

By: Hartnett

H.B. No. 2725

A BILL TO BE ENTITLED

AN ACT

relating to the determination of incompetency in criminal cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 46B.001, Code of Criminal Procedure, is amended by adding Subdivision (1-a) to read as follows:

(1-a) "Developmental disability" has the meaning assigned by Section 112.001, Human Resources Code.

SECTION 2. Article 46B.0095, Code of Criminal Procedure, is amended to read as follows:

Art. 46B.0095. MAXIMUM PERIOD OF ~~[FACILITY]~~ COMMITMENT OR OUTPATIENT TREATMENT PROGRAM PARTICIPATION DETERMINED BY MAXIMUM TERM FOR OFFENSE. (a) A defendant may not, under Subchapter D or E or any other provision of this chapter, be 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 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 ~~[beginning on the date of the initial order for outpatient treatment program participation was entered]~~.

(b) On expiration of the maximum restoration period under

1 Subsection (a), the defendant may be confined for an additional  
2 period in a mental hospital or other inpatient or residential  
3 facility or ordered to participate for an additional period in an  
4 outpatient treatment program, as appropriate, only pursuant to  
5 civil [~~commitment~~] proceedings under Subtitle C or D, Title 7,  
6 Health and Safety Code.

7 (c) The cumulative period described by Subsection (a):

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

11 (2) includes any time that, following the entry of an  
12 order described by Subdivision (1), the defendant is confined in a  
13 correctional facility, as defined by Section 1.07, Penal Code,  
14 while awaiting:

15 (A) transfer to a mental hospital or other  
16 inpatient or residential facility;

17 (B) release on bail to participate in an  
18 outpatient treatment program; or

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

21 SECTION 3. Article 46B.022(a), Code of Criminal Procedure,  
22 is amended to read as follows:

23 (a) To qualify for appointment under this subchapter as an  
24 expert, a psychiatrist or psychologist must:

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

1           (2) have the following certification [~~or experience~~]  
2 or training:

3           (A) as appropriate, certification by:

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

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

9           (B) [~~experience or~~] training consisting of[+  
10           [~~(i)~~] at least 24 hours of specialized  
11 forensic training relating to incompetency or insanity  
12 evaluations[+

13           [~~(ii) for an appointment made before  
14 January 1, 2005, at least five years of experience before January 1,  
15 2004, in performing criminal forensic evaluations for courts; or~~

16           [~~(iii) for an appointment made on or after  
17 January 1, 2005, at least five years of experience before January 1,  
18 2004, in performing criminal forensic evaluations for courts and  
19 eight or more hours of continuing education relating to forensic  
20 evaluations, completed in the 12 months preceding the appointment  
21 and documented with the court].~~

22           SECTION 4. Article 46B.024, Code of Criminal Procedure, is  
23 amended to read as follows:

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

1 (1) the capacity of the defendant during criminal  
2 proceedings to:

3 (A) rationally understand the charges against  
4 the defendant and the potential consequences of the pending  
5 criminal proceedings;

6 (B) disclose to counsel pertinent facts, events,  
7 and states of mind;

8 (C) engage in a reasoned choice of legal  
9 strategies and options;

10 (D) understand the adversarial nature of  
11 criminal proceedings;

12 (E) exhibit appropriate courtroom behavior; and

13 (F) testify;

14 (2) as supported by current indications or the  
15 defendant's personal history, whether the defendant:

16 (A) has a [diagnosable] mental illness;

17 (B) [or] is a person with mental retardation or  
18 other developmental disability; or

19 (C) has any other medical condition that  
20 significantly limits the defendant's cognitive functioning;

21 (3) whether the identified condition has lasted or is  
22 expected to last continuously for at least one year;

23 (4) the degree of impairment resulting from [impact  
24 of] the mental illness, [or] mental retardation or other  
25 developmental disability, or other cognitive impairment, if  
26 existent, and the specific impact on the defendant's capacity to  
27 engage with counsel in a reasonable and rational manner; and

1           (5) [~~(4)~~] if the defendant is taking psychoactive or  
2 other medication:

3                   (A) whether the medication is necessary to  
4 maintain the defendant's competency; and

5                   (B) the effect, if any, of the medication on the  
6 defendant's appearance, demeanor, or ability to participate in the  
7 proceedings.

8           SECTION 5. Articles 46B.025(a) and (b), Code of Criminal  
9 Procedure, are amended to read as follows:

10           (a) An expert's report to the court must state an opinion on  
11 a defendant's competency or incompetency to stand trial or explain  
12 why the expert is unable to state such an opinion and must also:

13                   (1) identify and address specific issues referred to  
14 the expert for evaluation;

15                   (2) document that the expert explained to the  
16 defendant the purpose of the evaluation, the persons to whom a  
17 report on the evaluation is provided, and the limits on rules of  
18 confidentiality applying to the relationship between the expert and  
19 the defendant;

20                   (3) in specific [~~general~~] terms, describe procedures,  
21 techniques, and tests used in the examination, and [~~and~~] the purpose of  
22 each procedure, technique, or test, and the conclusions reached;  
23 and

24                   (4) state the expert's clinical observations,  
25 findings, and opinions on each specific issue referred to the  
26 expert by the court, state the specific criteria supporting the  
27 expert's diagnosis, and state specifically any issues on which the

1 expert could not provide an opinion.

2 (b) If in the opinion of an expert appointed under Article  
3 46B.021 the defendant is incompetent to proceed, the expert shall  
4 state in the report:

5 (1) the symptoms, exact nature, severity, and expected  
6 duration of the deficits resulting from the defendant's mental  
7 illness, ~~[or]~~ mental retardation or other developmental  
8 disability, or other cognitive impairment, if any, and the ~~that~~  
9 impact of the identified condition on the factors listed in Article  
10 46B.024~~[, contributing to the defendant's incompetency]~~; [and]

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

14 (3) prospective treatment options and the least  
15 restrictive setting in which treatment may be delivered, as ~~[, if~~  
16 any, appropriate for the defendant.

17 SECTION 6. Article 46B.071, Code of Criminal Procedure, is  
18 amended to read as follows:

19 Art. 46B.071. OPTIONS ON DETERMINATION OF INCOMPETENCY.

20 (a) Except as provided by Subsection (b), on ~~[On]~~ a determination  
21 that a defendant is incompetent to stand trial, the court shall:

22 (1) commit the defendant to a facility under Article  
23 46B.073; or

24 (2) release the defendant on bail under Article  
25 46B.072.

26 (b) On a determination that a defendant is incompetent to  
27 stand trial and is unlikely to be restored to competency in the

1 foreseeable future, the court shall:

2 (1) proceed under Subchapter E or F; or

3 (2) take other action authorized by law.

4 SECTION 7. Article 46B.072, Code of Criminal Procedure, is  
5 amended by amending Subsections (a), (b), and (c) and adding  
6 Subsection (a-1) to read as follows:

7 (a) This article applies only to a defendant who is subject  
8 to an initial restoration period based on Article 46B.071.

9 (a-1) Subject to conditions reasonably related to assuring  
10 public safety and the effectiveness of the defendant's treatment,  
11 if the court determines that a defendant found incompetent to stand  
12 trial is not a danger to others and may be safely treated on an  
13 outpatient basis with the specific objective of attaining  
14 competency to stand trial and if an appropriate outpatient  
15 treatment program is available for the defendant, the court:

16 (1) may release on bail a defendant found incompetent  
17 to stand trial with respect to a felony or may continue the  
18 defendant's release on bail; and

19 (2) shall release on bail a defendant found  
20 incompetent to stand trial with respect to a misdemeanor or shall  
21 continue the defendant's release on bail.

22 (b) The court shall order a defendant released on bail under  
23 Subsection (a-1) [~~(a)~~] to participate in an outpatient treatment  
24 program for a period not to exceed 60 [~~120~~] days.

25 (c) Notwithstanding Subsection (a-1) [~~(a)~~], the court may  
26 order a defendant to participate in an outpatient treatment program  
27 under this article only if:

1           (1) the court receives and approves a comprehensive  
2 plan that:

3           (A) provides for the treatment of the defendant  
4 for purposes of competency restoration; and

5           (B) identifies the person who will be responsible  
6 for providing that treatment to the defendant; and

7           (2) the court finds that the treatment proposed by the  
8 plan will be available to and will be provided to the defendant.

9           SECTION 8. Articles 46B.073(a) and (b), Code of Criminal  
10 Procedure, are amended to read as follows:

11           (a) This article applies only to a defendant not released on  
12 bail who is subject to an initial restoration period based on  
13 Article 46B.071.

14           (b) The court shall commit a defendant described by  
15 Subsection (a) to a mental health facility or residential care  
16 facility for a period not to exceed 60 [~~120~~] days for further  
17 examination and treatment toward the specific objective of  
18 attaining competency to stand trial.

19           SECTION 9. Article 46B.076(a), Code of Criminal Procedure,  
20 is amended to read as follows:

21           (a) If the defendant is found incompetent to stand trial,  
22 not later than the date of the order of commitment or of release on  
23 bail, as applicable, the court shall send a copy of the order to the  
24 facility of the department to which the defendant is committed or  
25 the outpatient treatment program to which the defendant is  
26 released. The court shall also provide to the facility or  
27 outpatient treatment program copies of the following made available



1 to the court during the incompetency trial:

2 (1) reports of each expert;

3 (2) psychiatric, psychological, or social work  
4 reports that relate to the medical [~~mental~~] condition of the  
5 defendant;

6 (3) documents provided by the attorney representing  
7 the state or the attorney representing the defendant that relate to  
8 the defendant's current or past medical [~~mental~~] condition;

9 (4) copies of the indictment or information and any  
10 supporting documents used to establish probable cause in the case;

11 (5) the defendant's criminal history record; and

12 (6) the addresses of the attorney representing the  
13 state and the attorney representing the defendant.

14 SECTION 10. Article 46B.077, Code of Criminal Procedure, is  
15 amended to read as follows:

16 Art. 46B.077. INDIVIDUAL TREATMENT PROGRAM. (a) The  
17 facility to which the defendant is committed or the outpatient  
18 treatment program to which the defendant is released on bail shall:

19 (1) develop an individual program of treatment;

20 (2) assess and evaluate whether the defendant is  
21 likely to be restored to [~~will obtain~~] competency in the  
22 foreseeable future; and

23 (3) report to the court and to the local mental health  
24 authority or to the local mental retardation authority on the  
25 defendant's progress toward achieving competency.

26 (b) If the defendant is committed to an inpatient mental  
27 health facility or to a residential care facility, the facility

1 shall report to the court at least once during the commitment  
2 period. If the defendant is released to a treatment program not  
3 provided by an inpatient mental health facility or a residential  
4 care facility, the treatment program shall report to the court:

5 (1) not later than the 14th day after the date on which  
6 the defendant's treatment begins; and

7 (2) until the defendant is no longer released to the  
8 treatment program, at least once during each 15-day [~~30-day~~] period  
9 following the date of the report required by Subdivision (1).

10 SECTION 11. Article 46B.079, Code of Criminal Procedure, is  
11 amended to read as follows:

12 Art. 46B.079. NOTICE AND REPORT TO COURT. (a) The head of  
13 the facility or the provider of the outpatient treatment program,  
14 as appropriate, not later than the 15th day before the date on which  
15 the initial [~~a~~] restoration period is to expire, shall notify the  
16 applicable court that the [~~restoration~~] period is about to expire.

17 (b) The head of the facility or outpatient treatment program  
18 provider shall promptly notify the court when the head of the  
19 facility or outpatient treatment program provider believes that:

20 (1) the defendant has attained competency to stand  
21 trial; or

22 (2) the defendant is not likely to [~~will not~~] attain  
23 competency in the foreseeable future.

24 (c) When the head of the facility or outpatient treatment  
25 program provider gives notice to the court under Subsection (a) or  
26 (b), the head of the facility or outpatient treatment program  
27 provider also shall file a final report with the court stating the

1 reason for the proposed discharge under this chapter and including  
2 a list of the types and dosages of medications with which the  
3 defendant was treated [~~for mental illness~~] while in the facility or  
4 participating in the outpatient treatment program. To enable any  
5 objection to the findings of the report to be made in a timely  
6 manner under Article 46B.084(a), the court shall provide copies of  
7 the report to the attorney representing the defendant and the  
8 attorney representing the state.

9 (d) If the head of the facility or outpatient treatment  
10 program provider notifies the court that the initial restoration  
11 period is about to expire, the notice may contain a request for an  
12 extension of the period for an additional period of 30 [~~60~~] days and  
13 an explanation for the basis of the request.

14 SECTION 12. Articles 46B.080(a) and (b), Code of Criminal  
15 Procedure, are amended to read as follows:

16 (a) On its own motion or the motion of any party [~~a request~~  
17 ~~of the head of a facility or a treatment program provider that is~~  
18 ~~made under Article 46B.079(d)~~] and notwithstanding any other  
19 provision of this subchapter, the court may enter an order  
20 extending the initial restoration period for an additional period  
21 of 30 [~~60~~] days.

22 (b) The court may enter an order under Subsection (a) only  
23 if the court determines that [~~on the basis of information provided~~  
24 ~~by the head of the facility or the treatment program provider~~]:

- 25 (1) the defendant has not attained competency; and  
26 (2) an extension of the initial restoration period  
27 will likely enable the facility or program to restore the defendant

1 to competency within the period of the extension.

2 SECTION 13. Article 46B.080(c), Code of Criminal Procedure,  
3 is redesignated as Article 46B.0805, Code of Criminal Procedure,  
4 and amended to read as follows:

5 Art. 46B.0805. SECOND EXTENSION PERMITTED IN CERTAIN  
6 CIRCUMSTANCES. [~~(c)~~] The court may grant a second [~~only one~~]  
7 extension with respect to [~~under this article for~~] a period of  
8 restoration ordered under this subchapter if medical evidence shows  
9 a reduction in the severity of the defendant's symptoms or  
10 functional impairment.

11 SECTION 14. Article 46B.084(a), Code of Criminal Procedure,  
12 is amended to read as follows:

13 (a) On the return of a defendant to the court, the court  
14 shall make a determination with regard to the defendant's  
15 competency to stand trial. The court may make the determination  
16 based [~~solely~~] on the report filed under Article 46B.079(c) and on  
17 other medical information or personal history information relating  
18 to the defendant, unless any party objects in writing or in open  
19 court to the findings of the report not later than the 15th day  
20 after the date on which the court received notification under  
21 Article 46B.079. The court shall make the determination not later  
22 than the 20th day after the date on which the court received  
23 notification under Article 46B.079, regardless of whether a party  
24 objects to the report as described by this subsection and the issue  
25 is set for hearing under Subsection (b).

26 SECTION 15. Article 46B.085, Code of Criminal Procedure, is  
27 amended to read as follows:

1           Art. 46B.085. SUBSEQUENT RESTORATION PERIODS AND  
2 EXTENSIONS OF THOSE PERIODS PROHIBITED. (a) The court may order  
3 only one initial period of restoration and two extensions [~~one~~  
4 ~~extension~~] under this subchapter in connection with the same  
5 offense.

6           (b) After an initial restoration period and one or two  
7 extensions [~~an extension~~] are ordered as described by Subsection  
8 (a), any subsequent court orders for treatment must be issued under  
9 Subchapter E or F.

10           SECTION 16. Article 46B.086(a), Code of Criminal Procedure,  
11 is amended to read as follows:

12           (a) This article applies only to a defendant:

13                   (1) who is determined under this chapter to be  
14 incompetent to stand trial;

15                   (2) who either:

16                           (A) remains confined in a correctional facility,  
17 as defined by Section 1.07, Penal Code, for a period exceeding 72  
18 hours while awaiting transfer to an inpatient mental health  
19 facility, a residential care facility, or an outpatient treatment  
20 program;

21                           (B) is committed to an inpatient mental health  
22 facility or a residential care facility for the purpose of  
23 competency restoration;

24                           (C) is confined in a correctional facility while  
25 awaiting further criminal proceedings following competency  
26 restoration treatment; or

27                           (D) is subject to Article 46B.072, if the court

1 has made the determinations required by Subsection (a-1) [~~(a)~~] of  
2 that article;

3 (3) for whom a correctional facility that employs or  
4 contracts with a licensed psychiatrist, an inpatient mental health  
5 facility, a residential care facility, or an outpatient treatment  
6 program provider has prepared a continuity of care plan that  
7 requires the defendant to take psychoactive medications; and

8 (4) who, after a hearing held under Section 574.106,  
9 Health and Safety Code, if applicable, has been found to not meet  
10 the criteria prescribed by Sections 574.106(a) and (a-1), Health  
11 and Safety Code, for court-ordered administration of psychoactive  
12 medications.

13 SECTION 17. Article 46B.101, Code of Criminal Procedure, is  
14 amended to read as follows:

15 Art. 46B.101. APPLICABILITY. This subchapter applies to a  
16 defendant against whom a court is required to proceed according to  
17 [~~under~~] Article 46B.084(e) or according to the court's appropriate  
18 determination under Article 46B.071.

19 SECTION 18. Article 46B.151(a), Code of Criminal Procedure,  
20 is amended to read as follows:

21 (a) If a court is required by Article 46B.084(f) or by its  
22 appropriate determination under Article 46B.071 to proceed under  
23 this subchapter, or if the court is permitted by Article 46B.004(e)  
24 to proceed under this subchapter, the court shall determine whether  
25 there is evidence to support a finding that the defendant is either  
26 a person with mental illness or a person with mental retardation.

27 SECTION 19. To increase community-based placement

1 alternatives to incarceration, the Health and Human Services  
2 Commission shall apply for and actively pursue a waiver or other  
3 authorization to the state Medicaid plan from the federal Centers  
4 for Medicare and Medicaid Services or any other federal agency as  
5 necessary to provide Medicaid home and community-based services to  
6 persons with severe and persistent mental illness who have a  
7 history of more than one forensic commitment under Chapter 46B,  
8 Code of Criminal Procedure.

9         SECTION 20. The change in law made by this Act applies only  
10 to a defendant with respect to whom any proceeding under Chapter  
11 46B, Code of Criminal Procedure, is conducted on or after the  
12 effective date of this Act.

13         SECTION 21. This Act takes effect September 1, 2011.