COMPETENCY TO STAND TRIAL
COMPARING TEXAS ADULT AND JUVENILE AND FEDERAL ISSUES

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COMPETENCY TO STAND TRIAL COMPARING TEXAS ADULT AND JUVENILE AND FEDERAL ISSUES

I. INTRODUCTION
This paper attempts to examine aspects of competency and mental health covered in both state and federal court as well as juvenile courts in Texas. While the basic concepts involved are similar, in simplest terms: he must understand what he is charged with and be able to assist counsel; and that he understood the criminal activity was wrong; the terminology, procedure and methods for answering these questions vary. These issues are complex, and it is important to remember that there is a difference between mental health issues and a competence or sanity issue.

II. TEXAS COMPETENCY ISSUES
Texas presumes that defendants are competent and shall be found to be competent unless proved incompetent by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art 46B.004(b)(West 2013). A person is incompetent if he does not have: (1) sufficient present ability to consult with his attorney with a reasonable degree of rational understanding; or (2) a rational and factual understanding of the proceedings against him. TEX. CODE CRIM. PROC. ANN. art 46B.003(a)(West 2013). A defendant has the right to be competent throughout his trial and competency can be raised by either party or the court at any time before the sentence is pronounced. Rodriguez v. State, 329 S.W.3d 74, 78 (Tex. App. – Houston [14th Dist.] 2010, no pet).

Issues to be considered include the ability of the defendant to (A) rationally understand the charges against him and the potential consequences of the proceedings; (B) disclose to counsel pertinent facts, events and states of mind; (C) engage in a reasoned choice of legal strategies and options; (D) understand the adversarial nature of the proceedings; (E) exhibit appropriate courtroom behavior; and (F) testify. The suggestion of incompetency is a threshold requirement for the informal inquiry and may consist solely of a representation from any credible source. Art 46B.004(c-1). Following a suggestion of incompetency the court shall conduct an informal inquiry to determine whether there is some evidence from any source that would support a finding of incompetency. Art. 46B.004(c), Collier v. State, 959 S.W.2d 621 (Tex. Crim. App. 1997).

The evidence must raise a bona fide doubt in the judge’s mind as to whether the defendant is legally competent. Brown v. State, 970 S.W.2d 772 (Tex. App. – Dallas 1997, pet. ref’ed)). The suggestion of incompetency is a threshold requirement for the informal inquiry and may consist solely of a representation from any credible source. Tex. CODE CRIM. PROC. ANN. art 46B.024(1)(West 2013); Morris v. State, 301 S.W.3d 281, 286 (Tex. Crim. App. 2009).

A. Competency Article - 46B Code of Criminal Procedure
Unless otherwise noted, citations in this section are to Article 46N of the 2013 Code of Criminal Procedure. It is important to remember that competency is not raised by amnesia due to traumatic brain injury suffered at the time of a boating accident and intoxicated manslaughter charge. Morris v. State, 301 S.W.3d 281, 286 (Tex. Crim. App. 2009). Amnesia due to drug or alcohol abuse is not sufficient. Gonzales v. State, 313 S.W.3d 840 (Tex. Crim. App. 2010). However, at least one court has found that a defendant indicted for murder twenty before who had been living with his daughter due to Alzheimer’s was not competent.

1. Raising the Issue
The issue of competency can be raised by motion by either party supported by an affidavit or by the court. Art. 46B.004(a). If the court is aware of evidence suggesting incompetency, the court shall suggest incompetency. Competence is determined at the time of the proceedings, not at the time of the offense. Lasiter v. State, 283 S.W.3d 909, 925 (Tex. App. – Beaumont 2009, pet. ref’d). The suggestion of incompetency is a threshold requirement for the informal inquiry and may consist solely of a representation from any credible source. Art 46B.004(c-1). Following a suggestion of incompetency the court shall conduct an informal inquiry to determine whether there is some evidence from any source that would support a finding of incompetency. Art. 46B.004(c), Collier v. State, 959 S.W.2d 621 (Tex. Crim. App. 1997).

The evidence must raise a bona fide doubt in the judge’s mind as to whether the defendant is legally competent. Brown v. State, 970 S.W.2d 772 (Tex. App. – Dallas 1997, pet. ref’d). The suggestion of incompetency is a threshold requirement for the informal inquiry and may consist solely of a representation from any credible source. Tex. CODE CRIM. PROC. ANN. art 46B.024(1)(West 2013); Brown v. State, 970 S.W.2d 772 (Tex. App. – Dallas 1997, pet. ref’d). A defendant is entitled to counsel before any ordered evaluation and during any proceeding on the issue of competency. Art. 46B.006. Statements made by the defendant during a competency examination or
hearing, the testimony of an expert based on those statements, or evidence obtained as a result of those statements are not admissible at any criminal proceeding except competency proceedings. 46B.007.

The court, at any time upon motion from the State, may dismiss the charges regardless of whether there is evidence to support a finding of incompetency. If there is evidence to support a finding, the court may transfer the defendant for civil commitment proceedings. If he is not transferred, the court shall discharge the defendant. Art. 46B.004(e).

2. Agreed Incompetent

If the State and Defendant agree that he is not competent, no hearing is necessary. 46B.005(c), 46B.054. The court then must determine whether commitment is proper.

If he is not a danger to others and may be safely treated on an outpatient basis, and an appropriate outpatient facility is available, the court may release a felony offense on bond, and shall release a misdemeanor offense on bond. 46B.072. TO be released on bond, the court must receive and approve a comprehensive treatment plan for the restoration of competency. 46B.072(c). The plan must identify the person responsible for providing treatment and that the treatment planned for is available and will be provided. 46B.072(c). Outpatient treatment is for a period up to 120 days. 46B.072(b).

If the defendant is not released on bond, he is committed to an inpatient mental health facility or residential car facility also for a period not to exceed 120 days. 46B.073. This can be extended for one 60 day period if the head of the facility or program requests the extension and states that the defendant has not yet attained competency and the extension will likely enable a restoration of competency. 46B.081. The extension is only for one 60 day period. 46B.081(c). The extension does not require a physician’s certificate or a hearing.

If the defendant is charged with a “violent offense” defined by Art. 17.032(a) or the indictment alleges use of a deadly weapon, the defendant will be committed to a maximum security unit or a facility designated by the Department of State Health Services. Art. 46B.073. Competent medical or psychiatric testimony is required prior to a commitment to an inpatient facility. 46B.074(a). The testimony can be offered through the report prepared, and does not require live testimony. 46B.074(b). For the initial commitment testimony or a report from a psychologist or psychiatrist is sufficient. 46B.074 and 46B.022.

Unless requested, no jury is required. 46B.051. The issue of commitment for inpatient treatment or release on bond is for the court and will not be a jury determination. 46B.071 and 46B.072.

3. Contested Incompetency

If the parties do not agree, the court shall hold a hearing. 46B.005(b). The hearing will be to the bench unless a jury is requested by either party or the court. 46B.051(a). The same jury cannot be used on the issue of guilt or innocence. 46B.051(c). The verdict must be unanimous. 46B.052(b). If the jury finds the defendant incompetent, the court will make the determination on bail and outpatient restoration or commitment. 46B.071.

Because a competence hearing is civil in nature, only six peremptory challenges are allowed. White v. State, 591 S.W.2d 851 (Tex. Crim. App. 1979). The defendant bears the burden of production and persuasion. McFarland v. State, 834 S.W.2d 481 (Tex. App. – Corpus Christi 1992, no pet.).

Just as in an agreed incompetent situation, competent medical or psychiatric testimony is required prior to a commitment to an inpatient facility. 46B.074(a). The testimony can be offered through the report prepared, and does not require live testimony. 46B.074(b). For the initial commitment testimony or a report from a psychologist or psychiatrist is sufficient. 46B.074 and 46B.022.

There is no interlocutory appeal relating to the determination or ruling on the issue of competency. 46B.11.

4. After Initial Commitment

Following treatment, the court makes the determination of competency. 46B.084(a). This may be made on the report of the treatment provider alone. 46B.084(a). Both parties have the may object within 15 days of being served with the report. 46B.084(a). The hearing can be conducted using an electronic broadcast system. 46B.084(b-1) and 46B.013. If there is an objection, the court shall set the matter for a hearing, and a jury can be requested. 46B.084(b).

If the parties agree the defendant is competent, the court issues an order restoring competence and the case proceeds. 46B.084(d). A written notation on a docket sheet probably is not sufficient. Shaw v. State, 4 S.W.3d 875, 878 (Tex. App. – Dallas 1999, no pet.).

If the defendant is found incompetent, and the charges are not dismissed, a hearing will be conducted to determine if he is mentally ill or mentally retarded and meets the requirements for commitment to an inpatient facility or outpatient treatment. 46B.102; 46B.103.

If the defendant is mentally ill, proceedings are governed by 46B.102. Two physicians must examine the defendant within thirty days preceding the hearing and provide certificates that the proposed patient is mentally ill and as a result of that illness the patient is likely to cause serious harm to himself or others or suffering severe and abnormal mental, emotional or
physical distress and an inability to provide for his basic needs and unable to make a rational and informed decision as to whether or not to submit to treatment. TEX. HEALTH & SAFETY CODE §574.035; 574.009. The burden of proof is by clear and convincing evidence. TEX. HEALTH & SAFETY CODE §574.035. For inpatient treatment, the judge must find that he is mentally ill, the nature of that illness is severe and persistent and will continue for more than 90 days and he will be unable to live safely in the community without treatment and he cannot participate in outpatient treatment based on his actions over the preceding two years. TEX. HEALTH & SAFETY CODE §574.035(b). A mental illness commitment is for one year. TEX. HEALTH & SAFETY CODE §574.035(h).

If the defendant is believed to be mentally retarded, proceedings will be conducted under Chapter 593 of the Health and Safety Code, 46B.103. The burden of proof is beyond a reasonable doubt and a separate assessment for mental retardation is required for commitment. TEX. HEALTH & SAFETY CODE §593.050. There is no time period specified for this commitment. TEX. HEALTH & SAFETY CODE §593.052.

If the charge is a violent offense under Article 17.032(a) or a deadly weapon is used, the defendant will be committed to a maximum security unit of a facility designated by the Department of State Health Services. 46B.104. Within sixty days the defendant shall be transferred out of maximum security unless he is determined to be manifestly dangerous by a State Health Services Review Board. 46B.105.

The head of the facility, the outpatient treatment provider, the defendant, the attorney representing the defendant or the state may request the court to determine that competency has been restored. 46B.109; 46B.110. The court may appoint disinterested experts to examine the defendant, but if the parties agree he may be found competent without a hearing. 46B.112.

If the parties do not agree, and the court finds the motion and supporting evidence establish good reason to believe the defendant may have been restored to competency, the court shall hold a hearing. The hearing can be before a jury if either party requests it or the court on its own motion requires one. 46B.113.

The defendant’s commitment can only be the maximum period of time available as punishment for the offense charged. Ex parte Reinke, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012). This calculation applies to the statutory maximum term of confinement and does not include any enhancement provisions. Note that this does not apply to jurisdictional allegations for felony theft or DWI. Id. at note 7.

Misdemeanor cases shall be dismissed on motion by the State if the defendant is not tried before the second anniversary of the date on which the order of commitment was issued. 46B.010.

B. Diminished Capacity


The defense may offer evidence of a mental disease or defect to rebut or disprove the required mens rea for the offense. Ruffin at 594; Jackson at 574. Either lay or expert testimony may be offered. Ruffin, at 588, 594.

C. Mitigation

A history of mental illness may be used as mitigating evidence during the punishment phase. Even if the evidence is not enough to raise insanity, or completely negate mens rea, or affect competency, it may reduce culpability at punishment. Mendoza v. State, Nos. 14-06-01015-CR, 14-06-01016-CR; (Tex. App. – Houston [14th Dist.], June 12, 2008, pet. ref’d) 2008 Tex. App. LEXIS 4324.


Counsel is not required to always investigate a defendant’s psychiatric history to meet the effective assistance of counsel standard. Purchase v. State, 84 S.W.3d 696, 700-701 (Tex. App. – Houston [14th Dist.] 2002, pet. ref’d). Mitigation evidence may be offered through lay witnesses including the defendant, and family members who are able to testify about mental health issues, the medications prescribed and side effects. Pool v. State, No.01-07-00349-.CR (Tex. App. – Houston [1st Dist.], Jan. 31, 2008 no pet.) 2008 Tex. App. LEXIS 677.

III. FEDERAL COMPETENCY ISSUES

Overall the issue of competency does not arise with the same frequency in the federal system as it does in state or juvenile prosecution. This is most likely the result of the ability of federal prosecutors to selectively prosecute defendants and consultation prior to most arrests being made. Issues related to competency and sanity are contained in 18 U.S.C. §§4141-4248.
A motion to determine competency may be filed by the Government, the defense or the court. 18 U.S.C.§4241(A). The court shall grant the motion, or order a hearing on the motion if there is reasonable cause to believe that the defendant may be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings against him or to assist properly in his own defense. 18 U.S.C. §4241(a).

The court may order a psychiatric or psychological hearing be conducted and a report be filed with the court. 18 U.S.C. §§4241(b) and 4247(b) and (c). In most cases, these evaluations are done at Bureau of Prison facilities and the defendant is transported there in custody.

If the defendant is not competent, he shall be committed to the custody of the Attorney General for hospitalization and treatment for a reasonable period of time up to four months to determine whether there is substantial probability that in the foreseeable future he will attain competency. 18 U.S.C. §4241(d). The defendant may be recommitted for additional periods.

Any finding of competence does not prejudice the defendant in raising the issue of sanity as a defense and shall not be admissible as evidence in a trial for the offense charged. 18 U.S.C. §4241(f).

As in state court, the issue of competency is most often raised by defense counsel early in the proceedings. However, the issue of competency can be raised at any time after the commencement of a prosecution and prior to the completion of the sentence. 18 U.S.C. §4241(a).

Within ten days of sentencing, either party can raise the need for treatment of a mental disease or defect by motion supported by substantial evidence. 18 U.S.C. §4244(a). This allows, following evaluation, placement in a suitable facility rather than a regular BOP facility. A similar motion can be filed at any time by requesting a transfer to a suitable facility made by the attorney or the director of the BOP facility housing the defendant. 18 U.S.C. §4245.

If a defendant is due to be released from the sentence, the BOP may request hospitalization if release would create a substantial risk of bodily injury to another person or serious damage to another’s property. 18 U.S.C. §4246(a). Available options short of this hospitalization include state care and custody.

IV. TEXAS JUVENILE FITNESS TO PROCEED ISSUES

As in many areas, juvenile justice in Texas uses differing terminology: a juvenile is detained, not arrested; they are adjudicated not convicted and so on. In this regard, the issue of competence is a determination as to whether the juvenile is fit to proceed; the question is not sanity or insanity but lack of responsibility.

A. Mental Illness

Because the primary purpose of the juvenile system is to rehabilitate, the first major difference occurs with the possibility of an initial evaluation. Unlike in the adult criminal system, the evaluation can be conducted for treatment, not just competence or sanity. If the court determines that probable cause exists to believe the child has a mental illness, a stay is ordered.

Mental illness is defined as an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, 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 AND SAFETY CODE ANN. §571.003(14) (West 2013).

The juvenile courts have the same jurisdiction to initiate proceedings, order mental health or mental retardation services or commitment of a child under Chapter 55 or Title 7, Subtitle C and D of the Health and Safety Code. TEX. FAM. CODE ANN. §55.02 (West 2013). The same standards of care apply for juveniles as adults committed for or treated for mental health or retardation issues. TEX. FAM. CODE ANN. §55.03 (West 2013).

B. Mental Illness Determination, Examination

a) On a motion by a party, the juvenile court shall determine whether probable cause exists to believe that a child who is alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision has a mental illness. In making its determination, the court may:

(1) consider the motion, supporting documents, professional statements of counsel, and witness testimony; and

(2) make its own observation of the child.

b) If the court determines that probable cause exists to believe that the child has a mental illness, the court shall temporarily stay the juvenile court proceedings and immediately order the child to be examined under Section 51.20. The information obtained from the examination must include expert opinion as to whether the child has a mental illness and whether the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code. If ordered by the court, the
information must also include expert opinion as to whether the child is unfit to proceed with the juvenile court proceedings.

(c) After considering all relevant information, including information obtained from an examination under Section 51.20, the court shall:

(1) if the court determines that evidence exists to support a finding that the child has a mental illness and that the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code, proceed under Section 55.12; or

(2) if the court determines that evidence does not exist to support a finding that the child has a mental illness or that the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code, dissolve the stay and continue the juvenile court proceedings. TEX. FAM. CODE §55.11(West 2013).

C. Initiation of Commitment Proceedings

If, after considering all relevant information, the juvenile court determines that evidence exists to support a finding that a child has a mental illness and that the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code, the court shall:

(1) initiate proceedings as provided by Section 55.13 to order temporary or extended mental health services, as provided in Subchapter C, Chapter 574, Health and Safety Code; or

(2) refer the child's case as provided by Section 55.14 to the appropriate court for the initiation of proceedings in that court for commitment of the child under Subchapter C, Chapter 574, Health and Safety Code. TEX. FAM. CODE §55.12 (West 2012).

D. Commitment Proceedings in Juvenile Court

If the juvenile court initiates proceedings for temporary or extended mental health services under Section 55.12(1), the prosecuting attorney or the attorney for the child may file with the juvenile court an application for court-ordered mental health services under Section 574.001, Health and Safety Code. The juvenile court shall:

(1) set a date for a hearing and provide notice as required by Sections 574.005 and 574.006, Health and Safety Code; and

(2) conduct the hearing in accordance with Subchapter C, Chapter 574, Health and Safety Code.

The burden of proof at the hearing is on the party who filed the application. The juvenile court shall appoint the number of physicians necessary to examine the child and to complete the certificates of medical examination for mental illness required under Section 574.009, Health and Safety Code.

After conducting a hearing on an application under this section, the juvenile court shall:

(1) order temporary mental health services for the child; or

(2) order extended mental health services for the child. TEX. FAM. CODE §55.13 (West 2012).

E. Fitness to Proceed

This is similar to an adult finding of incompetence. However, the definition of fitness to proceed is broader than the adult definition of competence. The juvenile definition includes both mental illness and mental retardation as aspects of either a failure to understand the proceedings or an inability to assist in a defense. TEX. FAM. CODE §55.31(a) (West 2012). Mental retardation is based almost exclusively on intelligence quotient testing, and is not available to determine competence in the adult system. It can be an aspect to a competence finding, but is not as outcome determinative in any other situation except a death penalty case.

1. Initial Determination and Examination

Either party may submit a request for a forensic evaluation. The court will make a determination based on a probable cause standard. In most cases, as long as there is evidence offered, either through a proffer, an affidavit, either sealed or not, or testimony from family members or juvenile facility employees, the court will find probable cause and order the evaluation. The evaluation is available for either delinquent conduct or CHINS offenses. TEX. FAM. CODE ANN. §55.31(b) (West 2013).

It takes more than a motion to require the juvenile court to order the examination. In re Q.D., 600 S.W.2d 392 (Tex. App. – Fort Worth 1980, no writ). There is no statutory duty on the juvenile court to obligate the court to order an examination. In re E.M.R., 55 S.W.3d 712 (Tex. App. – Corpus Christi 2001, no pet.).

Once the court determines probable cause, an examination is ordered under §55.20.

The examination must include an expert opinion as to whether or not the child is unfit to proceed as a
result of mental illness or mental retardation. TEX. FAM. CODE ANN. §55.31(c) (West 2013).

Remember, the definitions for mental illness are broader in the juvenile system. If the expert performing the evaluations works primarily with adult offenders, make sure they know the different standards in juvenile court. Once the evaluation is complete, it is the trial court’s decision as to whether or not evidence supports or does not support an unfit to proceed finding. TEX. FAM. CODE ANN. §55.31(d) (West 2013).

If the court finds that the child is unfit to proceed, the court continues with a commitment under §55.32. TEX. FAM. CODE ANN. §55.31(d)(1) (West 2013). After the initial probable cause finding, all other matters in the juvenile case are stayed pending the evaluation. TEX. FAM. CODE ANN. §55.31(a) (West 2013).

The statute specifically names discretionary transfers, adjudications, dispositions and modifications. Detention hearings are not mentioned, and are also required under the Family Code on a regular basis. Those hearings can proceed, however, counsel should probably seek appointment of an ad litem if the issue of fitness to proceed has been raised, most definitely is there is not a parent to appear at any detention hearings. Even if the child is unfit to proceed as a result of mental illness or mental retardation does not preclude any legal objection to the juvenile court proceedings which is susceptible of fair determination prior to the adjudication hearing and without the personal participation of the child. TEX. FAM. CODE ANN. §55.32(g)(West 2013).

2. Fitness to Proceed Hearing

The hearing on fitness to proceed is separate and distinct from any other hearings in the case. This can be a jury trial on this issue, if a proper jury demand is made more than ten days prior to the hearing. Tex. Fam. Code Ann. §55.32(a) If the juvenile court determines that evidence exists to support a finding that a child is unfit to proceed as a result of mental illness or mental retardation, the court shall set the case for a hearing on that issue. TEX. FAM. CODE ANN. §55.32(c) (West 2013).

The standard of proof at this hearing is a preponderance of the credible evidence. TEX. FAM. CODE ANN. §55.32(d) (West 2013). If the court or jury finds the child is fit to proceed, the court continues with the case as though the issue had not been raised. TEX. FAM. CODE ANN. §55.32(e) (West 2013).

If the court or jury finds the juvenile is not fit to proceed as a result of either mental illness or mental retardation, the court shall stay the proceedings as long as that incapacity endures and proceed under a different section.

3. Child is Not Fit, Now What?

If the child is not fit to proceed because of mental illness or mental retardation and the qualifications are met under the Health and Safety Code, Title 7, the child will be committed to a state facility for a period of up to 90 days for evaluation in a facility designated by the state MHMR Department. TEX. FAM. CODE. ANN. §55.33(a)(1)(A) (West 2013). The child can also be placed at a private psychiatric inpatient facility for a period of not more than 90 days upon request by the parent, guardian or ad litem, but advance approval from the facility administrator is required. TEX. FAM. CODE. ANN. §55.33(a)(1)(B) (West 2013). The state may be ordered to pay costs associated with this placement, subject to an express appropriation if funds. TEX. FAM. CODE. ANN. §55.33(b) (West 2013). The author has seen this occur in situations where CPS was the managing conservator. The third option is for the child to receive outpatient care for a period of up to 90 days. TEX. FAM. CODE. ANN. §55.33(a)(2) (West 2013). This would be most likely only in a CHINS case, and probably some misdemeanor level offenses.

After this initial 90 day treatment period, the mental health facility can either confirm that they also believe the child is not fit to proceed, or that he is fit to proceed following treatment. If the report is that he is fit to proceed, file objections to the report in writing. TEX. FAM. CODE. ANN. §55.36(a) (West 2013). Again, the respondent can select whether to use a jury for this purpose or not, again ten days prior to the hearing. TEX. FAM. CODE. ANN. §55.36(b) (West 2013). After this, the respondent will have the option to seek commitment proceedings. TEX. FAM. CODE. ANN. §55.36(c) and (d) (West 2013).

4. Commitment based on Lack of Fitness - Mental Illness

If the MHMR facility concludes that the child is not fit to proceed, commitment proceedings are initiated and they will provide the required physician’s certificates. TEX. FAM. CODE. ANN. §55.37 (West 2013). The court can either order temporary or extended mental health services. TEX. FAM. CODE. ANN. §55.38(b) (West 2013). This is similar to an adult finding that a defendant is currently incompetent, but likely to regain competence in the near future. The juvenile court can also refer the matter to another court for initiation of a mental health commitment. TEX. FAM. CODE. ANN. §55.39 (West 2013).

5. Commitment based on Lack of Fitness Mental Retardation

If the facility deems the child to be unfit as a result of mental retardation, and the child meets the
appropriate criteria, the court can commit the child in the same fashion as for a mental illness commitment. In other respects, the proceedings for the two different “types” of fitness are the same. The difference being that if the lack is based on mental retardation, the child shall be committed to a residential care facility designated by MHMR. TEX. FAM. CODE. ANN. §55.41 (West 2013).

6. Age 18
If the child was found unfit to proceed, and not ordered to receive inpatient care or a residential treatment or has been discharged or furloughed from an inpatient program, the State can seek a restoration hearing before the child reaches age 18. TEX. FAM. CODE. ANN. §55.43 (West 2013). If the child is still not fit to proceed at the eighteenth birthday, the case will be transferred to an adult district court. The adult court shall within ninety days of the transfer institute adult competency proceedings, including commitment under Chapter 46B of the Code of Criminal Procedure. TEX. FAM. CODE. ANN. §55.44 (West 2013).

Because the child was not certified to face charges as an adult, if the child regains competency, the punishment assessed may not exceed the maximum allowed as if the case was still in the juvenile court. TEX. FAM. CODE. ANN. §55.44(b) (West 2013).

F. Lack of Responsibility
A child alleged by petition to have engaged in delinquent conduct or conduct indicating a need for supervision is not responsible for the conduct if at the time of the conduct, as a result of mental illness or mental retardation, the child lacks substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law. TEX. FAM. CODE ANN. §55.51(a)(West 2013).

This is closest in comparison to an adult sanity issue. Again this is broader in the juvenile code rather than the adult system. The juvenile code allows for insanity under both standards in American criminal jurisprudence, either because of mental illness or mental retardation, the child cannot appreciate the wrongfulness of the conduct or is unable to confirm his conduct to the requirements of law. In the adult criminal system, the defense is only available in the first situation.

On a motion by a party that the child may not be responsible as a result of mental illness or mental retardation, the court shall order an examination. TEX. FAM. CODE ANN. §55.51(b) (West 2013). Unlike fitness to proceed, if either party requests this evaluation, the court must order the evaluation. There is no probable cause analysis.

However, this is a defense issue and will be tried to the court or jury in the adjudication phase of the case and the burden is on the juvenile to show a lack of responsibility by clear and convincing evidence. TEX. FAM. CODE ANN. §55.51(d)(West 2013).

If the judge or jury finds a lack of responsibility, the juvenile is automatically placed for a ninety day evaluation period, including the possibility of a private psychiatric facility or out patient care. TEX. FAM. CODE ANN. §55.52(a)(West 2013). Within 75 days that facility must report back to the court with an opinion as to the child’s mental illness or mental retardation. If there is no finding of either, the child is discharged, unless in cases where a determinate sentence was sought and the prosecutor objects in writing within two days. TEX. FAM. CODE ANN. §55.55(d)(West 2013).

If the facility finds either mental illness or mental retardation, the court proceeds through a commitment proceeding similar to those for fitness to proceed. TEX. FAM. CODE ANN. §§55.56-61 (West 2013).

V. RECENT ISSUES AND QUESTIONS TO PONDER
A. Competence for New Trial
Two courts have held that competence cannot be raised in a motion for new trial if it is brought to the court’s attention for the first time after sentencing. Rodriguez v. State, 329 S.W.3d 74, 78 (Tex. App. – Houston [14th Dist.] 2010, no pet). See also Lindsey v. State, 310 S.W.3d 186, 188-189(Tex. App. – Amarillo 2010, no pet.). The Beaumont Court has held that new evidence on incompetency can be considered for the first time in a motion for new trial. Lasiter v. State, 283 S.W.3d 909, 926 (Tex. App. – Beaumont 2009 pet. ref’d).

B. IQ is a range
On May 27, 2014, the Supreme Court held that the Florida rule requiring a defendant to have an IQ of 70 or below before presenting evidence of intellectual disability violated his Eighth Amendment rights in a death penalty case. Florida considered the IQ score as final and conclusive evidence of intellectual capacity and failed to recognize the score is imprecise. Hall v. Florida, 188 L. Ed. 2d 1007 (2014). The Court recognized that IQ scores should not be read as a single fixed number but as a range, tests have standard errors of measurement which should be considered, and if the defendant’s score falls within the test’s own acknowledged and inherent margin of error, the defendant should be able to present additional evidence. The defendant here had nine IQ tests over forty years with scores ranging from 60 to 80 points. IQ tests can result in varied ranges at both ends of the spectrum of high and low scores, and facilities or
courts that look at the number alone without examining deficits in intellectual and adaptive functioning will be an issue under an Atkins analysis. While this is a death penalty case, the analysis can be used in a competency or treatment situation. At least one state school has refused to admit a juvenile to their facility because his IQ was 57, and they require an IQ below 55 for admission. That decision of the state school was prior to the Hall opinion.

C. Michael Morton Act
In broad strokes, the Michael Morton Act requires Texas prosecutors to turn over all evidence in the case including Brady, exculpatory, mitigating and impeachment evidence. While an in-depth discussion of that act is beyond this paper, there are interesting implications. Law enforcement officers frequently come into contact with individuals suffering from a variety of mental health issues. Many times, these individuals are civilly committed to a state hospital after they are examined by physicians following an initial hold placed by law enforcement. Sometimes these commitments are disclosed by the client, sometimes they are not. At some point either law enforcement or a prosecutor is involved in the process. Under Morton, both have a responsibility and a duty to disclose this evidence. This is complicated by the fact that civil commitments are themselves sealed under their own statutory provisions.

So the questions to be asked, and yet to be answered include: Should law enforcement disclose to the prosecutor in the criminal case prior civil commitment contacts; Should the prosecutor disclose that information as mitigating evidence; Should defense counsel have access to civil commitment records? The answer to each of these questions is probably yes.

D. Closing of TJJD Facilities
The Texas Juvenile Justice Department has closed the Corsicana Stabilization Unit which had been reserved for the juveniles with the most severe mental health issues. There are still juveniles with severe mental health issues, however, currently at least this facility is no longer an option.

VI. CONCLUSIONS
Anyone experienced in the area of criminal law knows that for many years, the criminal justice system has been filled with people accused of criminal conduct who suffer from a variety of mental health issues. We have seen addiction, schizophrenia, manic-depressive disorder, bipolar disorder, schizoaffective disorder, depression, personality disorders and virtually everything in between. Currently, the largest mental health facility in the state is operated at the Harris County Jail.

We have seen an increase in the area of mental health in the juvenile system as well. During a five year period, the Texas Youth Commission released approximately 250 students from their facilities because they were too mentally ill to benefit from the programs at TYC. Many, if not most of these juveniles were released following lengthy courses of treatment at the stabilization units. These §1550 releases have apparently stopped in 2009. However, the author has represented two juveniles who had been released under that section in Smith County. While overall, the number of juvenile referrals appears to be currently decreasing across the state, the concern is that we could see an increase in the numbers of children with severe mental health issues.

Many times clients, especially those charged with misdemeanor offenses do not want to undergo the process to determine their competence, even if they do, a brief stay in a mental health facility and ‘competence’ or ‘court’ school may not be effective. Also commonly seen are the recycling clients who only take the medication necessary to treat their illness while they are in custody so brief periods of stability are interspersed with lengthy periods of medical non-compliance.

Narcotics certainly can exacerbate underlying mental health issues, and we are all familiar with the concept of self-medication using illegal substances rather than the cost, expense or inconvenience of seeking treatment from medical professionals.
Appendix A

Questions to Assist you Determine Mental Health Issues

Age:
How old are you?
When is your birthday and year?

School:
What school/campus do you attend?
What grade are you in?
What subjects/classes are you taking?
Who are your teachers?
When was the last time you missed school? Why?

Employment:
Where do you work?
What do you do for a living?
Who is your employer/supervisor?
How do you get to work?

Health:
Who are your doctors?
When was the last time you saw a doctor, and why?
Have you ever talked with a therapist, counselor, psychologist?
Have you been to a hospital, and what were you treated for?
Are you taking any medications?
What does that medicine do?
Do the medicines make you feel better or worse, side-effects?
How often do you take the medicines?
Alcohol/drug use?

Prior Cases:
Any prior cases?
Who was involved?
What happened in court? What brought you to court then?
What judge heard the case?

Current Case:
What happened?
When did this happen?
Who could be witnesses?
General:
President/Governor/Mayor/Principal
2-4 words at beginning of interview - check recall
Reading ability
Driving ability (if age appropriate)

Orientation
Does the person know where they currently are, why you are meeting with them, what the consequences are for their situation? It is most obvious, but if the client does not realize they are in custody, or the county, there are probably issues. Ask some simple questions regarding address, the identity of the President and Governor, family members or current events. You can frequently receive a wealth of information, and you may receive information pertaining to other areas as well.

Medical History
Inquire as to any medical treatment. Frequently, clients will not tell you that they have been committed, but they may use phrases like treated or mis-diagnosed. Learn what medications they have taken in the past. Often you will hear drugs mentioned that should provide insight. If your client has seen multiple medical professionals not related to routine medical care or an acute incident, it may be an indicator that they or their family are seeking assistance for an undiagnosed mental health illness.

Behavior/Mood
How is your client acting? Does he behave appropriately for the setting? Does he interact appropriately with the people around him? Very few people are happy to be in custody, but if your client is exhibiting behavior out of the ordinary, take more time with the interview. Facilities regularly screen at intake for some basic mental health issues, among them depression and possible suicide risks. If he is sleeping all day, or not sleeping at all, inquire further. Is he speaking rapidly or so fast that he is difficult to understand? Does he appear to be extremely energetic or lethargic? Your client may tell you that he is contemplating suicide or wants to die. Take this seriously, inquire further, and if necessary alert the facility staff. Is your client excessively happy or excited? Is his mood fairly stable or does it vary from anger to hopeful or optimistic and back again or from happy to hopeless? Look for any repetitive movements or gestures. Sometimes these can indicate either a mental disorder or side effects from some of the early treatment regimens. If they act in a manner indicating intoxication, but there is no apparent source of intoxication, inquire further. Ask about what is important to them, everyone has family and interests, take the time to speak with them about their interests, family, work, projects or hobbies.

Basic Abilities
Can your client drive? This involves motor skills and mental skills. If they are the appropriate age to drive, and do not or cannot, follow up to determine why they are not driving. You may learn that their family does not trust them driving, or they have a history of blackouts or other issues. Can they obtain or maintain employment? Frequently our clients are not the best employees, but if they quit employment or school suddenly, look for other indicators of bi-polar or manic behavior. Inquire as
to their military service. Our military and courts have recognized that there are issues regarding post-traumatic stress disorder and how veterans are adapting to life following military service.

Affect
Is your client emotionally appropriate? Do they show emotion or vary their tone during conversation? If your client laughs at inappropriate times it could indicate several different mental issues. They may experiencing auditory or visual hallucinations. Similarly, if the client does not respond at all or is flat, it could be an area of concern.

Thought Processes
Listen to your client. Is he able to understand the information you are conveying and convey it back to you in his own words? Does he appear to be processing information in a rational logical fashion? Are they exhibiting bizarre or paranoid thought processes or an extreme lack of trust? If your client is convinced that they are the subject of a conspiracy or government plot, you may need the assistance of a mental health professional. If he provides insight in the form of “bizarre” thoughts, inquire further as to the source of these ideas. It is also very interesting to look at his letters to you. You may see a lack of logical thinking in his writings, or diagrams added which indicate issues.

Facility concerns
Every facility has medical treatment areas and confinement cells called different names in each facility. If your client is in a solitary cell and it is located on the same floor as the clinic, inquire of the jail staff. In the larger counties, there are even mental health wings, and you should know if your client is located there. The deputies are a tremendous source of information about your clients, watch them for signs when they bring your client to meet with you. In East Texas, frequently a deputy or bailiff will comment that a person is “10-99”

The first checklist was originally published as an appendix in *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, Lynda Frost and Adrienne Volenik, 14 Wash. U.J.L.& Policy 327, 356-58 (2004); The first and second checklists include material adapted from *Ethics: Working with Youth with Mental Disabilities*, by Dr. Lynda Frost and presented to the SBOT Special Education and the Juvenile Justice System; conversations with Jim Brown, Dr. Wade French, Dr. Timothy Proctor and Dr. Emily Fallis.
Appendix B

Sample Motion for Fitness to Proceed Evaluation

NO. CCL3-09-0091

IN THE INTEREST OF § IN THE COUNTY COURT
§ AT LAW NO. 3 OF
§ SMITH COUNTY, TEXAS,
§ SITTING AS A
§ JUVENILE COURT

B.T.

MOTION TO DETERMINE UNFITNESS TO PROCEED AS A RESULT OF MENTAL ILLNESS OR MENTAL RETARDATION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Counsel for B.T. in the above entitled and numbered cause, and makes this Motion to Determine Unfitness to Proceed as a Result of Mental Illness or Mental Retardation, and would show the Court as follows:

I.

This motion is brought pursuant to §55.31 of the Texas Family Code. Counsel for the Respondent requests the Court to make a determination as to whether the child respondent lacks the capacity to understand the proceedings in juvenile court or to assist in the child’s own defense and, thereby, is not fit to proceed in juvenile court. Counsel further requests that the Court stay the juvenile court proceedings and order the child respondent to be examined pursuant to §51.20 of the Texas Family Code. Counsel further requests that the Court hold a final hearing on this matter upon receipt of the examination results.

WHEREFORE, PREMISES CONSIDERED, Counsel for Respondent prays that this Honorable Court grant this motion and stay the juvenile court proceedings, order the Respondent
to be examined pursuant to §51.20 of the Texas Family Code, and hold a hearing upon receipt of the examination results.

Respectfully submitted,

______________________________
JIM HUGGLER
State Bar No. 00795437
100 E. Ferguson, Suite 802
Tyler, Texas 75702
903-593-2400
903-593-3830 fax

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing the Respondent’s Motion to Determine Unfitness to Proceed or Mental Retardation was delivered to Jeff Sanders on the 28th day of December, 2006

Jim Huggler
ORDER TO EXAMINE FOR LACK OF RESPONSIBILITY FOR CONDUCT AS A RESULT OF MENTAL ILLNESS OR MENTAL RETARDATION

_________________________ is appointed to examine B.T., a child, under §51.20 of the Texas Family Code with regard to whether he is unfit to proceed in juvenile court as a result of mental illness or mental retardation under §55.31 of the Texas Family Code. B.T. is ordered to submit to the exam. The examination must be performed by a doctor trained in making the mental illness and mental retardation evaluations for legal proceedings using the following definition:

“Unfitness to proceed” means the child lacks the capacity to understand the proceedings in juvenile court or to assist in the child’s own defense as a result of mental illness or mental retardation.

The examination report shall include a description of the procedures and tests used in the examination and the examiner’s observations and findings pertaining to whether or not the child is fit to proceed in juvenile court as a result of mental illness or mental retardation. If the results of the examination conclude that the child is not fit to proceed in juvenile court, the report shall include an opinion as to whether the child has mental illness or mental retardation.

If the results of the examination conclude that the child is a person with mental illness and/or mental retardation, the report may include an opinion as to whether or not the child meets the criteria for court ordered in-patient mental health services or commitment to a residential care facility under Subtitles C and D, Title 7, Health and Safety Code.

Signed this _________ day of ____________________, 2009.

_________________________
JUDGE PRESIDING
Appendix C

Sample Affidavit of Attorney

NO. 003-0295-09

IN THE INTEREST OF § IN THE COUNTY COURT
§ AT LAW NO. 3 OF
§ SMITH COUNTY, TEXAS,
§ SITTING AS A
§ JUVENILE COURT

B.T.

AFFIDAVIT OF ATTORNEY

BEFORE ME, on this day personally appeared James Huggler who states:

My name is James Huggler. I am over the age of eighteen and fully competent to make this affidavit. I am an attorney licensed to practice law in the State of Texas and the Eastern and Southern District Courts of the United States. I received my certification in criminal law by the Texas Board of Legal Specialization in 2005. I am a member of the College of the State Bar of Texas. I am a past president of the Smith County Bar Association, and a past and current president of the Smith County Criminal Defense Lawyer’s Association. I have attended numerous continuing education courses in criminal and juvenile law, specifically many involving recognizing and representing clients with mental illness. I have represented clients with mental retardation issues and those with mental illness.

On September 23, 2009, I was contacted by the County Court at Law #3 of Smith County, Texas regarding my receiving an appointment in the matter of B.T.. Mr. Truvia was alleged to have killed a teacher at John Tyler High School in Tyler, Texas that day. I met with my client that day, and have met with him regularly since that day. I have met with my client at least twenty times since September 23, 2009. The meetings have lasted between a few minutes and hours in length. During each of these meetings, my client has exhibited either: (1) a flat
affect with very little emotion, very slow blinking rate, and a very rigid body posture; or (2) minimal relaxation of body posture, but inappropriate emotional responses, including laughter or giggling or smiling. The smiling appears to occur when the client is focusing his eye contact on something behind myself, normally a wall in the detention center. There have been only two meetings where my client was able to use complete sentences. During the other meetings his responses were monosyllabic in nature with occasional two-three word responses.

As a result of my first two meetings with my client, I filed a Motion to Determine Fitness to Proceed on September 24, 2009. During those meetings, I had the opportunity to observe my client’s behavior and responses for a period of several hours.

During an early meeting I commented on the color of his shirt, then changed topics and came back about ten minutes later in the meeting and commented that I liked the color red of the shirt he was wearing. He agreed that it was a good color. However, during that meeting, my client was dressed in an orange shirt and pants like other juveniles housed in the facility.

I have sought and received records from the Texas Youth Commission, Terrell State Hospital, Tyler Independent School District, and the Andrews Center in Tyler, Texas. I have attempted to obtain records from two facilities in New Orleans that previously treated my client. My client was born and spent most of his life in New Orleans, he was evacuated prior to Hurricane Katrina to a facility in Corpus Christi, Texas. His family was evacuated after Hurricane Katrina to Tyler, Texas. Unfortunately, those facilities have informed me that they have lost their records as a result of that hurricane, in fact one facility that was in operation ceased operations as a result of the hurricane.

I have reviewed these records and they indicate a lengthy history of treatment for mental illness. There have been diagnoses of attention deficit hyperactivity disorder, conduct disorder,
schizophrenia and schizoaffective disorder. His intelligence quotient scores all range from 62 to 65 depending on specific tests administered.

I know that B.T. was previously represented in juvenile court in Smith County, Texas by attorney Stephen Hubbard. Mr. Hubbard confirmed that there were issues regarding fitness to proceed or competency when he represented Mr. Truvia ending in 2007. In 2007, this Court ordered an evaluation on B.T.’s fitness to proceed under the Family Code. That evaluation was performed by Dr. Paul Andrews. Dr. Emily Fallis has strongly disagreed with the opinion that B.T. was fit to proceed in 2007.

During each meeting with my client, I have been unable to determine if my client actually had comprehension of any matter we discussed. My client has been unable to relate back information to me regarding matters we have discussed. This includes, but is not limited to, the nature of the allegations against him, the possible consequences, his ability to testify, his right to confront and cross-examine witnesses, what is proper courtroom behavior. My client has been unable to discuss the facts as to what occurred on the day the conduct subject to the petition in the case occurred.

Counsel also testified as an officer of the court as to his observations of his client’s behavior actions, lack of understanding of the proceedings in juvenile court, and has no ability to participate in any meaningful way in his own defense, much less assist in his defense. Counsel incorporates that testimony by reference to this affidavit.

Counsel has reviewed this affidavit completely and believes this sets forth adequately counsel’s observations of his client’s behavior.

James Huggler
SUBSCRIBED AND SWORN TO BEFORE ME on this the ___ Day of January, 2010.

________________________________________
Notary Public in and for the State of Texas
Appendix D
Motion to Determine Competency in State Court

NOS. 003-82521-13 & 003-82522-13

STATE OF TEXAS § IN THE COUNTY COURT
§
vs. § AT LAW NO. 3 OF
§
COURTLAND LINDSEY § SMITH COUNTY, TEXAS

MOTION SUGGESTING INCOMPETENCY AND
REQUEST FOR EXAMINATION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Courtland Lindsey, Defendant, and files this motion suggesting incompetency and request for examination of Courtland Lindsey, Defendant, with respect to the issue of the competency of Defendant to stand trial herein, and shows as follows:

1. There is an issue in this cause regarding whether Defendant is "competent" to stand trial herein, as such term is defined by Article 46B.003 of the Texas Code of Criminal Procedure.

2. Request is hereby made that one or more disinterested experts be appointed as provided by Article 46B of the Texas Code of Criminal Procedure to examine Defendant with regard to the competency of Defendant to stand trial.

3. Request is further made for Defendant to be examined by Dr. Tim Proctor under Article 46B.021(f) of the Texas Code of Criminal Procedure.
4. In the event the Court determines that there is evidence to support a finding of incompetency, an incompetency trial is requested as provided by Article 46B of the Texas Code of Criminal Procedure.

Respectfully submitted

Law Office of James W. Huggler, Jr.
100 E. Ferguson, Suite 802
Tyler, Texas 75702
Tel: (903) 593-2400
Fax: (903) 593-3830

By:

James Huggler
State Bar No. 00795437
Attorney for Courtland Lindsey
NOS. 003-82521-13 & 003-82522-13

STATE OF TEXAS § IN THE COUNTY COURT

vs. § AT LAW NO. 3 OF

COURTLAND LINDSEY § SMITH COUNTY, TEXAS

AFFIDAVIT IN SUPPORT OF
SUGGESTION OF INCOMPETENCY

BEFORE ME, the undersigned authority, personally appeared James Huggler, who being duly sworn, stated the following:

"My name is James Huggler. I am at least 18 years of age and of sound mind. I am personally acquainted with the facts alleged herein.

"Affiant has met with the Defendant in this matter. Currently, the Defendant is restricted to a side-cell in the Smith County Jail. Statements made to Counsel by the Defendant indicate a need for examination regarding competency. At this time, Counsel doubts whether the Defendant understands his Constitutional rights, what he is charged with, and any possible consequences of this criminal case. Currently, Defendant is not capable of assisting Counsel with a meaningful defense, either factually or legally."

James Huggler, Affiant

Sworn to and subscribed before me on this the 13th day of February, 2014.
NOTARY PUBLIC

CERTIFICATE OF SERVICE

This is to certify that on February 13, 2014, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Smith County, 100 N. Broadway, 4th Floor, Tyler, Texas 75702, by hand delivery.

James Huggler
ORDER FOR EXAMINATION REGARDING INCOMPETENCY

On _________________________________, 2014, the Court considered the suggestion of incompetency to stand trial in this cause with respect to Courtland Lindsey, Defendant, and the Court is of the opinion that there is evidence to support a finding of incompetency and that Defendant should be examined as provided by Article 46B.021 of the Texas Code of Criminal Procedure.

It is, therefore, ORDERED that Dr. Tim Proctor, 11882 Greenville Ave., Suite 107, Dallas, Texas 75233, shall examine Courtland Lindsey to determine if Courtland Lindsey is incompetent to stand trial in this cause, as provided by Article 46B of the Texas Code of Criminal Procedure.

Courtland Lindsey is ORDERED to submit to the examination by Dr. Tim Proctor. Courtland Lindsey is further ORDERED is to be made available to Dr. Tim Proctor at the Smith County Jail as soon as possible.

It is further ORDERED that a written report of the examination as described below be submitted to the Court not later than thirty (30) days of the date of this Order.
Said written report shall state the expert's opinion on defendant's competency or incompetency to stand trial or explain why the expert is unable to state such an opinion and shall also: (a) identify and address specific issues referred to the expert for evaluation, (b) 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, (c) include a description of the procedures used in the examination, (d) state the examiner's observations, findings, and opinions pertaining to the Defendant's competency to stand trial, and (e) any recommended treatment.

Furthermore, if the examiner concludes that Defendant is incompetent to stand trial, the report shall include:

(1) the exact nature of the deficits resulting from the defendant's mental illness or mental retardation, if any, that impact the factors listed in Article 46B.024, contributing to the defendant's incompetency; and

(2) prospective treatment options, if any, appropriate for the defendant.

It is further ORDERED that the expert's report may not state the expert's opinion on the defendant's sanity at the time of the alleged offense, if in the opinion of the expert the defendant is incompetent to proceed.

It is further ORDERED that the expert provide the expert's report to the Court and the appropriate parties in the form provided by the Texas Correctional
Office on Offenders with Medical or Mental Impairments under Section 614.0032(b) of the Health and Safety Code.

It is further ORDERED that, upon request by Courtland Lindsey made herein, Dr. Tim Proctor shall have the opportunity to examine Defendant for the purposes of determining incompetency at the Smith County Jail.

It is further ORDERED that this matter is set for a hearing before this Court on the ____ day of ____________________, 2014, at ________, at which time the Court shall consider the reports of any experts herein. On the date of such hearing, the Court shall determine if there is evidence to support a finding of incompetency to stand trial and if it will be necessary to impanel a jury for an incompetency trial as provided by Article 46B.051 of the Texas Code of Criminal Procedure.

Signed on ____________________.

JUDGE PRESIDING
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA

V.

NO. 6:12CRXX(01)

Judge Leonard Davis

NAMED DEFENDANT

SEALED DEFENDANT’S MOTION FOR PSYCHOLOGICAL EXAMINATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, NAMED DEFENDANT, by and through his undersigned counsel of record, and files this Motion for Psychological Examination pursuant to Title 18 U.S.C. § 4241 (b) and 4242, and would show this Honorable Court as follows: to-wit:

I. PROCEDURAL HISTORY

On November 7, 2012 a sealed indictment was returned against the Defendant, NAMED DEFENDANT, alleging violations of federal law in multiple counts. Specifically alleged in the indictment were: Count 1, violations of 21 U.S.C. § 846 conspiracy to possess with intent to distribute methamphetamine; Counts 2, 3, 4, and 6, violation of 21 U.S.C. §841(a)(1) possession with intent to distribute methamphetamine; Count 5, violation of 18 U.S.C. §924(c) possession of a firearm in a drug trafficking offense. On date, Defendant NAMED DEFENDANT appeared before United States Magistrate Judge John Love for purposes of an initial appearance following a Petition for a Writ of Habeas Corpus Ad Prosequendum. Defendant, NAMED DEFENDANT was detained on the Government’s Motion and the arraignment and a Detention Hearing was
scheduled for DATE. Undersigned counsel was appointed on DATE pursuant to the Criminal Justice Act.

**II. GROUNDS FOR MOTION**

Defendant’s counsel requests that a psychological examination of Defendant be conducted pursuant to 18 U.S.C. § 4241(b) and 4242. Counsel for Defendant would request that the examination be conducted by the Bureau of Prisons at a federal medical facility, for a period of up to 120 days. Specifically, counsel for Defendant, NAMED DEFENDANT, would request this examination to determine whether Defendant, NAMED DEFENDANT is competent to stand trial in this matter and assist in his own defense and whether he was sane at the time of the offense.

This Motion for Psychological Evaluation is not sought for purposes of delay, but that justice may be served. Defendant’s counsel believes that Defendant may be suffering from a mental disorder rendering him incompetent to stand trial. This is based on personal observations of the Defendant, NAMED DEFENDANT by counsel from DATE through DATE. Defendant’s counsel believes a thorough psychological examination is appropriate. Defendant’s counsel understands that this motion tolls the speedy trial time from Indictment to trial pursuant to Title 18 U.S.C. § 3161(h)(8)(A).

WHEREFORE, PREMISES CONSIDERED, the Defendant NAMED DEFENDANT, prays that the Court issue an order commanding a psychological evaluation of Defendant NAMED DEFENDANT be conducted by the Bureau of Prisons, to determine the Defendant’s current mental condition. Specifically, Defendant NAMED DEFENDANT would request that
the examination be conducted to determine his present competency to stand trial and his sanity at the time of the offense. Defendant’s counsel has spoken with Assistant United States Attorney Bill Baldwin regarding this motion, and he is not opposed to the granting of this motion.

Respectfully submitted,

/s/
JAMES HUGGLER
Attorney for NAMED DEFENDANT
100 E. Ferguson, Suite 805
Tyler, Texas 75702
903-593-2400
903-593-3830 Fax
Texas Bar No. 00795437

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2012, I filed this sealed Motion with the District Clerk’s Office and hand-delivered a copy to the Government:

Bill Baldwin
U.S. Attorney’s Office
Tyler, Texas

And, I hereby certify that I have mailed by the United States Postal Service the document to the following non-CM/ECF participant(s).

/s/
JAMES HUGGLER
Attorney for NAMED DEFENDANT
100 E. Ferguson, Suite 805
Tyler, Texas 75702
903-593-2400
903-593-3830 Fax
Texas Bar No. 00795437
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA §

V. § NO. 6:12CRXX(01)

NAMED DEFENDANT §

ORDER

ON THIS DATE came to be considered the Defendant’s Motion for Psychological Examination.

This Court concludes that there is reasonable cause to believe that the Defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. This Court further finds that there is reasonable cause to believe that the Defendant may not have been sane at the time of the offense. Therefore, pursuant to Title 18 United States Code, Section 4241 and 4242, it is:

ORDERED THAT THE Defendant, NAMED DEFENDANT, shall be examined by a qualified psychologist/psychiatrist under the provisions of 18 U.S.C. §§ 4241, 4242 and 4247(b), to determine whether he is presently insane or otherwise so mentally incompetent as to be able to understand the proceedings against him or to assist properly in his own defense. It is further ordered that the examination be conducted by the Bureau of Prisons for a period of up to 120 days.

It is further ORDERED that the psychologist conducting the examination shall, within 30 days of said evaluation, submit a written report setting out findings of the mental competency examinations in accordance with 18 U.S.C. § 4247( c). The report shall be forwarded to Leonard
Davis, United States District Judge for the Eastern District of Texas, 211 W. Ferguson, Tyler, Texas 75702, with copies being furnished to Bill Baldwin, Assistant United States Attorney for the Eastern District of Texas, 110 N. College, Suite 700, Tyler, Texas 75702; and Jim Huggler, 100 E. Ferguson, Suite 805, Tyler, Texas 75702.