
A JUDICIAL RESOURCE: PROTECTING CONSTITUTIONAL RIGHTS OF DEFENDANTS WITH MENTAL IMPAIRMENTS

Defendants with a serious mental illness (schizophrenia, bipolar disorder, or major depression) comprise approximately 16 percent of those involved in the criminal justice system. Studies show that another 4 to 10 percent of defendants have mental retardation, however these estimates may be low due to poor screening instruments.¹

With a quarter of all defendants at high risk of having difficulty understanding and protecting their constitutional rights, it is imperative that law enforcement, attorneys, and judges to take an active role in ensuring that due process guarantees extend to all who come through the system.

Under the Texas Code of Criminal Procedure, judges participate in protecting the constitutional rights of defendants. For example, provisions in the Code allow competence to be raised by the court sua sponte, and require admonishments be read to the defendant so that the court can convince itself of a “knowing waiver” of rights before a plea may be accepted.² This makes it important for judges to recognize signs of mental illness or mental retardation, as well as how a mental impairment may affect a defendant’s ability to understand and protect his or her constitutional rights.

Recognizing Mental Illness and Mental Retardation

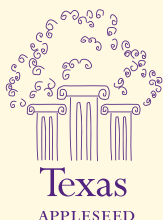
It is critical that judges and other court personnel adopt procedures and employ screening tools that can help accurately identify defendants with a mental illness or mental retardation. While most jails employ some form of screening, these tools are often inadequate and may allow some defendants to pass through the legal system without their mental disability being identified.

Mental Illness

According to the Texas Health and Safety Code, a mental illness “substantially impairs a person’s thought, perception of reality, emotional process, or judgment; or grossly impairs behavior as demonstrated by recent disturbed behavior.”³

A mental illness in no way affects a person’s intelligence (in fact, many persons with mental illness have high intelligence), but a “substantially impaired” thought process or perception of reality may affect the ability of that person to perceive accurately what is going on around him or her. For example:

- *Schizophrenia* impairs a person’s ability to think, make judgments, respond emotionally, remember, communicate, interpret reality, and/or behave appropriately so as to grossly interfere with the person’s capacity to meet the ordinary demands of life. Symptoms



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may include poor reasoning, disconnected and confusing language, hallucinations, delusions, and deterioration of appearance and personal hygiene.⁴

- *Bipolar Disorder or Manic-depressive Illness* is characterized by a person's moods alternating between depression and mania (exaggerated excitement). The manic phase of bipolar disorder is often accompanied by delusions, irritability, rapid speech, and increased activity.⁵
- *Major depression* is much more severe than common feelings of temporary sadness. People suffering from major depression may completely lose their interest in daily activities; feel unable to go about daily tasks; have difficulty sleeping; be unable to concentrate; have feelings of worthlessness, guilt, and hopelessness; and may have suicidal thoughts.⁶

Some Texas courts partner with mental health personnel in the community to help accurately screen defendants for mental illness and mental retardation.

Mental Retardation

Mental retardation is a developmental disability that generally refers to substantial limitations in a person's present levels of functioning. These limitations may be manifested by: 1) delayed intellectual growth; 2) inappropriate or immature reactions to one's environment; and/or 3) below average performance in academic, psychological, physical, linguistic, and social domains.⁷

The Texas Health & Safety Code defines mental retardation as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."⁸

Persons with mental retardation have a limited ability to learn and process information.⁹ While mental illness may be temporary, mental retardation is usually lifelong.

Mental retardation is:

- Rarely identified at the time of the arrest.
- Rarely identified at the time of police questioning.
- Rarely identified at arraignment.
- Infrequently identified at pretrial.
- Occasionally (10%) identified at trial.
- Often not identified until the person is in prison or even on death row.

Mental retardation is usually determined based on both an IQ test (with a score of around 70 or below) and a measurement of a person's adaptive behavior.¹⁰ Adaptive behavior describes the way people care for themselves and relate to others in the course of daily living.¹¹ Because mental retardation is a developmental disability, onset must have occurred before the person's 18th birthday.¹²

Even "mild" mental retardation constitutes a substantial disability. An IQ in the 60 to 70 range is approximately the scholastic equivalent to the third grade.¹³ In fact, the American Association on Mental Retardation discarded the "mild-moderate-severe-profound" classification system due to its concern that "mild mental retardation" was incorrectly viewed as something less than a "considerable disadvantage."¹⁴

There are several characteristics of persons with mental retardation that make it difficult for them to understand and protect their constitutional rights. These include:

- **Acquiescence.** When asked a yes/no question, persons with mental retardation are significantly more likely to answer "yes" regardless of the appropriateness of the response.

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- **Concrete thinking.** Persons with mental retardation have difficulty thinking abstractly.
- **Outer-directed behavior.** Failures in academic and social settings may cause some individuals with mental retardation to rely more on social and linguistic cues provided by others when they are trying to answer questions.
- **Strong desire to please others & deference to authority figures.** Many persons with mental retardation want to provide a “socially desirable” response, so much so that they often will answer a question incorrectly just because they think they are telling the interviewer what he or she wants to hear. They also may defer to an authority figure’s version of events, even if it is inaccurate. They are more likely to be influenced by leading questions and coercion during an interrogation.
- **Difficulty with social intelligence.** Persons with mental retardation cannot easily decipher the motives of other people and act on that information appropriately. As a result, they are more easily deceived than the general population.
- **Problems with language and attention span.** Persons with mental retardation often have difficulty expressing themselves and understanding the ordinary flow of language. They may have short attention spans and have difficulty remembering events.

The stigma of mental retardation is so great that individuals with mental retardation will often mask their disability with a “cloak of competence” in order to avoid its detection. This is true even when the consequences of having the disability identified would be beneficial to the person.

Persons with mental retardation often have learned ways to avoid having their disability detected, and will go to great lengths to cover it up,¹⁵ making the defendant vulnerable at key points in the criminal justice system.

Mental Illness & Mental Retardation May Affect Due Process

A mental illness or mental retardation may affect a defendant’s ability to understand his/her rights, including Miranda warnings.¹⁶ Also potentially compromised are a defendant’s ability or capacity to: 1) make “voluntary” statements or confessions; 2) give a reliable statement; 3) understand court proceedings; 4) knowingly, voluntarily, and intelligently waive constitutional rights, including the right to counsel, right to be present, right to trial and appeal, and right to testify; and 5) meaningfully participate in trial preparation and at trial.¹⁷

Steps Judges Can Take To Protect Due Process

There are several points at which a judge must ascertain whether a defendant is competent to protect or waive constitutional rights—and then ensure that legal protections are met:

- **Miranda warnings.** At the defendant’s initial court appearance following arrest, the magistrate is required to inform the defendant of his or her Miranda rights.¹⁸
- **Assistance requesting counsel.** The magistrate also must ensure that, if needed, the defendant receives help filling out forms to request appointment of counsel.
- **Ordering an examination.** If the magistrate has reasonable cause to believe that the defendant has a mental illness or mental retardation, article 16.22 of the Code of Criminal Procedure requires the magistrate to order an examination by the local MHMR.¹⁹
- **Release on personal bond.** If a 16.22 examination reveals a mental illness or mental retardation and the examining expert recommends treatment, the magistrate is required to release the defendant on personal bond (unless good cause is shown otherwise) if the defendant is

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competent, is not charged with a violent offense (the list of offenses is included in the statute), and the local MHMRA determines that appropriate community-based services are available.²⁰

Diverting the defendant away from jail and into community-based treatment ensures that he or she receives proper services and/or medication so that the defendant does not decompensate and become incompetent.

- **Guilty plea protections.** If the defendant enters a guilty plea at arraignment, the court is required to admonish the defendant according to art. 26.13 of the Code of Criminal Procedure.²¹ The statute does not allow the court to accept a guilty plea “unless it appears that defendant is mentally competent and the plea is free and voluntary.”²²
- **Jury trial protections.** If the defendant wishes to waive his right to a jury trial, it must be done

in person in writing in open court, and the court must enter its consent and approval on the record.²³ This is done to ensure a knowing and voluntary waiver of the right to jury trial.

- **Competency.** A defendant’s competence to stand trial may be raised by the court at any stage of the proceedings.²⁴
- **Pre-sentence investigation.** If a defendant who has been convicted of a felony appears to the judge to have a mental impairment, the pre-sentence investigation must include an evaluation which determines defendant’s IQ and adaptive behavior score.²⁵

Ensuring the integrity of the judicial system relies on all of its stakeholders to be vigilant to the problems some defendants may have in safeguarding their constitutional rights.

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1 TEXAS APPLESEED, MENTAL ILLNESS, YOUR CLIENT AND THE CRIMINAL LAW (3D ED. 2005); TEXAS APPLESEED, OPENING THE DOOR: JUSTICE FOR DEFENDANTS WITH MENTAL RETARDATION (2005).

2 TEX. CODE CRIM. PROC. art. 46B.004(A).

3 TEX. HEALTH & SAFETY CODE art. 571.003(14).

4 TEXAS APPLESEED, MENTAL ILLNESS, YOUR CLIENT, AND THE CRIMINAL LAW, *supra* n. 1, at 5.

5 *Id.*

6 *Id.*

7 TEXAS APPLESEED, OPENING THE DOOR: JUSTICE FOR DEFENDANTS WITH MENTAL RETARDATION 5 (2005).

8 TEX. HEALTH & SAFETY CODE ANN. § 591.003.

9 TEXAS APPLESEED, *supra* n. 7.

10 *Id.* at 6-7.

11 *Id.*

12 *Id.* at 8.

13 *Id.* at 8.

14 *Id.* at 8.

15 *Id.* at 15.

16 *Id.* at 15. Miranda warnings are written at the 7th grade reading level—posing a significant challenge to anyone with an intellectual disability.

17 *Id.* at 11-20.

18 TEX. CODE CRIM. PROC. art. 15.17(A)

19 TEX. CODE CRIM. PROC. art. 16.22

20 TEX. CODE CRIM. PROC. art. 17.032

21 TEX. CODE CRIM. PROC. art. 26.13.

22 *Id.* at art. 26.13(b).

23 TEX. CODE CRIM. PROC. art. 1.13(a); *see also Shuis v. State*, 11 S.W.3d 410, 412 (Tex. App. – Hous [14th Dist.] 2001, no pet.).

24 TEX. CODE CRIM. PROC. art. 46B.004.

25 TEX. CODE CRIM. PROC. art. 42.12 §9(i).

SAFEGUARDING RIGHT TO COUNSEL FOR DEFENDANTS WITH MENTAL ILLNESS OR MENTAL RETARDATION

“Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.... Without [the guiding hand of counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

- Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963)
(quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

In most Texas counties, fewer than 10 percent of misdemeanor defendants facing possible imprisonment receive appointed counsel.¹ A number of other defendants retain counsel or freely choose to represent themselves.

However, across Texas, monitors have observed courts routinely accepting unrepresented guilty pleas without obtaining constitutionally valid waivers of the right to counsel or complying with state indigent defense laws. Defendants with mental health issues are particularly vulnerable to waiving their right to counsel without understanding the consequences.

Defendants with mental illness or mental retardation may be incapable of exercising their right to counsel if a magistrate sends them back to jail to fill out a counsel request form without providing them “reasonable assistance” in completing such forms as required by law.²

The rights of such defendants are further compromised in courts where prosecutors and judges spend only a few minutes with an unrepresented

defendant before entry of a plea. Not only may defendants’ mental health issues go unidentified, but such defendants may believe they must discuss their case with the prosecutor — particularly in those courts where the prosecutor calls the docket and manages the courtroom, or where the judge does not consider counsel requests until every defendant has been contacted by the prosecutor with a plea bargain offer.

Failure to obtain a valid waiver of the right to counsel harms defendants, but it also creates significant liabilities for Texas counties by undermining the validity of convictions and exposing judges and prosecutors to potential legal and/or disciplinary action.

Courts can protect defendants and the integrity of their own proceedings by taking precautions against involuntary waivers of the right to counsel:

- In most counties, the procedures followed at magistration are not sufficient to elicit a valid waiver of the right to counsel.³ Thus, the court

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of jurisdiction is responsible for obtaining a waiver even if a defendant already appeared before a magistrate for an article 15.17 hearing and did not request counsel.

- The court cannot assume that a defendant who has not asked for counsel has validly asserted the right to self-representation. Prior to self-representation, the right to counsel must be affirmatively waived.⁴
- No contact between unrepresented defendants and prosecutors should be allowed before obtaining a valid waiver of the right to counsel. Failure to obtain a waiver before prosecutorial contact can raise doubts about the voluntariness of any subsequent waiver and expose the prosecutor to disciplinary action.⁵
- All requests for counsel, including oral requests, should be documented. No waiver of the right to counsel should be elicited after a defendant has requested counsel. Any waiver initiated by the state after a request for counsel has been made is invalid per se.⁶
- Written documents should not be relied upon exclusively when obtaining a waiver of right to counsel. Defendants may have mental health or literacy issues that prevent them from understanding the written waiver, and courts look beyond written waivers to surrounding circumstances when evaluating the validity of an alleged waiver.⁷
- Any defendant requesting court-appointed counsel should receive reasonable assistance in completing counsel request forms. A correctly completed counsel request form is not required in order for a request for counsel to be constitutionally valid.

Because of the questionable validity of any waiver of the right to counsel obtained from a defendant with mental illness or mental retardation, courts should

Case Study: Is Justice Being Served?

Ray (not his real name) is a 17-year-old diagnosed with major depression and dysthymic disorder.

He entered a vacant, unlocked apartment in his complex, and subsequently was charged with criminal trespass, a class B misdemeanor.

Ray's mother accompanied him to the courthouse for his first court appearance. He did not have enough money to hire a lawyer and, in the absence of counsel, his mother planned to help him explain his mental health issues to the court. Ray also needed his mother's help to fill out the paperwork necessary to request a court-appointed lawyer, but court personnel prevented her from entering the courtroom with her son.

While he was on his own in the courtroom, Ray was encouraged to talk to a prosecutor and evaluate a plea bargain offer. The court did not elicit an effective waiver of the right to counsel before he spoke to the prosecutor. Neither the court nor the prosecutor recognized that Ray had mental health issues that might impact his ability to knowingly waive counsel or understand the proceedings without the assistance of counsel. When he came out of the courtroom, his mother learned Ray had pleaded guilty and that he had not been given a court-appointed lawyer.

Ray has not been able to get a job since he entered his guilty plea. He currently is on probation, and his mother is worried that he will get into more trouble soon because he is unable to pay his probation fees without a job.

"[The court]...did this to my son without knowing about his deeper issues," Ray's mother said. "They set up my son to fail."

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adopt procedures that require the appointment of counsel for defendants who are suspected of being mentally incapable of requesting counsel for themselves. Many counties have included this requirement in their indigent defense plans.⁸

Proceeding without counsel holds serious consequences for the large number of criminal

defendants with mental health issues. Not every defendant will choose to have a lawyer, but courts must ensure that decisions to waive the right to counsel and to assert the right to self-representation are knowing and voluntary.

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1 Misdemeanor appointment rates can be calculated using caseload and appointment information reported by Texas counties to the Office of Court Administration, which is available at <http://tffd.tamu.edu/Public/default.asp>.

2 TEX. CODE CRIM. PROC. art. 15.17(a).

3 *Cf. Iowa v. Tovar*, 541 U.S. 77 (2004).

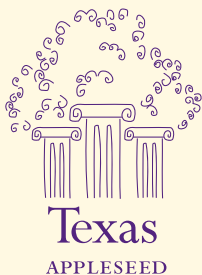
4 *Faretta v. California*, 422 U.S. 806, 835 (1975).

5 TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09.

6 *Michigan v. Jackson*, 475 U.S. 625, 635 (1986).

7 *See id.*

8 *See* THE EQUAL JUSTICE CENTER & TEXAS APPLESEED, QUALITY OF INITIAL COUNTY PLANS GOVERNING INDIGENT DEFENSE IN ADULT CRIMINAL CASES 5 (2002).



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