The recent implementation of forced medication orders in Texas, in combination with highly publicized trials that have highlighted the competency restoration process, have left many in both the legal and non-legal communities with questions concerning forced medication orders. This article is an attempt to answer some of these questions with respect to the forced medication process as it is conducted in Texas.

1. Is an order for forced medication beneficial to the client?

Depending on the client and the facts involved, most criminal defense attorneys are of two minds in regards to encouraging or forcing clients to take psychoactive medication. The examples below illustrate the conflict.
The first scenario involves a Class A Misdemeanor. Joseph is charged with Resisting Arrest. The most he can spend in jail is one year. Joseph has been found incompetent to stand trial under Chapter 46B of the Texas Code of Criminal Procedure. There is a long wait for a bed at a state mental hospital—perhaps as long as four months. Joseph's lawyer would like for him to take medication so he can more quickly be restored to competency and they can dispose of his case and send him home. His lawyer sees this as being in his client's best interest.

The second scenario involves a First Degree Felony. John is charged with Murder. His risk exposure is life in prison. He has been found incompetent to stand trial under Chapter 46B. There is a long wait for a bed at a state mental hospital—perhaps as long as four months. John's lawyer does not want him to take medication so he can more quickly be restored to competency because that would mean his case would be tried sooner and he would likely be sentenced to life in prison. His lawyer does not see how this could be in his client's best interest.

2. Is forcefully medicating a defendant to restore competency unconstitutional?

In *Sell v. United States* the Supreme Court addressed the issue of whether a defendant may be forcefully medicated in order to restore competency. The Court held that the government involuntarily administering medication to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial does not violate the Constitution. The Court stipulated that in order for medications to be administered, the treatment must be medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking into account less intrusive alternatives, necessary to significantly further important governmental interests. However, before an order for forced medication is issued, a court should ordinarily determine whether the government seeks or has sought an order of forced medication in a civil proceeding. The Court specifically detailed the above factors that must be considered before issuing a forced medication order after a civil proceeding has been held.

First, a court must find that an order for forced medication involves important governmental interests. The Court held that bringing to trial an individual accused of a serious crime is an important governmental interest. Second, a court must find that involuntary medication of the individual will significantly further state interests. Medications must be substantially likely to render a defendant competent to stand trial and must be substantially unlikely to have side effects that will interfere with the defendant's ability to assist counsel in conducting a trial defense. Third, a court must conclude that involuntary medication is necessary to further state interests. Thus, the court must find that there are not any alternative less intrusive treatments that will achieve the same results. Finally, a court must find that administration of the drugs is medically appropriate. This means the medication is in the patient's best medical interest in light of his medical condition.

3. How has Texas implemented forced medication laws?

In response to variations and inconsistencies in competency evaluations, in 2001 the Texas Legislature formed a task force, led by Senator Robert Duncan and former Representative Patty Gray, to review the competency evaluation procedure. In 2003, the Texas Legislature enacted Senator Duncan's Senate Bill 1057, which created Chapter 46B of the Texas Code of Criminal Procedure. Included in this new chapter was Article 46B.086, which addressed the situation that occurs when a defendant who had been restored refuses medication after restoration. Article 46B.086 established a procedure to allow a criminal court to issue an order for the defendant to be compelled to take medications to maintain competency and avoid decompensation while awaiting further criminal proceedings. After Chapter 46B was enacted the Supreme Court of the United States decided *Sell v. United States*. To square the Texas forced medication procedure with the Court's decision, in 2005 the Texas Legislature passed Senate Bill 465, which modified Article 46.B.086 to include a 'threshold' medication hearing under
§574.106 of the Texas Health and Safety Code. Thus, a §574.106 hearing must be held first, and if a defendant has not met the criteria under this section, then a hearing under Article 46B.086 may be held. In 2007, the Texas Legislature expanded Article 46B.086 to include defendants who may be participating in outpatient programs.

In 2009, the Texas Legislature addressed a large population of incompetent defendants, those who have been found incompetent but are awaiting transfer to competency restoration treatment facilities. Representative Jose Menendez’s House Bill 1223 amended both §574.106 of the Texas Health and Safety Code and Article 46B.086 of the Texas Code of Criminal Procedure to allow defendants who have been adjudicated incompetent and have remained in a correctional facility for 72 hours awaiting transfer to competency restoration treatment facilities to be forcefully medicated.

4. What exactly is the process that must be followed in order to have a forced medication order issued in Texas?

Beginning with §574.106 of the Texas Health and Safety Code, a court may issue an order to a defendant who is under court order to receive mental health services, or is in custody awaiting trial in a criminal proceeding and was ordered to receive inpatient mental health services in the prior six months. A court may only issue an order for such a defendant if the defendant lacks the capacity to make a decision regarding the administration of medication, or the defendant was ordered to receive inpatient mental health services by a criminal court and the defendant is a danger to self or others. This applies to defendants in an inpatient mental health facility or a correctional facility in which the defendant has been waiting in excess of 72 hours for transfer to competency restoration. In any case the medication must be in the best interest of the defendant.

If the above §574.106 conditions are not satisfied, then a court may pursue a forced medication order under Article 46B.086 of the Texas Code of Criminal Procedure. Article 46B.086 applies to defendants determined to be incompetent who remain in a correctional facility in excess of 72 hours awaiting transfer to competency restoration, are committed to an inpatient competency restoration program, or are confined in a correctional facility awaiting further criminal proceedings. In any of the above situations, the defendant must have a continuity of care plan that requires the defendant to take medication and the defendant must be refusing to take such medication. The requirement of a continuity of care plan generally limits these types of hearings to urban counties who have full-time psychiatrists on staff, although an outside contracted psychiatrist may be used as well. Texas? rural counties seldom can afford this type of service and cannot guarantee ?continuity of care? for their incompetent inmates.

For such an order to be issued it must be supported by the testimony of two physicians, one of whom is prescribing the medication under the defendant?s continuity of care plan, and the court has found 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 are 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.

A motion to compel medication under Article 46B.086 must be held no later than the fifteenth day after a
judge has issued an order stating the defendant does not meet the criteria for forced medication under §574.106 of the Texas Health and Safety Code, with the exception that outpatient treatment programs may have a hearing held at any time.  

5.?Why are there two different statutes and possibly two different courts available when issuing a forced medication order in Texas?

Civil courts have traditionally been the courts to determine if a defendant should be involuntarily medicated. Situations in which a civil court may issue a forced medication order include when a defendant is a danger to self or others, when the defendant lacks the capacity to make a decision as to whether or not to take medication, and when the medication is in the best interest of the defendant. If an order for forced medication has been issued on the above grounds, typically the need to issue an order for forced medication to restore competency is not present. If an order for forced medication has been denied because a defendant does not fit into any of the above listed situations, the reasoning behind the denial of an order in a civil proceeding may aid the forced medication determination for competency restoration in a criminal proceeding. For these reasons, the Supreme Court has held that a criminal court conducting a criminal proceeding concerning forced medication for competency restoration should ordinarily determine if a civil proceeding has first been held, and if not why. Article 46B.086 of the Texas Code of Criminal Procedure includes section (a)(1), which stipulates a defendant must first be found not to meet the criteria of the civil court §574.106 proceeding. This ensures that a civil proceeding has occurred before a forced medication hearing in a criminal court is initiated, following Supreme Court precedent and judicial norms of deferring to civil courts when making the forced medication determination.

6.?How is the process of obtaining a forced medication order initiated in a correctional facility?

In Travis County at Del Valle Correctional Facility, where this writer practices, a treatment team reviews inmates on a weekly basis who are incompetent, lack capacity, and are on the writ list waiting for competency restoration. An inmate must be found to be incompetent and be found not to have capacity to make decisions regarding the administration of medication. If an inmate is found to be incompetent, but found to have the capacity to refuse medication, then a forced medication order will not be initiated. The treatment team reviewing inmates includes the unit counselor, the correctional sergeant, a doctor, the nursing director, and the social services specialist. In their weekly discussions, the treatment team identifies incompetent inmates who lack capacity or inmates who have overtly demonstrated they are a danger to self or others and who are refusing to take their medication. Such inmates are informed that a forced medication order may be initiated if they do not voluntarily take medication. If the inmate wishes to avoid a forced medication order, they must not only agree to take medications but must also demonstrate that they will take the medication. If the inmate does not agree to voluntarily take medication, or is unable to demonstrate that they will take the medication, then an application for forced medication is submitted to the probate court. Since the beginning of the forced medication process in Travis County in December 2010 through the middle of June 2011, 15 Travis County inmates have had forced medication orders issued and have consequently been given medications involuntarily. Procedures in other Texas jurisdictions are similar. When an inmate is ordered to take forced medication, it can mean literally that. In Travis County, inmates who refuse can be held down and forcibly administered a shot. Fortunately, this procedure is seldom necessary.

7.?How long may an order for forced medication last?

House Bill 748 of the 2011 Texas Regular Legislative Session amends both the Texas Code of Criminal Procedure and the Texas Health and Safety Code concerning time credits, maximum periods of confinement, the mandatory dismissal of a misdemeanor, and the duration of a forced medication order. Article 46B.009 governing time credits now stipulates that a court sentencing a defendant convicted of a criminal offense must credit to the term of the defendant’s sentence any period of confinement that occurs pending a
determination of the defendant’s competency to stand trial. Additionally, a court must credit any period of confinement that occurs between the date of any initial determination of the defendant’s incompetency and the date the defendant is transported to jail following a final judicial determination that the defendant has been restored to competency.

Article 46.B.0095 concerning the maximum period of commitment or outpatient treatment program participation now states that a defendant may not be committed to an inpatient 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. The exception being that if the defendant is charged with a misdemeanor and has been ordered only to participate in an outpatient treatment program, then the maximum period of restoration is two years. On expiration of the maximum restoration period the inpatient facility or outpatient treatment program provider must assess the defendant to determine if civil proceedings are appropriate. The defendant may be confined for an additional period in a mental hospital or other inpatient facility or ordered to participate for an additional period in an outpatient treatment program pursuant to civil commitment proceedings.

The cumulative period begins on the date the initial order of commitment or initial order for outpatient treatment program participation is entered. The period includes any time the defendant is confined in a correctional facility while awaiting transfer to an inpatient facility, released on bail to participate in an outpatient treatment program, or is involved in a criminal trial following any temporary restoration of the defendant’s competency to stand trial. The court may credit to the cumulative period any time that a defendant, following arrest for the offense for which the defendant was to be tried, is confined in a correctional facility before the initial order of commitment or outpatient treatment program participation is entered. Additionally, the court may credit any good conduct time the defendant has been granted under Article 42.032 in relation to the defendant’s confinement.

Article 46B.010 concerning the mandatory dismissal of misdemeanor charges now states that if a court orders that a defendant charged with a misdemeanor punishable by confinement be committed to a mental hospital, inpatient facility, or outpatient treatment program, and the defendant is not tried before expiration of the maximum period of restoration, on the motion of the attorney representing the state the court shall dismiss the charge. The statute now authorizes on the motion of the attorney representing the defendant the court shall set the matter to be heard not later than the tenth day after the date of filing the motion and dismiss the charge on a finding that the defendant was not tried before the expiration of the maximum period of restoration.

Finally, §574.110(b) of the Texas Health and Safety Code now allows for an order issuing forced medication concerning a defendant who has returned to a correctional facility awaiting criminal proceedings to continue until the 180th day after the date the defendant was returned to the correctional facility, the date the defendant is acquitted, is convicted, or enters a plea of guilty, or the date on which the charges in the case is dismissed. Whichever one of the events listed above takes place the earliest is the point in time in which the order has expired. House Bill 748 will take effect on September 1, 2011.

8. How may a court determine if medication is in the best interest of a defendant as mandated by §574.106 of the Texas Health and Safety Code?

When determining whether medication is in the best interest of the defendant, a court shall consider the defendant’s expressed preferences regarding treatment; the defendant’s religious beliefs; the risks and benefits, from the perspective of the defendant, of taking psychoactive medication; the consequences to the defendant if the psychoactive medication is not administered; the prognosis for the defendant if the defendant is treated with medication; alternative less intrusive treatments that are likely to produce the same results as treatment with medication; and less intrusive treatments likely to secure the defendant’s agreement to take the psychoactive medication.
9. How may a court determine if a defendant is a danger to self or others as describe in §574.106 of the Texas Health and Safety Code?

When determining whether a defendant presents a danger to self or others, the court shall consider an assessment of the defendant's present mental condition; whether the defendant has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to the defendant's self or to another while in an inpatient mental health facility; and whether the defendant, in the six months proceeding the date the defendant was placed in the facility, has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to another that resulted in the defendant being placed in the facility. 59

10. What constitutes a serious crime as described in Sell v. United States?

A serious crime is one in which a defendant may be imprisoned for more than six months. 60 Therefore, under Sell, arguably an order for forced medication to restore competency to stand trial may not be issued if the possible sentence the defendant may receive is less than six months.

11. My client says he has been forcefully medicated, does that mean a forced medication order has been issued?

Not necessarily. Under §576.025 of the Texas Health and Safety Code, a physician at a correctional facility may administer psychoactive medication to an inmate involuntarily if the inmate is having a medication-related emergency. 61 A medication-related emergency is a situation in which it is necessary to administer medication to prevent an inmate from harming self or others. 62 Specifically, the inmate must face imminent probable death or substantial harm because the inmate is continually threatening or attempting to commit suicide or serious bodily harm, or the inmate's behavior indicates that he is unable to satisfy the basic needs of nourishment, essential medical care, or self-protection. 63 Additionally, a medication-related emergency includes situations in which the inmate's behavior places another in imminent physical or emotional harm because of threats, attempts, or other acts that the inmate overtly or continually makes. 64

If a physician does choose to administer medication involuntary due to a medication-related emergency, then the physician must follow several guidelines. First, the physician must document the necessity of the order and that the physician has evaluated but rejected other less intrusive forms of treatment. 65 Second, the treatment must be provided in a manner that is consistent with clinical standards, and that is the least restrictive to the inmate's liberty as possible. 66 This process under §576.025 of the Health and Safety Code does not require a formal hearing to be heard by a judge, nor does it require the correctional facility to notify the inmate's lawyer.

Conclusion

The issue of forced medication in criminal cases for incompetent defendants is fairly new to Texas but one that will be in the forefront of criminal law now and in the future. Although this article dealt exclusively with state law, the appellate decision in July 2011 by a three-judge panel of the Ninth Circuit Court of Appeals in Jared Loughner’s case will have an impact on how cases are handled in Texas and throughout the country. 67 Defense attorneys who handle these cases should be aware of changes in the law as well as local custom.

Notes


2. Id.

3. Id. at 183.
4. Id. at 180.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.

15. Id. at 320?21.
16. Id. at 321, 323?24.
17. Id. at 327?28.
18. Id. at 333?34.
19. Id. at 336.
20. Id. at 337?39.
21. Id. at 341?46.
23. Id. §574.106 (a-1).
24. Id.
26. Id. 46B.086(b).
27. Id. 46B.086(d) & 46B.086(e).
28. Id. 46B.086(b).
29. Sell, 589 U.S. at 182.
30. Id. at 183.
31. Id.
32. *Id.*


35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*


44. Tex. H.B. 748.

45. Tex. H.B. 748.

46. Tex. H.B. 748.

47. Tex. H.B. 748.


49. Tex. H.B. 748.

50. Tex. H.B. 748.

51. Tex. H.B. 748.

52. Tex. H.B. 748.

53. Tex. H.B. 748.

54. Tex. H.B. 748.

55. Tex. H.B. 748.

56. Tex. H.B. 748.

57. Tex. H.B. 748.


64. Id. §574.101(2)(B).


66. Id. §576.025 (F)(2).


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