's Application
- Court finds, by clear and convincing evidence, that ***PATIENT LACKS CAPACITY*** to make decision regarding medication; **and**
- Treatment with medication is in patient's ***Best Interest***

H&S § 574.106(a-1)(1)

↔

Best Interest

Court must consider patient's:
- expressed preferences regarding treatment with medications;
- religious beliefs;
- the risks and benefits of meds;
- consequences if the meds not administered;
- prognosis if treated with meds;
- alternative, less intrusive treatments that are likely to produce the same results as treatment with meds; and
- less intrusive treatments to

H&S § 574.106(b)

Yes → **Court Grants Order**

- OR - If Patient has Capacity Is Patient Dangerous?

Yes → Court may still issue order if patient is ***DANGEROUS*** **to self or others** in the facility considering:
- Assessment of patient's condition;
- Whether the patient has inflicted, attempted or made a serious threat of inflicting substantial physical harm while in the facility;
- Whether the patient, in the six months prior to being placed in the facility, has inflicted, attempted or made a serious threat of inflicting substantial physical harm; **and**
- Treatment is in ***Best Interest***

H&S § 574.106(a-1)(2)(A)or(B) and § 574.1065

Probate Court May ***Not*** Grant Order if patient, **with capacity**, is ***not Dangerous*** or **medications are *not* in patient's *Best Interest* -**
If denied may seek order from ***Crim. Court*** via Art 46B.086

Code of Criminal Procedure – Chapter 46C
NGRI / Insanity Defense*

A Defendant ("D") is Not Guilty by Reason of Insanity (NGRI) if:

- **The prosecution has established, beyond a reasonable doubt, that D committed the offense; and**
- **The defense establishes, by a preponderance of the evidence, that D was insane at the time of the offense. [46C.153(a)]**

***Penal Code, Sec. 8.01. Insanity**

It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.

A **D**efendant (**"D"**) must give **notice of intent to raise insanity defense** at least **20 days before trial**, or at the pretrial hearing if more than 20 days from trial **[46C.051]**

↓

Once the intent to raise the insanity defense has been raised, the court may **appoint disinterested experts** to:

- examine **D** with regard to the defense; and
- testify at trial regarding that issue **[46C.101]**

↓

Expert on insanity may be same person who opined on **D**'s competency under Art. 46B. The **report is due** to court in **30 days** from date of appointment and must address:

- **observations and findings** pertaining to **insanity;**
- whether **D** currently meets **MH Code** for **commitment;** or
- whether **D** has **Intellectual/Developmental Disabilities ("IDD")** **[46C.105]**

↓

Determination of sanity may be made by judge or jury, however, **jury may not be informed of the consequences of an acquittal by reason of insanity**. **[46C.151-156]**

↓

If found **N**ot **G**uilty by **R**eason of **I**nsanity (**"NGRI"**) the court must determine if the offense for which **D** was acquitted involved conduct that:

- caused **s**erious **b**odily **i**njury (**"SBI"**) to another;
- placed another in imminent danger of **SBI;** or
- consisted of a threat of SBI through use of a **deadly weapon** **[46C.157]**

↓

Conduct did **NOT** involve **SBI** or use of **deadly weapon** **[46C.159]**

Conduct **involving SBI** or **deadly weapon** **[46C.158]**

If there is evidence of continued **MH** or **IDD** issues the criminal court shall **transfer** the matter to **court with probate jurisdiction** **[46C.201-202]**

↓

The court shall order **Acquitted Person ("AP")** to a facility designated by Health and Human Services Commission (**HHSC**) for an initial **30 Day Commitment*** for **Evaluation/Treatment** of **AP**'s present mental condition and **Report** **[46C.251]**

* Court personnel please contact the Forensic Admissions Team's email at Forensicadmissions@hhsc.state.tx.us for more information about admission of **AP** to an HHSC designated facility

↓

The **Report** describes procedure, techniques and test used to evaluate acquittee including:

- whether **AP** has mental illness or intellectual/developmental disabilities and if so whether it is **severe**;
- whether, as a result of severe MH/IDD, **AP** is **likely to cause serious harm to others**;
- whether **AP meets commitment criteria** under Mental Health (**"MH"**) Code or Person with Intellectual Disabilities Act (**"PIDA"**); and
- whether **treatment** can be safely/effectively provided **on outpatient basis** **[46C.252]**

↓

NGRI procedures continued on next page

Flow Chart Key

- **Informational**
- **Exits from 46C**
- **Commitment Types**

NGRI procedures continued from first page

Court **hearing on disposition** of NGRI **acquitted person** (**"AP"**) following Report after Evaluation is conducted in the same manner as a hearing for involuntary commitment under MH Code or PIDA and addresses:

- whether **AP** has **severe mental illness** or **IDD**;
- whether, as a result of mental illness or IDD, **AP** is **likely to cause serious harm to another**; and
- whether appropriate treatment and supervision can be provided **AP** as **outpatient/community-based treatment** **[46C.253(a)/(b)]**

The court shall order AP to **HHSC designated facility** for **inpatient / residential treatment** for an initial **180-day commitment** if, by clear and convincing evidence, the state proves that **AP**:

- has **severe mental illness** or **IDD;**
- as a result of mental illness or IDD **AP** is **likely to cause serious harm to others**; and
- inpatient/residential treatment is necessary to protect the safety of others **[46C.256]**

The court shall order **outpatient/community-based treatment*** for a period of **12 months** if, by clear and convincing evidence, the state proves **AP**:

- has **severe mental illness** or **IDD;**
- as a result of mental illness or IDD **AP** is **likely to cause serious harm to others**; **however**
- the state fails to prove that inpatient/ residential treatment is necessary to protect the safety of others **[46C.257]**

If **AP** is designated by HHSC to a **M**aximum **S**ecurity **U**nit (**MSU**) they must be presented to Review Board, w/in 60 days to determine if AP is **M**anifestly **D**angerous (**MD**). If AP is not MD they must be transferred to **non-MSU state hospital** or **state supported living center** **[46C.260(c)]**

The court shall order **AP** transferred to **court with probate jurisdiction** if **state** fails to establish standards for inpatient **46C.256** or outpatient **46C.257** commitment **but evidence provides reasonable basis for commitment** under **MH Code** or **PIDA** **[46C.253(c)]**

*Court may only order AP into outpatient/community-based if:

- court **approves** comprehensive treatment/supervision **plan**; and
- plan will be **available** and **provided to AP** **[46C.263(b)]**

The treating **facility** or **outpatient program** has a **continuing responsibility** to determine if **AP**:

- continues to have a severe mental illness or IDD and is **likely to cause serious harm to others**; and
- if so, whether treatment and supervision **cannot** be safely and effectively provided as an **outpatient** **[46C.258(a)]**

The **head of** an inpatient/residential treatment **facility** must notify the committing court:

- at least **60 days** before **commitment expires** and provide report on **AP**'s psychological evaluation, certificate of medical examination (if required) and a recommendation for further treatment; **[46C.258(c)]** or
- seek commitment **modification**♦ if **AP** no longer:
  - has severe MH/IDD;
  - likely to cause serious harm to others; or
  - supervision and treatment can be safely provided on outpatient basis **[46C.258(b)]**

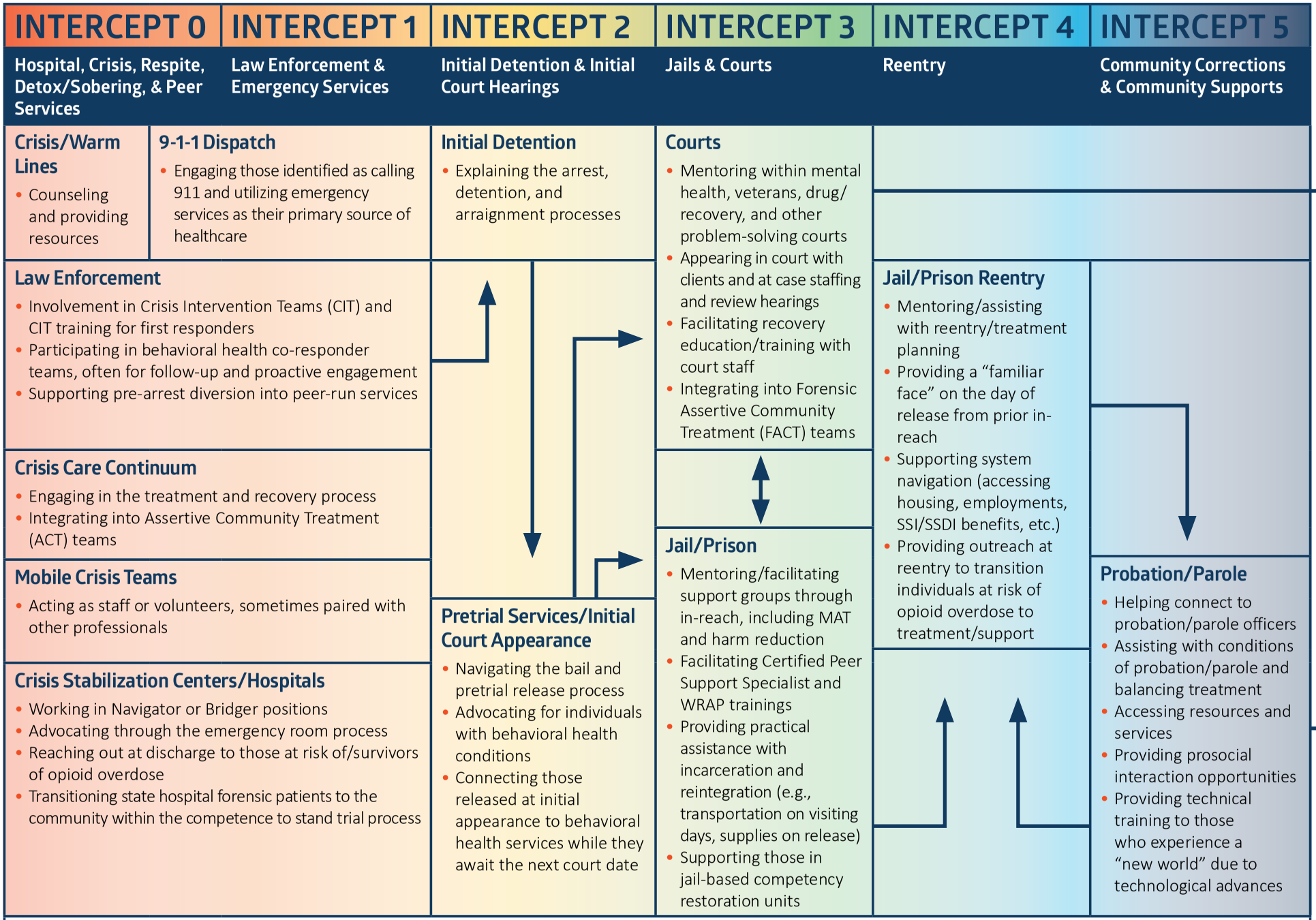
The **head of** an outpatient/community-based treatment **facility** must notify the committing court:

- at least **30 days** before **commitment expires** and request that the order be renewed, provide in detail the reason for the renewal and certificate of medical examination (if required); **[46C.261(b)]**

The court may renew commitment♦ for **12 months** for inpatient/ residential treatment or outpatient/community-based treatment if it is shown, by clear and convincing evidence, that continued mandatory supervision and treatment is appropriate **[46C.261(h)]**

♦ Courts have the ability to modify commitment from inpatient to outpatient and vice versa when deemed appropriate **[46C.262 and 46C.266]**

Peer Support Roles Across the Sequential Intercept Model



Note: People with lived experience can and should be represented across the Intercepts in positions of leadership to help design, inform, and guide programming that centers people with behavioral health needs.

SPECIFIC EXAMPLES

INTERCEPT 0

- The Hartford, CT Emergency Assistance Response Team (HEARTeam) couples peer responders with licensed clinicians to deliver tiered responses for youth and adults in emotional crisis
- The Mental Health and Addiction Association of Oregon's Clackamas Hope Team (Opioid Overdose Survivor Program) provides peer-delivered services
- San Francisco, CA's Street Crisis Response Team includes peer counselors with paramedics and mental health clinicians
- Oakland County, MI's Common Ground Resource and Crisis Center includes peers on the CIRT mobile crisis team
- Albany, NY's Northern Rivers Mobile Crisis Services teams include peer support specialists to respond across six counties
- MHA Nebraska's R.E.A.L. (Respond, Empower, Advocate, and Listen) program receives referrals from law enforcement and for those recently released from prison. Their Keya House and Honu Home Home respite are also staffed with peer specialists (also Intercepts 1, 4, & 5)
- Broome County, NY's Our House and People USA's Rose Houses provide fully peer-staffed crisis respite for hospital diversion; Dutchess County, NY's Stabilization Center also utilizes peer specialists

INTERCEPT 1

- In Perry County, MO, CIT trainings integrate peers with lived experience in panels and role playing

INTERCEPT 2

- The Defender Association of Philadelphia, PA employs peers as bail navigators
- The NYC CJ Agency's Queens Supervised Release program has utilized Peer Specialists to provide referrals and a variety of therapeutic services since 2018
- In Maricopa County, AZ, Forensic Peers connect those released at initial appearance to behavioral health services while they await court dates

INTERCEPT 3

- Albany County, NY's addictions services unit has two Certified Recovery Peer Advocates who provide Medication-Assisted Treatment (MAT) and harm reduction support in the jail
- NADCP's Justice For Vets National Mentor Corps provides professional development for volunteer veterans working in Veteran Treatment Courts
- Massachusetts uses the MISSION-CJ (Maintaining Independence and Sobriety through Systems Integration, Outreach, and Networking—Criminal Justice) model in their adult drug, mental health, veteran, and family drug courts and reentry programs
- The Pennsylvania Department of Correction's Certified Peer Support Specialist and Wellness Recovery Action Plan (WRAP) programs are offered in prison

INTERCEPT 4

- Hamilton County, OH's Transitioning Opportunities for Work, Education, and Reality (TOWER) program utilizes peers for five weeks of career-readiness prior to release
- Philadelphia, PA's Peerstar, LLC program provides jail in-reach for reentry planning
- The CA Ride Home Program utilizes peers to provide immediate unique and practical reentry assistance including transportation, counseling, and support
- The Mental Health and Addiction Association of Oregon's EVOLVE MULTNOMAH CO. HB 4143 peer program transitions those at risk of opioid overdose at reentry to substance use treatment
- The Via Hope: Texas Mental Health Resource in Austin provides a Reentry Peer Specialist training and certification

INTERCEPT 5

- Denver, CO's PHASE (Probation and Parole Accountability and Stabilization Enhancement) program provides peer support to those on probation
- NYC's Project Renewal Parole Support and Treatment Program (PSTP) includes peer support
- The Offender Alumni Association in multiple Alabama cities provides community-based peer-to-peer support to people following incarceration

Judge's Guide to Behavioral Health in the Courtroom: Techniques to Create a Safe and Productive Interaction

Judges Psychiatrists Leadership Initiative

This bench card provides road-tested strategies for judges to improve interactions with people who are appearing before them who seem to be impacted by a mental illness and/or a substance use disorder ("behavioral health need").

While judges often feel pressure to move through their calendars quickly, decades of experience from around the country shows that safety, well-being, and justice are best served when judges are able to be deliberate in their interactions:

TIME SPENT GETTING THIS RIGHT IS TIME SAVED LATER.

Courtroom Environment and Logistics

- Explain what's happening and why, including procedure and what roles individuals may be serving in the court
- Where possible, give a warning before you, court officers, or others move
- Encourage simple compliance (e.g., sitting)
- Schedule cases involving individuals with mental illnesses at the end of the day so the courtroom is less crowded, or schedule all such cases on a particular afternoon
- Where possible, provide written instructions where dates/locations are involved
- To empower individuals, use forms with blanks for them to initial or sign to indicate agreement
- Be honest. Explain truthfully why you want people to perform particular tasks

Facilitating Conversation and Understanding

- Use slow, clearly enunciated speech
- Repeat important things, as individuals may not grasp them initially
- Allow the individual to avoid humiliation or loss of respect
- Use nonverbal techniques: sit up straight, face the person, make eye contact, nod your head
- Respond, don't react to criticism
- Don't pretend to understand what people are saying when you don't. Psychotic symptoms can be experienced as deeply private and personal
- Exercise patience, even though it seems to be slowing things down
- Avoid finger-wagging, pointing, folding arms
- Avoid unnecessary intrusion
- Give positive feedback

Word Choice & Tone

- Be sensitive to how common court words may sound to a new person (e.g., "your screen is dirty," "we're done with you")
- Your attitude should remain calm
- Lower your voice and keep your tone even
- Use the individual's name, often/more than usual
- Paraphrase and summarize
- Use verbal ques like "mm's" and "ah's
- Don't use Jargon
- Avoid unnecessary intrusion

1. UNDERSTAND THE CONCEPT

People with mental illness and intellectual and developmental disabilities (IDD) cycle repeatedly through the courts but often lack the tools to address their needs or access adequate treatment. Judges can use a *Mental Health Court (MHC)* program to connect people with appropriate treatment, community resources, and ongoing judicial monitoring to address these issues. MHC programs can be used in various court settings, including, but not limited to, criminal, civil, and family law. MHC programs can also have varying goals, target participants, program conditions, treatment options, and can address mental health challenges in criminal courts either pre- or post-adjudication.

Tex. Gov't Code § 125.001 defines a mental health court as a program that has the following essential characteristics:

1. The integration of mental illness treatment services and [intellectual disability] services in the processing of cases in the judicial system;
2. The use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;
3. Early identification and prompt placement of eligible participants in the program;
4. Access to mental illness treatment services and [intellectual disability] services;
5. Ongoing judicial interaction with program participants;
6. Diversion of potentially mentally ill or [intellectual disability] defendants to needed services as an alternative to subjecting those defendants to the criminal justice system;
7. Monitoring and evaluation of program goals and effectiveness;
8. Continuing interdisciplinary education to promote effective program planning, implementation, and operations; and
9. Development of partnerships with public agencies and community organizations, including local [mental health or intellectual disability] authorities.

Resources

A Guide to Mental Health Court Design and Implementation

https://csgjusticecenter.org/wp-content/uploads/2020/01/Guide-MHC-Design.pdf

Mental Health Courts: A Guide to Research-Informed Policy and Practice

https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG_MHC_Research.pdf

2. COLLECT THE DATA

Data can be collected and analyzed to successfully launch the MHC program and to measure the program's success. Start with data that already exists in your county and consider what data could be collected in the future. Data can be used for advocating for funding, determining program improvements, and identifying what works for which participants and under what circumstances.

Develop a data collection plan for the program that identifies:

1. What data will be collected;
2. What is the source of the data;
3. Who is responsible for collecting the data; and
4. Where the data will be stored.

Resources

A Guide to Collecting Mental Health Court Outcome Data

https://csgjusticecenter.org/wp-content/uploads/2020/01/MHC-Outcome-Data.pdf

Developing a Mental Health Court: An Interdisciplinary Curriculum Handbook for Facilitators

https://www.arcourts.gov/sites/default/files/Mental%20Health%20Courts%20-%20Planning%20Guide.pdf

3. MAP COMMUNITY RESOURCES

Conduct a community mapping to convene local stakeholders, determine services available in the community or surrounding communities, survey opportunities and resources for diverting people to treatment options, and identify gaps in services. Mappings can range in depth of review and can be completed by the MHC team or by a third-party. Include a review of existing court and probation programs in the mapping to determine if there are options that already service individuals at different risk and need levels and identify which risk and need levels are not being assisted. Look to local NAMI chapters for additional resources.

Resources

JCMH Mapping Workshops
http://texasjcmh.gov/technical-assistance/mapping-workshop/

Policy Research Associates (PRA)
https://www.prainc.org/wp-content/uploads/2017/08/FFS-SIM-508.pdf

Meadows
https://mmhpi.org/work/systems-transformation/

HHSC's TA Center - email: forensicdirector@hhs.texas.gov

4. SELECT THE TEAM

At a minimum, the MHC program team for a criminal court should include a judge, defense attorney, prosecutor, supervision officer (pretrial/probation/parole officer), and a case manager or representative from the local mental health authority. While not critical to the team's success, consider including a representative from the sheriff's office or county jail medical, a social worker, a psychiatrist, a resource coordinator (check with your local NAMI chapter), a peer support specialist, and a person with lived experience to assist with the MHC program. For civil, family law, or other types of MHC program teams, the team should include similarly represented stakeholders.

To create the team, consider collaborating across departments and systems to get committed representatives or fund the necessary positions/roles within the court. Some treatment service providers employ staff members who may be able to fill some of the team roles needed to make the program a success. When creating the team, consider:

- Logistics of regular meetings/court settings;
- Willingness and ability to collaborate with other team members;
- Belief in the mission of the court program;
- Willingness and ability to complete training and take continuous steps to learn about the principles that support the MHC program; and
- Ability to conduct or review screenings and assessments.

Resources

A Guide to Mental Health Court Design and Implementation

https://csgjusticecenter.org/wp-content/uploads/2020/01/Guide-MHC-Design.pdf

Developing a Mental Health Court:
An Interdisciplinary Curriculum – Module 3

https://csgjusticecenter.org/wp-content/uploads/2020/08/Module_3_final.pdf

5. COMPLETE TRAINING

Seek training, mentoring, and technical assistance when creating an MHC program. Read written resources, schedule time to watch webinars available online, and observe other established treatment courts. Judges should determine what initial training should be completed by the MHC team and what ongoing training will be necessary. Also, consider what training should be developed or implemented for local treatment professionals to ensure a successful MHC program.

Resources

Council of State Governments (CSG):
Learning Modules
https://csgjusticecenter.org/projects/mental-health-courts/learning/learning-modules/

NPC Research
https://npcresearch.com/services-expertise/technical-assistance-and-consultation/

CSG: Center for Justice and Mental Health Partnerships
https://csgjusticecenter.org/resources/justice-mh-partnerships-support-center/

Specialty Courts
Resource Center (SCRC)
http://www.txspecialtycourts.org/tta_bureau.html

HHSC T.A. Center – email:
forensicdirector@hhs.texas.gov

SCRC: List of Active Texas
Specialty Courts
http://www.txspecialtycourts.org/_documents/active_courts.pdf

JCMH Technical Assistance
http://texasjcmh.gov/technical-assistance/

Center for Court Innovation
https://treatmentcourts.org/

6. IDENTIFY ELIGIBLE PARTICIPANTS

Be judicious in determining the target participants likely to be best served by the MHC program. Use risk assessment tools to help create a prompt identification process of potential participants and quick determination of their eligibility for the court. The Criminal Justice Division (CJD) of the Office of the Governor mandates the use of the Texas Risk Assessment Scale (TRAS) for all arrested adult participants in CJD-funded specialty courts. National practices advise that participants with a moderate to high risk of recidivism have the most potential to benefit from MHC programs. Consider which screening and risk assessment tools used by your jurisdiction could be a good fit for the program.

To identify the ideal participant that the program will serve, consider:

- **Criminal Offense:** Key stakeholders may disagree on the types of charges eligible for the program and may require a correlation between the mental illness and the offense committed.
- **Screening and Risk Assessment Tools:** These tools can make identifying potential participants more efficient.
- **Mental Health Evaluation:** Evaluations should be done by a professional or clinician and can be done before or after final eligibility.
- **Mental Health Diagnosis:** Certain diagnoses may need to be excluded from the program due to a lack of resources, key stakeholder agreement, and ability to ensure community safety.
- **Referral Process:** Determine who can send the referral and who will screen the referral.
- **Final Eligibility:** Determine the process for accepting or rejecting based on criteria required for final eligibility.

Resources

A Guide to Mental Health Court Design and Implementation

https://csgjusticecenter.org/wp-content/uploads/2020/01/Guide-MHC-Design.pdf

Developing a Mental Health Court: An Interdisciplinary Curriculum
A Handbook for Facilitators

https://www.arcourts.gov/sites/default/files/Mental%20Health%20Courts%20-%20Planning%20Guide.pdf

7. PLAN THE PROGRAM

Establish a treatment plan and other conditions that are the least restrictive while still ensuring public safety. Combining less restrictive conditions and reliable partnerships with treatment providers will encourage participants to turn to these community resources in times of crisis.

Tex. Gov't Code § 121.002(d) requires the program to comply with the Specialty Courts Advisory Council's programmatic best practices in order to receive state or federal grant funds administrated by a state agency. Tex. Gov't Code § 125.001(b) states that if the participant successfully completes the MHC program and the court determines a dismissal is in the best interest of justice, the court shall dismiss the case and may take the necessary steps for an expunction of the matter.

When developing a plan, consider:

- **Treatment Plans:** Ensure they are highly individualized and adaptable to change during the program period.
- **Adherence to the Program:** Determine the incentives and sanctions matrix.
- **Successful Program Completion:** Develop the criteria and procedure for a dismissal and expunction, or any alternative outcomes upon successful completion.
- **Unsuccessful Program Completion:** Determine the agreed upon plea arrangement or any other alternative outcome if a participant fails to complete the program.

Resources

A Guide to Mental Health Court Design and Implementation

https://csgjusticecenter.org/wp-content/uploads/2020/01/Guide-MHC-Design.pdf

Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court

https://csgjusticecenter.org/wp-content/uploads/2020/02/mhc-essential-elements.pdf

Developing a Mental Health Court:
An Interdisciplinary Curriculum – Module 5

https://csgjusticecenter.org/wp-content/uploads/2020/08/Module_5_final.pdf

Developing a Mental Health Court: An Interdisciplinary Curriculum
Handbook for Facilitators

https://www.arcourts.gov/sites/default/files/Mental%20Health%20Courts%20-%20Planning%20Guide.pdf

8. DOCUMENT THE WORK

Establish written policies and procedures at the beginning of the program, and continuously examine them for potential revisions as the program evolves. Do not wait for the program to become well-established. Create documentation that clearly explains the parameters of the program and describes the issues related to creating the program. Clearly communicate the MHC program eligibility criteria and referral/intake process to local defense bar associations, public defender's offices, prosecutor's offices, local judges, and other key stakeholders. Documentation should include:

1. Policy and Procedures Manual
2. Participant Handbook
3. Referral and screening procedures (include HIPAA-compliant *Release of Information* by the participant)
4. Eligibility criteria
5. MOU between all team members and other key stakeholders (or other information sharing protocols that include confidentiality requirements and *Protected Personal Health Information*)
6. Incentives and sanctions matrix
7. Integrated case plan template
8. Program goals and measurable objectives
9. Program history and partners
10. Case staffing and status hearing procedures

Resources

A Guide to Mental Health Court Design and Implementation

https://csgjusticecenter.org/wp-content/uploads/2020/01/Guide-MHC-Design.pdf

Developing a Mental Health Court: An Interdisciplinary Curriculum Handbook for Facilitators

https://www.arcourts.gov/sites/default/files/Mental%20Health%20Courts%20-%20Planning%20Guide.pdf

9. FIND FUNDING

Many judges have started a mental health court or docket with little or no funding. By starting small and gathering data, judges can seek funding from their local commissioners court or community organizations. There is also funding from national organizations and funding specifically for specialty courts in Texas. Relevant funding sources may assist with training, technology, and court improvements.

Tex. Gov't Code §§ 125.002 and 125.004 provide authority to county commissioners courts to establish an MHC program and permits an MHC program to require participants, if able to do so, to pay the cost of all treatment and services during the program.

There is a list of grant opportunities provided by Texas Association of Counties:
https://www.county.org/Legislative/Grant-Opportunities

Resources

Office of the Texas Governor (OOG)
https://gov.texas.gov/organization/financial-services/grants

Texas Judicial Commission on Mental Health (JCMH)
http://texasjcmh.gov/grants/

Texas Specialty Court Resource Center (SCRC)
http://www.txspecialtycourts.org/training-grant.html

Texas Indigent Defense Commission (TIDC)
http://www.tidc.texas.gov/funding/

Council of State Governments (CSG)
https://csgjusticecenter.org/projects/justice-and-mental-health-collaboration-program-jmhcp/funding-resources/

U.S. Dept of the Treasury/CARES Act
https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments

Substance Abuse and Mental Health Services Administration (SAMHSA) https://www.samhsa.gov/grants

Policy Research Associates (PRA)
https://www.prainc.com/gains-sim-solicitation-2022/

10. REGISTER THE COURT

Mental Health Court programs should be registered with the Office of Court Administration:
https://www.txcourts.gov/about-texas-courts/specialty-courts/

NOTE: *Your program must meet the statutory requirements of Tex. Gov't Code 125.001 to register.*

Cause No. _____
(The court clerk will fill in this blank when you turn in this Application.)

The State of Texas for the	§	**In the _____ Court**
	§	(The court clerk will fill in this blank
	§	when you turn in this Application.)
Best Interest and Protection of	§	
	§	**_____County, Texas**
_____	§	(The court clerk will fill in this blank
(List the initials of the person you want to protect.)	§	when you turn in this application.)
	§	

Application for Emergency Detention
(Sec. 573.011, Texas Health and Safety Code)

1. My full name is _____.

2. I am _____ years old.

3. My address is _____.

4. My phone number is _____.

5. My email address is _____.

6. I have reason to believe and do believe that the following person has a mental illness:

   _____. This person is called the "Proposed Patient."
   (List the person's full name.)

7. I have reason to believe and do believe that the Proposed Patient presents a substantial risk of serious harm to themselves or to others, which I have described in specific detail below:

   _____

   _____

   _____

   _____

   _____

1 *Approved by the Texas Judicial Commission on Mental Health on April 6, 2023.*

_____

_____

_____.

8. I have reason to believe and do believe that the risk of harm from the Proposed Patient is imminent unless the Proposed Patient is immediately restrained.

9. My beliefs are based on specific recent behavior, acts, attempts, or threats by the Proposed Patient, which I have described in specific detail below:

_____

_____

_____

_____

_____

_____

_____

_____.

10. My relationship to the Proposed Patient is: _____.

11. (Check one.)
I am the Proposed Patient's guardian:
☐ No
☐ Yes, and the following Court granted the guardianship: _____
(List the Court's name.)

12. I have attached any other relevant information to this Application.

13. I swear to the truth of everything in this Application, and I know that I can be prosecuted for the crime of lying.

_____
Applicant (Sign your name here.)

_____
Date

You should **not** fill in this portion of the Application. The judge or magistrate will complete it.
This Application was sworn to before me on _____. (List the date.) _____ Judge/Magistrate (Print name here.) _____ Judge/Magistrate (Sign name here.)

S. FORM: Notification of Emergency Detention

Notification – Emergency Detention NO. _____

DATE: _____ TIME: _____

THE STATE OF TEXAS

FOR THE BEST INTEREST AND PROTECTION OF:

_____

NOTIFICATION OF EMERGENCY DETENTION

Now comes _____, a peace officer with (name of agency) _____, of the State of Texas, and states as follows:

1. I have reason to believe and do believe that (name of person to be detained) _____ evidences mental illness.

2. I have reason to believe and do believe that the above-named person evidences a substantial risk of serious harm to themselves or others based upon the following: _____

_____

_____

_____

3. I have reason to believe and do believe that the above risk of harm is imminent unless the above-named person is immediately restrained.

4. My beliefs are based upon the following recent behavior, overt acts, attempts, statements, or threats observed by me or reliably reported to me: _____

_____

_____

_____

5. The names, addresses, and relationship to the above-named person of those persons who reported or observed recent behavior, overt acts, attempts, statements, or threats of the above-named person are (if applicable): _____

_____

_____

_____

For the above reasons, I present this notification to seek temporary admission to the (name of facility) _____, an inpatient mental health facility or a mental health facility deemed suitable by the local mental health authority if an appropriate inpatient mental health facility I not available, for the detention of (name of person to be detained) _____ on an emergency basis.

6. Was the person restrained in any way? Yes ☐ No ☐

_____ _____

PEACE OFFICER'S SIGNATURE BADGE NO.

Address:_____ Zip Code: _____

Telephone: _____

_____

SIGNATURE OF EMERGENCY MEDICAL

SERVICES PERSONNEL (if applicable)

Address:_____ Zip Code: _____

Telephone: _____

A mental health facility or hospital emergency department may not require a peace officer or emergency services personnel to execute any form other than this form as a predicate to accepting for temporary admission a person detained by a peace officer under section 573.001, Health and Safety Code, and transported by the officer under that section or by emergency services personnel of an emergency medical services provider at the request of the officer made in accordance with a memorandum of understanding executed under section 573.005, Health and Safety Code.

Advisement to Patient under Emergency Detention

(To be completed by a peace officer. **The peace officer should return one copy to the court.**)

To: _____
(List the Patient's name.)

You are being temporarily detained at a facility to determine if you are suffering from mental illness and if you need mental health services for the protection of yourself and others. "Detained" means held.

You should know the following information:

1. You are being temporarily detained at _____("Facility").
(List the facility's name.)

2. The reasons for your temporary detention are: _____

_____

_____

_____

_____

_____

_____

_____.

3. A doctor must examine you in the first 12 hours of your temporary detention. The Facility will then decide whether to officially admit you for temporary detention. "Temporary detention" is sometimes called "emergency detention" and usually lasts for less than 48 hours unless a court orders a longer period.

4. Your temporary detention could result in a longer period of involuntary commitment to a mental health facility. "Involuntary commitment" means checking you in to a mental health facility without your consent.

1 *Approved by the Texas Judicial Commission on Mental Health on April 6, 2023.*

5. You have the right to hire a lawyer of your own choosing. If you cannot afford to hire a lawyer, a lawyer will be appointed to represent you. You must be given a reasonable opportunity to communicate with your lawyer.

6. You also have the right to a reasonable opportunity to communicate with a member of your family or another person who has an interest in your health and safety.

7. If you communicate with a mental health professional, those communications may be used to determine if a longer period of detention is necessary.

8. You will be released from temporary detention if, after the doctor's examination, the Facility decides not to officially admit you.

9. Even if the Facility decides to officially admit you, you have the right to be released from temporary detention if the Facility administrator determines at any time that:

   a. you no longer have a mental illness;

   b. there is no longer a substantial risk of serious harm to yourself or others;

   c. the risk of harm to yourself or to others is no longer imminent; or

   d. temporary detention is no longer the least restrictive means of restraint necessary.

10. If you are released, you have the right to be taken back to the location where you were found, to your Texas home, if any, or to another suitable location, unless you are arrested or object to the return.

_____ _____

Signature of Patient Date

_____ _____

Signature of Peace Officer Date

U. FORM: Motion for Protective Custody

Cause No. _____

The State of Texas for the	**§**	**In the _____ Court**
	§	
	§	
Best Interest and Protection of	**§**	
	§	**_____County,**
_____	**§**	**Texas**
(List the initials of the person you want to protect.)	**§**	
	§	

Motion for Protective Custody
(Sec. 574.021, Texas Health and Safety Code)
(To be completed by a county or district attorney.)

1. An application for court-ordered mental health services ("Application") was filed in the Court and is still pending.

2. A Certificate of Medical Examination for Mental Illness ("Certificate") is attached to this Motion. The Certificate was prepared by a physician ("Certifying Physician") who examined _____ ("Proposed Patient") within the three days before this Motion's filing.

3. The person filing this motion ("Movant") has reason to believe and does believe that: (1) the Certifying Physician stated their opinion that the Proposed Patient is a person with mental illness and gave the detailed basis for that opinion; and (2) the Proposed Patient presents a substantial risk of serious harm to themselves or others if not immediately restrained pending a hearing.

4. Movant's belief is derived from:

   (Check all that apply.)
   ☐ the representation of a credible person;
   ☐ the Proposed Patient's conduct;
   ☐ the circumstances under which the Proposed Patient is found.

5. Movant asks the Court to determine—based on the information in the Application, this Motion, and the Certificate—that (1) the Certifying Physician stated their opinion that the Proposed Patient is a person with mental illness and gave the detailed basis for that opinion; and (2) the Proposed Patient presents a substantial risk of serious harm to themselves or others if not immediately restrained pending a hearing. However, Movant

conditionally requests to present additional evidence if the Court decides that a fair determination cannot be made from the Application, Motion, and Certificate alone.

6. Movant asks the Court to issue an Order of Protective Custody, ordering that a peace officer or other designated person:

(Check one.)

☐ take the Proposed Patient into protective custody and immediately transport the Proposed Patient to _____ ("Facility").

☐ maintain protective custody of the Proposed Patient at _____ _____ ("Facility").

7. Movant also asks the Court to order that the Proposed Patient be detained in the Facility until a probable cause hearing or a hearing on court-ordered mental health services, whichever is first.

Respectfully Submitted,

_____

County/District Attorney Name and Contact Information

_____

County/District Attorney Signature

_____

Date

V. FORM: Order of Protective Custody

Cause No. _____

The State of Texas for the	**§**	**In the _____ Court**
	§	
	§	
Best Interest and Protection of	**§**	
	§	**_____County, Texas**
_____	**§**	
	§	
	§	

Order of Protective Custody

1. An Application for Court-Ordered Mental Health Services ("Application") for _____ ("Proposed Patient") was filed in this Court. A Motion for Protective Custody ("Motion") was filed by the appropriate representative of the State. A Certificate of Medical Examination for Mental Illness ("Certificate") was attached to the Motion. The Certificate showed that the Proposed Patient was examined within the three days before the Motion's filing, by _____ ("Certifying Physician").

2. The Court has considered the Application, Motion, and Certificate.

3. (Check one.)
   - ☐ The Court determines that the conclusions of the Applicant, Movant, and Certifying Physician are adequately supported by the information provided.
   - ☐ The Court heard additional evidence.

4. Based on the Application, Motion, Certificate, and any additional evidence heard, the Court determines that the Certifying Physician stated their opinion that the Proposed Patient is a person with mental illness and gave the detailed basis for that opinion. The Court also determines that the Proposed Patient shows a substantial risk of serious harm to themselves or others if not immediately restrained pending a hearing. The substantial risk of serious harm was evidenced by:

   (Check all that apply.)
   - ☐ the Proposed Patient's behavior;
   - ☐ evidence of severe emotional distress and deterioration in the Proposed Patient's mental condition to the extent that the Proposed Patient cannot remain at liberty.

1 *Approved by the Texas Judicial Commission on Mental Health on April 6, 2023.*

5. A person authorized to transport a patient under Section 574.045 of the Texas Health and Safety Code **is ordered** to:

(Check one.)

☐ take the Proposed Patient into protective custody and immediately transport the Proposed Patient to _____ ("Facility"), which the Court finds is a suitable facility, pending a probable cause hearing or a hearing on court-ordered mental health services, whichever is first.

☐ maintain custody of the Proposed Patient at _____ ("Facility"), which the Court finds is a suitable facility, pending a probable cause hearing or a hearing on court-ordered mental health services, whichever is first.

6. A person authorized to transport a patient under Section 574.045 of the Texas Health and Safety Code **is also ordered** to return a copy of this Order, signed by a representative of the Facility, to the Court.

7. **This Order is effective for 72 hours from the below date and time, unless the expiration time falls on a weekend or legal holiday, then the Order expires the next business day at 4 p.m.**

_____
Date and Time

_____
Judge (Print name here.)

_____
Judge (Sign name here.)

To be completed by the Facility:

The Proposed Patient was received at _____ (facility name)

on _____ (date).

_____
Facility Representative (Print name here.)

_____
Facility Representative (Sign name here.)

_____
Title

W. FORM: Notification of Probable Cause Hearing

Notification -Probable Cause Hearing NO._____

DATE: _____ TIME: _____

THE STATE OF TEXAS
FOR THE BEST INTEREST AND PROTECTION OF:

_____

NOTIFICATION OF PROBABLE CAUSE HEARING

On this the _____ day of _____, 20__, the undersigned hearing officer heard evidence concerning the need for protective custody of _____ (herein referred to as proposed patient). The proposed patient was given the opportunity to challenge the allegations that the proposed patient presents a substantial risk of serious harm to self or others.

The proposed patient and the proposed patient's attorney _____ have been given written notice that the proposed patient was placed under an order of protective custody and the reasons for such an order on _____(date of notice).

I have examined the certificate of medical examination for mental illness and _____(other evidence considered). Based on this evidence, I that find that there is probable cause to believe that the proposed patient presents a substantial risk of serious harm to the proposed patient (yes ___ or no ___) or others (yes ___ or no ___) such that the proposed patient cannot be at liberty pending final hearing because _____

_____

_____

(reasons for finding; type of risk found)

SIGNED this ____ day of _____, 20__

_____
Probable Cause Hearing Officer

X. FORM: Motion to Modify Court-ordered Inpatient to Outpatient

Cause No. _____

The State of Texas for the	**§**	**In the _____ Court**
	§	
	§	
Best Interest and Protection of	**§**	
	§	**_____County, Texas**
_____	**§**	
(List the initials of the person you want to protect.)	**§**	
	§	

(Fill in the blanks above. Copy the information listed at the top of the Order for Inpatient Mental Health Services.)

Motion to Modify Court-Ordered Inpatient Mental Health Services to Outpatient Mental Health Services
(Sec. 574.061, Texas Health and Safety Code)

1. My name is _____.

2. I am a Mental Health Administrator at _____.
(List the name of the facility.)

3. I am the individual responsible for the court-ordered inpatient mental health services of the Patient,
_____.
(List the name of the patient.)

4. The Court issued an Order for Inpatient Mental Health Services on _____ date that ordered the Patient to participate in involuntary inpatient mental health services at _____.
(List the name of the facility.)

5. The Order for Inpatient Mental Health Services provides for:

(Check one.)
☐ temporary inpatient services under Section 574.034 of the Texas Health and Safety Code.
☐ extended inpatient services under Section 574.035 of the Texas Health and Safety Code.

6. I believe there has been a substantial change in the needs and condition of the Patient, and the Patient now requires a less restrictive environment. The detailed reasons for my opinion are:

_____

Approved by the Texas Judicial Commission on Mental Health on April 6, 2023.

_____

_____

_____

_____

_____.

7. I have attached a supporting Certificate of Medical Examination for Mental Illness, showing that the Patient was examined, within the seven days before this Motion's filing, by _____.
(List the name of the certifying physician.)

8. I ask the Court to modify the Order for Inpatient Mental Health Services to require the Patient to participate in outpatient mental health services.

_____
Movant (Print your name here.)

_____
Movant (Sign your name here.)

_____
Date

Y. FORM: Certificate of Notice on Motion to Modify Court-ordered Inpatient to Outpatient

Cause No. _____

The State of Texas for the	**§**	**In the _____ Court**
	§	
	§	
Best Interest and Protection of	**§**	
	§	**_____County, Texas**
_____	**§**	
	§	

(Fill in the blanks above. Copy the information listed at the top of the Order for Inpatient Mental Health Services.)

Certificate of Notice
Motion to Modify Court-Ordered Inpatient Services to Outpatient Services

I certify that on _____ (date) I gave a copy of the Motion to Modify Court-Ordered Inpatient Services to Outpatient Services to the Patient.

The Patient:

(Check one.)
☐ requests a hearing
☐ **does not** request a hearing.

_____ _____
Your Signature Date

_____
Patient Signature

_____
Witness Signature

1 *Approved by the Texas Judicial Commission on Mental Health on April 6, 2023.*

Z. FORM: Application for Order to Administer Psychoactive Medication (Patient with Criminal Justice Involvement)

Cause No. _____

The State of Texas for the	**§**	**In the _____ Court**
	§	
	§	
Best Interest and Protection of	**§**	
	§	**_____County, Texas**
_____	**§**	
	§	
	§	

(Fill in the blanks above. Copy the information listed at the top of the Order for Inpatient Mental Health Services.)

Application for Order to Administer Psychoactive Medication
(Patient with Criminal Justice Involvement)
(Sec. 574.104, Texas Health and Safety Code)

1. My name is _____.

2. (Check one.)
☐ I am a M.D.
☐ I am a D.O.

3. I am filing this Application under Section 574.104 of the Texas Health and Safety Code to ask for an order authorizing the administration of psychoactive medication(s) listed in Exhibit A to _____ ("Patient"), regardless of Patient's refusal.
(List the patient's name.)

4. The Court issued an Order for Inpatient Mental Health Services on _____ (date) that ordered the Patient to participate in involuntary inpatient mental health services.

5. The current Order for Inpatient Mental Health Services provides for services under:

(Check one.)
☐ Chapter 46B of the Texas Code of Criminal Procedure, titled "Incompetency to Stand Trial."
☐ Chapter 46C of the Texas Code of Criminal Procedure, titled "Insanity Defense."
☐ Chapter 55 of the Texas Family Code, titled "Proceedings Concerning Children with Mental Illness or Intellectual Disability."

6. I have diagnosed the Patient with the following condition(s): _____

_____

_____.

7. I have determined that the administration of the psychoactive medication(s) listed in Exhibit A is the proper course of treatment for and in the best interest of the Patient.

8. I propose administering the psychoactive medication(s) by the method(s) specified in Exhibit A. If a proposed method for administering a medication is not customary, I have explained my reasons for the departure from custom in Exhibit A.

9. The Patient, verbally or by other indication, refuses to take voluntarily the psychoactive medication(s) listed in Exhibit A.

10. (Check all that apply.)

☐ I believe the Patient lacks the capacity to make a decision regarding the administration of psychoactive medication for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____.

☐ I believe the Patient presents a danger, as set forth in Section 574.1065 of the Texas Health and Safety Code, to self or others in the mental health facility or correctional facility in which they are being treated for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____.

11. I believe that, if the Patient is treated with the psychoactive medication(s) listed in Exhibit A, the Patient's prognosis is:

_____

_____

_____

_____

_____

_____

_____

_____.

12. I have considered the following alternatives to the psychoactive medication(s) listed in Exhibit A for treatment of the Patient:

_____

_____

_____

_____

_____

_____

_____

_____.

13. I have determined that the alternatives listed in paragraph 12 will not be as effective as the administration of the psychoactive medication(s) listed in Exhibit A for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____.

14. I believe that, if the Patient is not administered the psychoactive medication(s) listed in Exhibit A, the consequences will be:

_____

_____

_____

_____

_____

_____

_____

_____.

15. I believe that the benefits of the Patient taking the psychoactive medication(s) listed in Exhibit A outweigh the risks of such medication in relation to present medical treatment.

16. I believe the following entity is responsible for costs and expenses:
☐ Hospital: _____ (List name of hospital.)
☐ Healthcare district
☐ County where the proceedings are pending
☐ Other County: _____
(List the name of the other county.)

_____

(List the person you spoke with from that county.)

_____

(List that person's phone number.)

_____

(List the date you contact that person.)

(**Attach paperwork from the other county to this Application.**)

17. In addition to the requests in paragraphs 3 and 4, I also ask the Court to:

    a. appoint a lawyer to represent the Patient;

    b. set a hearing on this Application to be held not later than 30 days after the date this Application is filed;

    c. direct the Clerk of the Court to issue a notice of hearing with a copy of this Application to be served upon the Patient immediately after the time of the hearing is set; and

    d. direct the Clerk of the Court to issue a notice of hearing to me immediately after the time of hearing is set.

18. I swear to the truth of everything in this Application, and I know that I can be prosecuted for the crime of lying.

_____

Date

_____

Applicant (List your contact information here.)

_____

Applicant (Sign your name here.)

5 *Approved by the Texas Judicial Commission on Mental Health on April 6, 2023.*

AA. FORM: Application for Order to Administer Psychoactive Medication (Patient without Criminal Justice Involvement)

Cause No. _____

The State of Texas for the	**§**	**In the _____ Court**
	§	
	§	
Best Interest and Protection of	**§**	
	§	**_____County, Texas**
_____	**§**	
	§	
	§	

(Fill in the blanks above. Copy the information listed at the top of the Order for Inpatient Mental Health Services.)

Application for Order to Administer Psychoactive Medication
(Patient without Criminal Justice Involvement)
(Sec. 574.104, Texas Health and Safety Code)

1. My name is _____.

2. (Check one.)
   ☐ I am a M.D.
   ☐ I am a D.O.

3. I am filing this Application under Section 574.104 of the Texas Health and Safety Code to ask for an order authorizing the administration of psychoactive medication(s) listed in Exhibit A to _____ ("Patient"), regardless of Patient's refusal.
   (List Patient's name.)

4. (Check one.)
   ☐ The Court issued an Order for Inpatient Mental Health Services on _____ (date) that ordered the Patient to participate in involuntary inpatient mental health services.
   ☐ An Application for Court-Ordered Mental Health Services has been filed and is still pending. I ask that this Application be heard on the same date as the Application for Court-Ordered Mental Health Services.

5. The current Order for Inpatient Mental Health Services or Application for Court-Appointed Mental Health Services provides for or requests:

   (Check one.)
   ☐ temporary inpatient services under Section 574.034 of the Texas Health and Safety Code.
   ☐ extended inpatient services under Section 574.035 of the Texas Health and Safety Code.

6. I have diagnosed the Patient with the following condition(s):

   _____

_____

_____.

7. I have determined that the administration of the psychoactive medication(s) listed in Exhibit A is the proper course of treatment for and in the best interest of the Patient.

8. I propose administering the psychoactive medication(s) by the method(s) specified in Exhibit A. If a proposed method for administering a medication is not customary, I have explained my reasons for the departure from custom in Exhibit A.

9. The Patient, verbally or by other indication, refuses to take voluntarily the psychoactive medication(s) listed in Exhibit A.

10. I believe the Patient lacks the capacity to make a decision regarding the administration of psychoactive medication for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____.

11. I believe that, if the Patient is treated with the psychoactive medication(s) listed in Exhibit A, the Patient's prognosis is:

_____

_____

_____

_____

_____

_____

_____

_____.

12. I have considered the following alternatives to the psychoactive medication(s) listed in Exhibit A for treatment of the Patient:

_____

_____

_____

_____

_____

_____

_____

_____.

13. I have determined that the alternatives listed in paragraph 12 will not be as effective as the administration of the psychoactive medication(s) listed in Exhibit A for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____.

14. I believe that, if the Patient is not administered the psychoactive medication(s) listed in Exhibit A, the consequences will be:

_____

_____

_____

_____

_____

_____

_____

_____.

15. I believe that the benefits of the Patient taking the psychoactive medication(s) listed in Exhibit A outweigh the risks of such medication in relation to present medical treatment.

16. I believe the following entity is responsible for costs and expenses:
☐ Hospital: _____ (List name of hospital.)
☐ Healthcare district
☐ County where the proceedings are pending
☐ Other County: _____
(List the name of the other county.)

_____
(List the person you spoke with from that county.)

_____
(List that person's phone number.)

_____
(List the date you contact that person.)

(**Attach paperwork from the other county to this Application.**)

17. In addition to the requests in paragraphs 3 and 4, I also ask the Court to:

a. appoint a lawyer to represent the Patient;

b. set a hearing on this Application to be held not later than 30 days after the date this Application is filed;

c. direct the Clerk of the Court to issue a notice of hearing with a copy of this Application to be served upon the Patient immediately after the time of the hearing is set; and

d. direct the Clerk of the Court to issue a notice of hearing to me immediately after the time of hearing is set.

4 *Approved by the Texas Judicial Commission on Mental Health on April 6, 2023.*

18. I swear to the truth of everything in this Application, and I know that I can be prosecuted for the crime of lying.

_____
Date

_____
Applicant (List your contact information here.)

_____
Applicant (Sign your name here.)

5 *Approved by the Texas Judicial Commission on Mental Health on April 6, 2023.*

BB. FORM: Jail Screening Form for Suicide, Mental Health, IDD

Screening Form for Suicide and Medical/Mental/Developmental Impairments

County:	Date and Time:		Name of Screening Officer:
Inmate's Name:	Gender:	DOB:	If female, pregnant? Yes ☐No ☐Unknown ☐
Serious injury/hospitalization in last 90 days? Yes ☐No ☐If yes, describe:			
Currently taking any prescription medications? Yes ☐No ☐If yes, what:			
Any disability/chronic illness (diabetes, hypertension, etc.) Yes ☐No ☐If yes, describe:			
Does inmate appear to be under the influence of alcohol or drugs? Yes ☐No ☐If yes, describe:			
Do you have a history of drug/alcohol abuse? If yes, note substance and when last used			
*Do you think you will have withdrawal symptoms from stopping the use of medications or other substances (including alcohol or drugs) while you are in jail? If yes, describe			
*Have you ever had a traumatic brain injury, concussion, or loss of consciousness? Yes ☐No ☐If yes, describe:			
***If yes, Notify Medical or Supervisor Immediately**			

Place inmate on suicide watch if Yes to 1a-1d or at any time jailer/supervisor believe it is warranted

	YES	NO	"Yes" Requires Comments
IF YES TO 1a, 1b,1c,or 1d BELOW, NOTIFY SUPERVISOR, MAGISTRATE, AND MENTAL HEALTH IMMEDIATELY			
Is the inmate unable to answer questions? If yes, note why, notify supervisor and place on suicide watch until form completed.			
1a. Does the arresting/transporting officer believe or has the officer received information that inmate may be at risk of suicide?			
1b. Are you thinking of killing or injuring yourself today? If so, how?			
1c. Have you ever attempted suicide? If so, when and how?			
1d. Are you feeling hopeless or have nothing to look forward to?			
IF YES to 2-12 BELOW, NOTIFY SUPERVISOR AND MAGISTRATE. Notify Mental Health when warranted			
2. Do you hear any noises or voices other people don't seem to hear?			
3. Do you currently believe that someone can control your mind or that other people can know your thoughts or read your mind?			
4. Prior to arrest, did you feel down, depressed, or have little interest or pleasure in doing things?			
5. Do you have nightmares, flashbacks or repeated thoughts or feelings related to PTSD or something terrible from your past?			
6. Are you worried someone might hurt or kill you? If female, ask if they fear someone close to them.			
7. Are you extremely worried you will lose your job, position, spouse, significant other, custody of your children due to arrest?			
8. Have you ever received services for emotional or mental health problems?			
9. Have you been in a hospital for emotional/mental health in the last year?			
10. If yes to 8 or 9, do you know your diagnosis? If no, put "Does not know" in comments.			
11. In school, were you ever told by teachers that you had difficulty learning?			
12. Have you lost / gained a lot of weight in the last few weeks without trying (at least 5lbs.)?			
IF YES TO 13-16 BELOW, NOTIFY SUPERVISOR, MAGISTRATE, AND MENTAL HEALTH IMMEDIATELY			
13. Does inmate show signs of depression (sadness, irritability, emotional flatness)?			
14. Does inmate display any unusual behavior, or act or talk strange (cannot focus attention, hearing or seeing things that are not there)?			
15. Is the inmate incoherent, disoriented or showing signs of mental illness?			
16. Inmate has visible signs of recent self-harm (cuts or ligature marks)?			

Additional Comments (Note CCQ Match here):		
Magistrate Notification Date and Time: Electronic or Written (Circle)	Mental Health Notification Date and Time:	Medical Notification Date and Time:
Supervisor Signature, Date and Time:		

CC. FORM: TCOOMMI Collection of Information Form

COLLECTION OF INFORMATION FORM FOR MENTAL ILLNESS AND INTELLECTUAL DISABILITY

AUTHORITY: Art. 16.22, Code of Criminal Procedure & Sec. 614.0032, Health &Safety Code & Chapter 552 of the Government Code
Approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI)

SECTION I: DEFENDANT INFORMATION

Defendant Name *(Last, First):* _____ Offense: _____

Date of Birth: _____ CARE Identification # *(If available)*: _____ SID or CID # *(If available):* _____

Last Four Digits of Social Security Number: _____

Current County or Municipality of Incarceration: _____ Date of Magistrate Order*:* _____

SECTION II: PREVIOUS HISTORY

Has the defendant been determined to have a mental illness or to be a person with an intellectual disability within the last year?

☐*Yes* ☐*No* ☐ *Unknown*

Date of Previous Written Report of Collected Information *(if applicable):* _____

Previous Mental Health and/or Intellectual Disability Information *(if available)*:

_____

_____

_____

SECTION III: CURRENT INFORMATION

Most Recent Diagnosis(es) and Date(s) *(if available)*:

_____

At time of the collection of information or as indicated on the jail screening form for suicide and medical/mental/developmental impairments, is the defendant acutely decompensated, suicidal, or homicidal according to self-report?

☐*Yes- Circle Above* ☐*No* ☐ *Not Applicable- Reason*_____

Other relevant information pertaining to mental health and intellectual disability history and/or previous treatment or service recommendations:

_____

_____

_____

Observations and Findings Based on Information Collected:

☐Defendant is a person who has a mental illness. ☐Defendant is a person who has an intellectual disability.

☐There is clinical evidence to support the belief that the defendant may be incompetent to stand trial and should undergo a complete competency examination under Subchapter B, Chapter 46B, Code of Criminal Procedure.

☐Any appropriate or recommended treatment or service:

_____

_____

☐None of the above.

Procedures Used to Gather Information:

_____

SECTION IV: INFORMATION OF PROFESSIONAL SUBMITTING FORM

Name, Credentials & Organization of Person Submitting Form:_____ Date of Submission: _____

Upon completion of this form, its contents remain confidential as applicable to Health and Safety Code Chapter 614.017 & Chapter 552 of the Government Code

COLLECTION OF INFORMATION FORM FOR MENTAL ILLNESS AND INTELLECTUAL DISABILITY

AUTHORITY: Art. 16.22, Code of Criminal Procedure & Sec. 614.0032, Health &Safety Code & Chapter 552 of the Government Code

Approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI)

INSTRUCTIONAL GUIDELINES

This form is not to be confused or supplemented by the "Screening Form for Suicide and Medical/Mental/Developmental Impairments" as required by the Texas Commission on Jail Standards

Section I: DEFENDANT INFORMATION

- **Defendant Name** should be filled out by last name followed by first name.
- **Offense** information should include arresting offense information.
- **Date of Birth** and **last four digits of social security number** are to be obtained to assist in validating identity.
- **CARE Identification #** – *If available*, this number should be complimentary to the CCQ match.
- **SID or CID Number** – *If available*, this number should include the State Identification Number (SID) or the County Identification (CID) Number.
- List the **Current County** or **Municipality** of the current incarceration.
- **Date of Magistrate Order** should be the date the magistrate signed the order which initiates the timeframes for completing the collection of information (not later than 96 hours for a defendant in custody; not later than 30 days for a defendant not in custody).

Section II: PREVIOUS HISTORY

- **Has the defendant been determined to have a mental illness or to be a person with an intellectual disability within the last year?**
  - ***If Yes*** – The Magistrate ***is not required*** to order the interview and collection of other information if the defendant ***in the year proceeding*** the defendant's applicable date of arrest has been determined to have a mental illness or to be a person with an intellectual disability by the service provider that contracts with the jail to provide mental health or intellectual and developmental disability services, local mental health authority, local intellectual and developmental disability authority, or another mental health or intellectual disability expert described.
  - ***If No*** – Further collection of information under this form will be necessary for applicable defendants.
  - ***If Unknown*** - Further collection of information under this form *may* be necessary for applicable defendants.
- **Previous Mental Health and/or Intellectual Disability Information and Date** - *If available,* collect information regarding whether the defendant has a mental illness as defined by Section 571.003, Health and Safety Code, or is a person with an intellectual disability as defined by Section 591.003, Health and Safety Code, including, if applicable, information obtained from any previous assessment of the defendant and information regarding any previously recommended treatment.

  Note: Include source of information. Examples are self-report, CARE or CCQ match, or clinical records available from local mental health authority of local intellectual developmental disability authority.

Section III: CURRENT INFORMATION

- **Most Recent Diagnosis(es) and Date(s)** - *If available*, include information here.
- **Is the client acutely (at time of written report of collected information or as indicated on the jail screening form for suicide and medical/mental/developmental impairments) decompensated, suicidal, or homicidal according to self-report?**
  - ***If Yes*** – select yes.
  - ***If No*** – select no.

- ***If Not Applicable*** – Indicate the reason why here.

Note: This information may be helpful to the magistrate or judge, as it will allow the magistrate or judge to know the severity of the defendant's mental health status for prioritization purposes.

- **Other relevant information pertaining to mental health history and/or previous treatment or service recommendations** – Note: Examples may include the following:
  - Previous competency examination results or outcome of examination results;
  - Parole, Probation or Pre-Trial Supervision status;
  - Military history is applicable to treatment history;
  - If this section is not applicable, indicate as such.
- **Observations and Findings Based on Information Collected**– Select option as appropriate.

  Note: **Any appropriate or recommended treatment or service** – Include whether the defendant warrants a competency examination, outpatient services, etc. Provide any recommendation for further assessment/evaluation by higher level clinical providers.
- **Procedures Used to Gather Information** – Include informational sources used to collect information. Examples may include: Sources of information such as, self-report, CARE or CCQ match, previous psychological evaluations, assessments or clinical records available from local mental health authority of local intellectual developmental disability authority. *An interview to prepare the written report of collected information for the purposes of this document may be gathered in the following ways: in person in the jail, by telephone, or through a telemedicine medical service or telehealth service.*

Section IV: ***INFORMATION OF PROFESSIONAL SUBMITTING FORM***

- **Name, Credentials and Organization of Person Submitting Form** – Person completing the form along with his or her credentials, is to be listed here. Note: *This form is to be completed by the local mental health authority, local intellectual and developmental disability authority, or another qualified mental health or intellectual disability expert.*
- **Date of Submission** – Include the date the form is submitted to the Magistrate.

EE. FORM: Certification of Competency Evaluator Credentials & Template for Competency Evaluations

Certification of Competency Evaluator Credentials:

Name:
Address:
Phone number:

Professional Discipline and License #:

Board Certifications:

Continuing Education Meeting Requirements: (note: statute requires the equivalent of 24 hours of continuing education relating to forensic evaluations, including 6 in the two years prior to the current evaluation)

Template for Competency Evaluations

Name of Defendant:
County:
Cause #:
Date of Evaluation:
Date of Report:

Specific Issues Referred for Evaluation:

Disclosures: (Please include, at minimum, that you explained the purpose of the evaluation, persons or entities to whom the report will be provided, and limits of confidentiality.)

Procedures, Techniques, Tests, and Collateral Information Reviewed:

Clinical Observations and Findings:

Diagnoses:

Areas of Competency: (Please describe in detail any deficits in the defendant's capacity during criminal proceedings and the exact nature of the deficits resulting form mental illness or mental retardation. As required by statute, be certain to consider:

- Capacity to rationally understand the charges and potential consequences of the pending proceedings;
- Capacity to disclose to counsel pertinent facts, events and states of mind;
- Capacity to engage in legal strategies and options;
- Capacity to understand the adversarial nature of the proceedings;
- Capacity to exhibit appropriate courtroom behavior;
- Capacity to testify;
- Capacity to consult with counsel)

Opinion on Competence to Stand Trial: (Please provide a clear statement of whether in your professional opinion the defendant is competent to stand trial, incompetent to stand trial, or why you are unable to formulate an opinion.)

Treatment recommendations: (Please list current medications. If, in your opinion, the defendant is currently competent, the impact of any of these medications on the defendant's appearance, demeanor or ability to participate in the proceedings and whether the medications are necessary to maintain competence. If, in your opinion, the defendant is not currently competent, is treatment/medication likely to restore the person to competence in the foreseeable future. Please include any recommendations you may have as to treatment options.)

Signature:

Index:

B

C

D

E

F

G

H

I

J

L

M

N

O

P

Q

R

S

T

V

W

Y