

## **BILL ANALYSIS**

Senate Research Center  
82R24083 KEL-F

C.S.S.B. 931  
By: Williams  
Criminal Justice  
4/27/2011  
Committee Report (Substituted)

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Currently, there is a severe backlog of persons waiting in county jails to receive competency restoration services in the state mental hospital system. Competency restoration services are ordered for persons who have been ruled to be unable to stand trial because they do not have the ability to consult with their attorney within a reasonable degree of rational understanding or do not have a rational or factual understanding of the proceedings against them. These persons are ordered for forensic commitment to the state mental hospital if a bed is available. If a bed is not available, the person must wait while confined in the county jail until a bed is available. The lack of available beds for forensic commitment has caused a backlog in county jails.

C.S.S.B. 931 amends current law relating to the determination of incompetency in criminal cases.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 2(a), Article 42.03, Code of Criminal Procedure, as follows:

(a) Requires the judge of the court in which the defendant is convicted, in all criminal cases, to give the defendant credit on the defendant's sentence for the time that the defendant has spent:

(1) in jail for the case, including confinement served as described by Article 46B.009 and excluding confinement served as a condition of community supervision, from the time of his arrest and confinement until his sentence by the trial court, rather than in jail for the case, other than confinement served as a condition of community supervision, from the time of his arrest and confinement until his sentence by the trial court;

(2) in a substance abuse treatment facility operated by the Texas Department of Criminal Justice under Section 493.009 (Substance Abuse Felony Punishment Facilities), Government Code, or another court-ordered residential program or facility as a condition of deferred adjudication community supervision granted in the case if the defendant successfully completes the treatment program at that facility; or

(3) confined in a mental health facility or residential care facility as described by Article 46B.009

SECTION 2. Amends Article 46B.009, Code of Criminal Procedure, as follows:

Art. 46B.009. TIME CREDITS. Requires a court sentencing a person convicted of a criminal offense to credit to the term of the person's sentence each of the following

periods for which the person may be confined in a mental health facility, residential care facility, or jail:

(1) any period of confinement that occurs pending a determination under Subchapter C (Incompetency Trial) as to the defendant's competency to stand trial; and

(2) any period of confinement that occurs between the date of any initial determination of the defendant's incompetency under that subchapter and the date the person is transported to jail following a final judicial determination that the person has been restored to competency.

Deletes existing text requiring a court sentencing a person convicted of a criminal offense to credit to the term of the person's sentence the time the person is confined in a mental health facility, residential care facility, or jail pending trial under Subchapter C.

SECTION 3. Amends Article 46B.0095, Code of Criminal Procedure, as follows:

Art. 46B.0095. New heading: MAXIMUM PERIOD OF COMMITMENT OR OUTPATIENT TREATMENT PROGRAM PARTICIPATION DETERMINED BY MAXIMUM TERM FOR OFFENSE. (a) Prohibits a defendant from being committed to a mental hospital or other inpatient or residential facility, ordered to participate in an outpatient treatment program, or subjected to both inpatient and outpatient treatment under Subchapter D (Procedures After Determination of Incompetency) or E (Civil Commitment: Charges Pending) or any other provision of this chapter for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried, except that if the defendant is charged with a misdemeanor and has been ordered only to participate in an outpatient treatment program under Subchapter D or E, the maximum period of restoration is two years. Deletes existing text providing that the two-year maximum period begins on the date of the initial order for outpatient treatment program participation was entered.

(b) Authorizes the defendant, on expiration of the maximum restoration period under Subsection (a), to be confined for an additional period in a mental hospital or other inpatient or residential facility or ordered to participate for an additional period in an outpatient treatment program, as appropriate, only pursuant to civil proceedings conducted under Subtitle C (Texas Mental Health Code) or D (Persons With Mental Retardation Act), Title 7 (Mental Health and Mental Retardation), Health and Safety Code, by a court with probate jurisdiction, rather than pursuant to civil commitment proceedings.

(c) Provides that the cumulative period described by Subsection (a):

(1) begins on the date the initial order of commitment or initial order for outpatient treatment program participation is entered under this chapter; and

(2) in addition to any inpatient or outpatient treatment periods described by Subsection (a), includes any time that, following the entry of an order described by Subdivision (1), the defendant is confined in a correctional facility, as defined by Section 1.07 (Definitions), Penal Code, or is otherwise in the custody of the sheriff during or while awaiting, as applicable:

(A) the defendant's transfer to a mental hospital or other inpatient or residential facility;

(B) the defendant's release on bail to participate in an outpatient treatment program; or

(C) a criminal trial following any temporary restoration of the defendant's competency to stand trial.

(d) Requires the court to credit to the cumulative period described by Subsection (a) any time that a defendant, following arrest for the offense for which the defendant was to be tried, is confined in a correctional facility, as defined by Section 1.07, Penal Code, before the initial order of commitment or initial order for outpatient treatment program participation is entered under this chapter.

SECTION 4. Amends Article 46B.010, Code of Criminal Procedure, as follows:

Art. 46B.010. MANDATORY DISMISSAL OF MISDEMEANOR CHARGES. Provides that if a court orders that a defendant charged with a misdemeanor punishable by confinement be committed to a mental hospital or other inpatient or residential facility, participate in an outpatient treatment program, or be subjected to both inpatient and outpatient treatment, and the defendant is not tried before the expiration of the maximum period of restoration described by Article 46B.0095:

(1) the court is required to dismiss the charge on the motion of the attorney representing the state; or

(2) the court, on the motion of the attorney representing the defendant and notice to the attorney representing the state:

(a) is required to set the matter to be heard not later than the 10th day after the date of filing of the motion; and

(b) is authorized to dismiss the charge on a finding that the defendant was not tried before the expiration of the maximum period of restoration.

Deletes existing text requiring a court to dismiss the charge on the motion of the attorney representing the state if the court orders the commitment of or participation in an outpatient treatment program by a defendant who is charged with a misdemeanor punishable by confinement and the defendant is not tried before the date of expiration of the maximum period of restoration under this chapter as described by Article 46B.0095.

SECTION 5. Amends Article 46B.022(a), Code of Criminal Procedure, as follows:

(a) Requires a psychiatrist or psychologist, to qualify for appointment under this subchapter as an expert, to:

(1) as appropriate, be a physician licensed in this state or be a psychologist licensed in this state who has a doctoral degree in psychology; and

(2) have the following certification or training, rather than certification or experience or training:

(A) as appropriate, certification by:

(i) the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or

(ii) the American Board of Professional Psychology in forensic psychology; or

(B) training consisting of:

(i) at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations; and

(ii) at least eight hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment.

Deletes existing text requiring a psychiatrist or psychologist to have, in addition to proper licensure, for an appointment made before January 1, 2005, at least five years of experience before January 1, 2004, in performing criminal forensic evaluations for courts, or for an appointment made on or after January 1, 2005, at least five years of experience before January 1, 2004, in performing criminal forensic evaluations for courts and eight or more hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment and documented with the court, to qualify for appointment under this subchapter as an expert if the psychiatrist or psychologist does not have the requisite training. Makes nonsubstantive and conforming changes.

SECTION 6. Amends Article 46B.024, Code of Criminal Procedure, as follows:

Art. 46B.024. FACTORS CONSIDERED IN EXAMINATION. Requires an expert, during an examination under this subchapter and in any report based on that examination, to consider, in addition to other issues determined relevant by the expert, the following:

- (1) Makes no changes to this subdivision;
- (2) as supported by current indications and the defendant's personal history, whether the defendant:
  - (A) has a mental illness, rather than a diagnosable mental illness; or
  - (B) is a person with mental retardation;
- (3) whether the identified condition has lasted or is expected to last continuously for at least one year;
- (4) the degree of impairment resulting from, rather than the impact of, the mental illness, or mental retardation, if existent, and the specific impact on the defendant's capacity to engage with counsel in a reasonable and rational manner; and
- (5) Redesignates existing Subdivision (4) as Subdivision (5). Makes no further changes.

Makes nonsubstantive changes.

SECTION 7. Amends Article 46B.025, Code of Criminal Procedure, by amending Subsections (a) and (b) and adding Subsection (a-1), as follows:

- (a) Requires that an expert's report to the court state an opinion on a defendant's competency or incompetency to stand trial or explain why the expert is unable to state such an opinion and also:
  - (1)-(2) Makes no changes to these subdivisions;
  - (3) in specific, rather than general, terms, describe procedures, techniques, and tests used in the examination, the purpose of each procedure, technique, or test, and the conclusions reached; and
  - (4) state the expert's clinical observations, findings, and opinions on each specific issue referred to the expert by the court, state the specific criteria supporting the

expert's diagnosis, and state specifically any issues on which the expert could not provide an opinion.

(a-1) Prohibits the expert's opinion on the defendant's competency or incompetency from being based solely on the defendant's refusal to communicate during the examination.

(b) Requires the expert, if in the opinion of an expert appointed under Article 46B.021 (Appointment of Experts) the defendant is incompetent to proceed, to state in the report:

(1) the symptoms, exact nature, severity, and expected duration of the deficits resulting from the defendant's mental illness or mental retardation, if any, and the impact of the identified condition on the factors listed in Article 46B.024 (Factors Considered in Examination), rather than the exact nature of the deficits resulting from the defendant's mental illness or mental retardation, if any, that impact the factors listed in Article 46B.024, contributing to the defendant's incompetency;

(2) an estimate of the period needed to restore the defendant's competency, including whether the defendant is likely to be restored to competency in the foreseeable future; and

(3) prospective treatment options, if any, appropriate for the defendant.

Makes nonsubstantive changes.

SECTION 8. Amends Article 46B.071, Code of Criminal Procedure, as follows:

Art. 46B.071. OPTIONS ON DETERMINATION OF INCOMPETENCY. (a) Creates this subsection from existing text. Requires the court, except as provided by Subsection (b), on a determination that a defendant is incompetent to stand trial, to:

(1) commit the defendant to a facility under Article 46B.073 (Commitment for Restoration to Competency); or

(2) release the defendant on bail under Article 46B.072 (Release on Bail).

(b) Requires the court, on a determination that a defendant is incompetent to stand trial and is unlikely to be restored to competency in the foreseeable future, to:

(1) proceed under Subchapter E or F (Civil Commitment: Charges Dismissed); or

(2) release the defendant on bail as permitted under Chapter 17 (Bail).

SECTION 9. Amends Article 46B.072, Code of Criminal Procedure, by amending Subsections (a), (b), and (c) and adding Subsection (a-1), as follows:

(a) Provides that this article applies only to a defendant who is subject to an initial restoration period based on Article 46B.071 (Options on Determination of Incompetency).

(a-1) Redesignates existing Subsection (a) as Subsection (a-1). Makes no further changes.

(b) Requires the court to order a defendant released on bail under Subsection (a-1), rather than under Subsection (a), to participate in an outpatient treatment program for a period not to exceed 120 days.

(c) Makes a conforming change.

SECTION 10. Amends Articles 46B.073(a) and (b), Code of Criminal Procedure, as follows:

(a) Provides that this article applies only to a defendant not released on bail who is subject to an initial restoration period based on Article 46B.071.

(b) Requires the court to commit a defendant described by Subsection (a) to a mental health facility or residential care facility for further examination and treatment toward the specific objective of the defendant attaining competency to stand trial, for the applicable period as follows:

(1) a period of not more than 60 days, if the defendant is charged with an offense punishable as a misdemeanor; or

(2) a period of not more than 120 days, if the defendant is charged with an offense punishable as a felony.

Deletes existing text requiring the court to commit a defendant described by Subsection (a) to a mental health facility or residential care facility for a period not to exceed 120 days for further examination and treatment toward the specific objective of attaining competency to stand trial.

SECTION 11. Amends Subchapter D, Chapter 46B, Code of Criminal Procedure, by adding Article 46B.0755, as follows:

Art. 46B.0755. PROCEDURES ON CREDIBLE EVIDENCE OF IMMEDIATE RESTORATION. (a) Authorizes the court, notwithstanding any other provision of this subchapter, if the court receives credible evidence indicating that the defendant has been restored to competency at any time after the defendant's incompetency trial under Subchapter C but before the defendant is transported under Article 46B.075 (Transfer of Defendant to Facility or Outpatient Treatment Program) to a mental health facility, residential care facility, or outpatient treatment program, as applicable, to appoint disinterested experts to reexamine the defendant in accordance with Subchapter B (Examination). Provides that the court is not required to appoint the same expert or experts who performed the initial examination of the defendant under that subchapter.

(b) Provides that, if after a reexamination of the defendant the applicable expert's report states an opinion that the defendant remains incompetent, the court's order under Article 46B.072 or 46B.073 remains in effect and the defendant is required to be transported to the facility or outpatient treatment program as required by Article 46B.075. Requires the court to withdraw its order under Article 46B.072 or 46B.073 and proceed under Subsection (c) or (d) if after a reexamination of the defendant the applicable expert's report states an opinion that the defendant has been restored to competency.

(c) Requires the court to find the defendant competent to stand trial and proceed in the same manner as if the defendant had been found restored to competency at a hearing if:

(1) both parties agree that the defendant is competent to stand trial; and

(2) the court concurs.

(d) Requires the court to hold a hearing to determine whether the defendant has been restored to competency if any party fails to agree or if the court fails to concur that the defendant is competent to stand trial. Requires a jury, on the request of the counsel for either party or the motion of the court, to make the competency determination if a court holds a hearing under this subsection. Provides that for purposes of the hearing, incompetency is presumed, and the defendant's competency must be proved by a preponderance of the evidence. Requires the court to issue a new order under Article 46B.072 or 46B.073, as

appropriate based on the defendant's current condition, if after the hearing the defendant is again found to be incompetent to stand trial.

SECTION 12. Amends Article 46B.077(a), Code of Criminal Procedure, as follows:

(a) Requires the facility to which the defendant is committed or the outpatient treatment program to which the defendant is released on bail to perform certain tasks, including assessing and evaluating whether the defendant is likely to be restored to competency in the foreseeable future, rather than assessing and evaluating whether the defendant will obtain competency in the foreseeable future.

SECTION 13. Amends Article 46B.079, Code of Criminal Procedure, as follows:

Art. 46B.079. NOTICE AND REPORT TO COURT. (a) Requires the head of the facility or the provider of the outpatient treatment program, as appropriate, not later than the 15th day before the date on which the initial restoration period, rather than a restoration period, is to expire according to the terms of the order or under Article 46B.0095 or other applicable provisions of this chapter, to notify the applicable court that the period is about to expire. Makes a conforming change.

(b) Requires the head of the facility or outpatient treatment program provider to promptly notify the court when the head of the facility or outpatient treatment program provider believes that:

(1) Makes no changes to this subdivision; or

(2) the defendant is not likely to attain, rather than will not attain, competency in the foreseeable future.

(c) Requires the head of the facility or outpatient treatment program provider, when the head of the facility or outpatient treatment program provider gives notice to the court under Subsection (a) or (b), to also file a final report with the court stating the reason for the proposed discharge under this chapter and including a list of the types and dosages of medications prescribed for the defendant while the defendant was in the facility or participating in the outpatient treatment program, rather than including a list of the types and dosages of medications with which the defendant was treated for mental illness while in the facility or participating in the outpatient treatment program.

(d) Provides that, if the head of the facility or outpatient treatment program provider notifies the court that the initial restoration period is about to expire, the notice may contain a request for an extension of the period for an addition period of 60 days and an explanation for the basis of the request. Requires that an explanation provided under this subsection include a description of any evidence indicating a reduction in the severity of the defendant's symptoms or impairment.

SECTION 14. Amends Articles 46B.080(b) and (c), Code of Criminal Procedure, as follows:

(b) Authorizes the court to enter an order under Subsection (a) (relating to authorizing the court to enter an order extending the initial restoration period for an additional period of 60 days) only if the court determines that:

(1) the defendant has not attained competency; and

(2) an extension of the initial restoration period will likely enable the facility or program to restore the defendant to competency within the period of the extension.

Deletes existing text authorizing the court to enter an order under Subsection (a) only if the court makes certain determinations on the basis of information provided by the head of the facility or the treatment program provider.

(c) Authorizes the court to grant only one 60-day extension under this article in connection with the specific offense with which the defendant is charged, rather than authorizes the court to grant only one extension under this article for a period of restoration ordered under this subchapter.

SECTION 15. Amends Article 46B.084(a), Code of Criminal Procedure, as follows:

(a) Requires the court, on the return of a defendant to the court, to make a determination with regard to the defendant's competency to stand trial. Authorizes the court to make the determination based, rather than based solely, on the report filed under Article 46B.079(c) and on other medical information or personal history information relating to the defendant. Authorizes a party to object in writing or in open court to the findings of the report not later than the 15th day after the date on which the court received notification under Article 46B.079. Deletes existing text authorizing the court to make the determination based solely on the report filed under Article 46B.079(c), unless any party objects in writing or in open court to the findings of the report not later than the 15th day after the date on which the court received notification under Article 46B.079.

SECTION 16. Amends Article 46B.086(a), Code of Criminal Procedure, to provide that this article applies only to certain defendants, including a defendant who is subject to Article 46B.072, if the court has made the determinations required by Subsection (a-1) of that article, rather than Subsection (a) of that article.

SECTION 17. Amends Article 46B.101, Code of Criminal Procedure, to provide that this subchapter applies to a defendant against whom a court is required to proceed according to, rather than under, Article 46B.084(e) (relating to continuing proceedings under Subchapter E if the defendant is found incompetent to stand trial and if all charges pending against the defendant are not dismissed) or according to the court's appropriate determination under Article 46B.071.

SECTION 18. Amends Article 46B.151(a), Code of Criminal Procedure, to require a court, if the court is required by Article 46B.084(f) (relating to proceeding under Subchapter F if the defendant is found incompetent to stand trial and if all charges pending against the defendant are dismissed) or by its appropriate determination under Article 46B.071 to proceed under this subchapter, or if the court is permitted by Article 46B.004(e) (relating to authorizing the court on motion of the attorney representing the state to dismiss all charges) to proceed under this subchapter, to determine whether there is evidence to support a finding that the defendant is either a person with mental illness or a person with mental retardation.

SECTION 19. Requires the Department of State Health Services (DSHS), in coordination with the Health and Human Services Commission, to study the feasibility of providing home and community-based services, instead of institutional care, to persons with severe and persistent mental illness who have a history of more than one inpatient commitment under Chapter 46B, Code of Criminal Procedure. Requires DSHS, not later than December 1, 2012, to issue a report to the legislature regarding the results of the feasibility study.

SECTION 20. Provides that the change in law made by this Act applies only to a defendant with respect to whom any proceeding under Chapter 46B, Code of Criminal Procedure, is conducted on or after the effective date of this Act.

SECTION 21. Effective date: September 1, 2011.