

- SUBJECT:** Procedures for defendants with mental illness or mental retardation
- COMMITTEE:** Criminal Jurisprudence — favorable without amendment
- VOTE:** 7 ayes — Peña, Vaught, Riddle, Escobar, Hodge, Mallory Caraway, Talton
0 nays
2 absent — Moreno, Pierson
- SENATE VOTE:** On final passage, April 12 — 31-0, on Local and Uncontested Calendar
- WITNESSES:** For — Chris Shields, Travis County; (*Registered, but did not testify:* Talia Gaster, Travis County Comm. Court; Joe Lovelace, Texas Council of Community MHMR Centers)
Against — None
On — Chris Lopez, Texas Department of State Health Services
- BACKGROUND:** Code of Criminal Procedure, ch. 46B, establishes procedures and standards for determining if a criminal defendant is competent to stand trial. People are considered incompetent to stand trial if they do not have sufficient present ability to consult with their lawyers with a reasonable degree of rational understanding or with a rational and factual understanding of the proceedings against them.
- In 2003, the 78th Legislature enacted SB 1057 by Duncan, which revised procedures governing determinations of competency. In general, a decision on competency occurs before a trial begins. The issue of competency can be raised by either party in a criminal case or by the court. If a court determines after an informal inquiry that there is evidence to support a finding that a defendant may be incompetent, courts are required to stay proceedings and order an examination of the defendant's mental state. A hearing can be held to determine competency unless certain conditions are met, such as when no party opposes a finding of incompetency.

If a defendant is found incompetent, the court must release the defendant on bail or commit the defendant to an initial term of up to 120 days in a mental health or residential care facility or in a maximum security unit of the Department of State Health Services (DSHS) for treatment with the objective of attaining competency to stand trial.

Defendants must be returned to court when an initial commitment expires or if the head of the facility to which the person was committed determines that the defendant is competent or that the defendant will not attain competency in the foreseeable future. At this point, a court must make a determination about the defendant's competency to stand trial. A court can order a 60-day extension of the commitment term under certain circumstances.

If it appears to a court after an initial commitment of 120 days that an incompetent defendant against whom charges are pending could be mentally ill or mentally retarded, courts may proceed with hearings for commitment to a mental health or residential care facility or, in specified circumstances, to a maximum security unit of a DSHS facility. The law also establishes procedures for cases in which a defendant is found incompetent and charges are dismissed, for handling defendants who attain competency, and for extended commitment to facilities for those who do not.

In 2005, the 79th Legislature enacted SB 679 by Duncan, which authorized videoconferencing of some hearings related to the competency of criminal defendants to stand trial and made numerous changes to procedures used in determining competency to stand trial.

DIGEST:

SB 867 would amend the Code of Criminal Procedure to:

- allow the state to treat those found incompetent to stand trial in outpatient treatment programs;
- limit the maximum time a mentally ill or mentally retarded person could be committed to a DSHS facility or participate in an outpatient treatment program to the maximum time that the person could be confined for the offense for which the person was arrested;
- establish guidelines for a court to grant bail to certain persons who were incompetent to stand trial;

- establish procedures for restoration of competency to stand trial periods, extensions of those periods, and reporting requirements by mental health care providers to courts;
- alter and separate procedures for civil commitment for mental illness and mental retardation;
- remove assault from the list of crimes for which a person with a mental illness or mental retardation would automatically be confined to a maximum security section of a state mental health facility; and
- require counties to pay for certain probate court hearings to authorize medication.

Outpatient treatment. SB 867 would allow courts to commit individuals who were either incompetent to stand trial or who had a mental illness or mental retardation to outpatient treatment programs. SB 867 would make changes throughout Art. 46B, which regulates civil commitment, to reflect this change. The changes would allow outpatient treatment programs to provide appropriate care, where possible, to mentally ill or mentally retarded suspects.

Maximum period of confinement. SB 867 would establish Art. 46B.0095 to create a maximum period of state facility commitment or participation in an outpatient treatment program that was determined by the maximum term possible for the offense for which the person originally was arrested. If the defendant was charged with a misdemeanor and ordered only to participate in an outpatient treatment program, the maximum period of restoration of competency to stand trial would be two years. Pursuant to civil commitment proceedings, a defendant could be civilly confined for an additional period as appropriate.

If a court ordered a defendant who was charged with a misdemeanor punishable by confinement to be committed or to participate in an outpatient treatment program and the defendant was not tried before the date of expiration of the maximum period of restoration of competence to stand trial, the court, on motion by the prosecutor, would dismiss the charge.

Bail for certain defendants not competent to stand trial. Subject to conditions reasonably related to assuring public safety and the effectiveness of the defendant's treatment, if a court determined that a defendant found incompetent to stand trial was not a danger to others and

could be safely treated on an outpatient basis with the specific objective of attaining competency to stand trial, and if an appropriate outpatient treatment program was available for the defendant, a court would be:

- allowed to release on bail or continue bail for a defendant found incompetent to stand trial for a felony; and
- required to release on bail or continue bail for a defendant found incompetent to stand trial for a misdemeanor.

The court would order a defendant released on bail to participate in an outpatient treatment program for not more than 120 days.

A judge could only release on bail a defendant not competent to stand trial if the court received and approved a comprehensive plan that provided for the treatment of the defendant for purposes of competency restoration and identified the person who would be responsible for providing the treatment to the defendant. The court also would have to find that the treatment proposed by the plan would be available and provided to the defendant.

The bail order would require that the defendant participate in an outpatient treatment program, either public or private, and follow an appropriate prescribed regimen of medical, psychiatric, or psychological care or treatment, including care or treatment involving the administration of psychoactive medication.

Procedures to regulate the restoration of competency. SB 867 would establish new procedures for determining the competency of a defendant to stand trial and how those defendants could be treated in order to restore competency.

SB 867 would amend Code of Criminal Procedure, Art. 16.22 to stipulate that a magistrate would not be required to order a defendant who had or could have a mental illness or mental retardation to be evaluated by an expert if the defendant had been so evaluated in the past year.

The written report of an ordered mental health examination would have to be submitted to the magistrate who ordered it within 30 days for a felony and within 10 days for a misdemeanor. Nothing in Art. 16.22 would prevent a court from releasing a mentally ill or mentally retarded defendant on bond or ordering an examination regarding the defendant's competency to stand trial.

SB 867 would amend Code of Criminal Procedure, Art. 46B.079 to require the head of a facility or the provider of the outpatient treatment to notify a court at least 15 days before the expiration of a competency restoration period. This notice would express the facility or program head's belief that the defendant had attained competency to stand trial or that the defendant would not attain competency in the foreseeable future. The facility or program head would file a report with the notice stating the reason for the conclusion and a list of the types and dosages of medications with which the defendant was treated. The notice could contain a request for an extension of the of the competency restoration period for an additional 60 days and an explanation for the basis of the request. A court would grant the extension only if it found that the defendant had not attained competency and that an extension of the restoration period would likely enable the facility or program to restore the defendant to competency. The court could grant only one such extension for a competency restoration period.

SB 867 would amend Code of Criminal Procedure, Art. 46B.084 to direct a court to make a determination of a defendant's competency within 15 days after the court's receipt of notice and findings of a mental health report issued by the director of the facility or program treating the defendant. If there was an objection, the court would be directed to hold a public hearing and would be required to make a determination of competency within 20 days after the court was notified by a facility or outpatient treatment director that the defendant should be reevaluated for competency.

SB 867 would amend art. 46B.085(b) to create procedures under which a facility or program would be able to file a motion to compel medication.

SB 867 would amend art. 46B.082, Code of Criminal Procedure, to require a sheriff to transport the defendant to the court, upon notice from the court to do so. If the sheriff had not transported the defendant to the court within 15 days of the end of the competency restoration period, the director would have to have the defendant promptly transported to the court. The county in which the court is located would have to reimburse DSHS for mileage and per diem expenses.

Civil commitment procedures for those with mental illness or mental retardation. SB 867 would require separate procedures for notice, hearing, and appeals for court proceedings to have a defendant declared a

person with a mental illness or mental retardation. Mental illness proceedings would be regulated by subtitle C, title 7, Health and Safety Code, while mental retardation would be regulated by subtitle D, title 7, Health and Safety Code.

Removing assault as an automatic trigger for confinement in maximum security. SB 867 would amend Arts. 46B.073(c)-(d), 46B.104(1) to remove assault as an automatic trigger for which a defendant would be assigned to the maximum security unit of any DSHS facility or any federal mental hospital.

County payment for certain civil commitment hearings. SB 867 would require the county in which the criminal charges were pending or adjudicated to pay the costs of hearings to authorize psychoactive medication to a patient ordered to receive inpatient treatment due to incompetency to stand trial or having been acquitted of an offense by reason of insanity, or a patient awaiting trial after having been found competent to stand trial and ordered to receive medication as part of a treatment regimen prior to a hearing.

SB 867 would take effect on September 1, 2007, and would apply only to hearings that took place on or after the effective date.

**SUPPORTERS
SAY:**

Mental health facilities are operating at or above capacity in Texas. This makes caring for the most needy difficult. SB 867 would address the capacity shortage and free up beds in these facilities by allowing outpatient treatment programs to handle many of the same mental health functions that state-run facilities do, including evaluation and treatment of incapacity to stand trial and ongoing treatment as part of bail programs. SB 867 also would establish bail procedures for low-risk defendants and free up space for those most in need of treatment. Furthermore, SB 867 would establish procedures for courts, sheriffs, and mental health providers that should streamline treatment and competency hearings.

SB 867 also would allow probate courts to charge counties for hearings to authorize medication as part of treatment to restore competency. SB 465, from the 2005 regular session, allowed probate courts to conduct these hearings but lacked a funding mechanism. SB 867 would allow probate courts to receive funding from the county in which the offense the defendant was suspected of committing took place. Probate courts have a specialization in this kind of analysis because one of their original

functions is to evaluate individuals' capacity to oversee their own affairs, and if necessary, appoint guardians. With SB 867 as a funding mechanism for hearings to authorize medication, probate courts would be able to conduct more of these hearings and thus speed up due process for these individuals.

SB 867 would remove simple assault from the list of serious crimes for which a suspect with mental illness normally would be automatically confined to the maximum security unit of a treatment facility. Suspects with mental illness or mental retardation often resist arrest because of their inability to comprehend their situation. Once admitted to a safe and secure environment, attended by mental health professionals who can treat and medicate them, they are no longer a threat. With this change, SB 867 would free up beds in the maximum security area for truly dangerous suspects, yet hospitals still could confine truly dangerous suspects to these areas regardless of their suspected crime.

OPPONENTS
SAY:

SB 867 would fail to address the problem of transporting mentally ill and mentally retarded patients. While the laws direct sheriffs to transport these suspects within a specified number of days and allows treatment providers to transport suspects under certain conditions, SB 867 still would allow for sheriffs to delay. Every day of delay means that a hospital bed is occupied by someone who has been certified by their doctor as competent to stand trial. This means others with mental illness or mental retardation are denied a bed, and the state could end up moving them great distances in order to find them treatment. More likely, these people would spend time in jail waiting for a bed to open up. During this time, it would be highly unlikely that they were receiving treatment, and their conditions could be exacerbated by the delay. The mental health system in Texas cannot continue to wait for sheriffs to transport mentally ill suspects when it is convenient. Specific court dates should be set by courts to force local law enforcement to transport suspects at specified times.

OTHER
OPPONENTS
SAY:

SB 867 would not address the underlying cause of mental health facility overcrowding in Texas — these facilities are underfunded. Since the movement to place the mentally ill out into the community that started in the 1960s and 1970s, there has been an increase in the number of mentally ill persons suspected of criminal offenses. This has led to an increased role for courts, police, and criminal justice organizations in dealing with the mentally ill. While SB 867 would provide procedures for how these groups would interact with the state's mental health providers, it would

not grant these providers enough resources to properly treat the state's mentally ill population.

In addition, the current structure is designed so that suspects are released back into the community or bounced among programs or facilities after receiving only a small amount of care. Very often, these suspects will re-offend and become involved with the police and courts all over again. Texas should address long-term causes, not short-term symptoms, by thinking systematically about the mentally ill.