

Increasingly, Texas mental health hospitals and state schools do not have enough available beds to treat defendants found incompetent to stand trial. Judges are concerned about defendants who languish in jails as they wait for a space for treatment, and county officials worry about the impact on already overcrowded jails. Jail personnel and defense counsel watch as clients decompensate in an environment that is not equipped to handle a serious mental illness.

Texas Appleseed is taking this opportunity to spotlight innovative alternatives to inpatient commitment—examining current law and the options it allows to safely restore defendants to mental competency in the community.

- Deborah Fowler, *Texas Appleseed Legal Director*

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## JUDICIAL OPTIONS: WHEN CLIENTS ARE INCOMPETENT TO STAND TRIAL

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The Texas Code of Criminal Procedure provides judges with three options when confronted with the need for an individual who has a mental illness or mental retardation to regain mental competency to stand trial:

- Commitment to a state hospital or an intermediate care facility;
- Bail with conditions; or
- Outpatient commitment.

Because few courts are aware of available outpatient resources, the last two options are rarely utilized. However, a critical shortage of state hospital beds for court-ordered competency restoration is prompting new interest among courts in exploring outpatient options.

### The Process

After finding a defendant incompetent to stand trial, the Code requires the court to either release the defendant on bail under Article 46B.072, or commit the defendant to a facility under Article 46B.073.<sup>1</sup>

#### Release on Bail - Article 46B.072

A court may choose to release the person on bail only if the individual is not a danger to others and can be safely treated in the community.<sup>2</sup> This option is available for both individuals with mental illness and those with mental retardation.

To ensure the safety of the public and the defendant, the court can place conditions on the individual while out on bail.<sup>3</sup> These can include requiring the defendant to take prescribed medications, refrain from using alcohol or drugs, and/or meet with a counselor.



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If a court chooses to release a defendant on bail, it should confirm that there is a treatment provider who will monitor the progress of the individual.<sup>4</sup> The treatment provider must either develop an individual treatment program or follow the treatment program (conditions of bail) that the court has imposed.<sup>5</sup>

The treatment provider is also required to send a report to the court not later than 14 days after treatment has begun and every 30 days thereafter—noting the individual’s progress and whether the defendant will obtain competency in the foreseeable future.<sup>6</sup>

Release on bail should be limited to a maximum 120 days, with a possible 60-day extension.<sup>7</sup> After 120 days, unless all parties agree otherwise, the court must hold a hearing to determine if the individual has regained competency.<sup>8</sup>

If the individual has not been restored to competency, the court must hold a hearing to determine if the individual meets the criteria for civil outpatient commitment.<sup>9</sup>

### **Commitment to Mental Health Facility or Residential Care Facility – 46B.073**

A court also has the choice of committing a person to a “mental health or residential care facility.”<sup>10</sup>

The Code of Criminal Procedure relies on the Texas Health and Safety Code’s definitions of these facilities.<sup>11</sup>

- Mental health facility – an inpatient or outpatient mental health facility, or a community center.<sup>12</sup>
- Inpatient mental health facility – a facility that provides 24-hour residential and psychiatric services.
- Residential care facility – a facility operated by the Department on Aging and Disability Services or a community center that provides 24-hour services to individuals with mental retardation, including domiciliary services.<sup>13</sup>

As indicated by these Texas Health and Safety Code definitions, competency restoration can be accomplished either in an inpatient setting or an outpatient setting.

### **Outpatient Mental Health Commitment**

For defendants who are deemed incompetent due to mental illness, a court has the option of making the initial commitment to an outpatient mental health facility or community center.<sup>14</sup>

Although the Code of Criminal Procedure does not include a definition for an outpatient mental health facility (most likely because the Health and Safety Code does not include such a definition), it does include a reference to the Health and Safety Code’s definition of a mental health facility, as set out above, which includes inpatient and outpatient facilities. If the legislature intended to limit competency restoration to inpatient programs, it would have referred to the more restrictive “inpatient mental health treatment” definition. Instead, it chose to reference a definition that embraces both inpatient and outpatient facilities, indicating its intent for outpatient restoration to be an option for restoration of individuals who have a mental illness.<sup>15</sup>

Furthermore, the Code of Criminal Procedure anticipates outpatient restoration, stating “[i]f the defendant is released to a treatment program not provided by an inpatient mental health facility...the treatment program shall report to the court.”<sup>16</sup>

### **Outpatient Mental Retardation Commitment**

For defendants who are deemed incompetent due to mental retardation, a court also has the option of making the initial commitment to a facility that is not a state school and is located in the community.

The Texas Health and Safety Code’s definition of residential care facility only requires that the commitment be to a facility operated by the Department on Aging and Disability Services

(DADS) or a community center.<sup>17</sup> Both DADS and community centers operate other types of intermediate care facilities that are not state schools and are located in the community. Therefore, commitment to a residential care facility does not necessitate a state school placement.

A court may order an individual to outpatient restoration treatment services if the facility administrator agrees to the commitment. These commitments can last up to 120 days, with a 60-day extension.<sup>18</sup> During that time, treatment should be provided toward the specific objective of restoring competency.<sup>19</sup>

Prior to the expiration of the 120-day period, the head of the facility is required to file a report with the court stating whether the individual has been restored to competency.<sup>20</sup>

Unless all parties agree otherwise, the court must then hold a hearing to determine whether the

individual has been restored to competency.<sup>21</sup> If the individual has not been restored, the court must hold a hearing to determine if the individual meets civil commitment criteria.<sup>22</sup>

### **State Hospital or Other Intermediate Care Facility**

If a defendant cannot regain mental competency safely in the community, a defendant with mental retardation can be referred to a residential care facility—which would include a state school, and a person with mental illness can be referred to an inpatient mental health facility that can provide 24-hour residential and psychiatric services.<sup>23</sup>

The same commitment period, required reports, and hearings that apply in the outpatient commitment process apply to a residential facility.

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<sup>1</sup> TEX. CODE CRIM. PROC. ANN. arts. 46B.072 & 46B.073.

<sup>2</sup> Id. art. 46B.072.

<sup>3</sup> Id.

<sup>4</sup> Entities should bring all stakeholders to the table to develop these services if there are doubts that sufficient resources exist. It is important to analyze the costs associated with housing the individual in jail for several months awaiting a state hospital bed and transporting him/her to the state hospital and back to the jail for periodic reviews versus the costs associated with contracting with a treatment provider in the community to guarantee compliance with bail conditions.

<sup>5</sup> Id. art. 46B.077.

<sup>6</sup> Id.

<sup>7</sup> Id. art. 46B.085.

<sup>8</sup> Id. art. 46B.084.

<sup>9</sup> Id. The court could also order inpatient mental health services; however, if the individual has maintained himself or herself in the community on bail, it would be difficult to justify an inpatient commitment.

<sup>10</sup> Id. art. 46B.073.

<sup>11</sup> Id. art. 46B.001; TEXAS HEALTH & SAFETY CODE ANN. §§ 571.003 & 591.003.

<sup>12</sup> TEX. HEALTH & SAFETY CODE ANN. § 571.003.

<sup>13</sup> Id. § 591.003

<sup>14</sup> Id. art. 46B.073(b).

<sup>15</sup> Boykin v. State, 818 SW2d 782 (Tex. Crim. App. 1991)(legislative intent is derived from plain meaning of statutory text).

<sup>16</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.077(b).

<sup>17</sup> Id. § 591.003

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id. art. 46B.080.

<sup>21</sup> Id. art. 46B.084.

<sup>22</sup> Id.

<sup>23</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.073.

# DALLAS COUNTY DEVELOPS OUTPATIENT RESTORATION PROGRAM

Dallas County's specialized Mental Health Public Defender unit—trained to represent clients with mental illness or mental retardation—has initiated a cost-effective, outpatient program to help defendants regain competency after being initially found incompetent to stand trial.

The outpatient restoration program was developed out of frustration with how long it took to transfer defendants, deemed incompetent to stand trial, to an available forensic mental health bed in the state hospital.

This program is just one creative solution to a difficult problem developed in partnership between attorneys and caseworkers in the Mental Health Public Defender unit and mental health providers in the Dallas area.

It is an approach that focuses on reducing recidivism rates, increasing public safety, lowering county costs, and helping those with mental illness or retardation navigate the justice system and receive the treatment they need.

Caseworker Walter Norris says one of the division's strengths is "finding appropriate resources that are very beneficial in helping defendants manage their illness."

The specialized public defender unit partnered with a local behavioral health authority provider (NorthSTAR) to develop a program to help restore the mental competency of defendants on an outpatient basis. Trimble explains how the program works:

"Clients are good candidates (for outpatient commitment) if they are high-functioning, have family support, and do not have a history of being dangerous. Just like the inpatient clients, they are 'committed' for 90 to 120 days.

"Instead of receiving treatment recommendations from within the facility, conditions regarding outpatient treatment are incorporated into the judgment of the competency proceeding, and compliance is closely monitored by the person's caseworker. The caseworker is under an obligation to the court to report any non-compliance, at which time the judge can pull the bond, and, if necessary, the person can be taken into custody."

Trimble says outpatient competency restoration produces positive results, citing just one example:

*"After completing the terms of her court-ordered outpatient restoration, our client...is doing well and should be deemed 'competent' by her next court date. At that time, the District Attorney is expected to dismiss her case. The client is not only compliant with her mental health regime, but is also working part-time and participating in her household.*

*This is so much better than waiting for treatment at the jail, only to be shipped to the state hospital. As the time line goes, if she had received an inpatient commitment, she may have just been transferred to the state hospital right about now."*

Caseworker Karen Thompson says the mental health public defender division has "been encouraged by the enthusiasm and willingness of local mental health providers to embrace this process.

"It's ultimately a 'win-win' for everyone. The client is able to have his or her mental health needs appropriately met, the provider is able to better monitor the psychosocial needs and progress of the client through court-ordered meetings, and the District Attorney is confident that the client is receiving adequate services to promote their active and safe return into their community."

# ALTERNATIVES TO STATE SCHOOL COMMITMENT FOR DEFENDANTS WITH MENTAL RETARDATION

Only a small percentage of individuals with mental retardation come into contact with the Texas justice system. When they do, they usually wind up in an institution, either a state school for persons with mental retardation or even at a state hospital for persons with mental illness depending on the nature of their alleged offenses.

But for persons with mental retardation who have committed nonviolent offenses or who are in need of restoration of competency, these institutional responses may not be the best approach.

Restoring competency of persons with mental retardation is a matter of ensuring their awareness of court processes, the roles of court participants, and the charges against them.

Opportunities to reinforce these concepts in the community—with the support of educators, family, and friends—may produce more lasting results and eliminate problem behaviors.

## Scope of the Problem

There are tremendous variations in skills, abilities, and presentation among individuals who have mental retardation.

In some cases, an individual with mental retardation may be tried and convicted with no one even being aware that he or she has an intellectual disability that may affect the person's ability to consult with an attorney and understand the processes and actions taking place in the courtroom.

To make matters worse, mental retardation may be confused with mental illness—making it all the more important to obtain a qualified examiner to help the court make the legal determination of whether the

defendant is competent to participate in the process and ultimately stand trial for the alleged offense.

*There are multiple factors that may contribute to a high risk of justice system involvement for people with mental retardation including:*

- *Limited communication skills and memory for events* which contributes to their inability to understand complex sentences and abstract concepts;
- *Impulsivity* that may cause them to respond or act before thinking through their actions;
- *Desire to acquiesce and please others*, resulting in their possibly waiving rights without understanding them and/or their being easily coerced or "left holding the bag" by more capable companions; and
- *A desire for acceptance that results in their attempting to hide their disability.*

Some individuals with mental retardation may be passive, preferring not to draw attention to themselves, while others may enjoy the attention they receive from police or others in the justice system. Consider this scenario:

*Mr. R is a 22-year-old charged with criminal trespass of a habitation, and a motion to revoke probation has been entered. His court-appointed attorney has difficulty discussing the case with his client and requests a competency evaluation.*

*A psychiatrist concludes that the defendant does not have a mental illness, but may have mental*

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retardation. His attorney then requests that a psychologist conduct intellectual or adaptive behavior testing.

Although Mr. R. is agreeable and gives short answers to questions, he displays poor reasoning and communication skills when pressed to respond in ways that demonstrate intellectual reasoning. The psychologist concludes that Mr. R. has moderate mental retardation and discovers documentation that his intellectual functioning has been tested within this range for more than 15 years.

The psychologist testifies that the defendant is not competent to stand trial based on these limitations. The prosecutor claims Mr. R. is faking. The jury takes two hours to find the defendant incompetent to stand trial, and later reports that they had difficulty understanding what “normal” intellectual functioning was. To restore his competency to stand trial, Mr. R. is placed at a state school for persons with mental retardation.

This case study illustrates a number of issues that all too frequently characterize the justice system’s interactions with persons with mental retardation:

- 1) An inability to assess mental retardation in a high-functioning defendant until after multiple interactions with the justice system;
- 2) Difficulty understanding what mental retardation is, as suggested above by the comments of the prosecutor and the jury; and
- 3) A failure to pursue alternatives to state school commitment to restore competency for low-risk, high-functioning defendants with mental retardation.

## Community-Based Positive Behavior Support

Behavioral approaches have long been the methods of choice for assisting people with mental retardation to learn new skills and decrease or eliminate problem behaviors.

Due to their difficulties in transferring knowledge and skills from one setting to another, people with mental retardation generally learn best within the settings in which skills are to be applied. This is called “learning in place”—and it applies to positive and negative skills or behaviors. Because of this type of learning, placing someone with mental retardation in jail or an institution may have the undesirable effect of teaching them to behave inappropriately.

To restore competency by teaching a person with mental retardation about court processes and appropriate courtroom behaviors, it makes most sense to work with them in a community setting where they can receive appropriate services under specialized supervision. Family and friends can positively reinforce the adaptive behaviors and lessons learned.

Community providers of services need training to support this specialized population successfully. One source for this training for providers might be the state residential facilities that currently provide restoration services to these individuals. Some practices might be modified for use in the community.

With careful attention to systemic issues, successful community-based restoration of competency programming can be a reality for defendants with mental retardation.

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Capacity For Justice

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## WHEN IS OUTPATIENT RESTORATION APPROPRIATE FOR A DEFENDANT WITH MENTAL ILLNESS?

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Competence to stand trial is a legal determination, however there can be a great deal of variability in the clinical manifestations of incompetent defendants. While some defendants cannot be safely restored to competency in an outpatient setting, many can benefit from this approach.

At a time when Texas ranks 48<sup>th</sup> in the nation in per capita funding for mental health services, the severe lack of resources requires careful consideration of how limited funding is allocated. Psychiatric hospital beds are the most expensive resource in our mental health system and should only be used when absolutely necessary.

When is outpatient restoration appropriate for a defendant with mental illness? Consider the following scenario:

*Sarah is a 38-year-old woman with no prior criminal justice history. She has been treated in the MHMR system for approximately 20 years with a diagnosis of chronic paranoid schizophrenia. Her clinical condition, however, has responded well to treatment, and she has never required hospitalization for her mental illness.*

*She was arrested at her boyfriend’s house for possession of cocaine paraphernalia. At the time of her arrest, she had been off of her medications for about two weeks because she did not have transportation to get to the clinic.*

*She was found incompetent to stand trial because she did not have a good appreciation of court processes, did not understand the potential consequences of her charges, and her thought processes were not sufficiently clear to allow her to fully consult with counsel about her defense.*

*Is outpatient treatment to restore competency appropriate in this case?*

When trying to reach such a determination, the court should consider these factors:

- Whether the defendant may be safely treated on an outpatient basis;
- Previous criminal justice history and compliance with conditions of supervision;
- Previous response to and compliance with mental health treatment; and
- Availability of family or other support systems.

In this hypothetical case, Sarah has no history of involvement in the criminal justice system. It appears that the primary reason for her incompetence to stand trial is that she had been off of her medications for a period of time leading up to her arrest.

A recent demonstration project of local restoration of competency in Houston confirmed that the vast majority of these defendants are restored to competency simply by restarting their psychotropic medications.

In fact, the literature demonstrates that *long-term outcomes for individuals treated in the community are significantly better than for those confined to more institutional settings.*

Even individuals with severe mental illness can benefit from community-based treatment to restore competency.

Assertive Community Treatment (ACT), for example, is an intensive form of case management that helps individuals with severe mental illness maintain successfully in the community. Some communities have even developed Forensic ACT Teams, targeted to individuals with mental illness who are involved in the justice system.

For Sarah and many defendants with mental illness, outpatient treatment for restoration of competence is a cost-saving option that works.

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By Susan Stone, J.D., M.D.

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**TEXAS APPLESEED** is a public interest organization that engages the volunteer efforts of lawyers and other professionals to pursue systemic change to achieve greater justice for Texas' most vulnerable populations.

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