



Online

Published on *Voice For The Defense Online* (<http://voiceforthedefenseonline.com>)

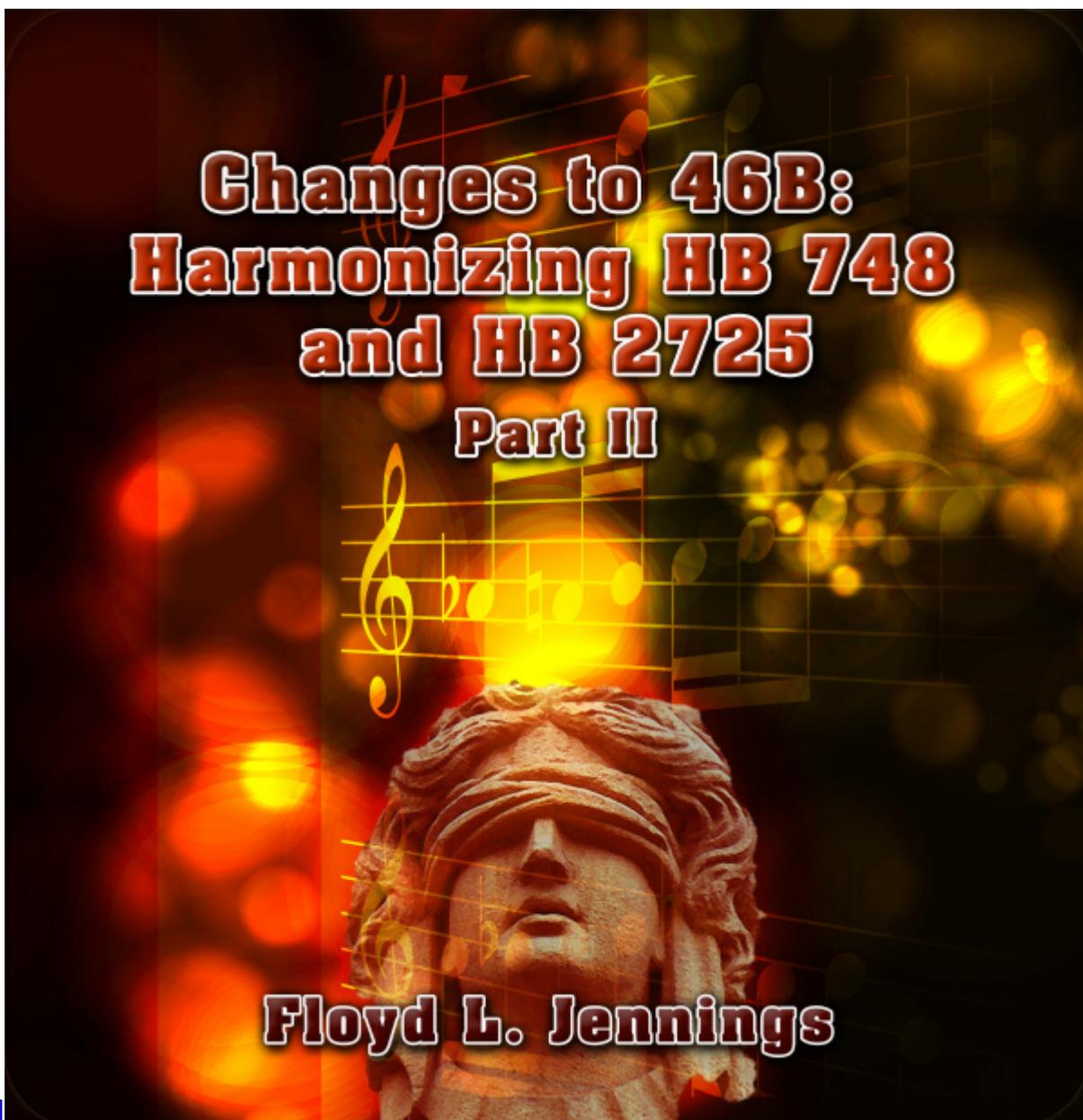
[Home](#) > Printer-friendly PDF

Changes to 46B: Harmonizing HB 748 and HB 2725 - Part II

[1][Features](#)

[2][Floyd L. Jennings](#)

Tuesday, November 22nd, 2011



[3]

Art. 46B.071. Options on Determination of Incompetency

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

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

- (1) commit the defendant to a facility under Article 46B.073; or
- (2) release the defendant on bail under Article 46B.072.

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

- (1) proceed under Subchapter E or F; or
- (2) release the defendant on bail as permitted under Chapter 17.

The issue of lack of foreseeability impacts outcome upon such a finding by the court. In this circumstance, required is either civil commitment with charges pending under Subchapter E, or transfer with charges having been dismissed under Subchapter F. Art. 46B.071 would, however, apply only in those cases where the defendant has not yet served the combination of jail time plus any hospitalization equal to the maximum sentence for the act with which charged.

This section may be a section that will result in appellate review based upon *Jackson v. Indiana*, 406 U.S. 715 (1972). *Jackson* was a case of a mentally retarded deaf mute who the court held could not be committed indefinitely save under strictly civil statutes because of an equal protection challenge. The Supreme Court noted that he was subject to a more lenient standard for commitment and a more stringent standard for release than those in strictly civil circumstance, which was impermissible. Similarly, 46B.103 though it is a "civil" commitment would invoke an indefinite commitment, and while procedurally under civil rules, this type of commitment has significant differences from commitments strictly civil: namely that release from 46B.102/.103 commitments is not effectuated by mere discharge by the attending physician as other civil commitments.

Rather, the criminal court has power to review and veto any proposed discharge. Thus, the revisions to 46B.071 might be subject to a *Jackson* challenge though whether such would be successful is not at all clear. The contrary argument is that the criteria for commitment are civil, and that even under such a commitment, the person could not remain longer than the maximum period of time as described in 46B.0095. In any event, such a circumstance should precipitate consultation with one's appellate section.

Consider the case of a defendant adjudicated incompetent and not restored, and then opined "not foreseeably likely to be restored" subjected to either 46B.102/103 commitment or transferred under 46B.151 but ultimately released. In his next case, there is now a presumption of incompetency, *i.e.*, there is an unvacated adjudication of incompetency. In this second case, absent any intervening conviction, the State bears the burden to prove competency "beyond a reasonable doubt." *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987). Whether there would be warrant to continue to pursue charges in such a circumstance is an interesting issue, as well as is whether to again seek restoration treatment. Both are well beyond the scope of this writing; but again, requiring collegial consultation. Careful review of 46B.073, however, reveals that a 46B.073 commitment requires treatment toward the "specific objective of regaining competency" and if the defendant is found unlikely to regain competency in the foreseeable future, then in the interests of economy, other alternatives might be considered.

Art. 46B.072. Release on Bail

Art. 46B.072. RELEASE ON BAIL. (a) This article applies only to a defendant who is subject to an initial restoration period based on Article 46B.071.

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

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

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

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

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

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

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

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

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

(d) An order issued under this article may require the defendant to participate in:

(1) as appropriate, an outpatient treatment program administered by a community center or an outpatient treatment program administered by any other entity that provides outpatient competency restoration services; and

(2) an appropriate prescribed regimen of medical, psychiatric, or psychological care or treatment, including care or treatment involving the administration of psychoactive medication, including those required under Article 46B.086.

This article is, in some ways, only nominally useful. Persons adjudicated incompetent are uncommonly able to participate effectively in a truly "outpatient" program which lacks the structure to provide food, clothing, shelter, as well as control of a defendant's ingestion of alcohol or illegal substances. Nor is there means of ensuring medication compliance. If a defendant is adjudicated incompetent, given that competency is a very low standard to achieve, he/she more than likely needs inpatient treatment. This issue arouses little anxiety simply because in Harris County there are no outpatient programs, and very few existent within the state. Moreover, merely releasing a defendant to conventional mental health treatment is not the equivalent of providing restoration treatment: The two should not be confused, as the latter is highly structured, based upon a model accepted nationally, and includes an educational or cognitive component in addition to conventional treatment.

Article 46B.073.?Commitment for Restoration

Art. 46B.073. COMMITMENT FOR RESTORATION TO COMPETENCY.

- (a) 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) For further examination and treatment toward the specific objective of the defendant attaining competency to stand trial, the [The] court shall commit a defendant described by Subsection (a) to a mental health facility or residential care facility for the applicable [a] 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 [not to exceed 120 days for further examination and treatment toward the specific objective of attaining competency to stand trial].
- (c) If the defendant is charged with an offense listed in Article 17.032(a), other than an offense listed in Article 17.032(a)(6), or the indictment alleges an affirmative finding under Section 3g(a)(2), Article 42.12, the court shall enter an order committing the defendant to the maximum security unit of any facility designated by the department, to an agency of the United States operating a mental hospital, or to a Department of Veterans Affairs hospital.
- (d) If the defendant is not charged with an offense described by Subsection (c) and the indictment does not allege an affirmative finding under Section 3g (a)(2), Article 42.12, the court shall enter an order committing the defendant to a mental health facility or residential care facility determined to be appropriate by the local mental health authority or local mental retardation authority.

As noted earlier, a restoration commitment is made for treatment ?toward the specific objective of the defendant attaining competency to stand trial.? The radical change in this article, however, has to do with the reduction in the period of commitment from 120 days to 60 days for an initial restoration period?applying only to misdemeanants and not to felony defendants. Note that if a defendant had a pending felony and was committed for restoration, in order to ensure that the restoration period was 120 days with a possible 60-day extension, the commitment would need to be related to the felony case and not the misdemeanor only.

While it was pointed out earlier that a local restoration program in Harris County effectuated restoration in less than 60 days, the average restoration period in Rusk State Hospital is slightly less than 100 days. This is because at least 60 days of that period is devoted to initial stabilization?and while not necessary for defendants from Harris County who have 24/7 psychiatric services in the jail, the larger number of smaller counties have no similar services. Thus, their defendants arriving at the state hospital with a psychiatric condition are far less stable than defendants from Harris County who have been treated since booking. But, unless the state hospital dramatically changes their structure for delivery of restoration services, the Class B misdemeanants?if sent?will likely not be restored in 60 days.

Article 46B.0755.?Procedures on Credible Evidence of Immediate Restoration

Art. 46B.0755. PROCEDURES ON CREDIBLE EVIDENCE OF IMMEDIATE RESTORATION.

- (a) 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 to a mental health facility, residential care facility, or outpatient treatment program, as applicable, the court may appoint disinterested experts to reexamine the defendant in accordance with Subchapter B. The court is not required to appoint the same expert or experts who performed

the initial examination of the defendant under that subchapter.

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

(c) The court shall 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) The court shall 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. If a court holds a hearing under this subsection, on the request of the counsel for either party or the motion of the court, a jury shall make the competency determination. For purposes of the hearing, incompetency is presumed, and the defendant's competency must be proved by a preponderance of the evidence. If after the hearing the defendant is again found to be incompetent to stand trial, the court shall issue a new order under Article 46B.072 or 46B.073, as appropriate based on the defendant's current condition.

This article is a new article and but provides a procedure with which to deal with the case that either spontaneously, or with treatment, restores in the jail prior to being transported for restoration under 46B.075. Allowed is re-examination either by the same examiner, or another. Note that the article appears to permit the court to find a defendant competent if the parties agree or after a hearing regardless of the expert's opinion. That is, while the expert's opinion is necessary, it is not solely a matter for the expert to conclude. This is reminiscent of the court's language in *Graham v. State*, 566 S.W.2d 941 (Tex. Crim. App. 1978), in which the court stated pithily (though about sanity):

The issue is not strictly medical, and expert witnesses, although capable of giving testimony that may aid the jury in its determination of the ultimate issue, are not capable of dictating determination of that issue. Only the jury can join the non-medical components that must also be considered in deciding the ultimate issue. That ultimate issue of criminal responsibility is beyond the province of expert witnesses. Were it otherwise, the issue would be tried in hospitals rather than the courts.

Art. 46B.077. Individual Treatment Program

This section includes a minor addition that the restoration program to which the defendant is committed has a duty to assess and evaluate whether the defendant is likely to be restored in the foreseeable future.

Art. 46B.079

Art. 46B.079. NOTICE AND REPORT TO COURT.

(a) 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 [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, shall notify the applicable court that the [restoration] period is about to expire.

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

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

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

(c) When the head of the facility or outpatient treatment program provider gives notice to the court under Subsection (a) or (b), the head of the facility or outpatient treatment program provider also shall 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 [with which] the defendant [was treated for mental illness] while the defendant was in the facility or participating in the outpatient treatment program. To enable any objection to the findings of the report to be made in a timely manner under Article 46B.084(a), the court shall provide copies of the report to the attorney representing the defendant and the attorney representing the state.

(d) 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 additional period of 60 days and an explanation for the basis of the request.

An explanation provided under this subsection must include a description of any evidence indicating a reduction in the severity of the defendant's symptoms or impairment.

This modification places a duty on the facility to notify the court within 15 days before the restoration period is to expire according to the terms of the order or under Article 46B.0095 or other applicable provisions of this chapter which might well be before the 60/120 period of restoration or the 60-day extension has expired. As well, the facility shall submit a report whenever the facility has reason to believe that the defendant has attained competency or is not likely to attain competency in the foreseeable future.

Art. 46B.080. Extension of Order

Art. 46B.080. EXTENSION OF ORDER.

(a) On a request of the head of a facility or a treatment program provider that is made under Article 46B.079(d) and notwithstanding any other provision of this subchapter, the court may enter an order extending the initial restoration period for an additional period of 60 days.

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

(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.

(c) The court may grant only one 60-day extension under this article in connection with the specific offense with which the defendant is charged [~~for a period of restoration ordered under this subchapter~~].

As mentioned at several points, a facility may request an additional 60 period for restoration, but only if it is believed that the defendant will regain competency during the extension period.

Art. 46B.084. Proceedings on Return of Defendant

Art. 46B.084. PROCEEDINGS ON RETURN OF DEFENDANT TO COURT.

(a) On the return of a defendant to the court, the court shall make a determination with regard to the defendant's competency to stand trial. The court may make the determination based [~~solely~~] on the report filed under Article 46B.079(c) and on other medical information or personal history information relating to the defendant. A [~~-, unless any~~] party may object [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. The court shall make the determination not later than the 20th day after the date on which the court received notification under Article 46B.079, regardless of whether a party objects to the report as described by this subsection and the issue is set for hearing under Subsection (b).

(b) If a party objects under Subsection (a), the issue shall be set for a hearing. The hearing is before the court, except that on motion by the defendant, the defense counsel, the prosecuting attorney, or the court, the hearing shall be held before a jury.

(b-1) If the hearing is before the court, the hearing may be conducted by means of an electronic broadcast system as provided by Article 46B.013. Notwithstanding any other provision of this chapter, the defendant is not required to be returned to the court with respect to any hearing that is conducted under this article in the manner described by this subsection.

(c) Repealed by Acts 2007, 80th Leg., R.S., Ch. 1307, Sec. 21, eff. September 1, 2007.

(d) If the defendant is found competent to stand trial, criminal proceedings against the defendant may be resumed.

(e) If the defendant is found incompetent to stand trial and if all charges pending against the defendant are not dismissed, the court shall proceed under Subchapter E.

(f) If the defendant is found incompetent to stand trial and if all charges pending against the defendant are dismissed, the court shall proceed under Subchapter F.

This section again clarifies that the court is not dependent solely upon the report of the examiner in order to determine competency. Objections to the content of the report, however, must be made within 20 days of the notification to the court concerning the defendant's status.

Art. 46B.086.?Court-ordered Medications

Art. 46B.086. COURT-ORDERED MEDICATIONS.

(a) This article applies only to a defendant:

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

(2) who either:

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

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

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

(D) is subject to Article 46B.072, if the court has made the determinations required by Subsection (a-1) [(a)] of that article;

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

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

(b) If a defendant described by Subsection (a) refuses to take psychoactive medications as required by the defendant's continuity of care plan, the director of the correctional facility or outpatient treatment program provider, as applicable, shall notify the court in which the criminal proceedings are pending of that fact not later than the end of the next business day following the refusal. The court shall promptly notify the attorney representing the state and the attorney representing the defendant of the defendant's refusal. The attorney representing the state may file a written motion to compel medication. The motion to compel medication must be filed not later than the 15th day after the date a judge issues an order stating that the defendant does not meet the criteria for court-ordered administration of psychoactive medications under Section 574.106, Health and Safety Code, except that, for a defendant in an outpatient treatment program, the motion may be filed at any time.

(c) The court, after notice and after a hearing held not later than the 10th day after the motion to compel medication is filed [~~fifth day after the defendant is returned to the committing court~~], may authorize the director of the correctional facility or the program provider, as applicable, to have the medication administered to the defendant, by reasonable force if necessary. A hearing under this subsection may be conducted using an electronic broadcast system as provided by Article 46B.013.

(d) The court may issue an order under this article only if the order is supported by the testimony of two physicians, one of whom is the physician at or with the applicable correctional facility or outpatient treatment program who is prescribing the medication as a component of the defendant's continuity of care plan and another who is not otherwise involved in proceedings against the defendant. The court may require either or both physicians to examine the defendant and report on the examination to the court.

(e) The court may issue an order under this article if the court finds by clear and convincing evidence that:

(1) the prescribed medication is medically appropriate, is in the best medical interest of the defendant, and does not present side effects that cause harm to the defendant that is greater than the medical benefit to the defendant;

(2) the state has a clear and compelling interest in the defendant obtaining and maintaining competency to stand trial;

(3) no other less invasive means of obtaining and maintaining the defendant's competency exists; and

(4) the prescribed medication will not unduly prejudice the defendant's rights or use of defensive theories at trial.

(f) A statement made by a defendant to a physician during an examination under Subsection (d) may not be admitted against the defendant in any criminal proceeding, other than at:

(1) a hearing on the defendant's incompetency; or

(2) any proceeding at which the defendant first introduces into evidence the contents of the statement.

(g) For a defendant described by Subsection (a)(2)(A), an order issued under this article:

(1) authorizes the initiation of any appropriate mental health treatment for the defendant awaiting transfer; and

(2) does not constitute authorization to retain the defendant in a correctional facility for competency restoration treatment.

Modifications to this section but extend the period of time in which to hold a hearing on a motion to compel from five to ten days.

The issue of court-ordered medications is, however, very cumbersome requiring a two-step process of seeking authorization in a civil court; only after failure in such a proceeding may 46B.086 be invoked. Discussion of that issue is beyond the scope of this writing. However, it is important to add that HB 748 amends the Health & Safety Code in a significant manner:

Section 574.110(b), Health and Safety Code, is amended to read as follows:

(b) An order issued under Section 574.106 for a patient who is returned to a correctional facility, as defined by Section 1.07, Penal Code, to await [awaiting] trial in a criminal proceeding continues to be in effect until the earlier of the following dates, as applicable:

(1) the 180th day after the date the defendant was returned to the correctional facility;

(2) [expires on] the date the defendant is acquitted, is convicted, or enters a plea of guilty; or

(3) the date on which charges in the case are dismissed. [An order continued under this subsection shall be reviewed by the issuing court every six months.]

The foregoing section is not included in HB 2725 whatsoever, but has helpful implications for management of a defendant who needs, but is refusing, psychoactive medication. The section referenced is Tex. Health & Safety Code §574.106 which is the statute delineating procedures for pursuit of court-ordered medications through the Probate Courts. With this modification, should the state hospital seek a court order to authorize administration of psychoactive medications to a person adjudicated incompetent and receiving restoration treatment, then, if granted, that order would follow the defendant back to Harris County and remain valid for 180 days. The impetus for this modification are the cases in which persons are stabilized on medication while receiving restoration treatment but then refuse medication upon return to the county, virtually ensuring that the person would again decompensate and become incompetent. And given that there is but one opportunity for restoration (*see* art. 46B.085), such would delay proceedings unnecessarily, if not provoke dismissal.

Art. 46B.101. Applicability (Relating to Civil Commitment with Charges Pending)

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

This section references the criteria for civil commitment by the criminal court as delineated in 46B.084(e) or 46B.071. Art. 46B.084(e) reads:

If the defendant is found incompetent to stand trial and if all charges pending against the defendant are not dismissed, the court shall proceed under Subchapter E.

On the other hand, Art. 46B.071, as earlier described, permits reliance on this subchapter for persons found incompetent but unlikely to be restored in the foreseeable future and authorizes civil commitment (albeit under the procedures of the Health & Safety Code).

Art. 46B.151. Court Determination Related to Civil Commitment

Art. 46B.151. COURT DETERMINATION RELATED TO CIVIL COMMITMENT.

(a) If a court is required by Article 46B.084(f) 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) to proceed under this subchapter, the court shall 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.

(b) If it appears to the court that there is evidence to support a finding of mental illness or mental retardation, the court shall enter an order transferring the defendant to the appropriate court for civil commitment proceedings and stating that all charges pending against the defendant in that court have been dismissed. The court may order the defendant:

(1) detained in jail or any other suitable place pending the prompt initiation and prosecution by the attorney for the state or other person designated by the court of appropriate civil proceedings to determine whether the defendant will be committed to a mental health facility or residential care facility; or

(2) placed in the care of a responsible person on satisfactory security being given for the defendant's proper care and protection.

(c) Notwithstanding Subsection (b), a defendant placed in a facility of the department pending civil hearing under this article may be detained in that facility only with the consent of the head of the facility and pursuant to an order of protective custody issued under Subtitle C, Title 7, Health and Safety Code.

(d) If the court does not detain or place the defendant under Subsection (b), the court shall release the defendant.

This is a minor modification permitting art. 151 transfers to a court having civil mental health jurisdiction of persons with reference to whom all charges were dismissed. There is a clause in 46B.004 that 151 transfers are possible only if there is evidence to support a finding of the defendant's incompetency. The importance of this clause is as follows: First, a 151 transfer creates a rare exception to the authority of a court to order a defendant held in jail with no charges pending for a reasonable period pending transfer to a court with probate (*i.e.*, mental health) jurisdiction. Second, then, in a case wherein a defendant was restored, pled out, or received a sentence of time served, but was mentally ill, and necessity existed for continued court-ordered mental health services, no authority would exist for the person to be held in jail after dismissal of the charges as is the case in 151 transfers. Rather, careful management of release would involve filing an application for court-ordered mental health services and timing the dismissal to coincide with the person's being transported to a mental health facility.

IV. Conclusion

First, harmonization of HB 748 and HB 2725 appears quite possible as there are no obviously irreconcilable sections.

Second, the most fundamental changes have to do with reduction of the number of days permitted for restoration commitments, and the requirement that even with a combination of jail and restoration treatment, a person may serve no period of time greater than the maximum sentence for the act with which charged. This issue, however, will have effect largely, if not solely, in Class B misdemeanor cases.

[\[4\]Click Here to Read Part I](#)

. © Copyright by Texas Criminal Defense Lawyers Association
Web hosting and design by [ChiliPepperWeb.net](#)

Source URL: <http://voiceforthedefenseonline.com/story/changes-46b-harmonizing-hb-748-and-hb-2725-part-ii>

Links:

[1] <http://voiceforthedefenseonline.com/channel/1/stories>

[2] <http://voiceforthedefenseonline.com/source/floyd-l-jennings>

[3] <http://voiceforthedefenseonline.com/image/changes-46b-harmonizing-hb-748-and-hb-2725-part-ii>

[4] <http://voiceforthedefenseonline.com/story/changes-46b-harmonizing-hb-748-and-hb-2725-part-i>