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by

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MENTAL incapacity raises two distinct problems in the area of criminal law. First, the lack of responsibility for a criminal offense by reason of insanity; and secondly, the competency or ability of the accused to stand trial. While insanity relates to the accused's mental status at the time of the crime, incompetency relates to his mental status at the time of trial.[1] Thus, the problem of competency to stand trial consists of a determination of the accused's mental status not in relation to the crime, but in relation to his trial proceedings.[2]

Not only do incompetency and insanity relate to different periods of time, but the legal tests for each are quite different. Generally, the test of incompetency is whether the accused can understand the nature and object of the proceedings against him, comprehend his own condition in reference to such proceedings, and consult with his lawyer in the preparation of his defense.[3] Insanity, on the other hand, requires that the accused not know the nature and quality of his act and be unable to distinguish between right and wrong.[4]

I. COMPETENCY PROCEEDINGS IN TEXAS

In Texas proceedings to determine the competency of an accused to stand trial are governed by article 46.02 of the Texas Code of Criminal Procedure.[5] Although the statute speaks in terms of an accused's "present insanity,"[6] reference is clearly intended to the incompetency of an accused to stand trial.[7] The use of the term "present insanity" is unfortunate since that term usually connotes a serious mental disorder affecting legal responsibility.[8] It is widely recognized that an accused may be incompetent

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[1] Massey v. Moore, 348 U.S. 105, 108 (1954).

[2] *See* Magnus, *Mental Incompetency*, 18 BAYLOR L. REV. 22 (1966); Mezer & Rheingold, *Mental Capacity and Incompetency: A Psycho-Legal Problem*, 118 AM. J. PSYCHIATRY 827 (1962); Robey & Bogard, *The Compleat Forensic Psychiatrist*, 127 AM. J. PSYCHIATRY 519 (1969).

[3] H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 428-30 (1954).

[4] *Id.* at 68-81.

[5] TEX. CODE CRIM. PROC. ANN. art. 46.02 (Supp. 1970); *see* Note, *Competency To Stand Trial—Pre-Trial Procedures*, 22 SW. L.J. 857 (1968).

[6] TEX. CODE CRIM. PROC. ANN. art. 46.02, §§ 1, 2 (Supp. 1970).

[7] *Id.* § 2(a): "For purposes of present insanity, the defendant shall be considered presently insane if he is presently incompetent to make a rational defense." *See* Townsend v. State, 427 S.W.2d 55 (Tex. Crim. App. 1968).

[8] Floyd v. United States, 365 F.2d 368, 374-75 n.9 (5th Cir. 1966); Magnus, *supra* note 2, at 25 n.5; *see* Johnson v. United States, 344 F.2d 401, 406 n.13, 408 n.16 (5th Cir. 1965); JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA, REPORT OF THE COMMITTEE ON PROBLEMS CONNECTED WITH MENTAL EXAMINATION OF THE ACCUSED IN CRIMINAL CASES, BEFORE TRIAL 128-30 (1965) [hereinafter cited as D.C. REPORT]. *See also* Hess & Thomas, *Incompetency To Stand Trial: Procedures, Results and Problems*, 119 AM. J. PSYCHIATRY 713 (1963). Prior to the enactment of the Texas Code of Criminal Procedure considerable confusion existed between the concepts of competency to stand trial and insanity. In *Ex parte* Hodges, 166 Tex. Crim. 433, 314 S.W.2d 581 (1958), and Freeman v. State, 166 Tex. Crim. 626, 317 S.W.2d 726 (1958), the

to stand trial, yet be criminally sane.[9] Thus, a charge to a jury cast in terms of "present insanity"[10] could be prejudicial and violative of due process.[11]

A. *Raising the Issue*

The general wording of article 46.02 would seem to permit the question of competency to be raised by defense counsel, the prosecution, or the court.[12] Indeed, there is a duty upon all concerned to see that an accused is not convicted while he is incompetent.[13] If the attorney for the accused is aware of facts indicating his client's incompetence, he has a duty to raise the issue,[14] barring some exceptional circumstances.[15] Also, if evidence is known by the prosecutor that casts doubt upon the competency of an accused, he has a duty to disclose the information.[16] Likewise, if facts come to the attention of the trial court which suggest that an accused is incompetent, the trial court has a duty to order an appropriate inquiry.[17]

B. *Procedure and Operation*

Separate Hearing. Once the question of competency is raised, article 46.02 contemplates that the issue "shall be tried in advance of trial."[18] Neverthe-

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Texas court of criminal appeals held, in effect, that there was no significant difference between incompetency to stand trial and insanity as a defense to a crime.

[9] *E.g.*, D.C. REPORT 129-30; Cooke, *The Court Study Unit: Patient Characteristics and Differences Between Patients Judged Competent and Incompetent*, 27 J. CLIN. PSYCHOLOGY 141 (1969); McGarry, *Competency for Trial and Due Process Via the State Hospital*, 122 AM. J. PSYCHIATRY 623 (1965); Pfeiffer, Eisenstein & Dabbs, *Mental Competency Evaluation for the Federal Courts: I. Methods and Results*, 144 J. NERV. MENT. DIS. 320, 321 (1967); Robey, *Criteria for Competency To Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCHIATRY 616, 617 (1965) [hereinafter cited as Robey].

[10] TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(b)(2)(a) (Supp. 1970) states: "Instructions submitting the issue of present insanity shall be framed so as to require the jury to state in its verdict whether defendant is sane or insane at the time of the trial."

[11] *See* Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960), wherein the Supreme Court stated that the legal test of incompetency is "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

[12] TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1 (Supp. 1970) states that the issue of competency may be raised "on behalf of accused" without specifying the requesting party. *Cf.* D.C. REPORT 19 n.1. *See generally* H. WEIHOFEN, *supra* note 3, at 440-42.

[13] *See generally* D.C. REPORT 66-67.

[14] *See* Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1966); Plummer v. United States, 260 F.2d 729 (D.C. Cir. 1958); Goodwin v. Swenson, 287 F. Supp. 166 (W.D. Mo. 1968); Evans v. Kropp, 254 F. Supp. 218 (E.D. Mich. 1966); D.C. REPORT 85. *See generally* Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1438-40 (1965).

[15] *See* Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967), *cert. denied*, 393 U.S. 986 (1968); O'Beirne v. Overholser, 193 F. Supp. 652, 661 (D.D.C. 1961), *rev'd on other grounds*, 302 F.2d 852 (D.C. Cir. 1962); McGee, *Defense Problems Under the Durham Rule*, 5 CATHOLIC LAW. 35 (1959); *cf.* Lynch v. Overholser, 369 U.S. 705 (1962).

[16] Ormsby v. United States, 273 F. 977 (6th Cir. 1921); Evans v. Kropp, 254 F. Supp. 218 (E.D. Mich. 1966); *see* Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); D.C. REPORT 92. *See also* Note, *The Prosecutor's Constitutional Duty To Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

[17] Pate v. Robinson, 383 U.S. 375 (1966); Townsend v. State, 427 S.W.2d 55 (Tex. Crim. App. 1968); TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(g) (Supp. 1970).

[18] TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1 (Supp. 1970). Prior to its amendment in 1969, § 1 provided that the issue of competency could not be heard in advance of trial "except upon written application on behalf of the accused with the consent of the State's attorney and the approval of the trial judge." Ch. 722, §§ 1-10, [1965] Tex. Laws 532-35. These limitations would appear to conflict with TEX. PEN. CODE ANN. art. 34 (Supp. 1970), which provides that "no person who becomes insane after he committed an offense shall be tried for the same while in such

less, if facts raising a reasonable doubt as to the competency of the accused come to the court's attention for the first time during the course of the trial, the court is required to suspend those proceedings and convene a separate hearing on the issue.[19] It appears that the issue of competency can be heard with the trial on the merits *only* when such procedure is requested by the accused or his counsel.[20]

Trial by Jury. Article 46.02 preserves the right to a jury determination of the competency of the accused to stand trial.[21] Presumably, this right could be waived and the matter submitted to the court.[22] However, there is authority to the contrary.[23]

Test of "Present Insanity." Section 2(a)(2) of article 46.02 defines the issue of "present insanity" in terms of whether the accused "is presently incompetent to make a rational defense."[24] This test omits the requirement of the federal standard that the cognitive functions of the accused be intact,[25] and may, therefore, be unconstitutionally narrow.[26]

Appointment of Experts. Under section 2(f)(1) the trial court is authorized to "appoint disinterested qualified experts" to examine the accused with regard to his competency to stand trial.[27] This provision is designed to satisfy certain due process requirements[28] that were overlooked by the earlier version of article 46.02.[29] Article 46.02 would seem to permit the

condition," and Pate v. Robinson, 383 U.S. 375 (1966), which suggests that due process requires a preliminary hearing on the issue of competence to stand trial. However, in Townsend v. State, 427 S.W.2d 55 (Tex. Crim. App. 1968), the court of criminal appeals, construing art. 46.02 prior to its amendment, held that when a lack of the state's attorney's consent precluded application of § 1, the accused was still entitled to a separate hearing on the question of competency under § 2 once a bona fide doubt about his competency is raised. *See* Note, *Competency To Stand Trial—Pre-Trial Procedures*, 22 Sw. L.J. 857 (1968); Note, *An Accused Has the Right, Upon Motion, to a Hearing on His Competency To Stand Trial Before Trial on the Merits*, 47 TEXAS L. REV. 147 (1968); *cf.* Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 22 Sw. L.J. 211, 217-18 (1968).

[19] TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(g)(1) (Supp. 1970); *accord*, Pate v. Robinson, 383 U.S. 375 (1966); Townsend v. State, 427 S.W.2d 55 (Tex. Crim. App. 1968).

[20] *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(a) (Supp. 1970).

[21] *Id.* §§ 1, 2. It should be noted, however, that there is no federal right to a jury hearing on competence to stand trial. Jordan v. United States, 207 F.2d 28 (D.C. Cir. 1953); Higgins v. United States, 205 F.2d 650 (9th Cir. 1953); United States v. McFalls, 247 F. Supp. 439 (E.D. Tenn. 1965).

[22] *See* TEX. CODE CRIM. PROC. ANN. art. 1.13 (1966).

[23] *See* Townsend v. State, 427 S.W.2d 55, 57-58 (Tex. Crim. App. 1968); TEX. CONST. art. I, § 15; TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(g)(1) (Supp. 1970).

[24] TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(a)(2) (Supp. 1970).

[25] In Dusky v. United States, 362 U.S. 402 (1960), the Supreme Court stated that the test of competency to stand trial is "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding *and* whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 403 (emphasis added).

[26] *See* Noble v. Sigler, 351 F.2d 673 (8th Cir. 1965), *cert. denied*, 385 U.S. 853 (1966), which holds that the federal standard of competency to stand trial is applicable to state criminal proceedings.

[27] TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(f)(1) (Supp. 1970); *see* Steele, *supra* note 18, at 217.

[28] *See* Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965); Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394 (1964). *See also* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963).

[29] Ch. 722, §§ 1-10, [1965] Tex. Laws 532-35.

trial court to authorize an examination covering criminal responsibility as well as competence to stand trial, even though a plea of insanity has not been entered.[30] Such a two-pronged examination at the outset could be of great benefit to an accused who is restored to competence after several years and faces the problem of mustering evidence in support of a delayed insanity defense.[31]

During the course of examination the appointed psychiatrist will seek to obtain information from the accused on which he can base an opinion as to the accused's mental state. If the psychiatrist is subsequently permitted to testify for the prosecution, the result may be that the accused's own words are used against him.[32] In an attempt to avoid a possible violation of fifth amendment rights, section 2(f)(4) provides that no statement made by the accused during an examination into his competency "shall be admitted in evidence . . . on the issue of guilt in any criminal proceeding . . . ."[33] Article 46.02 does not however, prohibit the examining psychiatrist from divulging, out of court, any information obtained from the accused. Likewise, no provision is made for informing the accused of his right to have counsel present at all critical stages of the proceeding, which may well include the psychiatric examination.[34]

Proceeding on the Merits. Article 46.02 fails to make any provision for the accused who, although conceded to be incompetent, insists upon an immediate trial on the merits because he has valid grounds for attacking the charge against him.[35] Situations may arise where the accused cannot, as a matter of law, be convicted, or where a valid affirmative defense exists which does not require his participation.[36] In these instances the accused

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[30] *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(f)(1) (Supp. 1970).

[31] *See* D.C. REPORT 79-82.

[32] *See* French v. District Court, 153 Colo. 10, 384 P.2d 268 (1963); State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966); Stater v. Obstein, 52 N.J. 516, 247 A.2d 5 (1968); Lee v. County Court, 27 N.Y.2d 432, 267 N.E.2d 452 (1971); D.C. REPORT 107-18; Danforth, *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination*, 19 RUTGERS L. REV. 489 (1965); Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 WIS. L. REV. 671; Note, *Requiring a Criminal Defendant To Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648 (1970); Note, *Pretrial Mental Examinations in Maine: Are They Mechanisms for Compelling Self-Incrimination*, 18 MAINE L. REV. 96 (1966); *cf.* Wade v. United States, 426 F.2d 64 (D.C. Cir. 1970). *But see* United States v. Baird, 414 F.2d 700 (2d Cir. 1969); United States v. Albright, 388 F.2d 719, 722-26 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33 (8th Cir. 1967); *cf.* Pope v. United States, 372 F.2d 710, 720-21 (8th Cir. 1967) (en banc), *vacated on other grounds*, 392 U.S. 651 (1968); Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959), *cert. denied*, 365 U.S. 848 (1961).

[33] TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(f)(4) (Supp. 1970).

[34] *See* Lee v. County Court, 27 N.Y.2d 432, 267 N.E.2d 452 (1971). *See also* Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969); D.C. REPORT 112-18; Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 24 SW. L.J. 229, 237 (1970); Note, *Right to Counsel at the Pretrial Mental Examination of an Accused*, 118 U. PA. L. REV. 448 (1970). *Contra*, United States v. Baird, 414 F.2d 700 (2d Cir. 1969); United States v. Albright, 388 F.2d 719 (4th Cir. 1968); State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965); Blankenship v. State, 432 S.W.2d 945 (Tex. Crim. App. 1968).

[35] *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(b)(3) (Supp. 1970). *But see Ex parte* Hodges, 166 Tex. Crim. 433, 314 S.W.2d 581 (1958).

[36] *See, e.g.*, United States v. Barnes, 175 F. Supp. 60 (S.D. Cal. 1959). *See also* D.C. REPORT 144-45; Foote, *Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 841-44 (1960).

should not be prevented from having his defenses adjudicated.[37]

Section 2(b)(3) of article 46.02 does permit the issue of sanity at the time of the alleged offense to be tried even though the accused may be incompetent.[38] Thus, if an incompetent accused is found to have been insane at the time of the alleged offense he would be acquitted, subject to possible commitment to a mental institution.[39] In the event the incompetent accused is found to have been sane at the time of the alleged offense, the court is required to declare a mistrial on that issue.[40]

II. Psychiatric Examination of the Accused

Since a determination of the competency of an accused to stand trial is largely predicated upon medical testimony,[41] a psychiatric examination of the accused is almost always necessary. The purpose of such an examination is twofold: (1) to ascertain whether the cognitive functions of the accused are intact, that is, whether the accused is able to comprehend and understand his position as it relates to his legal status; and (2) to determine if the accused's ability to communicate is such that he may adequately cooperate with his lawyer in the preparation of his case. When these two functions of the accused's mind are sufficiently intact, he is mentally competent to stand trial. If either or both are impaired, he is not.[42]

A. *Problem of Communication*

There has been a consistent failure on the part of the legal profession to inform the examining psychiatrist of the specific questions that need to be answered on the issue of mental competency to stand trial.[43] Questions addressed to the psychiatrist on this issue range from the most

[37] *See* Model Penal Code § 4.06 (Tent. Draft No. 6, 1962); D.C. Report 143-46; Foote, *supra* note 36, at 841-44; Magnus, *supra* note 2, at 66-72; Vann, *Pretrial Determination and Decision-Making*, 43 U. Det. L.J. 13, 30 (1965); Comment, *Criminal Law—Insane Persons—Competency To Stand Trial*, 59 Mich. L. Rev. 1078, 1094-97 (1961); Note, *Incompetency To Stand Trial*, 81 Harv. L. Rev. 454, 455-56 (1967). *Compare* United States v. Barnes, 175 F. Supp. 60 (S.D. Cal. 1959), *with* United States v. Marino, 48 F. Supp. 75 (N.D. Ill. 1957).

[38] Tex. Code Crim. Proc. Ann. art. 46.02, § 2(b)(3) (Supp. 1970); *see* Foote, *supra* note 36, at 841-44.

[39] Tex. Code Crim. Proc. Ann. art. 46.02, § 2(d)(1) (Supp. 1970):

> (d) The following rules shall apply upon defendant's being acquitted by reason of the jury's returning a finding that he was insane as of the time of the alleged offense:
>
> (1) If the jury finds the defendant to be insane at the time of trial, and it further finds that the defendant should be committed to a mental institution, the court shall enter an order committing the defendant to a State mental hospital or to an agency of the United States operating a mental hospital or to a Veterans' Administration hospital, and placing him in the custody of the sheriff for transportation to the mental hospital to be confined therein until he becomes sane. The court shall further order that a transcript of all medical testimony adduced before the jury shall be forthwith prepared by the court reporter and such transcript shall accompany the patient to the mental hospital.

[40] *Id.* § 2(e).

[41] *See* Slough & Wilson, *Mental Competency To Stand Trial*, 21 U. Pitt. L. Rev. 593, 609-10 (1960); *cf.* Tex. Code Crim. Proc. Ann. art. 46.02, § 9 (1966).

[42] Scrignar, *The Physician and the Law—Determination of Mental Competency To Stand Trial*, 201 J.A.M.A. 343 (1967).

[43] McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 Boston U.L. Rev. 46, 49 (1969); Robey 616-17.

general, requesting "psychiatric evaluation of the accused,"[44] to the highly complex, couched in the strictest of legal terms.[45] Due process of law may be compromised where there is a failure of communication between attorney and psychiatrist. To avoid possible confusion the question of competency should be propounded to the psychiatrist in clear and intelligible terms.[46] One suggestion is to frame the question of the mental competency of an accused in terms of (1) whether the accused possesses sufficient mental capacity to comprehend the nature and object of the proceedings and his own position in relation to those proceedings, and (2) whether he is able to advise counsel rationally in the preparation and implementation of his own defense.[47]

When the psychiatrist is called upon to evaluate the competency of an accused he should be advised of the legal and factual setting of the case. The need for the psychiatrist to be fully aware of the nature of the proceedings facing the accused cannot be over-emphasized. No opinion on the competency of an accused can be complete without consideration of the severity of the charges, the complexity of the case, and the demands which may be made upon the accused during the course of trial.[48] Obviously, standing trial on a charge of murder or tax evasion involves the need for considerably greater ability to assist counsel than does standing trial for theft or driving while intoxicated.[49] If the psychiatrist underestimates the level of mental competency required, he may send an incompetent accused to face proceedings he does not understand.[50] On the other hand, if he overestimates the demands that will be placed upon the accused, he will unfairly deprive a competent accused of his right to a speedy trial.[51]

B. *Mental Evaluation*

Psychiatric opinions on mental incompetency should be based upon a review of the mental history of the accused and an objective examination of his present mental status.[52] If a mental disorder is diagnosed, the psychiatrist should determine whether, and to what extent, the disorder impairs the capacity of the accused to stand trial.[53] However, neither a diagnosis of a psychotic disorder nor of intellectual deficiency is of itself tantamount to a finding of mental incompetency.[54]

Mental History. A previous history of mental illness or prior hospitali-

[44] Pfeiffer, Eisenstein & Dabbs, *Mental Competency Evaluation for the Federal Courts: II. Appraisal and Implications*, 145 J. NERV. MENT. DIS. 18, 19 (1967).
[45] *Id.*
[46] *See* Hess & Thomas, *supra* note 8, at 715; McGarry, *supra* note 9, at 625; Robey 617.
[47] *See* Robey 617.
[48] D.C. REPORT 99; Robey 620.
[49] *See* Robey 620.
[50] *See* Pfeiffer, Eisenstein & Dabbs, *supra* note 44, at 18.
[51] TEX. CONST. art. I, § 10; *see* Pfeiffer, Eisenstein & Dabbs, *supra* note 44, at 18.
[52] *See* Balcanoff & McGarry, *Amicus Curiae: The Role of the Psychiatrist in Pretrial Examinations*, 126 AM. J. PSYCHIATRY 342, 343-44 (1969); Smith, *Psychiatric Examinations in Federal Mental Competency Proceedings*, 37 F.R.D. 171, 174 (1965) [hereinafter cited as Smith].
[53] Smith 173-74.
[54] Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 325; Robey, 617-19; *see* D.C. REPORT 43; Smith 174.

zation may reflect upon the competency of an accused.[55] Therefore, efforts should be made to contact all authorities and institutions that might have relevant information about the accused. Included are penal institutions, hospitals, and the Veterans Administration. Additional background information should be developed through interviews with relatives, friends, employers, and others.[56]

Examination. Ideally, the accused should be admitted to a hospital or clinic for observation over a period of several days.[57] The circumstances of each particular case may dictate a shorter or longer stay.[58] Initially the accused is given a routine physical examination.[59] In cases where organic brain disease is indicated, a complete neurological examination is undertaken to determine the extent of the disability.[60] Included are X-ray films of the skull, spinal fluid examinations, and electroencephalograms.[61]

A psychological examination provides valuable objective evidence of mental disability.[62] Therefore, an extensive battery of psychological tests is usually administered.[63] These tests can be used to measure intelligence,[64] pathological thought trends, degrees of mental and emotional disorder, and organic brain damage.[65] Routinely included are the Wechsler Bellevue Intelligence Scale, Wechsler Memory Scale, Bender-Gestalt, Rorschach, Thematic Apperception Test, and Projective Drawings.[66]

Finally the accused is interviewed by the examining psychiatrist. The total contact between accused and psychiatrist usually covers between three and eight hours.[67]

C. *Criteria*

Comprehension of Court Proceedings. An examination of the accused must show that when he goes to trial he will be aware of the court surroundings and procedures.[68] He must be able to distinguish between a plea of guilty and a plea of not guilty.[69] The accused must be aware of the principals involved, such as the judge, the jury, and the attorneys, as well as the fact that he is the defendant in the proceedings.[70] He must have some awareness of the nature of the charges against him and the range

[55] *See* D.C. REPORT 31; Smith 173-74.
[56] *See* D.C. REPORT 31; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 322.
[57] *See* D.C. REPORT 29-30, 81, 102-04; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 322.
[58] *See* D.C. REPORT 29-31; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 322.
[59] D.C. REPORT 31; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 322; Smith 174.
[60] D.C. REPORT 31; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 322; Robey & Bogard, *supra* note 2, at 520; Smith 174.
[61] D.C. REPORT 31; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 323; Robey & Bogard, *supra* note 2, at 520.
[62] Smith 174.
[63] D.C. REPORT 32; Balcanoff & McGarry, *supra* note 52, at 343; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 322.
[64] Robey reports, however, that "intellectual deficiency in and of itself rarely serves to render an individual incompetent." Robey 325; *accord*, Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 325.
[65] Smith 174.
[66] D.C. REPORT 32; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 322.
[67] D.C. REPORT 98; Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 322.
[68] D.C. REPORT 132; Robey 619.
[69] D.C. REPORT 131.
[70] Robey 619.

of possible verdicts.[71] The accused must be aware of the possible penalties if he should be found guilty, particularly in the case of a capital offense.[72] He must understand what defenses are available to him.[73] Finally, the accused must have some awareness of his legal rights, such as his right to trial by jury, to counsel, and to protection from self-incrimination.[74] If the accused fails to understand even the relatively simple level of proceedings that would take place were he returned to court, he cannot be considered competent, and the likelihood of his being able to advise counsel adequately is so small that the remaining portions of the test for competency become somewhat academic.[75]

Ability To Advise Counsel. Determination of the ability of the accused to advise counsel rationally in the preparation and implementation of his defense seems to require that the psychiatrist talk with the accused's attorney.[76]

Generally, the accused must show the ability to counsel with and accept advice from his attorney.[77] He must be able to divulge to his lawyer without paranoid distrust the facts of the case as he understands them.[78] He must decide with his lawyer upon a plea and approve the legal strategy to be used by them during the trial.[79] The accused must show a capacity to maintain a consistent defense and not insist upon a change in strategy without an adequate reason.[80] The accused must also show a capacity to maintain the attorney-client relationship.[81] For example, he cannot discharge his lawyer solely on the basis of paranoid suspicions and still be considered mentally competent.[82]

Frequently, during the course of trial proceedings, the question of waiver of rights arises. In such instance the accused should be able to make simple decisions in response to well-explained alternatives.[83]

The accused should be able to assist his attorney in challenging jurors.[84] He must show a capacity to listen to the testimony of witnesses and advise his lawyer of any distortions or misstatements.[85] Further, if the circumstances of the case make it necessary, he must show the capacity to testify in his own defense.[86] Generally speaking, if the accused is required to take the stand, the level of competency should be higher.[87]

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[71] D.C. REPORT 131; Robey 619.
[72] D.C. REPORT 132; Robey 619.
[73] *Id.*
[74] Robey 619; *see* McGarry, *supra* note 9, at 627.
[75] Robey 619.
[76] *Id.*; *see* Steele, *supra* note 18, at 217.
[77] D.C. REPORT 130-32; Robey 619.
[78] Robey 619.
[79] *Id.*
[80] *Id.*
[81] D.C. REPORT 132; Robey 619.
[82] *See* Robey 619.
[83] *Id.*
[84] D.C. REPORT 131.
[85] D.C. REPORT 131-32; Robey 619; *see* McGarry, *supra* note 9, at 627.
[86] D.C. REPORT 132.
[87] Robey 619; *see* D.C. REPORT 132.

III. Waiver of the Issue of Competency To Stand Trial

The evaluation of the mental status of an accused is largely a medical function; however, the parties charged with raising the issue of mental incompetency to stand trial have usually had no psychiatric training.[88] Thus, an obscured mental disorder that could constitute grounds for a finding of incompetency may be overlooked.[89] The result may be the conviction of an accused who is in actual fact incompetent. Since the trial of an accused person while he is legally incompetent violates due process,[90] there is a strong likelihood that a resulting conviction is subject to collateral attack.[91]

The issue of competency to stand trial is not deemed to have been waived merely because the accused failed to assert it.[92] The Supreme Court has held that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have a court determine his capacity to stand trial."[93] After all "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so."[94]

IV. Retrospective Determination of Competency

Collateral attack of a conviction allegedly obtained while an accused was incompetent poses a serious problem.[95] The reviewing court is called upon to look back to the time of trial and determine whether the accused was, in fact, incompetent. What might appear to be a simple inquiry, however, has become complicated by the passage of time. Indeed, there is some indication that the problems associated with an after-the-fact determination of competency make it an impermissible alternative.[96] This

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[88] *See* Hess & Thomas, *supra* note 8, at 715; Rice, *Mental Competency To Stand Trial Under Federal Criminal Procedure*, 1 WASHBURN L.J. 91, 101-03 (1960).

[89] The selection of accused persons for psychiatric evaluation of their competency has been described as "extremely haphazard." Pfeiffer, Eisenstein & Dabbs, *supra* note 44, at 19; *accord*, Ordway, *Discussion*, 122 AM. J. PSYCHIATRY 622 (1965).

[90] Bishop v. United States, 350 U.S. 961 (1956).

[91] *See, e.g.*, Lee v. Alabama, 386 F.2d 97 (5th Cir. 1967) (en banc). *See also* Swadron, *Collateral Attack of Federal Convictions on the Ground of Mental Incompetency*, 39 TEMP. L.Q. 117 (1966).

[92] Carroll v. Beto, 421 F.2d 1065 (5th Cir. 1970); Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967); Floyd v. United States, 365 F.2d 368 (5th Cir. 1966); Sharp v. Beto, 276 F. Supp. 871 (N.D. Tex. 1967).

[93] Pate v. Robinson, 383 U.S. 375, 384 (1966).

[94] Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960); *accord*, Carroll v. Beto, 421 F.2d 1065, 1067 (5th Cir. 1970); Floyd v. United States, 365 F.2d 368 (5th Cir. 1966); Sharp v. Beto, 276 F. Supp. 871 (N.D. Tex. 1967).

[95] *See, e.g.*, Lee v. Alabama, 386 F.2d 97 (5th Cir. 1967).

[96] *See* Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960); Clonch v. Boles, 419 F.2d 393 (4th Cir. 1969); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966); Holloway v. United States, 343 F.2d 265 (D.C. Cir. 1964); Brizendine v. Swenson, 302 F. Supp. 1011 (W.D. Mo. 1969); United States v. Follette, 301 F. Supp. 1137 (S.D.N.Y. 1969), *aff'd*, 421 F.2d 952 (2d Cir. 1970); Goodwin v. Swenson, 287 F. Supp. 166 (W.D. Mo. 1968); Sullivan v. United States, 205 F. Supp. 545 (S.D.N.Y. 1962). *But see* Crail v. United States, 430 F.2d 459 (10th Cir. 1970); Conner v. Wingo, 429 F.2d 630 (6th Cir. 1970) (2-1 decision); *cf.* United States v. Silva, 418 F.2d 328 (2d Cir. 1969).

is suggested in *Dusky v. United States*[97] where the Supreme Court ordered a new trial in one such case because of "the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago."[98] Similarly, in *Pate v. Robinson*[99] the Court granted a new trial after a lapse of six years since "the jury would not be able to observe the subject of their inquiry" and "expert witnesses would have to testify solely from information contained in the printed record."[100]

The United States Court of Appeals for the Fifth Circuit has sought to avoid the implications of *Dusky* and *Pate* by requiring that the reviewing court initially determine whether, under the circumstances, it can conduct an adequate restrospective hearing on the question of competency.[101] If so, then the reviewing court will proceed to the issue of competency; otherwise, a new trial must be ordered.[102]

The approach suggested by the Fifth Circuit appears to have limited usefulness[103] because as time passes the likelihood of an accurate and just finding on the question of mental competency decreases progressively.[104] One authority has concluded that "[t]he question of past mental state is, in the strictest sense, unanswerable."[105] A review of the various criteria for mental competency that would have to be considered in retrospect lends support to this view.

V. Conclusion

The question of an accused's competency to stand trial has generated a number of difficult problems which article 46.02 fails to solve. To clarify some of the points previously raised it is recommended that article 46.02 be further amended:

(1) The statute should be recast in terms of "competency to stand trial" rather than "present insanity."

(2) The question of mental competency should be reframed in terms of (a) whether the accused possesses sufficient mental capacity to comprehend the nature and object of the proceedings and his own position in relation to those proceedings, and (b) whether he is able to advise counsel rationally in the preparation and implementation of his own defense. Additionally, the standard of competence should be considered as subsuming a number of subsidiary factors or criteria.

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[97] 362 U.S. 402 (1960).

[98] *Id.* at 403.

[99] 383 U.S. 375 (1966).

[100] *Id.* at 387.

[101] Lee v. Alabama, 386 F.2d 97, 108 (5th Cir. 1967); *accord*, Carroll v. Beto, 421 F.2d 1065 (5th Cir. 1970).

[102] Lee v. Alabama, 386 F.2d 97, 108 (5th Cir. 1967).

[103] *Compare* McLain v. Beto, Civil No. 3-2140 (N.D. Tex., filed Apr. 15, 1970), *aff'd per curiam*, No. 30147 (5th Cir., Apr. 13, 1971); Clark v. Beto, 283 F. Supp. 272 (S.D. Tex. 1968), *aff'd*, 415 F.2d 71 (5th Cir. 1969); United States v. Anderson, 280 F. Supp. 565, 573-74 (D. Del. 1967); *with* Lee v. Alabama, 291 F. Supp. 921 (M.D. Ala. 1967), *aff'd*, 406 F.2d 466 (5th Cir.), *cert. denied*, 395 U.S. 927 (1969), *and* Sharp v. Beto, 282 F. Supp. 558 (N.D. Tex. 1968).

[104] McGarry, *supra* note 9, at 626; Pfeiffer, Eisenstein & Dabbs, *supra* note 44, at 23; *see* Carroll v. Beto, 421 F.2d 1065, 1068 (5th Cir. 1970) (Thornberry, J., concurring specially); Lee v. Alabama, 386 F.2d 97, 108-13 (5th Cir. 1967) (en banc) (Tuttle, J., Thornberry, J., & Goldberg, J., concurring specially); Blunt v. United States, 244 F.2d 355, 364 n.23 (D.C. Cir. 1957).

[105] Pfeiffer, Eisenstein & Dabbs, *supra* note 9, at 321.

(3) The statute should make clear the right of the accused to waive a jury determination of his competency to stand trial and have the matter submitted to the court.

(4) The accused should have the privilege to prevent psychiatrists and others participating in the conduct of an examination from testifying to statements made by him that are relevant to the offense charged *and* the examiners should be prohibited from divulging such statements outside of court.

(5) Article 46.02 should require that the accused be informed by the court in advance of a statutory examination of his rights with respect thereto. No sanctions should be invoked against an accused who refuses to cooperate in a statutory examination.

(6) The conduct of a statutory mental examination should be made impermissible unless at the time the accused is represented by counsel.

(7) The statute should make clear that legal or other defenses to the offense charged which do not require the assistance or participation of the accused may be presented to and passed upon by the court after the adjudication of an accused as incompetent.