CPJC 10.4 General Comments on Competency

Article 46B of the Code of Criminal Procedure creates the jury-trial right for a determination of competency to stand trial on the merits. *See* Tex. Code Crim. Proc. arts. 46B.051, 46B.052. It is beyond the scope of this commentary to discuss the procedures required to reach that point. However, once the statutory procedures have been satisfied, the state, the defense, and the trial court all have the separate right to request a jury trial rather than a bench trial, and upon request, jury determination is mandatory. Tex. Code Crim. Proc. art. 46B.051.

Burden. In all cases, a defendant is presumed competent unless proven incompetent by a preponderance of the evidence. Tex. Code Crim. Proc. art. 46B.003(b). Since 1979, courts have been ascribing the burden to prove incompetency to the defendant. *White v. State*, 591 S.W.2d 851, 854 (Tex. Crim. App. 1979) ("[T]he burden of proof in a regular competency hearing will be on the defendant and not the State."); *Barber v. State*, 757 S.W.2d 359, 363 & n.1 (Tex. Crim. App. 1988) (citing *White* for the proposition that a "regular" competency hearing or "normal[]" situation warrants placement of the burden on the defendant). However, either party or the trial court itself can raise the issue of incompetency, Tex. Code Crim. Proc. art. 46B.004(a), and either party or the trial court can insist on a jury trial after the examiner's report, Tex. Code Crim. Proc. art. 46B.005(a), (c). Thus, for example, defense counsel can initiate the proceedings by making a suggestion of incompetency, and later, after the evaluations and reports have been filed, the state could request the jury trial, even when the defense does not seek it.

In addition, after a suggestion of incompetency, the parties and the trial court cannot agree among themselves that the defendant is competent. Rather, the court "must conduct a competency trial." *See Bluntson v. State*, 2021 WL 2677462 at *5–6(Tex. Crim. App. June 30, 2021) (not designated for publication); *but see* Tex. R. App. P. 77.3 (unpublished opinions of the court of criminal appeals must not be cited as authority by counsel or a court). Though by statute, the trial court and the lawyers together can agree the defendant is incompetent and thereby dispense with a jury trial. *See* Tex. Code Crim. Proc. arts. 46B.005(c), 46B.054.

The Committee also notes the particular ethical problems defense counsel can be presented in these cases. For example, counsel can agree under the statute, and over the objection of the defendant, that their client is incompetent, and thereby subject them to various forms of competency restoration and restrictions on liberty. *See* Tex. Code Crim. Proc. arts. 46B.054, 46B.071. Or, counsel might be directed by a client to argue competency when counsel sincerely believes the client is incompetent, and the statute expressly envisions that counsel may waive a jury trial and agree for commitment for restoration. And defense counsel might be called as a witness to testify against the defendant on the competency issue despite the prohibition in rule 3.08(b) of the Texas Rules of Professional Conduct on a lawyer continuing as an advocate if "the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client." Tex. Rules Disciplinary P. R. 3.08(b); *see Manning v. State*, 766 S.W.2d 551, 556–58 (Tex. App.—Dallas 1989), *affirmed and opinion adopted in part*, 773 S.W.2d 568, 569 (Tex. Crim. App. 1989); *see Gonzalez v. State*, 616 S.W.3d 585 (Tex. Crim. App. 2020) (unpublished section) (rule 3.08 0f the Texas Rules of Professional Conduct does not apply to article 46B trials).

The Dallas court of appeals has suggested that competency trials are "nonadversarial" in nature as a way to navigate the difficult legal and ethical issues raised. *Manning*, 766 S.W.2d at

554–55. The court of criminal appeals has cited this position in an approving manner, though in the unpublished section of *Gonzalez. Gonzalez*, 616 S.W.3d 585 (unpublished section); *see also* Tex. R. App. P. 77.3. Adopting this conclusion would support an argument that no party bears any burden in a competency trial and so lead to the conclusion that no statement of burden be included in the charge.

However, the U.S. Supreme Court has considered a California statute substantially similar to the Texas statute and concluded that it "establishes a presumption that the defendant is competent, and the party claiming incompetence bears the burden of proving that the defendant is incompetent by a preponderance of the evidence." *Medina v. California*, 505 U.S. 437, 440 (1992) (construing statute that "[i]t shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally competent"). The Court reviewed the laws of the fifty states and the common-law history of competency determinations and noted that some states define the burden as being on the defendant, while others define it as being on the raising party. *Medina*, 505 U.S. at 447–48. At issue for the Court was whether placing the burden on the defendant raising incompetence violated due process; the Court concluded that it did not. *Medina*, 505 U.S. at 447–48. At no point did it raise or consider the issue of there being no burden on any party. In fact, it understood the presumption of competence to have thereby placed the burden of proof on the party arguing for *in*competence. *Medina*, 505 U.S. at 447 ("Some States have enacted statutes that, like [the California statute], place the burden of proof on the party raising the issue.").

The court of criminal appeals has not addressed the *Manning* issue in a published opinion, and it has not overruled the *White* or *Barber* language. As a result, the Committee is including a burden section in the pattern charge but leaves it for courts and litigants to form their own arguments and approaches until such time as the court of criminal appeals clarifies the issue.

Unlike in just about any other criminal proceeding, though, the trial court has the right to set the issue before a jury, even when the parties agree otherwise. In such a case, the Committee recommends that the charge remove any mention of burden rather than attempt to ascribe any sort of burden to the trial court. Of course, one of the parties may agree to bear the burden in such a scenario to avoid confusion to the jury.

Evidence Related to the Indicted Offense. It is generally improper to introduce evidence of the offense itself into the competency hearing. *Barber*, 757 S.W.2d at 361; *Brandon v. State*, 599 S.W.2d 567, 580 (Tex. Crim. App. 1979); *Ex parte Hagans*, 558 S.W.2d 457, 461 (Tex. Crim. App. 1977); *Townsend v. State*, 427 S.W.2d 55 (Tex. Crim. App. 1968). The necessity of the separate trial on competency is so that the determination may be made "uncluttered by the evidence of the offense itself." *Hagans*, 558 S.W.2d at 461 (quoting *Townsend*, 427 S.W.2d at 63). A determination of competency should not include facts of the underlying offense because those facts "might well so stir the minds of the jury as to make difficult the exercise of calm judgment upon the question" of incompetency. *Haggans*, 558 S.W.2d at 461 (citing *Ramirez v. State*, 241 S.W. 1020, 1021 (1922)).

However, "[n]ot every mention of the crime itself will be prejudicial; to necessitate reversal evidence of the offense brought to the attention of the competency jury must be of such nature as to deny the accused a fair trial and impartial determination of his competency." *Barber*, 757 S.W.2d at 361 (citing *Brandon*, 599 S.W.2d at 580).

The court of criminal appeals considered charge language on this issue in *Goodman v. State*, 701 S.W.2d 850, 863 (Tex. Crim. App. 1985), *superseded on other grounds by Sattiewhite v. State*, 768 S.W.2d 271 (Tex. Crim. App. 1989). The first sentence of the charge stated the offense the defendant was charged with and the date of its alleged commission. *Goodman*, 701 S.W.2d at 863. The charge also contained instructions that the indictment was not to be considered by the jury as evidence of appellant's competency to stand trial and that the jury was not to consider appellant's guilt or innocence in their competency determination. *Goodman*, 701 S.W.2d at 863. The court found this language not to have caused harm, which of course is not the same as saying it was not error. *See Goodman*, 701 S.W.2d at 863.

In its charge, the Committee decided the better approach would be to recognize that the defendant has been accused of a criminal offense while firmly directing the jury to consider only their task—to decide competency.

Extraneous Offense and Bad Acts. The rules of evidence apply to competency trials. Tex. Code Crim. Proc. art. 46B.008. Presumably, then, rule 404(b) applies—but to what extent, and how should the trial court instruct on the issue?

At the very least, questions concerning the extraneous offense might be relevant to develop a theory of malingering. *C.f. Ex parte Harris*, 618 S.W.2d 369, 373 (Tex. Crim. App. 1981); *Blacklock v. State*, 820 S.W.2d 882, 885 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd); *Firo v. State*, 878 S.W.2d 254, 256 (Tex. App.—Corpus Christi–Edinburg 1994, pet. ref'd). Of course, the relevance could cut the other direction—a history of bad acts might be argued to be attributable to mental illness or intellectual disability to such a degree to tend to prove incompetence.

It remains unclear whether the purpose of 404(b) even applies to competency trials. Seemingly in dicta, the court of criminal appeals has suggested that it does not:

> The basic purpose for the exclusion of extraneous offenses [under rule 404(b)] is to prevent the accused from being tried for some collateral crime or for being a criminal generally. Such purpose is not applicable in a competency hearing. A [defendant's] guilt or innocence is to be determined in a separate trial where extraneous offenses are generally prohibited. In a competency hearing, all relevant facts concerning petitioner's mental competency should be submitted to the jury.

Ex parte Harris, 618 S.W.2d at 373.

What remains is the question of the proper jury instruction when evidence is raised under 404(b)—or even, presumably, when evidence is raised of the underlying offense itself. This Committee has published a general extraneous offense charge, which is required by law in criminal cases and mandates that the jury must find beyond a reasonable doubt that the defendant committed those extraneous acts. *See* CPJC 2.2. But competency trials are civil in nature, not criminal. *See White*,591 S.W.2d at 854–55, *overruled on other grounds by Bigby v. State*, 892 S.W.2d 864 (Tex. Crim. App. 1994) (noting that the traditional view of competency trials was that they were not a "criminal case" and thus determining that the civil rules concerning the

number of peremptory jury strikes applied rather than the criminal rules); *see also* George E. Dix & John M. Schmolesky, 43 Texas Practice: Criminal Practice and Procedure § 31:55, at 68 (3d ed. 2011). The court of criminal appeals has cited *White* favorably on this issue. *See Meraz v. State*, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990). Texas civil law does not have a clear application of burdens in an extraneous-offense situation. *See Texas Farm Bureau Mutual Insurance Co. v. Baker*, 596 S.W.2d 639, 642–43 (Tex. App.—Tyler 1980, writ ref'd n.r.e.) (allegation inadmissible when never proved). *See generally* Jeff Brown & Reece Rondon, Texas Rules of Evidence Handbook 273–74 (2023). The State Bar committees for civil law areas do not offer a pattern instruction.

The Committee believes that Texas courts would be unlikely to apply a beyond-a-reasonable-doubt standard to an instruction on extraneous bad acts when the burden in the trial itself is preponderance of the evidence. The reasoning in the long case law establishing the burden of such evidence in a criminal trial simply does not seem relevant to a competency trial.

The Committee offers here a modified 404(b) instruction in light of this difficult issue—with no statement of the burden:

> **Evidence of Wrongful Acts Possibly Committed by Defendant**
>
> During the trial, you heard evidence that the defendant may have committed wrongful acts. These acts were offered for the limited purpose of determining whether the defendant is competent to stand trial. You are not to consider that evidence at all unless you find that the defendant did, in fact, commit the wrongful acts. Those of you who believe the defendant did the wrongful act may consider it.
>
> Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose I have described. You may not consider this evidence for any other purpose. To do so would be improper.

The Committee recognizes that this instruction comes with no guidance from courts or from the civil practice pattern jury instructions. The Committee encourages the parties to study this issue and advance arguments appropriate for their cases in the trial courts.

Defendant's Right to Remain Silent. The defendant has a constitutional right to remain silent during trial on the merits. The question arises as to whether this right applies in the context of a competency trial.

Texas courts have not ruled on this issue. However, by statute a defendant's statements made during any course of 46B proceedings, including trial, "may not be admitted in evidence against the defendant in any criminal proceeding," unless the defendant first introduces them. Tex. Code Crim. Proc. art. 46B.007. Furthermore, the legislative immunity defined in article 46B.007 is substantially similar to the judicially created immunity in California that the Ninth Circuit considered when it held that the Fifth Amendment did not apply to California competency trials. *See Nguyen v. Garcia*, 477 F.3d 716, 725–26 (9th Cir. 2007, cert. denied).

The Committee believes that Texas courts would rule in a manner similar to the Ninth Circuit because testimony produced during a 46B trial cannot be used against the defendant at any future criminal proceeding. The interests of the Fifth Amendment do not seem implicated, and so the Committee has not included a Fifth Amendment instruction in this charge.

Undefined Terms. As the court of criminal appeals recognized in *Penry v. State*, 903 S.W.2d 715, 729–30 (Tex. Crim. App. 1995), because there are no statutory definitions of "rational," "reasonable," or "understanding," and because these words are not used in any technical sense, the jury is entitled to give them their ordinary meaning.. Just as no definitions of these terms are required in the jury charge, no further meaning need be given to the phrase "sufficient present ability to consult with his lawyer to a reasonable degree of rational understanding." *Penry*, 903 S.W.2d at 729–30. The only definition provided in the Committee's instruction is for "preponderance of the evidence."

Verdict Form. The Code provides, "If a jury determination of the issue of incompetency to stand trial is required … the court shall require the jury to state in its verdict whether the defendant is incompetent to stand trial." Tex. Code Crim. Proc. art. 46B.052. Read literally, this language might require the trial court to instruct the jury, "State in your verdict whether the defendant is incompetent to stand trial," and leave it to them to draft their own verdict. Or it might require the trial court to pose the question, "Is the defendant incompetent to stand trial?" The Committee, however, believed the plain language of the statute is directed at what the jury is required to articulate in its verdict—not how the trial court must achieve that result. Consequently, the Committee determined the legislative mandate would best be followed by offering the jury a verdict form with two options to select from: (1) we find the defendant competent, or (2) we find the defendant incompetent. The Committee also believed it would be unduly repetitive to include a recitation of the burden in the verdict form.

CPJC 10.5 Instruction—Competency

JURY INSTRUCTIONS

Members of the jury,

The parties will soon present final arguments. Before they do so, I must now give you the instructions you must follow.

You will have a written copy of these instructions to take with you and to use during your deliberations.

I first will tell you about some general principles of law that must govern your decision of the case. Then I will tell you about the specific law applicable to this case. Finally, I will instruct you on the rules that must control your deliberations.

GENERAL PRINCIPLES

The defendant has been accused of a crime and a question has arisen about whether he/she is incompetent to stand trial. A person cannot be tried for an offense if he is mentally incompetent. You are here to decide that question of competence. You are not deciding whether the defendant is guilty or not guilty of a crime—that is an issue for another jury.

A person is incompetent to stand trial if the person does not have sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against the person.

Presumptions

The defendant is presumed competent to stand trial unless proved incompetent. To find him incompetent, you must be convinced by a preponderance of the evidence that he is incompetent. The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

Burden of Proof

The [defendant/state] must prove that the defendant is incompetent by a preponderance of the evidence.

Jury as Fact Finder

As the jurors, you review the evidence and determine the facts and what they prove. You judge the believability of the witnesses and what weight to give their testimony.

In judging the facts and the believability of the witnesses, you must apply the law provided in these instructions.

Evidence

The evidence consists of the testimony and exhibits admitted in the trial. You must consider only evidence to reach your decision. You must not consider, discuss, or mention anything that is not evidence in the trial. You must not consider or mention any personal knowledge or information you may have about any fact or person connected with this case that is not evidence in the trial.

Statements made by the lawyers, [except when they testify], are not evidence. The questions asked by the attorneys are not evidence. Evidence consists of the testimony of the witnesses and materials admitted into evidence.

Nothing the judge has said or done in this case should be considered by you as an opinion about the facts of this case or influence you to vote one way or the other.

You should give terms their common meanings, unless you have been told in these instructions that the terms are given special meanings. In that case, of course, you should give those terms the meanings provided in the instructions.

While you should consider only the evidence, you are permitted to draw reasonable inferences from the testimony and exhibits that are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the evidence.

You are to render a fair and impartial verdict based on the evidence admitted in the case under the law that is in these instructions. Do not allow your verdict to be determined by bias or prejudice.

Admitted Exhibits

You may, if you wish, examine exhibits. If you wish to examine an exhibit, the foreperson will inform the court and specifically identify the exhibit you wish to examine. Only exhibits that were admitted into evidence may be given to you for examination.

Testimony

Certain testimony will be read back to you by the court reporter if you request. To request that testimony be read back to you, you must follow these rules. The court will allow testimony to be read back to the jury only if the jury, in a writing signed by the foreperson, (1) states that it is requesting that testimony be read back, (2) states that it has a disagreement about a specific statement of a witness or a particular point

in dispute, and (3) identifies the name of the witness who made the statement. The court will then have the court reporter read back only that part of the statement that is in disagreement.

The Verdict

The law requires that you render a verdict of either "competent" or "incompetent." You may return a verdict only if all twelve of you agree on this verdict. When you reach a verdict, the foreperson should notify the court.

LAW APPLICABLE TO THE CASE

You must determine whether the [defendant/state] has proved by a preponderance of the evidence either that:

(1) the defendant lacks the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or

(2) the defendant lacks a rational as well as factual understanding of the proceedings against him.

You must all agree on your verdict, but if you all agree one of these elements has been proven, you need not agree on which element has been proven.

If you all agree the [defendant/state] has failed to prove, by a preponderance of the evidence, both element 1 and 2 above, you must find the defendant competent.

If you all agree the [defendant/state] has proved, by a

preponderance of the evidence, either element 1 or 2 above, you must find the defendant incompetent.

RULES THAT CONTROL DELIBERATIONS

You must follow these rules while you are deliberating and until you reach a verdict. After the closing arguments by the attorneys, you will go into the jury room.

Your first task will be to pick your foreperson. The foreperson should conduct the deliberations in an orderly way. Each juror has one vote, including the foreperson. The foreperson must supervise the voting, vote with other members on the verdict, and sign the verdict sheet.

While deliberating and until excused by the trial court, all jurors must follow these rules:

1. You must not discuss this case with any court officer, or the attorneys, or anyone not on the jury.

2. You must not discuss this case unless all of you are present in the jury room. If anyone leaves the room, then you must stop your discussions about the case until all of you are present again.

3. You must communicate with the judge only in writing, signed by the foreperson and given to the judge through the officer assigned to you.

4. You must not conduct any independent investigations, research, or experiments.

5. You must tell the judge if anyone attempts to contact you about the case before you reach your verdict.

Your sole duty at this point is to determine whether the defendant has been proved incompetent. You must restrict your deliberations to this matter.

After you have arrived at your verdict, you are to use one of the forms attached to these instructions. You should have your foreperson sign his or her name to the particular form that conforms to your verdict.

After the closing arguments by the attorneys, you will begin your deliberations to decide your verdict.

[Include any other instructions raised by the evidence. Continue with the following verdict form.]

SIGNED on this _____ _____.

1 _____

2 JUDGE PRESIDING

VERDICT

We, the jury, unanimously find the defendant to be competent to stand trial at this time.

_____
PRESIDING JUROR

OR

We, the jury, unanimously find the defendant to be incompetent to stand trial at this time.

_____
PRESIDING JUROR