
**JAILS INTO ASYLUMS: HOW HARRIS COUNTY JAIL
BECAME THE LARGEST MENTAL HEALTH FACILITY IN
TEXAS AND WHY PEOPLE INCOMPETENT TO STAND
TRIAL FACE INDEFINITE DETENTION**

*J. Elizabeth Hergert**

INTRODUCTION	94
I. OVERVIEW OF THE PROBLEM	98
A. <i>Criminalizing Mental Illness</i>	98
B. <i>The Forensic Clearinghouse Waiting List</i>	100
C. <i>Case Study: Harris County Jail</i>	102
1. Harris County Jail is Overcrowded	102
2. Harris County Jail Has a Problem with Excessive Violence and Deaths	105
II. LEGAL BACKGROUND	108
A. <i>Texas Incompetency Law</i>	109
B. <i>The Problem of Indefinite Commitment</i>	111
C. <i>Texas Courts Affirm the Constitutionality of Confinement</i>	112
III. PROPOSED INTERVENTIONS	115
A. <i>Evaluation of Existing Solutions</i>	115
B. <i>Solving Indefinite Confinement</i>	118
C. <i>Solving the Conditions of Confinement</i>	119
CONCLUSION	120

* J.D. Candidate, 2025, Boston University School of Law. B.A. in Sociology, 2022, Rice University in Houston, Texas. Native and former resident of Harris County. Many thanks to my faculty advisor, Jonathan Feingold, for his invaluable assistance to clarify my argument. Thank you to the hardworking staff of the Public Interest Law Journal. I owe my gratitude most of all to former inmates of Harris County Jail and their loved ones for voicing their experiences of abuse while incarcerated.

INTRODUCTION

Harris County Jail in Houston, Texas, is the largest mental health provider in the state. This is a concern because jails are not capable of effectively treating mental illness and inflict further harm on their inmates.¹ In 2019, Harris County Sheriff Ed Gonzalez described the significant presence of severe mental illness: “On a daily basis, our jail has more inmates on psychotropic medications than any single mental health hospital in Texas.”² The situation has worsened since his statement: as of November 25, 2024, there were over 3,000 inmates on psychotropic medication at Harris County Jail, representing about thirty percent of the jail’s total population of over 9,500 people.³ Inmates on psychotropic medication can include defendants who have been determined incompetent to stand trial (IST) by a judge and committed to a state hospital for competency restoration treatment.⁴ Meanwhile, there are just over 2,200 psychiatric hospital beds across Texas’ nine state hospitals, over 700 of which are not being used due

¹ See Alex Stuckey & Maria De Jesus, *Texans with Mental Illnesses are Dying in Houston-Area Jails. They Didn’t Need to Be There.*, HOUS. LANDING (Feb. 8, 2023), <https://houstonlanding.org/texans-with-mental-illnesses-are-dying-in-houston-area-jails-they-didnt-need-to-be-there/> [https://perma.cc/X7V7-A6SU] (citing Houston Landing investigation which found that half of people who died of unnatural causes in jail custody in the Houston area had been previously flagged as mentally ill by jail or court staff); Ram Subramanian et al., *Incarceration’s Front Door: The Misuse of Jails in America*, VERA INST. OF JUST. (Feb. 2015), http://www.antonioacasella.eu/nume/VERA_feb15.pdf [https://perma.cc/38YF-6VCZ] (detailing the inherent economic, social, and physical harms of jail).

² Hannah Zedaker, *Harris County Leaders Target Better Jail Diversion Programs*, CMTY. IMPACT (Apr. 9, 2019, 2:00 PM), <https://communityimpact.com/houston/spring-klein/city-county/2019/04/09/harris-county-leaders-target-better-jail-diversion-programs/#:~:text=%E2%80%9COn%20a%20daily%20basis%2C%20our,%5D%20for%20months%2C%20even%20years> [https://perma.cc/P2JF-PQ9S].

³ *Jail Population*, HARRIS CNTY. TEX., <https://charts.hctx.net/jailpop/App/JailPopCurrent> [https://perma.cc/2ZWB-L5QJ] (last visited Nov. 25, 2024).

⁴ See TEX. CODE CRIM. PROC. ANN. art. 46B.001 (West 2017) (defining competency restoration as “the treatment or education process for restoring a person’s ability to consult with the person’s attorney with a reasonable degree of rational understanding, including a rational and factual understanding of the court proceedings and charges against the person”); TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2004) (defining incompetency as lacking sufficient present ability to consult with the person’s lawyer with a reasonable degree of rational understanding or lacking a rational and factual understanding of the proceedings against them); TEX. CODE CRIM. PROC. ANN. art. 46B.073 (West 2017) (committing defendant found IST to competency restoration). Some defendants found IST refuse to take psychotropic medication, but there is overlap between inmates on psychotropic medication and inmates who have been found mentally incompetent to stand trial. See Christopher Ponder, *‘Drugs Don’t Work in Patients Who Don’t Take Them’*, TEX. DIST. & CNTY. ATTY’S ASSOC. (Sept.-Oct. 2017), <https://www.tdcaa.com/journal/drugs-dont-work-in-patients-who-dont-take-them/> [https://perma.cc/J7LE-ZC4L] (outlining two-step process by which defendants found incompetent to stand trial may be forcibly medicated and statutory exceptions).

to healthcare staffing shortages.⁵ Until a bed becomes available, defendants found IST remain in the custody of the county sheriff, and their trial is paused for competency restoration.⁶

In 2006, the Texas Health and Human Services Commission (HHSC) created the Forensic Clearinghouse Waiting List (“waitlist”) to track the allocation of beds to people committed for psychiatric treatment.⁷ People on the waitlist are “denie[d] acceptance” into state hospitals until a bed becomes available.⁸ Because state hospitals lack sufficient space to treat the number of people committed for competency restoration, waitlisted defendants are spending increased periods of time in jail; wait times have grown from days to years as the waitlist has soared from a then-record 970 people in October 2020 to peak at 2,540 people in September 2022.⁹ The HHSC releases an update on the waitlist biannually, and as of May 2024, the number of people in Texas jails waiting for transfer to a state hospital is over 1,900.¹⁰ Though the waiting list

⁵ Stephen Simpson, *Texas’ Shortage of Mental Health Care Professionals is Getting Worse*, THE TEX. TRIB. (Feb. 21, 2023), <https://texastribune.org/2023/02/21/texas-mental-health-workforce-shortage/> [https://perma.cc/79AK-M925]; Sara Willa Ernst, *Waitlist Grows for Psychiatric Beds at State Hospitals in Texas*, HOUS. PUB. MEDIA (Dec. 22, 2022), <https://www.houstonpublicmedia.org/articles/news/health-science/2022/12/22/439874/waitlist-grows-for-psychiatric-beds-at-state-hospitals-in-texas/> [https://perma.cc/WHF3-REUL].

⁶ TEX. CODE CRIM. PROC. ANN. art. 46B.075 (West 2004). I use the term “defendant” to note that someone has been criminally charged, but once someone is found IST, their trial is paused, meaning that people on the waitlist are detained for lengthy periods of time without a conviction.

⁷ See *Lakey v. Taylor*, 435 S.W.3d 309, 314 (Tex. App. 2014); Cate Graziani et al., *Texas Outpatient Competency Restoration Programs Evaluation Report*, HOGG FOUND. FOR MENTAL HEALTH (2015), https://utw10282.utweb.utexas.edu/wp-content/uploads/2015/09/EvaluationReport_091815.pdf [https://perma.cc/F643-A4HN].

⁸ See *Lakey*, 435 S.W.3d at 314.

⁹ Michael Murney, *In Texas, The Waitlist For a Bed at State Mental Hospital Hits an All-Time High*, DALL. OBSERVER (Oct. 19, 2021), <https://www.dallasobserver.com/news/in-texas-the-waitlist-for-a-bed-at-a-state-mental-hospital-hits-an-all-time-high-12636706> [https://perma.cc/K9BU-TLCR] (reporting waitlist doubling from 970 in 2020 to 1,813 in 2021); David Barer & Josh Hinkle, *State Mental Hospital Backlog Grows, New Record Exceeds 2,500 Waiting in Jail*, KXAN (Oct. 25, 2022), <https://www.kxan.com/investigations/state-mental-hospital-backlog-grows-new-record-exceeds-2500-waiting-in-jail/#:~:text=State%20mental%20hospital%20backlog%20grows,waiting%20in%20jail%20%7C%20KXAN%20Austin> [https://perma.cc/4GHB-UCLD] (reporting new wait list record of 2,540).

¹⁰ TEX. HEALTH AND HUM. SERVS. COMM’N, REPORT ON WAITING LISTS FOR MENTAL HEALTH SERVICES 5 (May 2024), <https://www.hhs.texas.gov/sites/default/files/documents/mhs-waiting-lists-may-2024.pdf> [https://perma.cc/4LXM-44W9] [hereinafter MAY 2024 REPORT ON WAITING LISTS] (reporting 1,249 people on the non-maximum security waiting list and 720 people on the maximum-security waiting list waiting an average of 200 and 530 days, respectively, in Q2).

has contracted, people found IST are still spending months to years in jail before receiving treatment, during which time their trial is paused.¹¹

For this Note, Harris County Jail serves as a case study of the deficiencies in Texas incompetency law, which presents several concerns. The first is the conditions in which incompetent defendants are detained. The Jail has earned a reputation as a “troubled facility” due to its failure to maintain inmate safety.¹² According to both the Jail’s state regulatory board and anecdotal evidence from former inmates, conditions in the Jail are substandard.¹³ After twenty-seven in custody deaths occurred at Harris County Jail during 2022, former inmates brought federal suit against Harris County for its unconstitutional failure to maintain the safety of its detainees.¹⁴ Ultimately, people with mental illness who are detained in Harris County Jail while waiting to be transferred to a state hospital face notable risks of serious injury or death.

A secondary concern is that waitlisted defendants face potentially indefinite detention before they have been found guilty of a crime. The statutory limit on how long a defendant deemed IST may be detained is counted from the day the defendant is committed or the day that competency restoration treatment actually begins, whichever is later.¹⁵ Counting from the day treatment begins means that there is not an effective limit on how long people found IST who are waiting for a state hospital bed may spend in jail while their trial is paused for competency restoration. In effect, the waitlist determines when an inmate will be released from jail. This is a concern because there are thousands of people on the waitlist, so defendants found IST are waiting months to years in jail before receiving treatment.¹⁶ In jails like Harris County, inmates are also waiting without proper medical care or monitoring by jail staff.¹⁷

There is not a viable legal path for people found IST and placed on the waitlist to get out of jail. The Texas Code of Criminal Procedure prohibits interlocutory

¹¹ *Id.*

¹² See Stuckey & De Jesus, *supra* note 1; TEX. COMM’N ON JAIL STANDARDS, NOTICE OF NON-COMPLIANCE HARRIS COUNTY JAIL (Feb. 20, 2024), https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/03/Harris_NC_202402.pdf [<https://perma.cc/NJH2-75Q9>].

¹³ See Stuckey & De Jesus, *supra* note 1; TEX. COMM’N ON JAIL STANDARDS, NOTICE OF NON-COMPLIANCE HARRIS COUNTY JAIL (Feb. 20, 2024), https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/03/Harris_NC_202402.pdf [<https://perma.cc/QG5L-WB2G>].

¹⁴ Wagner et al. v. Harris Cnty., No. 4:23-cv-02886, 2024 WL 2836332, at *3 (S.D. Tex. June 4, 2024).

¹⁵ TEX. CODE CRIM. PROC. ANN. art. 46B.0735 (West 2021). Note that the day treatment begins is necessarily later than the day a defendant is committed to receive such treatment.

¹⁶ See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11.

¹⁷ TEX. COMM’N ON JAIL STANDARDS, SPECIAL INSPECTION REP., ANN. JAIL REP., INSPECTION REQUIREMENTS REVIEW AND NOTICE OF NON-COMPLIANCE HARRIS COUNTY JAIL (Mar. 8, 2023), <https://tjpprod.wpenginepowered.com/wp-content/uploads/2023/03/Harris-Co-Feb-2023-NONC.pdf> [<https://perma.cc/WX7G-LZHR>] (citing failures in medical care and monitoring inmates with known mental illness).

appeals of incompetency determinations.¹⁸ Texas courts have consistently rejected habeas petitions from defendants in jail awaiting transfer to a state hospital.¹⁹ When the Commissioner of the HHSC was sued for the Commission's waitlist practice, the Texas Court of Appeals ultimately held that the continued detention of waitlisted defendants is not unconstitutional because any unreasonable delay in transfer did not result from HHSC's policies or practices.²⁰

The upshot is that Harris County Jail is the largest mental health provider in the state of Texas, at least in part because of the number of waitlisted defendants the jail holds. This is a problem because defendants found IST are being detained in jail for months to years before being transferred to a competency restoration program, long before they have been convicted of a crime.²¹ The first concern is that jail is not a place for severely mentally ill people to be held for the purpose of regaining competency, and further, the plethora of problems inside Harris County Jail means that the Jail is not only ineffective but deadly for people found IST. The second concern is that people on the waitlist for transfer to a state hospital do not have a means of effectuating their liberty and are dependent on the slow process of the waitlist to receive treatment for their mental illness.

In Part I, I give an overview of the problem. I discuss the criminalization of mental illness, the development of the soaring waitlist, and Harris County Jail as an example of how people with mental illness are treated in Texas jails. In Part II, I detail the legal context that has allowed the problem to proliferate. I examine the statutory scheme of Texas incompetency law, the limits that the Supreme Court has placed on indefinite detention, and how Texas courts have affirmed the constitutionality of the waitlist and ensuing confinement. In Part III, I conclude with proposed interventions to the problem I have described. I first review existing efforts to solve the problem and then suggest alternative solutions to the possibility of indefinite detention and conditions of confinement.

¹⁸ TEX. CODE CRIM. PROC. ANN. art. 46.011 (West 2005).

¹⁹ See, e.g., *Queen v. State*, 212 S.W.3d 619, 623 (Tex. App. 2006); *Ex parte Valero*, No. 08-22-00172-CR, 2023 Tex. App. LEXIS 901, at *9-10 (Feb. 13, 2023); *Ex parte Flint*, No. 03-10-00852-CR, 2013 Tex. App. LEXIS 9090, at *16 (July 25, 2013); see also *In the Best Interest & Prot. of D.B.*, No. 05-16-00381-CV, Tex. App. LEXIS 12429, at *1 (Tex. App. Nov. 18, 2016) (interlocutory appeal from determination of incompetency rejected for lack of jurisdiction).

²⁰ *Lahey*, 435 S.W.3d. at 312.

²¹ See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11.

I. OVERVIEW OF THE PROBLEM

Jails are not equipped to provide mental health care and pose further harm to their inmates.²² Yet jails like Harris County are some of the largest mental health facilities in the United States.²³ In a process termed “transinstitutionalization,” many states, including Texas, closed their mental institutions and funneled mentally ill people into jails and prisons.²⁴ This transformation of mental health care created a gap in public services through which indigent people with mental health issues have been swept into jail.²⁵ Presently, the waitlist of people in jail who need to be transferred to a state hospital for competency restoration is extensive; defendants found IST are waiting months to years in jail without being convicted of the crime that placed them in detention.²⁶ Further, people routed to Harris County Jail may die during this wait because of the dangerous conditions within the jail.

A. *Criminalizing Mental Illness*

The entrapment of mentally ill people in jails can be traced to two separate but interrelated trends: the decline in public mental health care and the rise of mass incarceration.²⁷ The movement to deinstitutionalize mental healthcare in the 1960s led to the widespread closure of state mental hospitals.²⁸ While the population in Texas soared from over ten million people to twenty-eight million

²² See Stuckey & De Jesus, *supra* note 1 (citing Houston Landing investigation which found that half of people who died of unnatural causes in jail custody in the Houston area had been previously flagged as mentally ill by jail or court staff).

²³ Eric Westervelt & Liz Baker, *America's Mental Health Crisis Hidden Behind Bars*, NAT'L PUB. RADIO (Feb. 25, 2020), <https://www.npr.org/2020/02/25/805469776/americas-mental-health-crisis-hidden-behind-bars> [<https://perma.cc/TH6K-JLDL>] (“Today the three biggest mental health centers in America are jails: LA County, Cook County, Ill. (Chicago) and New York City’s Rikers Island jail.”).

²⁴ See Ralph Slovenko, *The Transinstitutionalization of the Mentally Ill*, 29 OHIO N. U. L. REV. 641 (2002) (defining transinstitutionalization as the alternate routing of mentally ill people from mental health to criminal justice system such that prisons and jails now serve as large providers of mental health services).

²⁵ See Paul F. Stavis, *Why Prisons Are Brim-Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. C. R. L.J. 157 (2000) (concluding that there is a direct relationship between the closure of mental institutions and the rise of mentally ill incarcerates and proposing revisiting involuntary commitment instead).

²⁶ See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11.

²⁷ See Cecil J. Hunt, *The Jim Crow Effect: Denial, Dignity, Human Rights, and Racialized Mass Incarceration*, 29 J. OF C. R. AND ECON. DEV. 15 (2016) (building on Michelle Alexander’s *The New Jim Crow*, Hunt argues that the explosive growth of the American carceral system is racialized in what he terms “The Jim Crow Effect”); Murney, *supra* note 9.

²⁸ Samantha Raphelson, *How The Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis*, NAT'L PUB. RADIO (Nov. 30, 2017, 1:15 PM), <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis> [<https://perma.cc/MB66-QJBH>].

people between 1964 and 2016, the number of state hospital beds dropped from 14,921 to 3,013 during the same period.²⁹ States also adopted “order maintenance” policing, which focuses on arresting people engaged in low-level offenses as a means to search for or prevent more serious crimes.³⁰ In Texas, misdemeanor crimes like resisting arrest, trespassing, disorderly conduct, or criminal mischief often introduce people with severe mental illness into the criminal justice system.³¹

Meanwhile, the Texas legislature has increased spending on policing and incarceration at the cost of public health services.³² Texas spends \$6.9 billion on the incarceration, probation, and parole of adults each biennium.³³ This investment has led to a 328% increase in the number of people incarcerated in Texas since 1983.³⁴ The increase in incarceration has not been applied equally; Black and Hispanic people are overrepresented in Texas prisons and jails.³⁵ In fact, Black people in Texas are incarcerated at a rate 3.3 times higher than white people in the state.³⁶ Further, the expenses required to aggressively police people of color are directly related to diminished public resources for mental health treatment.³⁷

The proof is in the budget: Texas spends the most of any state on prisons and jails but ranks forty-ninth in the nation with regard to the capacity of its behavioral health care providers.³⁸ Although Texas already spends less than other states on health and welfare, the state has increased its allocations towards

²⁹ Murney, *supra* note 9.

³⁰ Former federal prosecutor Paul Butler uses the term “the Chokehold” to describe how “order maintenance” policing and prosecution is used to physically and systemically oppress Black men. See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 65 (2017).

³¹ *Misdemeanors in Texas: Classifications and Penalties*, TEX. CRIM. DEF. GRP., <https://texascriminaldefensegroup.com/misdemeanors-in-texas-classification-penalties/> [<https://perma.cc/4SBJ-Z7TB>] (last visited Dec. 27, 2024).

³² Alycia Castillo et al., *Spend Your Values, Cut Your Losses: Smart and Safe Justice System Solutions That Put Communities First*, TEX. CTR. FOR JUST. AND EQUITY 2 (Nov. 2020), <https://www.texascjc.org/system/files/publications/Spend%20Your%20Values%20Cut%20Your%20Losses%20Portfolio.pdf> [<https://perma.cc/V9SL-HCML>].

³³ *Id.*

³⁴ *Incarceration Trends in Texas*, VERA INST. OF JUST. 1 (Dec. 2019), <https://www.vera.org/downloads/pdffdownloads/state-incarceration-trends-texas.pdf> [<https://perma.cc/5MZA-A9QW>].

³⁵ See *Texas Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/TX.html#:~:text=Texas%20has%20an%20incarceration%20rate,any%20democratic%20country%20on%20earth> [<https://perma.cc/42QF-XE2L>] (last visited Dec. 28, 2024).

³⁶ *Id.*

³⁷ See Sarah Reyes & Alycia Castillo, *Reversing the War on Drugs in Texas*, TEX. CTR. FOR JUST. AND EQUITY (Apr. 2022), <https://www.texascjc.org/system/files/publications/2022-04/reversing-war-drugs-texas-prioritizing-real-public-health-and-safety-texans.pdf> [<https://perma.cc/STC7-MBZG>].

³⁸ Castillo et al., *supra* note 32.

police and corrections budgets, necessarily decreasing its investment in public mental healthcare.³⁹ Over the past thirty years, Texas' spending on prisons and jails has grown five times faster than its spending on elementary and secondary education.⁴⁰ Spending in Harris County follows a similar pattern; of the city's total \$6.2 billion budget for fiscal year 2024, the City of Houston approved a \$1.6 billion budget for the Houston Police Department.⁴¹ In sum, Texas' legislative bodies are allocating an increased amount of funding for incarceration while lowering spending on public health. As a result, people with mental illness are landing in jail instead of healthcare settings.

B. *The Forensic Clearinghouse Waiting List*

The lack of sufficient state hospital space to treat all defendants found IST has produced the Forensic Clearinghouse Waiting List ("waitlist") for inpatient competency restoration services.⁴² HHSC maintains two separate waitlists for state hospital beds for inpatient treatment of incompetent defendants: one for non-maximum security units and one for maximum security units.⁴³ Per HHSC's most recent report, there were 1,249 people on the waitlist for non-maximum security units, who spent an average of 200 days, or over six months, on the list.⁴⁴ For the maximum security waitlist, over 700 people on the list waited an average of over 500 days.⁴⁵

Over the past decade, the waitlist has grown, lengthening the time that waitlisted defendants spend in jail. When the waitlist encompassed 354 people by September 2016, HHSC warned the Texas legislature that the list had "reached crisis levels."⁴⁶ Yet the problem has drastically worsened since then.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Ashley Brown, *City of Houston Approves \$6.2 Billion Budget, Includes Employee Raises, Funding for Drainage Projects*, HOUS. PUB. MEDIA (Jun. 8, 2023, 3:48 PM), <https://www.houstonpublicmedia.org/articles/news/city-of-houston/2023/06/08/453997/city-of-houston-approves-6-2-billion-budget-includes-employee-raises-funding-for-drainage-projects/> [https://perma.cc/9GHV-NRYW].

⁴² See *Competency Restoration*, TEX. HEALTH AND HUM. SERVS. COMM'N, <https://www.hhs.texas.gov/providers/behavioral-health-services-providers/competency-restoration> [https://perma.cc/WW44-NSN] (last visited Dec. 27, 2024).

⁴³ MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11; TEX. CODE CRIM. PROC. ANN. art. 17.032(a) (West 2017) (offenses which require maximum security placement: murder, capital murder, kidnapping, aggravated kidnapping, indecency with a child, assault, sexual assault, aggravated assault, aggravated sexual assault, injury to a child, elderly individual or disabled individual, aggravated robbery, continuous sexual abuse of young child or disabled individual, and continuous trafficking of persons).

⁴⁴ MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11.

⁴⁵ *Id.*

⁴⁶ JOINT COMM. ON ACCESS AND FORENSIC SERV., DEP'T OF STATE HEALTH SERV. & HEALTH AND HUM. SERVS. COMM'N, REPORT OF THE JOINT COMMITTEE ON ACCESS AND FORENSIC SERVICES FOR FISCAL YEAR 2016 1 (2016), <https://www.kxan.com/wp-content>

The waitlist nearly doubled from under 1,000 people in 2020 to 1,800 people by October 2021.⁴⁷ At that time, criminal magistrate Roxanne Nelson described how the waitlist system has deteriorated during her time as a judge:

When I started in March 2010, if I couldn't get someone into a bed within twenty-one days, I was upset. Because I thought twenty-one days is a long time for somebody to stay in a county jail with a mental illness. . . . I thought twenty-one days was [a] terribly long time for somebody to be stuck in our county jails. Now, if someone told me they could get someone a bed in twenty-one days, I'd be thanking the Lord.⁴⁸

Just under a year later in September 2022, the waitlist hit an all-time high of over 2,500 people.⁴⁹ The average wait time for non-maximum security beds was almost 250 days, and wait times for maximum security beds was 699 days, or about two years.⁵⁰ As shown by average wait times, an overloaded waitlist forces people found IST to spend extended periods of time in detention.

A separate issue that has worsened waiting times is Texas' shortage of mental health professionals. The COVID-19 pandemic has exacerbated the staffing shortage such that state hospitals employed 25% fewer people at the end of 2022 as compared to 2019.⁵¹ Over 700 of the 2,911 beds across state psychiatric hospitals are unavailable for use because of the staffing shortage.⁵² The shortage of healthcare staff has been a persistent problem, but HHSC began reporting results from raises implemented in June 2022, showing an increase in applicants and improvements in filled positions.⁵³ Greater healthcare staffing is a cause for optimism, but as long as state hospital beds remain offline, recent growth should be viewed as an initial step in a longer campaign.

/uploads/sites/40/2020/04/joint-comm-access-forensic-services-fy2016.pdf [https://perma.cc/UAX7-XFVM]; HOUSE SELECT COMM. ON MENTAL HEALTH, INTERIM REPORT TO THE 85TH TEXAS LEGISLATURE, at 88 (2016).

⁴⁷ Murney, *supra* note 9.

⁴⁸ *Id.*

⁴⁹ Barer & Hinkle, *supra* note 9.

⁵⁰ *Id.*

⁵¹ Simpson, *supra* note 5.

⁵² *Id.* (reporting 717 beds offline); Sara Willa Ernst, *Waitlist Grows For Psychiatric Beds at State Hospitals in Texas*, HOUS. PUB. MEDIA (Dec. 22, 2022), <https://www.houstonpublicmedia.org/articles/news/health-science/2022/12/22/439874/waitlist-grows-for-psychiatric-beds-at-state-hospitals-in-texas/> [https://perma.cc/785C-WZV5] (reporting 842 beds offline).

⁵³ See *Presentation to the House Services Committee on State Hospitals and the Forensic Waitlist*, TEX. HEALTH AND HUM. SERVS. COMM'N (Jun. 8, 2022), <https://www.lhs.texas.gov/sites/default/files/documents/presentation-to-the-house-human-services-committee.pdf> [https://perma.cc/P32W-UVGU] (report by Scott Schalchlin, Health and Specialty Care System Deputy Executive Commissioner).

C. Case Study: Harris County Jail

Texas' jail regulatory body, the Texas Commission on Jail Standards ("TCJS"), has found Harris County Jail to be out of compliance with state standards on numerous occasions, almost twice per year since 2018.⁵⁴ As of August 2024, Harris County Jail is finally in compliance with minimum state standards after nearly two years of continuing deficiencies towards inmates with mental illness noted in August of the previous year.⁵⁵ The Jail's extended failure to correct these issues led to an "escalated and enhanced enforcement" by TCJS as well as a federal investigation and a lawsuit against Harris County regarding the deaths and serious injuries of former inmates.⁵⁶ Due to these persisting systemic problems, assigning defendants found IST to Harris County Jail is a potential death sentence.

1. Harris County Jail is Overcrowded

Harris County Jail has recently come into compliance with minimum safety standards after a two-year streak of non-compliance.⁵⁷ Previous inspection

⁵⁴ *Non-Compliant Jail Reports*, TEX. JAIL PROJECT, <https://www.texasjailproject.org/resources/texas-commission-on-jail-standards/non-compliant-jail-reports/> [https://perma.cc/F8YX-PSKD] (last visited Apr. 25, 2024) (Harris County Jail cited for supervision of inmates on August 23, 2018; sanitation and food service violation on November 26, 2018; health services violation on February 12, 2019; discipline, food service, health services, and sanitation violation on March 4, 2019; health services violation on December 2, 2019; supervision violation on December 4, 2020; health services and supervision violation on December 16, 2020; sanitation and supervision violation on November 15, 2021; admission violations in the booking area on September 7, 2022; life safety violation on October 5, 2022; health services violation on December 19, 2022; health services and supervision violation on March 8, 2023; supervision violation on April 17, 2023; supervision violation on August 18, 2023; health services and supervision violation on February 12, 2024; clothing, personal hygiene, and bedding and discipline and grievances violation on April 8, 2024).

⁵⁵ TEX. COMM'N ON JAIL STANDARDS, NOTICE OF NON-COMPLIANCE HARRIS CNTY. JAIL (Apr. 10, 2024), https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/04/Harris_Special_NC_202404.pdf (jail standards governing admission and release, classification and separation of inmates, health services, inmate supervision, clothing, personal hygiene, and bedding, sanitation, food services, discipline and grievances, recreation and exercise, education and rehabilitation programs, work assignments, and other miscellaneous rules).

⁵⁶ Monroe Trombly, *State Regulators: Harris County Jail Still Out of Compliance, Faces 'Escalated' Enforcement*, HOUS. LANDING (Aug. 3, 2023), <https://houstonlanding.org/state-regulators-harris-county-jail-still-out-of-compliance-faces-escalated-enforcement/> [https://perma.cc/ZP2G-BER7] [hereinafter Trombly, *State Regulators*]; Alex Nguyen, *FBI Announces Investigation into Deaths at Harris County Jail*, HOUS. LANDING (Feb. 13, 2023, 8:00 PM), <https://www.texastribune.org/2023/02/13/fbi-investigations-harris-county-jail-deaths/> [https://perma.cc/2C3S-2P42]; Wagner et al. v. Harris Cnty., No. 4:23-cv-02886, 2024 WL 2836332, (S.D. Tex. Aug. 7, 2023).

⁵⁷ See Monroe Trombly, *Finally in Compliance: Harris County Jail Passes State Inspection for the First Time in Two Years*, HOUS. LANDING (Aug. 28, 2024), <https://houston>

failures include processing delays of more than 48 hours during which people are kept in holding cells, failure to provide medical care, failure to properly monitor an inmate who died in jail, and staffing shortages.⁵⁸ Harris County Jail did not comply with minimum state standards for jail conditions from September 2022 onwards.⁵⁹ Finally, the Jail passed its August 2024 inspection, though not without several deficiencies: (1) the Sheriff's Office wrongly included emergency and transportation officers in its state mandated staffing ratio, (2) two fire alarm control panels need to be replaced, and (3) jail staff were late to several routine inmate checks.⁶⁰ The Sheriff's Office credits increased staff retention for its progress, noting that there are only ninety-nine staff openings,⁶¹ in comparison to 180 officer openings earlier this year.⁶² Though the Jail has made notable improvements, county regulators must set higher goals than continued understaffing and barely passing inspection.

In response to prior non-compliance, TCJS took a more aggressive approach to enforcement. In November 2023, TCJS ordered Harris County Sheriff's Office to create a plan to outsource inmates to other facilities by December 1.⁶³ For each month that the Sheriff's Office did not comply, the Jail would lose 144 of its total 500 variance beds that expand building capacity past its design.⁶⁴ This order resulted in a \$11.3 million contract with Tallahatchie Correctional Facility, a private prison near Tutwiler, Mississippi, to send 360 jail inmates for at least one year with an option to renew for up to four years.⁶⁵

landing.org/finally-in-compliance-harris-county-jail-passes-state-inspection-for-first-time-in-2-years/ [https://perma.cc/QXW4-GMD3] [hereinafter *Finally in Compliance*].

⁵⁸ See *id.*; TEX. COMM'N ON JAIL STANDARDS, *supra* note 17.

⁵⁹ See Trombly, *State Regulators*, *supra* note 56.

⁶⁰ Trombly, *Finally in Compliance*, *supra* note 57. If the Jail does not correct these deficiencies, they may not pass their next inspection. *Id.*

⁶¹ Eileen Grench & Michael Zhang, *Sheriff's Office Reports Improvements in Harris County Jail as Scrutiny from State Continues*, HOUS. LANDING (Nov. 8, 2024), <https://houstonlanding.org/sheriffs-office-reports-improvements-in-harris-county-jail-as-scrutiny-from-state-continues/#:~:text=Seven%20people%20have%20died%20in,by%20the%20Landing%20on%20Thursday> [https://perma.cc/M7BW-3NXX] [hereinafter Grench & Zhang, *Sheriff's Office Reports Improvements*].

⁶² Trombly, *Finally in Compliance*, *supra* note 57.

⁶³ See Monroe Trombly, *State Regulators Order Harris County Sheriff's Office to Outsource More Inmates*, HOUS. LANDING (Nov. 2, 2023), <https://houstonlanding.org/state-regulators-order-harris-county-sheriffs-office-to-outsource-more-inmates/> [https://perma.cc/L8XQ-L4BA].

⁶⁴ *Id.* ("Variance beds are beds placed in spaces not intended as sleeping quarters but renovated that way.").

⁶⁵ See McKenna Oxenden & Akhil Ganesh, *Harris County OKs \$11M Contract to Send 360 Inmates to Mississippi to Ease Overcrowding*, HOUS. LANDING (Nov. 14, 2023), <https://houstonlanding.org/harris-county-oks-11m-contract-to-send-360-inmates-to-mississippi-to-ease-jail-overcrowding/> [https://perma.cc/CF7S-LFRM].

The pressure to offload inmates continues as the Jail's population outpaces its capacity.⁶⁶ In November 2024, the Harris County Sheriff's Office reported that over 1,000 inmates are being held in "out-of-county" facilities.⁶⁷ Indeed, 100 inmates were transferred to Jefferson County, Texas, which borders Louisiana.⁶⁸ However, three of the four out-of-county facilities are also located outside of the state; in addition to the 360 people sent to Mississippi, 500 people were sent to LaSalle Correctional Center, and 99 people were moved to Natchitoches Parish Detention Center, both of which are in Louisiana.⁶⁹ The distance of these transfers removes inmates hundreds of miles from their community, complicating visitation for their loved ones and attorneys. And even after spending \$50 million on outsourcing, the total jail population remains above its capacity of 9,400 people.⁷⁰

Harris County officials note that people selected for transfer outside of the county "generally . . . do not have a court date in the near future."⁷¹ As such, it is reasonable to conclude that people on the waitlist, whose trials are paused for competency restoration treatment when they are found IST, likely make up a significant portion of transferred inmates. The stress involved with transfer, including potential disruption to medication, will be especially harmful for people found IST.⁷²

⁶⁶ Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61 (reporting jail capacity of 9,400 and jail population of over 9,500).

⁶⁷ Trombly, *Finally in Compliance*, *supra* note 57.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61 (reporting jail capacity of 9,400 and jail population of over 9,500); *Jail Population*, *supra* note 3 (current jail population of 9,655 people); Trombly, *Finally in Compliance*, *supra* note 57 (reporting \$50 million spent on outsourcing inmates to other jails).

⁷¹ Oxenden & Ganesh, *supra* note 65.

⁷² HEALTH & HUM. SERVS., TECHNICAL EXPERT PANEL EXECUTIVE SUMMARY: ADDRESSING THE HIV CARE NEEDS OF PEOPLE WITH HIV IN STATE PRISONS AND LOCAL JAILS 3 (n.d.) (sources last reviewed by the Department of Health & Human Services Oct. 2023) (noting that inmates needing HIV treatment may experience delays in access upon transfer); Byrhonda Lyons, Jocelyn Wiener & Erica Yee, *Mentally ill prisoners in California are three times likelier to get shuffled around*, CAL MATTERS (May 2, 2023), <https://calmatters.org/justice/2022/11/california-mentally-ill-prisoner-transfers/> ("Transfers for an inmate are disruptive," said Christopher Lisieski, the attorney representing Collier's mother in a federal lawsuit against several prison employees. "Disrupting someone's routine who's severely mentally ill is additional stress and strain and can worsen mental health symptoms."); Beatrix Lockwood & Nicole Lewis, *The Long Journey to Visit a Family Member in Prison*, THE MARSHALL Project (Dec. 18, 2019) <https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison> (highlighting that visits from family help incarcerated person's mental health and the subsequent toll being in a facility far from loved ones has on mental health).

Further, the private facilities to which Harris County Jail outsourced inmates pose similar risks of injury and death. Louisiana has lower minimum jail standards than Texas, suggesting that inmates transferred from Harris County remain vulnerable to substandard conditions.⁷³ At least two people arrested in Harris County have died in Louisiana jails in 2024.⁷⁴ The exact number is unknown because jails in Louisiana do not have to report in custody deaths to the state attorney general.⁷⁵ Texas' requirement to report and investigate deaths that occur in jails and prisons does not extend to inmates who die out-of-state.⁷⁶

LaSalle Corrections, the private prison company that operates LaSalle Correctional Center, has been sued over 100 times for inadequate provision of medical care.⁷⁷ CoreCivic, the private prison company that operates Tallahatchie Correctional Facility, possesses a similarly concerning record; CoreCivic has paid \$4.4 million since 2016 to settle complaints of mistreatment from former inmates of its Tennessee prisons, including at least twenty-two inmate deaths.⁷⁸ An audit of its Tennessee prisons in 2020 revealed inaccurate reporting of inmate deaths and allegations of sexual abuse by corrections staff.⁷⁹ Transferring inmates far from their community into private prisons rampant with abuse is a poor solution to Harris County Jail's substandard conditions.

2. Harris County Jail Has a Problem with Excessive Violence and Deaths

In custody deaths at Harris County Jail have spiked in recent years: at least nineteen people died in custody during 2023, following a record high of twenty-seven deaths in 2022.⁸⁰ As of November 2024, Harris County Jail has reported seven in custody deaths to the Texas Committee for Jail Standards.⁸¹ Yet the Jail and its staff continue to face investigations and sanctions from deaths that occurred in 2021, suggesting that in custody deaths are outpacing the Jail's efforts to reform.

⁷³ Pooja Salhotra, *When Texas Jail Standards Push Inmates to Lockups in Other States, Oversight Doesn't Follow*, THE TEX. TRIB. (Aug. 14, 2024), <https://www.texastribune.org/2024/08/14/texas-jaleen-anderson-harris-county-jail-overcrowding/> [https://perma.cc/BJ2T-WXB3].

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Jonathan Matisse et al., *Prison Operator Under Federal Scrutiny Spent Millions Settling Tennessee Mistreatment Claims*, ASSOC. PRESS (Oct. 13, 2024), <https://apnews.com/article/prison-settlement-tennessee-mistreatment-deaths-1c2b3cd5cd395a7f1453566e366fb415> [https://perma.cc/5SV5-QSY5].

⁷⁹ Oxenden & Ganesh, *supra* note 65.

⁸⁰ Vasquez, *supra* note 12; OFF. OF THE INSPECTOR GEN., 2021 MONTHLY COMPARISON AND PERFORMANCE REPORT (2021), <https://www.harriscountysoc.org/Documents/AboutUs/OIGReports/2021%20OIG%20Annual%20Performance%20Report.pdf> (reporting twenty-one jail deaths in 2021; fifteen jail deaths in 2020).

⁸¹ Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61.

In February 2023, the FBI announced a civil rights investigation into the deaths of Jaquarea Simmons and Jacoby Pillow in Harris County Jail.⁸² After detainee Jaquarea Simmons died on February 17, 2021, Harris County Jail conducted an internal investigation that found multiple policy violations by Jail staff.⁸³ Two policy violations occurred when officers twice responded to an incident in Simmons' cell with force and did not document the use of force in either instance.⁸⁴ The internal investigation resulted in the sheriff's office terminating eleven employees and suspending six others.⁸⁵ The Houston Police Department conducted an independent criminal investigation into Simmons' death, and Harris County District Attorney charged a corrections officer, Eric Morales, with felony manslaughter.⁸⁶ Morales is the first former detention officer in Harris County to be charged with the death of an inmate.⁸⁷

Regarding Jacoby Pillow's death, his sister, Octevia Wagner, is the first named plaintiff in a lawsuit filed with the District Court for the Southern District of Texas on behalf of twenty-seven individuals detained in Harris County Jail between 2021 and 2023.⁸⁸ Plaintiffs allege that their constitutional rights were violated by Harris County Jail's "longstanding culture of deliberate indifference" to the lives of its detainees, and the sheriff's unconstitutional failure to correct myriad issues of which he was aware that led to their deaths and injuries.⁸⁹ At least nine of the twenty-seven plaintiffs were booked in the jail with known mental illness or disability.⁹⁰ This pattern matches the trend of

⁸² See FBI Houston (@FBIHouston), TWITTER (Feb. 13, 2023, 6:17 PM), <https://twitter.com/FBIHouston/status/1625272942824157184> [<https://perma.cc/9SBW-L8L2>]; *FBI Agrees to Review Pair of Jail Deaths*, HARRIS CNTY. SHERIFF'S OFF. (Feb. 13, 2023, 1:28 PM), <https://nixle.us/E9G7D> [<https://perma.cc/Z4XF-4WF3>].

⁸³ See Cara Tabachnick, *FBI Launches Civil Rights Investigation into Two Inmate Deaths at Harris County Jail*, CBS NEWS (Feb. 15, 2023, 5:48 PM), <https://www.cbsnews.com/news/fbi-investigates-inmate-deaths-harris-county-jail-houston-texas-jaquarea-simmons-jacoby-pillow/> [<https://perma.cc/5D2H-JV52>].

⁸⁴ See Randy Wallace, *Eleven Employees Terminated, Six Suspended After Investigation into Harris County Jail Death*, FOX 26 (May 28, 2021, 3:08 PM), <https://www.fox26houston.com/news/11-employees-terminated-6-suspended-after-investigation-into-harris-county-jail-death> [<https://perma.cc/R8NQ-AM3N>].

⁸⁵ Tabachnick, *supra* note 83.

⁸⁶ *Id.*

⁸⁷ Jeff Ehling, *Former Jail Officer Eric Morales Becomes First in Harris County to be Charged For Inmate's Death*, ABC13 (Feb. 7, 2023), <https://abc13.com/jaquarea-simmons-inmate-death-harris-county-jail-fatalities-eric-morales-deputy-charged-ada-kimberly-clark/12781011/> [<https://perma.cc/FFK3-PQ5E>].

⁸⁸ See Complaint at 1, Wagner et al. v. Harris Cnty., Tex., No. 4:23-cv-02886, 2024 WL 2836332 (S.D. Tex. Aug. 7, 2023) (Wagner and other family members of former inmates have standing in the suit as heirs and representatives of their family member's estate).

⁸⁹ Plaintiff's First Amended Complaint at 58, Wagner et al. v. Harris Cnty., Tex., No. 4:23-cv-02886, 2024 WL 2836332 (S.D. Tex. Nov. 21, 2023).

⁹⁰ *Id.*

disproportionate violence faced by individuals with mental illness within Harris County Jail.⁹¹

The plaintiffs' stories illustrate the standard procedure—and excessive force—with which jail personnel respond to internal incidents. The lead plaintiff, Jacoby Pillow, landed in Harris County Jail on a misdemeanor trespassing charge, posted \$100 bond the next day, and should have been released soon after.⁹² Instead, Pillow was kept in a medical holding cell and experienced an altercation with an officer.⁹³ Though multiple officers beat Pillow and put their weight on his chest and back, the Jail clinic cleared Pillow to return to his cell.⁹⁴ Pillow was left alone until he died from his injuries the next day.⁹⁵

Bryan Johnson, represented in the suit by his mother Amanda Harris, was booked into Harris County Jail with known mental and physical disabilities and was similarly beaten by multiple officers during an interaction with jail staff.⁹⁶ Johnson was returned to his cell and beaten for a second time.⁹⁷ Johnson was not taken to the jail clinic until multiple days later, after which he was prescribed an inhaler for his difficulty breathing.⁹⁸ An officer took said inhaler and returned it empty.⁹⁹ Johnson continued to experience trouble breathing for weeks and made requests for medical care that were ignored until Johnson presented as unresponsive and died from his injuries.¹⁰⁰

Evan Lee, represented in the suit by his mother Jacilet Griffin-Lee, was booked into Harris County Jail with severe mental illness and frequently was not provided with medication for his mental illness, high blood pressure, and diabetes.¹⁰¹ Lee got into an altercation with another detainee that resulted in a brain bleed, but the Jail clinic returned him to his cell with no further examination or treatment.¹⁰² Lee was eventually transferred to the hospital,

⁹¹ See Alex Stuckey, *Ten People Have Died in Harris County Jail in 2023. Five Were Identified as Mentally Ill*, HOUS. LANDING (Jul. 17, 2023), <https://houstonlanding.org/10-people-have-died-in-harris-county-jail-in-2023-five-of-them-identified-as-mentally-ill/> [<https://perma.cc/U4UT-JEGP>] [hereinafter Stuckey, *Ten People Have Died*] (reporting more than half of the eighteen people who died in custody at Harris County Jail in 2023 had previously been identified as mentally ill by jail or court staff); Stuckey & De Jesus, *supra* note 1; Vasquez, *supra* note 12.

⁹² Plaintiff's First Amended Complaint at 15, *Wagner*, No. 4:23-cv-02886.

⁹³ *Id.* at 16.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 17.

⁹⁷ *Id.*

⁹⁸ *Id.* at 17-18.

⁹⁹ *Id.* at 18.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 19.

¹⁰² *Id.*

where they found significant injuries and two brain bleeds; he passed away two days later.¹⁰³ Another plaintiff, William Curtis Barrett, who was booked into Harris County Jail with known mental health issues requiring medication, was assaulted in jail by another inmate.¹⁰⁴ The Jail failed to monitor Barrett's condition, and he died within three days of his initial booking.¹⁰⁵

The rest of the deaths alleged in the lawsuit are remarkably similar: an inmate experiences an altercation with an officer or another inmate, multiple Jail officers respond with physical force, the inmate suffers obvious injury but is not taken to the Jail clinic or is given cursory treatment, and the inmate is returned to their cell where they are unmonitored until their death or hospitalization. The number of inmate deaths can perhaps be explained by excessive use of force: an astounding 51% of all police officer uses of force in Texas in 2022 occurred in Harris County Jail.¹⁰⁶

Depending on the day, Harris County Jail is the largest mental health facility in the state of Texas. This is troublesome given that the Jail was out of compliance with state minimum standards for the past two years and has experienced about forty in custody deaths during that time. Due to its substandard conditions, the Jail poses a severe risk of harm to its inmates, and this risk is disproportionately amplified for inmates with mental illness. Despite its lethal failures, Harris County Jail is relied upon by Texas government to house people with mental illness awaiting competency restoration. This is a problem because jails, unlike hospitals, are not equipped to treat mental illness, and Harris County Jail poses an increased risk of harm to its inmates. While extreme, Harris County Jail provides one example of the substandard conditions in which defendants found IST across the state must wait.

II. LEGAL BACKGROUND

While jails such as the one in Harris County are proving themselves to be incapable of administering mental healthcare, people found incompetent to stand trial continue to be housed in jails awaiting transfer to a competency restoration program. Upon a judicial determination that a defendant charged with a crime is not competent to stand trial, the court will either release the defendant on bail for outpatient competency restoration or commit them to a mental health facility.¹⁰⁷ A finding of incompetency and order of commitment places the defendant in custody of the sheriff for transportation to the facility where the defendant will receive competency restoration services.¹⁰⁸ Defendants who are IST may be released to an outpatient competency restoration program only if the

¹⁰³ *Id.* at 20.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 20-21.

¹⁰⁶ *Id.* at 8-9.

¹⁰⁷ TEX. CODE CRIM. PROC. ANN. art. 46B.071 (West 2004).

¹⁰⁸ TEX. CODE CRIM. PROC. ANN. art. 46B.075 (West 2004).

court determines that they do not pose a danger to others and may safely be treated on an outpatient basis.¹⁰⁹

Due to the limited number of state hospital beds available, many defendants spend months to years in jail awaiting transfer.¹¹⁰ The statutory limit on the competency restoration period is counted from when a defendant is committed or when competency restoration begins, whichever is later, so the time spent in jail does not actually count against the limit.¹¹¹ In the meantime, defendants are prohibited by statute from appealing their competency determination, and writs of habeas corpus petitioning for release or transfer to state hospital have not been recognized by the Texas judiciary.¹¹²

A. *Texas Incompetency Law*

The Texas legislature codifies safeguards and procedure concerning defendants who are incompetent to stand criminal trial at Article 46B of the Texas Code of Criminal Procedure. Incompetency is statutorily defined as someone lacking (1) sufficient present ability to consult with their lawyer with a reasonable degree of rational understanding; or (2) a rational and factual understanding of the proceedings.¹¹³ After a determination of incompetency has been made, a finding of incompetency may not be appealed.¹¹⁴ Texas courts have affirmed and elaborated on the legislature's standard.¹¹⁵ While the judiciary has recognized the potential due process issue inherent in disallowing appeal from a state determination of this kind, appeals have been steadfastly

¹⁰⁹ TEX. CODE CRIM. PROC. ANN. art. 46B.071 (West 2017); TEX. CODE CRIM. PROC. ANN. art. 46B.072 (West 2017).

¹¹⁰ MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11 (reporting average time spent on state hospital waiting list as 200 days for non-maximum-security beds and 531 days for maximum security beds).

¹¹¹ See TEX. CODE CRIM. PROC. ANN. art. 46B.0735 (West 2021).

¹¹² TEX. CODE CRIM. PROC. ANN. art. 46B.011 (West 2004) ("Neither the state nor the defendant is entitled to make an interlocutory appeal relating to a determination or ruling under Article 46B.005."); see, e.g., *In the Best Interest & Prot. of D.B.*, No. 05-16-00381-CV, 2016 Tex. App. LEXIS 12429, at *5-6 (Nov. 18, 2016); *Ex parte Thompson*, No. 10-22-00162-CR, 2022 Tex. App. LEXIS 7415, at *10 (Oct. 5, 2022).

¹¹³ TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2004) (presuming defendants competent to stand trial unless proved incompetent by preponderance of the evidence).

¹¹⁴ TEX. CODE CRIM. PROC. ANN. art. 46B.011 (West 2004) ("Neither the state nor the defendant is entitled to make an interlocutory appeal relating to a determination or ruling under Article 46B.005.").

¹¹⁵ See *Queen v. State*, 212 S.W.3d 619, 621 (Tex. App. 2006) (holding that the court lacked jurisdiction over an appeal from trial court determination of incompetency where the state legislature barred appeal of incompetency determinations); *In re D.B.*, 2016 Tex. App. LEXIS 12429, at *5-6 (holding that the court lacked jurisdiction over defendant's interlocutory appeal of incompetency and commitment where the state legislature did not provide for interlocutory appeal).

rejected, sometimes with the caveat that such action would be better brought as a habeas corpus petition.¹¹⁶

Texas courts have elaborated on the standard by which defendants should be found IST.¹¹⁷ Any “suggestion” of incompetency calls for an informal inquiry as to whether evidence exists to justify a formal competency trial.¹¹⁸ Conducting a competency trial requires some evidence of the following: “1) that the defendant suffers some degree of debilitating mental illness, and that 2) he obstinately refuses to cooperate with counsel to his own apparent detriment, but also that 3) his mental illness is what fuels his obstinacy.”¹¹⁹ Further, the correct inquiry should evaluate whether a defendant can

(1) understand the charges against him and the potential consequences of the pending criminal proceedings; (2) disclose to counsel pertinent facts, events, and states of mind; (3) engage in a reasoned choice of legal strategies and options; (4) understand the adversarial nature of criminal proceedings; (5) exhibit appropriate courtroom behavior; and (6) testify.¹²⁰

While higher courts have set a clear standard to evaluate potentially incompetent defendants, recognizing mental illness in practice has proved challenging for Texas trial courts. Judges sometimes overlook evidence of mental illness where a defendant’s behavior appears merely irritable or obstinate.¹²¹ As a result, trial courts may find defendants competent without conducting a formal competency trial.¹²² Additionally, few appellate courts

¹¹⁶ *Queen*, 212 S.W.3d at 623 (“We recognize that Queen raises complaints of constitutional dimension, complaints that cannot be disregarded lightly. However, Queen or others in his position are not without remedy. Under these circumstances, claims such as Queen’s would seem more properly brought by way of a petition for writ of habeas corpus.”).

¹¹⁷ *Turner v. State*, 422 S.W.3d 676, 696 (Tex. Crim. App. 2013) (setting three-part standard for formal competency inquiries: evidence of mental illness, evidence of obstinance with their own lawyers, and evidence that said obstinance was fueled by such mental illness).

¹¹⁸ *Id.* at 692.

¹¹⁹ *Id.* at 696.

¹²⁰ *Morris v. State*, 301 S.W.3d 281, 286 (Tex. Crim. App. 2009) (citing TEX. CODE CRIM. PROC. ANN. art. 46B.024).

¹²¹ *See Dixon v. State*, No. 06-20-00123-CR, 2021 Tex. App. LEXIS 10086, at *14-15, *18, *22 (Dec. 22, 2021) (holding that trial court did not abuse discretion by not conducting informal competency inquiry where defendant displayed “religious grandiosity and delusional episodes,” “paranoia and irrational fixation,” and insisted on representing himself); *Clark v. State*, No. 05-09-00004-CR, 2010 Tex. App. LEXIS 1951, at *13 (Mar. 19, 2010) (holding that trial court did not err by failing to sua sponte conduct a competency inquiry where defendant testified to history of mental illness and displayed post-trial confusion) (“However, Clark’s post-trial statement shows only that Clark did not understand the terms of probation—not that Clark did not understand the nature of the proceedings against her.”).

¹²² *Hartfield v. State*, No. 2-07-454-CR, 2008 Tex. App. LEXIS 9645, at *2, *8-9 (Dec. 23, 2008) (holding that court was not compelled to conduct formal competency hearing where defendant had diagnosable mental illness but did not display evidence of incompetency).

have overturned or remanded a trial court's competency determination.¹²³ The relevant standard of review is abuse of discretion, which is a high bar, perhaps explaining why appeals of one's status as competent are rarely successful.¹²⁴

B. *The Problem of Indefinite Commitment*

The Supreme Court has held that indefinite commitment solely on account of incompetency to stand trial is unconstitutional.¹²⁵ However, the lack of urgency and clear guidelines regarding the use of jails as holding sites for the mentally ill has allowed the practice to proliferate. Criminally prosecuting a defendant who is not competent to stand trial is unconstitutional as a violation of due process under the Fourteenth Amendment.¹²⁶ In *Jackson v. Indiana*, the Supreme Court set a baseline that the period of confinement must bear "some reasonable relation" to its purpose, which is restoring a defendant's competency to stand trial.¹²⁷ For defendants unlikely to ever be able to stand trial, commitment based solely on incapacity must conform to the "reasonable period of time necessary" to determine whether the defendant will regain competency in the foreseeable future.¹²⁸ Further, courts have a responsibility to inquire into a defendant's competence where there is evidence that the defendant does not understand the nature of the proceedings or is not able to cooperate with counsel.¹²⁹

¹²³ See *Moralez v. State*, 450 S.W.3d 553, 560 (Tex. App. 2014) (holding that trial court properly found defendant competent to stand trial where state hospital superintendent reported that appellant was competent to stand trial and defendant failed to meet burden to establish incompetency by preponderance of the evidence); *Welch v. State*, No. 08-14-00116-CR, 2015 Tex. App. LEXIS 7589, at *2-3 (Jul. 22, 2015) (holding that trial court did not abuse discretion by not conducting informal competency inquiry where evidence did not suggest defendant was incompetent) ("The trial court . . . appointed the psychiatrist who previously examined Welch. This time, she concluded that Welch was competent to stand trial because his mental illness was in remission due to the high doses of medication he was receiving in jail. But she warned that Welch had to 'remain on a high dose of antipsychotic medications in order for him to remain mentally competent.'").

¹²⁴ *Lawrence v. State*, 169 S.W.3d 319, 322 (Tex. App. 2005).

¹²⁵ See *Jackson v. Indiana*, 406 U.S. 715, 720 (1972) (holding that defendant's commitment to a mental health facility was unconstitutional where defendant was committed "until sane" and was unlikely to regain competency to stand trial).

¹²⁶ See *Medina v. California*, 505 U.S. 437, 439 (1992) ("It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial") (first citing *Drope v. Missouri*, 420 U.S. 162 (1975); and then citing *Pate v. Robinson*, 383 U.S. 375 (1966)); U.S. CONST. amend. XIV.

¹²⁷ *Jackson*, 406 U.S. at 738.

¹²⁸ *Id.*

¹²⁹ See *Pate*, 383 U.S. at 384-85 (holding that defendant was denied fair trial where trial court did not inquire into defendant's competency to stand trial and defendant displayed evidence of severe mental illness).

While the Supreme Court's holding instructed lower courts to ensure that defendants are competent to stand trial, the weak requirement that confinement bear "some reasonable relation" to restoring competency to stand trial has fueled the idea that jails can serve as sites of treatment for debilitating mental illness. Commitment for the purpose of competency restoration is statutorily limited to sixty days for misdemeanors and 120 days for felonies in Texas, but the competency restoration period does not begin until treatment begins.¹³⁰ As a result, the statute does not limit the amount of time that defendants may be held in jail while waiting for transfer to a state hospital.¹³¹ In effect, the only limit on how long a defendant found IST will spend in jail pretrial is the waitlist. However, confinement while on the waitlist for competency restoration is reasonably related to restoring competency, so Texas' potentially indefinite commitment of defendants found IST is legal.¹³²

C. Texas Courts Affirm the Constitutionality of Confinement

The Texas Court of Criminal Appeals, the state's highest appeals court, has repeatedly affirmed the constitutionality of jailing defendants found IST while awaiting transfer to a state hospital for psychiatric treatment. The most prominent of such cases is *Lakey v. Taylor*, a class action lawsuit by Disability Rights Texas and nine other plaintiffs against the Commissioner of the Texas Department of State Health Services.¹³³ The plaintiffs involved in the suit were detainees required to wait in county jail while on the waitlist for weeks and months, some suffering from untreated mental illness.¹³⁴ Relying on *Jackson v. Indiana*, plaintiffs argued that there is a constitutional limit to the commitment of incompetent defendants such that the prolonged detention of defendants without any form of competency restoration treatment is a violation of due process.¹³⁵

The court agreed that lengthy pretrial detention of incompetent defendants without treatment would violate a defendant's due process rights.¹³⁶ However, the court rejected the facial challenge to the Department's waitlisting practice, holding that delays in transfer cannot be blamed on Department policy or

¹³⁰ See TEX. CODE CRIM. PROC. ANN. art. 46B.073(b)(2) (West 2003); TEX. CODE CRIM. PROC. ANN. art. 46B.0735 (West 2021).

¹³¹ See TEX. CODE CRIM. PROC. ANN. art. 46B.073 (West 2003).

¹³² See *id.* ("A defendant may be committed to a jail-based competency restoration program only if the program provider determines the defendant will begin to receive competency restoration services within 72 hours of arriving at the program.").

¹³³ *Lakey v. Taylor*, 435 S.W.3d at 309, 309 (Tex. App. 2014).

¹³⁴ *Id.* at 314.

¹³⁵ *Id.* at 319.

¹³⁶ See *id.* at 320-21 (holding that prolonged detention of incompetent defendants is not rationally related to a legitimate government interest where no progress is made towards the goal of competency restoration).

procedure.¹³⁷ Where defendants present a threat of danger or flight risk and are prohibited from being assigned to outpatient treatment, their continued confinement is justified on its own merit as a safety measure.¹³⁸

An important crux of the court's holding is that wait times are not standardized and defendants may wait as few as three days on the waitlist prior to transfer.¹³⁹ While that may be true for some defendants, this portrayal of wait times falls dangerously far from the truth in light of circumstances detailed in Part I.¹⁴⁰ It is now a given that defendants will wait at least months, if not years, to be transferred to a state hospital, and the Department certainly shares responsibility for the delays in transfer caused by understaffing and poor management. However, Texas courts refuse to hold any state entity responsible for the waitlist backlog, rejecting the idea that inmates should be transferred to state hospital treatment with any particular speed.¹⁴¹

In that vein, Texas courts have routinely rejected habeas petitions brought by defendants committed to state hospital treatment and held in jail on the waitlist.¹⁴² Courts have reasoned that habeas petitions are not cognizable where they cannot result in a defendant gaining liberty from confinement, and defendants committed to inpatient competency restoration cannot be released anywhere but to a state hospital bed. In one such case, defendant Nicholas Thompson petitioned for release or transfer to a suitable mental health facility within seventy-two hours after nine months of confinement for resisting arrest.¹⁴³ A Texas court of appeals affirmed the trial court's denial of writ, holding Thompson's claims not cognizable where the writ would not result in either his release or deprivation of the trial court's jurisdiction.¹⁴⁴ Specifically, the Court characterized Thompson's appeal as "asserting a fundamental due process right to being transferred to a mental health facility within a 'reasonable'

¹³⁷ *See id.* at 322.

¹³⁸ *See id.* at 321 (citing TEX. CODE CRIM. PROC. ANN. Art. 46B.072).

¹³⁹ *Id.* at 322.

¹⁴⁰ *See* MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11 (average wait time for non-mandatory security units and maximum-security units of 200 days and 530 days, respectively).

¹⁴¹ *See Ex parte* Flint, No. 03-10-00852-CR, 2013 Tex. App. LEXIS 9090 (July 25, 2013); *Ex parte* McVade, No. 03-17-00207-CR, No. 03-17-00208-CR, No. 03-17-00209-CR, 2017 Tex. App. LEXIS 9079 (Sept. 28, 2017).

¹⁴² *See Ex parte* Valero, No. 08-22-00172-CR, 2023 Tex. App. LEXIS 901 (. 13, 2023) (affirming trial court denial of defendant's pretrial habeas application where defendant IST detained in jail while awaiting transfer to state hospital); *Ex parte* Burton, No. 02-23-00215-CR, 2023 Tex. App. LEXIS 8002 (Oct. 19, 2023) (holding that trial court did not abuse discretion by denying habeas petition where defendant IST detained in jail while awaiting transfer to state hospital).

¹⁴³ *See Ex parte* Thompson, No. 10-22-00162-CR, 2022 Tex. App. LEXIS 7415 (Oct. 5, 2022).

¹⁴⁴ *Id.* at *8.

time” and denied that such a substantive right exists in the United States Constitution or has been identified by the Supreme Court.¹⁴⁵

Another person found IST and challenging commitment, Divine Burton, filed a habeas petition for the period of over ninety days that she had spent in jail thus far.¹⁴⁶ On appeal, the court ruled that Burton’s claims were not cognizable because there is no fundamental right to being transported to a mental health facility “in a timely manner.”¹⁴⁷ Making similar findings for a defendant who was charged with more serious crimes, a Texas court of appeals affirmed the trial court’s denial of defendant Bobby McVade’s petition for habeas relief from confinement in Travis County Jail awaiting transfer to a mental health facility.¹⁴⁸ Courts have again affirmed denials of habeas writs where defendants have been found to pose a danger to themselves or others.¹⁴⁹

For some defendants, however, competency is not a stable status, and reevaluations of a defendant’s ability to stand trial can sometimes interfere with their progression on the waitlist. One such defendant challenging confinement, Juan Valero, climbed from twenty-second in line to fourth by the time he was found competent to stand trial and transferred to court.¹⁵⁰ Upon pretrial examination, Valero was found incompetent to stand trial again and placed at the back of the waitlist.¹⁵¹ When a Texas court of appeals took up his case, he had progressed from forty-second to thirty-ninth, where he stayed after his appeal was rejected.¹⁵² Now that the waitlist has surpassed 2,000 people, defendants who are mistakenly deemed competent to stand trial may lose months to years of progress towards transferring to a state hospital.

Upon closer examination of the Texas Code of Criminal Procedure and associated case law, a problem of potentially indefinite confinement arises. The statutory limit on how long defendants found IST may be detained starts from when treatment begins, so the time that a defendant may spend in jail waiting to be transferred for competency restoration treatment is dependent on the length of the waitlist, which exists independent of any statutory mandate. Recent habeas petitions and appeals highlight the state’s ability to hold defendants in jail pending transfer to a mental health facility upon determination of

¹⁴⁵ *Id.*

¹⁴⁶ *See Ex parte Burton*, 2023 Tex. App. LEXIS 8002.

¹⁴⁷ *Id.* at *5, *8.

¹⁴⁸ *Ex parte McVade*, No. 03-17-00207-CR, No. 03-17-00208-CR, No. 03-17-00209-CR, 2017 Tex. App. LEXIS 9079 (Sept. 28, 2017).

¹⁴⁹ *See, e.g., Ex parte Schmidt*, No. 09-11-00350-CR, No. 09-11-00351-CR, 2011 Tex. App. LEXIS 8884 (Nov. 9, 2011); *Ex parte Flint*, No. 03-10-00852-CR, 2013 Tex. App. LEXIS 9090 (July 25, 2013).

¹⁵⁰ *Ex parte Valero*, No. 08-22-00172-CR, 2023 Tex. App. LEXIS 901, at *2, *5 (Feb. 13, 2023).

¹⁵¹ *Id.* at *5.

¹⁵² *Id.* at *5-6.

incompetency to stand trial.¹⁵³ Finally, the Court of Criminal Appeals holds that the time someone spends on the waitlist is not the fault of any HHSC policy or procedure, so the agency cannot be held responsible for lengthy periods of detention before receiving competency restoration treatment. Hence, incompetent defendants who are held in jail while waiting for competency restoration do not have a clear path to attain either mental health treatment or freedom from detention.

III. PROPOSED INTERVENTIONS

Harris County Jail houses a number of people waiting for competency restoration among nearly 3,000 inmates receiving psychotropic medication.¹⁵⁴ Indigent defendants who cannot bail themselves out and pay for competency restoration on an outpatient basis, as well as defendants determined to pose a danger to themselves or others, must remain in jail. There is no obvious legal recourse for being committed indefinitely without a conviction for a crime. As noted, the Texas Code of Criminal Procedure does not allow appeals of incompetency determinations, and the Texas judiciary does not accept habeas corpus petitions to release someone from jail or transfer them to state hospitals. In this section, I propose solutions to end indefinite confinement in jail as well as improve the conditions of Harris County Jail specifically.

A. *Evaluation of Existing Solutions*

The HHSC warned the legislature as early as 2016 that the state needed 1,800 more state hospital beds to solve the waitlist backlog.¹⁵⁵ The Texas legislature has appropriated over \$2.5 billion towards state hospital construction and renovation projects since 2017, though HHSC includes civil and juvenile beds in the construction cost estimate.¹⁵⁶ When the construction is complete, the state will add just under 800 beds to its state hospitals that can be used for competency restoration of committed defendants.¹⁵⁷ Though the additional beds are certainly

¹⁵³ *Id.* (holding that there was no due process violation where defendant failed to prove indefinite holding period, that defendant held no right to an immediate or speedy transfer to a mental health facility, and that a writ of habeas was not cognizable where it would not result in release).

¹⁵⁴ *Jail Population*, *supra* note 3.

¹⁵⁵ JOINT COMM. ON ACCESS AND FORENSIC SERV., DEP'T OF STATE HEALTH SERVS. AND TEX. HEALTH AND HUM. SERVS. COMM'N, REPORT OF THE JOINT COMMITTEE ON ACCESS AND FORENSIC SERVICES FOR FISCAL YEAR 2016 10 (2016), <https://www.kxan.com/wp-content/uploads/sites/40/2020/04/joint-comm-access-forensic-services-fy2016.pdf> [<https://perma.cc/C9P6-Q4GH>].

¹⁵⁶ *Changes to Texas State Hospitals*, TEX. HEALTH AND HUM. SERVS. COMM'N (last visited Nov. 20, 2024), <https://www.hhs.texas.gov/about/process-improvement/improving-services-texans/changes-texas-state-hospitals> [<https://perma.cc/5VUA-ZQWU>].

¹⁵⁷ *Id.*

necessary, the investment in state hospital construction has not yet reduced the number of people on the waitlist for inpatient treatment.¹⁵⁸

The Texas legislature appropriated \$50 million to HHSC to address maintenance needs.¹⁵⁹ While continued appropriation of funds enables HHSC to take up new projects, the amounts dedicated to HHSC are inadequate compared to its total \$1 trillion deferred maintenance needs and requested \$14 million for emergency repairs.¹⁶⁰

In addition to hospital construction projects, the HHSC has implemented, with varying degrees of success, some solutions to the waitlist backlog.¹⁶¹ First, HHSC is pursuing recruitment and retention efforts, including raises, bonuses, and employee engagement, to combat staffing shortages.¹⁶² Second, HHSC and the Office of Forensic Coordination (OFC) are working with counties and external stakeholders to prevent people with mental illnesses from being swept into the criminal justice system.¹⁶³ OFC's services include clinical consultation for psychiatric stabilization, trial competency re-evaluation for those currently waitlisted, legal education on alternative case resolutions, and enhanced follow-ups for people restored to competency.¹⁶⁴

OFC also launched the "Eliminate the Wait" campaign, which provides training and assistance to municipal county stakeholders surrounding competency restoration.¹⁶⁵ "Eliminate the Wait" assigns roles to local mental health treatment providers, police, sheriffs and jail administrators, judges and court staff, prosecutors, and defense attorneys to identify mental health needs as early as possible, prioritize diversion, consider alternatives to state hospital treatment, and continue serving defendants who have to wait for inpatient services.¹⁶⁶

As for solutions pursued by Harris County Jail, an increase in funding has allowed the Jail to better distribute medication.¹⁶⁷ The correct and timely distribution of medication is part of Texas' minimum jail standards, so this measure should have been implemented in response to the infraction cited on

¹⁵⁸ See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-12.

¹⁵⁹ *Changes to Texas State Hospitals*, *supra* note 156, at 12.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 11.

¹⁶³ *Id.* at 12.

¹⁶⁴ *Id.*

¹⁶⁵ TEX. JUD. COMM'N ON MENTAL HEALTH & TEX. HEALTH AND HUM. SERVS. COMM'N, ELIMINATE THE WAIT: THE TEXAS TOOLKIT FOR RIGHTSIZING COMPETENCY RESTORATION SERVICES 1 (1st ed. 2021).

¹⁶⁶ *Id.*

¹⁶⁷ Gabby Hart, *Harris County Jail Hit with Class Action Lawsuit Over Inmate Deaths, Injuries*, FOX 26 (Aug. 7, 2023, 9:32 PM), <https://www.fox26houston.com/news/harris-county-jail-hit-w-class-action-lawsuit-over-inmate-deaths-and-injuries> [<https://perma.cc/P36L-8BAG>].

December 12, 2022.¹⁶⁸ In response to the federal lawsuit, the Sheriff's Office pledged to implement body-worn cameras, which, while promising, nonetheless requires transparency from the Jail to enforce.¹⁶⁹ Finally, Sheriff Gonzalez will increase enforcement mechanisms for pre-existing drug bans, which have not been at issue in the Jail's noncompliance reports or lawsuit.¹⁷⁰ As previously noted, Harris County Jail has also outsourced 1,000 inmates to ease overcrowding, but the Jail is still over capacity.¹⁷¹ Beyond the mediocrity of the solutions enacted by the Sheriff's office, this response fails to account for the culture of disregard for the Jail's mentally ill inmates. If Harris County Jail cannot be trusted to effectively address its problem of causing inmates deaths, it should not then be trusted to provide mental health care for inmates who are not competent to stand trial.

Amid the Jail's documented failures, Harris County Jail piloted its Jail Based Competency Restoration (JBCR) program in 2020 and doubled its capacity in February 2023.¹⁷² JBCR programs are meant to replace transfer to a state hospital in order to reduce the waitlists from inside the Jail.¹⁷³ State Senator Kirk Watson explains that a defendant "may not need to be in a state hospital in order to have your competency restored, thus adding to the waitlines and problems."¹⁷⁴ Between September 2020 and August 2021, the JBCR pilot program treated fifty-six participants, thirty-three of whom were restored to competency and one of whose charges were dismissed.¹⁷⁵ During roughly the same time period, the state hospital waitlist soared from under 1,000 people in 2020 to 1,800 people by October 2021.¹⁷⁶ While the pilot program certainly

¹⁶⁸ TEXAS COMM'N ON JAIL STANDARDS, REMEDIAL ORDER 1 (May 11, 2023), <https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/04/10.-Harris-County-May-23-Remedial-Order.pdf> [<https://perma.cc/DHF2-YBP6>].

¹⁶⁹ Hart, *supra* note 167.

¹⁷⁰ *Id.*

¹⁷¹ Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61.

¹⁷² TEX. HEALTH AND HUM. SERVS. COMM'N, REPORT ON THE JAIL-BASED COMPETENCY RESTORATION PILOT PROGRAM 2 (2021), <https://www.hhs.texas.gov/sites/default/files/documents/jail-based-competency-restoration-pilot-program-2021.pdf> [<https://perma.cc/P3QB-YZBD>] [hereinafter REPORT ON COMPETENCY RESTORATION PROGRAM]; Alex Stuckey, *Lina Hidalgo Pledges Funds for Jail Program, Citing Investigation by Houston Landing*, HOUS. LANDING (Feb. 9, 2023), <https://houstonlanding.org/lina-hidalgo-pledges-funds-for-jail-program-citing-investigation-by-houston-landing/> [<https://perma.cc/G427-TVLV>] [hereinafter *Hidalgo Pledges Funds*].

¹⁷³ David Barer, *Thousands Waiting in Jail for State Hospital Beds, Is Help Coming?*, KXAN (Jan. 18, 2023), <https://www.kxan.com/investigations/thousands-waiting-in-jail-for-state-hospital-beds-is-help-coming/>.

¹⁷⁴ David Barer, *Solutions to Restore Inmates' Mental Health and Get Them to Trial*, KXAN (May 17, 2020), <https://www.kxan.com/locked-in-limbo-stories/explore-solutions-alternatives-for-texas-inmates-competency-restoration/> [<https://perma.cc/C4YM-TYBP>].

¹⁷⁵ REPORT ON COMPETENCY RESTORATION PROGRAM, *supra* note 172, at 6.

¹⁷⁶ Murney, *supra* note 9.

does necessary work to restore competency, its results pale in comparison to the growing number of people who sit in jail not receiving treatment.¹⁷⁷ Further, the expansion of the JBCR program amid growing problems within Harris County Jail casts doubt on the effectiveness of competency restoration that occurs in such an environment.¹⁷⁸

The variety of strategies and agencies involved may give the impression that the Texas government is effectively addressing the waitlist problem. However, the HHSC's solutions are "not doing a darn thing for the people that are on the waitlist now," as stated by Jim Allison, member of the Joint Committee on Access and Forensic Services. "We don't seem to grasp that there is a crisis here."¹⁷⁹ Allison's words speak to ineffective solutions pursued by Texas government agencies, such as OFC's "Eliminate the Wait" campaign. OFC's suggested interventions, such as identifying mental health needs early or continuing to serve defendants on the waitlist, do not impose new or different responsibilities on system actors towards incompetent defendants. Further, the interventions are only triggered after someone has been arrested or charged with a crime and thus are incapable of reducing contact with the justice system for people with mental illness. Overall, the solutions enacted in response to the waitlist backlog have not significantly impacted the lengthy pretrial detention of mentally ill Texans awaiting competency restoration.

B. *Solving Indefinite Confinement*

Given the multi-faceted nature of this problem, a range of solutions, including financial and legal measures, should be pursued. The most glaring answer to this problem is to fund more state hospital psychiatric beds. Funding existing state hospitals to their full capacity of required personnel would provide the state with a few hundred additional beds, with no additional construction costs required.¹⁸⁰ The understaffing of state hospitals certainly has multiple causes, but research suggests that the large number of nurses leaving the profession during the COVID-19 pandemic have not yet been replaced by graduates from Texas nursing schools.¹⁸¹ This cause suggests multiple solutions: increased recruitment and graduation rates from nursing schools but also improving

¹⁷⁷ *Jail Population*, *supra* note 3 (showing 3,029 inmates on psychotropic medication).

¹⁷⁸ *Hidalgo Pledges Funds*, *supra* note 172; Moriah Ballard, *Harris Co. Jail Saw Record Number Deaths in 2022 After New Case Reveals 31-Year-Old Died by Homicide While in Custody*, CLICK2HOUSTON.COM (Dec. 18, 2022, 5:17 PM), <https://www.click2houston.com/news/local/2022/12/18/harris-co-jail-saw-record-number-deaths-in-2022-after-new-case-reveals-31-year-old-died-by-homicide-while-in-custody/> [<https://perma.cc/X3XA-8PFE>].

¹⁷⁹ Barer & Hinkle, *supra* note 9.

¹⁸⁰ Simpson, *supra* note 5 (reporting that seven hundred out of 2,911 funded state psychiatric hospital beds cannot be used due to workforce shortages).

¹⁸¹ See Luann Glowacz, *Tackling the Great Staffing Shortage*, TEX. HOSP. ASS'N (Mar. 2022), <https://www.tha.org/news-publications/texas-hospitals-magazine/2022-issues/march-april-2022/tackling-the-great-staffing-shortage/> [<https://perma.cc/45XQ-8TGL>].

Texas' public health approach to the pandemic to protect existing hospital staff.¹⁸²

Ultimately, appropriating funds to the state hospital system will not fix the legal framework that routes mentally ill people who have not been convicted of a crime towards potentially indefinite jail time. The bloated waitlist has prompted habeas petitions from people confined in jail waiting for transfer to state hospital.¹⁸³ In response, the Texas judiciary has held that speedy or timely transfer to a state hospital is not a substantive right.¹⁸⁴ In effect, the judiciary has punted the problem to the legislature to solve. Indeed, the legislature is uniquely situated to address the needs of the thousands of people on the waitlist dispersed in jails of varying conditions.

In situations like the present, where there are thousands of people on the waitlist for state hospital competency restoration, the legislature should enact a more drastic solution. One of the reasons that people land on the waitlist is not being able to afford outpatient treatment. I propose that people on the waitlist should be treated in private hospital settings until the need for the waitlist is eliminated, or at least until the waitlist is no longer in crisis. Much like government contracts with private detention centers to move jail detainees offsite, HHSC could contract with local hospitals to provide competency restoration treatment to people in jails across the state. For example, incompetent defendants waiting in Harris County Jail would be treated by hospitals in the Houston medical center with the funds otherwise spent on the jail-based competency restoration program. Because the state is responsible for holding people on the waitlist in jail, the state legislature should bear the cost of bringing treatment to incompetent defendants who cannot be treated on an outpatient basis.

C. Solving the Conditions of Confinement

Finally, Harris County Jail needs dedicated reform. Though the Jail recently passed inspection, this was achieved only with technical assistance from inspectors.¹⁸⁵ As previously discussed, jail-specific reforms have thus far failed to address one of the most pressing issues: violence directed at mentally ill inmates.¹⁸⁶ Government agencies do not seem to be incentivizing the Jail to

¹⁸² *Id.*

¹⁸³ See, e.g., *Ex parte Valero*, No. 08-22-00172-CR, 2023 Tex. App. LEXIS 901 (Feb. 13, 2023); *Ex parte Burton*, No. 02-23-00215-CR, 2023 Tex. App. LEXIS 8002 (Oct. 19, 2023); *Ex parte Thompson*, No. 10-22-00162-CR, 2022 Tex. App. LEXIS 7415, at *8 (Oct. 5, 2022); *Ex parte McVade*, No. 03-17-00207-CR, No. 03-17-00208-CR, No. 03-17-00209-CR, 2017 Tex. App. LEXIS 9079 (Sept. 28, 2017).

¹⁸⁴ See, e.g., *Ex parte Valero*, 2023 Tex. App. LEXIS 901; *Ex parte Burton*, 2023 Tex. App. LEXIS 8002; *Ex parte Thompson*, 2022 Tex. App. LEXIS 7415, at *8; *Ex parte McVade*, 2017 Tex. App. LEXIS 9079.

¹⁸⁵ *Finally in Compliance*, *supra* note 57.

¹⁸⁶ See *Ten People Have Died*, *supra* note 91.

reform its conditions. As suggested by John Rappaport, insurers may be able to hold police accountable by imposing stringent requirements to renew liability coverage.¹⁸⁷ Harris County faces mounting liability with the number of lawsuits filed on behalf of people harmed by the jail.¹⁸⁸ Perhaps the jail would be forced to reform its conditions and officers' use of force if Harris County refused to pay settlements for corrections officer misconduct.¹⁸⁹

Secondly, the continued criminalization of mental illness means that Houston's \$1 billion police force will continue arresting mentally ill people.¹⁹⁰ Harris County Jail cannot keep pace; despite outsourcing hundreds of defendants, the jail is still over capacity.¹⁹¹ Providing mental health treatment before someone becomes a target of the police would be far more effective in reducing the flow of severely mentally ill people into jail.¹⁹² In other words, funding public institutions other than jails and prisons where people can receive psychiatric treatment would cut down on the number of mentally ill people being funneled into jails. If this situation continues with no intervention, Harris County Jail will continue to fill with people who desperately need help that the jail is not equipped to provide, and inmates, overwhelmingly those with mental illness, will continue to die at the hands of jail personnel.

CONCLUSION

In Texas, people with severe mental illness are in danger of being indefinitely confined in jail. Once someone has been determined incompetent to stand trial, the proceedings are paused, and the defendant is committed to competency restoration treatment. Due to insufficient state hospital space, defendants waiting for inpatient treatment are held in jail pending transfer. At this point, defendants found IST wait months to years before being transferred to a state hospital. Texas courts have rejected habeas petitions and interlocutory appeals of incompetency, leaving incompetent defendants in jail with no clear legal path

¹⁸⁷ See generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017); BUTLER, *supra* note 30, at 55.

¹⁸⁸ See Eileen Grench, "A Place of Torment": 22 Families, Former Inmates Sue Harris County Over Jail Conditions, HOUS. LANDING (Aug. 7, 2023), <https://www.texastribune.org/2023/08/07/harris-county-jail-deaths-injuries-lawsuit/> [https://perma.cc/9FR9-H7SG] (reporting fifty-one lawsuits filed against Harris County for jail conditions).

¹⁸⁹ See BUTLER, *supra* note 30, at 55 (suggesting that larger cities self-insure against police brutality by building settlements into the budget, so the city would need to restrict its own budget).

¹⁹⁰ Brown, *supra* note 41 (reporting \$1.6 billion Houston Police Department budget for Fiscal Year 2024).

¹⁹¹ Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61.

¹⁹² Buzz McClain, *Study: To Reduce Jail Populations, Increase Mental Health Services in Communities*, GEO. MASON U. SCH. POL'Y AND GOV'T (Aug. 25, 2022), <https://schar.gmu.edu/news/2022-08/study-reduce-jail-populations-increase-mental-health-servicescommunities#:~:text=The%20study's%20conclusions%20point%20to,reduce%20prison%20and%20jail%20populations> [https://perma.cc/6HEA-FELG].

to release. The problem reaches crisis proportions in a place like Harris County Jail, where inmates with mental illness are vulnerable to physical harm and substandard conditions.

Using Harris County Jail as a case study, I first argue that jails are not appropriate places to hold people with severe mental illness. Second, I suggest that Texas incompetency law allows potentially indefinite confinement on the basis of being incompetent to stand trial. To address the waitlist problem, the Texas legislature should contract with private hospitals for competency restoration services for the 2,000 people waiting in jails across the state. This can be an emergency measure that ends once the state hospital construction projects are completed and hospital staffing is back to normal levels. As for the conditions of confinement, Harris County Jail is in need of an intervention. Considering that past attempts to force the Jail to come into compliance have produced insufficient solutions, reform may require the city or state to threaten to withhold funding. For the dozens of people who have died in Harris County Jail, some while waiting for competency restoration, drastic solutions are long overdue.