

The need for diverting defendants with mental illness or mental retardation away from the criminal justice system and into community-based treatment or habilitation programs has become a topic of interest for many stakeholders in the criminal justice system. Yet few are aware that Texas was one of the first states to adopt statutes aimed at encouraging diversion for defendants who have committed non-violent offenses.

This monograph—the third in a series on mental health and mental retardation and the Texas justice system—reviews these key statutes. It discusses the Texas Code of Criminal Procedure articles mandating courts order further examination of defendants when there is reason to believe they have a mental illness or mental retardation. Also discussed are personal bonding procedures—and how they apply in these cases.

Texas Appleseed is grateful to **Houston Endowment** and the **Hogg Foundation** for underwriting these resources for Texas judges and court personnel.

- Deborah Fowler, *Legal Services Director*
TEXAS APPLESEED

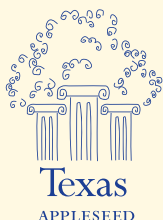
JUDICIAL OPTIONS: PERSONAL BOND STATUTES AND DEFENDANTS WITH MENTAL ILLNESS OR MENTAL RETARDATION

In 1993, the Texas legislature added Articles 16.22 and 17.032 to the Texas Code of Criminal Procedure to encourage diversion of defendants away from jail and into mental health treatment, where appropriate.

An analysis of the original bill noted that, up until then, “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.”¹ The bill analysis also stated that this creates “a grave injustice” and that:

“Regardless of guilt or innocence, these citizens should be provided appropriate care. The system of justice may proceed with the procedure that is called for; but, the health care issue is to be addressed if we are to act as a civilized society.”²

Despite the legislature’s attempt to cure these problems by adding Articles 16.22 and 17.032, these provisions are often under-utilized. Yet they can be an important tool for judges concerned with jail overcrowding and finding the best setting for mental health treatment.



Continued on following page

Article 16.22

Before this statute was enacted, the Mental Health Code prohibited providing temporary or extended mental health services to persons charged with crimes. Article 16.22 ushered in a new approach, allowing proper diagnosis and initiation of mental health services in an appropriate treatment setting notwithstanding criminal charges. Specifically, Article 16.22 requires:

- A sheriff to notify a magistrate within 72 hours of receiving evidence or a statement that may establish reasonable cause to believe that an alleged offender has a mental illness or is a person with mental retardation. The statute requires the magistrate to take the alleged offender's behavior and any prior mental health assessments into account.
- If the evidence or statement establishes reasonable cause, then the magistrate:
 - ❖ **Must** order the alleged offender to submit to a medical examination conducted either by the local mental health authority or some other disinterested expert experienced and qualified in mental health; and
 - ❖ **May** require the defendant be transferred to an appropriate mental health facility, as identified by the local mental health authority for such examination in accordance with that subsection, if the defendant refuses to comply. A psychiatrist affiliated with the local community MHMR center may conduct the examination, according to the statute.

The examining expert is required to provide a report to the magistrate and counsel within 30 days of the initial order. The report must include the examiner's observations and findings pertaining to:

- Whether the defendant has a mental illness or is a person with mental retardation;
- 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; and
- Treatment recommendations.

Article 17.032

This statute generally requires magistrates to release certain alleged offenders with mental illness or mental retardation on personal bond pending further criminal proceedings. If a defendant is released on personal bond, there is no requirement for sureties or other security.

More specifically, Article 17.032 directs a magistrate to release a defendant with mental illness or mental retardation on personal bond if:

- The pending charges do not include any of the violent crimes identified in subsection (a) of the statute;
- The alleged offender has not been previously *convicted* of any such violent crime; and
- The defendant was examined by the local mental health or mental retardation authority or another mental health expert under Article 16.22, and the expert:
 - ❖ Concluded that the defendant has a mental illness or is a person with mental retardation;
 - ❖ Concluded defendant is nonetheless competent to stand trial; and
 - ❖ Recommended treatment for the defendant.

Article 17.032 also directs the magistrate to require that the defendant obtain the inpatient or outpatient mental health services recommended under Article 16.22 expert if the magistrate finds either that (1) the defendant's mental illness is chronic in nature, *or* (2) the defendant's ability to function independently will continue to deteriorate without the benefit of treatment. Exceptions to treatment should be made only in rare circumstances, where good cause is shown. **A shortage of funds for treatment should not equate to "good cause" for not requiring treatment.**

Conclusion

Articles 16.22 and 17.032 provide a basis for authorizing and ensuring mental health treatment outside the jail environment pending further criminal proceedings. Even those jurisdictions that have not yet developed full-blown "jail diversion" programs can work with the local MHMR authority to divert eligible defendants away from jail and into treatment. This presents a win-win solution for counties looking for a cost-effective, viable alternative to providing treatment or habilitation services in a jail setting.

By Brian D. Shannon
Associate Dean for Academic Affairs and
Charles "Tex" Thornton Professor of Law
Texas Tech University School of Law

¹ HOUSE COMM. ON CRIM. JURISPRUDENCE, BILL ANALYSIS, TEX. H.B. 1605, 73RD LEG. (1993).

² *Id*



EVALUATION FOR RELEASE ON PERSONAL BOND: SCREENING FOR MENTAL ILLNESS AND MENTAL RETARDATION

The first step in any evaluation for release on personal bond under Article 17.032 of the Texas Code of Criminal Procedure is the simple recognition of mental illness or mental retardation. In some cases, a defendant's behavior may flag the need to pursue whether he or she has a mental illness. In other cases, jail personnel may discover during intake that a defendant's name appears on a list of prior MHMR clients. Other defendants may be identified using a jail screening tool.

Much work has been done in recent years with regard to jail screening for mental health issues. In the mid-1990's, the Texas Commission on Jail Standards required statewide implementation of a mental health screening instrument in all jails—and now, a decade later, this screening instrument is being revised. Recently, at the national level, a Brief Jail Mental Health Screen was developed to fill a perceived lack of screening instruments that are concise, easy to administer, and valid. The Brief Jail Mental Health Screen takes about 2.5 minutes to administer, is appropriate for use by correctional officers, and has been determined to be valid, particularly for men.¹ Still, this instrument appears to be the first of its type to be standardized and validated.

Less work has been done with regard to jail screening for mental retardation. While the Texas jail screening instrument contains two questions aimed at identifying mental retardation, they are generally seen as ineffective. However, where a magistrate has reasonable cause to believe a defendant has mental retardation, the defendant must be referred to a disinterested expert for examination, following the same process used to determine whether a defendant has a suspected mental illness. **The statute requires examinations in both cases.**

Examination by Expert

When the evidence raises a reasonable belief of mental illness or mental retardation, a magistrate is required to order an examination. The expert who examines the defendant must submit a report that will be given to counsel and to the magistrate. This report is not only required to include observations and findings related to whether the defendant has a mental illness or mental retardation, it also must include treatment recommendations. When determining appropriateness for release on personal bond, the required treatment recommendations should take the following clinical issues into account:

- **Complexity of mental health needs.** Some defendants will have relatively straightforward clinical needs. Effective treatment may entail resuming or beginning medication.
- **Availability of services.** The criteria for inpatient care is quite narrow, however the vast majority of individuals can be treated successfully on an outpatient basis. There are also some non-profits that provide services to persons with mental illness or mental retardation that may be willing to help if the local MHMR does not have the resources.
- **Willingness to accept treatment.** The defendant's interest in treatment, as well as his or her treatment history, should be considered.
- **Availability of support systems.** It is important to consider whether there are family members and interested friends available to help the defendant follow through with treatment—and whether safe, affordable housing and transportation to and from treatment are available if needed.

- **Risk assessment.** In addition to clinical factors, there are a number of risk factors that have been identified related to successful criminal justice diversion. Article 17.032 essentially performs the first level of risk assessment by eliminating violent offenders, or those with a previous conviction of violent offenses, from consideration for release on personal bond. A standardized risk assessment scheme, called the HCR-20, has been used in many criminal justice system settings, and has been well validated.

- **Service planning.** Development of a structured and individualized service plan is essential when releasing a person with mental impairments on personal bond. This plan should include a detailed assessment of service needs, including medications, case management, housing, substance abuse rehabilitation, and counseling. The plan should explain how those services will be provided to the defendant. Some communities have Assertive Community Treatment (ACT) programs, or even Forensic ACT programs, in place. However, the vast majority of individuals who are appropriate for release on personal bond can be supported by much less intensive services. This means that even those communities that do not have such programs in place can recognize the benefit of Articles 16.22 and 17.032.

Distinction Between 16.22 Evaluation and a Competency Evaluation

There has been some confusion among both MHMR centers and criminal justice stakeholders concerning the interface between Article 16.22 evaluations for release on personal bond and evaluations for competency to stand trial. This has been fueled, in part, by some confusing statutory language suggesting that the two evaluations could occur simultaneously. Yet the two are different in a number of ways.

The Article 16.22 evaluation is intended to be a brief screening to determine if an individual has a mental illness or mental retardation, whether the defendant is a good candidate for release on personal bond, and what treatment is needed. **The expert is not to perform a full competency exam.** Presumably, if the appointed mental health expert believes the defendant is both mentally ill and *incompetent* to stand trial, a full competency exam and further competency proceedings should be pursued. From an ethical standpoint, the role of a clinician assessing treatment needs is quite different from the role of a forensic expert working for the legal system.

Since the exam results and report are provided to the judge, defense counsel and prosecutor, those writing the reports should be encouraged to limit the information included in the report to that required by the statute. This is necessary in order to preserve a defendant's constitutional rights. **Under no circumstances should the report include information relating to the offense that is revealed during the course of the exam.**

Conclusion

Articles 16.22 and 17.032 are innovative statutes that support a growing need for diversion of appropriate individuals with mental illness and/or mental retardation from the criminal justice system through the use of personal bonds. The procedures contained in these statutes are currently underutilized. Their purpose is not fully understood, and many court systems have not pursued a coordinated and informed process for effectively following these important statutes. With better communication between judges, attorneys, and local MHMR providers, Articles 16.22 and 17.034 can become a powerful tool for reducing jail overcrowding, diverting defendants into treatment or habilitation programs, and effectively utilizing scarce county resources.

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

¹ While the screening tool has been found less reliable for women, it correctly diagnoses 61.6% correctly. Steadman, et al., Validation of the Brief Jail Mental Health Screen, Psychiatric Services, Vol. 56, No. 7 (2005).

TEXAS APPLESEED
BOARD MEMBERS

J. Chrys Dougherty,
Chair Emeritus
Graves, Dougherty,
Hearon & Moody, P.C.* *Austin*

R. James George,
Chair
George & Brothers, L.L.P.* *Austin*

Ronald Lewis,
Chair Elect
Baker Botts L.L.P.* *Houston*

Joe Crews,
Secretary-Treasurer
Crews & Elliott, P.C.* *Austin*

Michael Lowenberg,
Immediate Past Chair
Gardere Wynne Sewell LLP,* *Dallas*

Sarah J. Clark
Dallas

Mark Curriden
Vinson & Elkins, LLP,* *Houston*

Allene D. Evans
Perry & Haas, L.L.P.* *Austin*

David Gerger
David Gerger & Associates,* *Houston*

Robin Gibbs
Gibbs & Bruns L.L.P.* *Houston*

Sean Gorman
LeBoeuf, Lamb,
Greene & MacRae, LLP,* *Houston*

Carla Powers Herron
Shell Oil Company, *Houston*

Gregory Huffman
Thompson & Knight, LLP,* *Dallas*

Tommy Jacks
Jacks Law Firm, *Austin*

Susan Karamanian
Washington, D.C.

Charles Kelley
Mayer, Brown, Rowe & Maw LLP,*
Houston

Layne Kruse
Fulbright & Jaworski L.L.P.* *Houston*

Benigno (Trey) Martinez
Martinez, Barrera &
Martinez, L.L.P.* *Brownsville*

Tracy McCormack
Austin

Carrin F. Patman
Bracewell & Giuliani, LLP,* *Houston*

Thomas P. Perkins, Jr.
Dallas

David Sharp
Beirne, Maynard & Parsons, L.L.P.*
Houston

Allan Van Fleet
Greenberg Traurig, L.L.P.* *Houston*

Mark L. D. Wawro
Susman Godfrey L.L.P.* *Houston*

Luis Wilmot
San Antonio

**affiliations listed for
identification only*

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.

Texas Applesseed would like to thank [Brian D. Shannon](#) and [Susan Stone](#) for their contributions to this monograph. We also would like to thank the members of our Steering Committee: [Judge Gladys Burwell](#), Probate Court of Galveston County; [Judge Nancy Hohengarten](#), Travis County Court at Law #5; [Judge Philip Kazen](#), 227th Criminal District Court, Bexar County; [Judge Jan Krockner](#), 184th Criminal District Court, Harris County; [Judge Reva Towslee-Corbett](#), 335th District Court, Bastrop County; [Judge Martha Trudo](#), 264th District Court, Bell County; and [Judge Kristin Wade](#), County Criminal Court of Appeals, Dallas County.

We are also grateful to our Advisory Committee: [Daniel H. Benson](#), Paul Whitfield Horn Professor of Law, Texas Tech University School of Law; [William J. Edwards](#), Deputy Public Defender, Los Angeles County, CA; [David Evans](#), Executive Director, Austin Travis County MHMR; [Jaime Gonzalez](#), Chief Public Defender, Hidalgo County, TX; [Beth Mitchell](#), Senior Attorney, Advocacy, Inc.; [James R. Patton](#), Ed.D., Adjunct Associate Professor, The University of Texas at Austin; [Brian D. Shannon](#); [Susan Stone](#); and [Sarah Trimble](#), Assistant Public Defender, and [Walter Norris](#) and [Karen Thompson](#), Caseworkers, Mental Health Unit, Dallas County Public Defender.

* * * * *

Third in series. For copies of our other monographs,

*A Better Model: Ensuring Equal Justice for Persons
with Mental Illness & Mental Retardation*

and

Judicial Options: When Clients are Incompetent to Stand Trial

see our website, www.texasapplesseed.net.

* * * * *



512 EAST RIVERSIDE DRIVE, SUITE 212

AUSTIN, TEXAS 78704

WWW.TEXASAPPLESEED.NET

August 2006