

87TH TEXAS LEGISLATURE SPOTLIGHT ON: SB 1739/ HB 4212



Texas Judicial Commission on Mental Health

SEN. JUDITH ZAFFIRINI / REP. JOE MOODY

Relating to procedures regarding defendants who are or may be persons with a mental illness or intellectual disability

Section 1: 16.22 Interview for Out-of-Custody Defendant.

Issue: The intent of Article 16.22 of the Texas Code of Criminal Procedure, including amendments in 2017 and 2019, “has been to identify (promptly) persons in custody who will likely need treatment intervention.”¹ The current law requires that when a magistrate determines that an arrestee has a mental illness or is a person with intellectual disability (ID), they shall order the local mental health provider to conduct a 16.22 interview by a qualified mental health professional. Currently, this interview is required even if a defendant bonds out of jail. This interview and collection of information from an out-of-custody defendant is a beneficial idea in theory; however, in practice, there is neither the capacity in the system to conduct the required number of assessments, nor the mechanism to monitor the assessment requirement of those released on bond.²

SB 1739/HB 4212: This bill removes the requirement that a magistrate order a 16.22 interview if the defendant is no longer in custody. This bill amends the statute to focus on screening those individuals suspected of mental illness or ID who remain in the jail population, and not “out-of-custody” defendants. The judge, however, can still order assessments as deemed appropriate.

Section 2: Oath and Promise to Appear for Persons with Mental Illness and/or IDD.

Issue: Included in the requirements for a release on personal bond, is that the defendant swears under oath that he or she will appear in court. A failure to appear can result in a contempt finding and other consequences. Individuals released on bond, with treatment conditions or competency restoration requirements due to their mental illness or intellectual disability, may not comprehend the significance of their oath yet might face a contempt charge for failing to appear.

SB 1739/HB 4212: This bill removes the requirement that certain individuals with MI or ID “swear under oath” that they will appear in court as part of their release on bond. This oath is waived as the qualifying individuals (individuals released under certain statutes involving MI, ID, or a finding of incompetent to stand trial).

Section 3: Defendants with Lack of Capacity in Justice & Municipal Courts.

Issue: Subject to procedural requirements, Justices of the Peace (JPs) and Municipal Judges are provided statutory authority to dismiss complaints alleging Class C misdemeanors in *juvenile* cases when the justice or judge finds probable cause exists to believe the child is unfit to proceed. Currently, there is no corollary law for adults who are charged with Class C misdemeanors.

SB 1739/HB 4212: This bill gives JPs and Municipal Court Judges the discretion to dismiss a Class C misdemeanor complaint when the court finds that the defendant lacks the capacity to understand the proceedings or assist in their own defense; or are unfit to proceed. This section of the bill mirrors the law already in place for juveniles with Class C misdemeanors.

Section 4: Acceptance of a Plea in Justice and Municipal Courts.

Issue: Constitutional principles and case law dictate that judges only accept a plea when (i) a defendant is mentally competent, and (ii) the plea is given freely and voluntarily. This is codified for County and District Court Judges but is not yet codified for Justices of the Peace or Municipal Judges.

SB 1739/HB 4212: This section of the bill tracks the language of law already in place for County and District Judges. It codifies that JPs and Municipal Judges may only accept a plea from a defendant who appears to be mentally competent and requires that the plea be given freely and voluntarily.

Section 5: Time Credit for Defendants Released to Outpatient Competency Restoration Programs.

Issue: Defendants who are ordered to receive inpatient or jail-based competency restoration services earn time credit against a possible future sentence for the crime with which they are charged. Individuals who are ordered to participate in an outpatient competency restoration program, however, are not provided that same opportunity or incentive to earn time credit, even though they also receive competency restoration services, and do so in a more cost-effective manner than through inpatient or jail-based services.

SB 1739/HB 4212: The bill gives time credit against a jail or prison sentence for participation in an outpatient competency restoration program. Similar time credit is currently given for periods of inpatient competency restoration.

Section 6: Clarification of Time Periods for Competency Orders.

Issue: The law is not clear on when competency restoration orders technically begin, thereby creating confusion.

SB 1739/HB 4212: This section of the bill provides clarification for when competency restoration orders technically begin. This promotes consistency and assists in determining the period of competency restoration, with the triggering event being the latter of either the date the order is signed or when competency restoration services begin.

Section 7: Jail-Based Competency Restoration Pilot Program and County Programs.

Issue: The Legislature created two possible paths for establishing jail-based competency restoration (JBCR) programs: i) the JBCR Pilot Program to be operated by the Texas Health and Human Services Commission (HHSC), and ii) a JBCR program implemented by a county. However, the laws regarding the two types of JBCR programs are not aligned.

SB 1739/HB 4212: This bill amends the pilot program language to better align with the language for a JBCR implemented by a county and allows the HHSC program to sunset in 2022 and be governed by the laws of the county implemented JBCR.

Section 8: Deadlines for Competency Evaluations and Timelines in Jail Based Competency Restoration Programs.

Issue: The jail-based competency restoration statute caps the maximum period for JBCR services at sixty days, although the general period for an order of competency restoration services is longer. The statute contemplates that if the defendant has not been restored by the end of the 60-day period of jail-based services, he or she will be immediately transferred ‘without unnecessary delay’ to an inpatient facility for the remaining authorized restoration period. While this statutory requirement is reasonable in theory, the practical concern is that given long waiting lists and backlogs at state inpatient facilities, immediate transfers simply do not happen.

SB 1739/HB 4212: This section of the bill mandates the continuation of jail-based services while the defendant waits for an inpatient bed at a JBCR facility. As currently written, the statute can result in the defendant receiving 60 days of JBCR but with the competency clock then pausing and resuming only when the defendant reaches an inpatient facility. This amendment would allow continued services until an inpatient bed opens. This proposed change also provides the trial court authority to modify an order for JBCR to outpatient competency restoration, when appropriate.

Issue: The JBCR statute requires “at least two full psychiatric or psychological evaluations of the defendant during the [sixty-day] period the defendant receives competency restoration services in the jail.” These evaluations must occur by the twenty-first and fifty-fifth days, respectively, of the sixty-day period. The practical problem, however, is that it can take weeks for a forensic psychiatrist or psychologist to prepare and submit a report of an evaluation. Accordingly, it is effectively impossible for a court to be able to receive a report on an examination conducted on or shortly before the fifty-fifth day prior to the completion of the sixty-day statutory period.

SB 1739/HB 4212: This section also revises the deadline for competency evaluations in JBCR to match those required for 46B.079.

Section 9: Modification of Order Following Inpatient Civil Commitment Placement.

Issue: The law currently allows a possible modification from an inpatient-hospitalization order for certain insanity acquittees to court-ordered outpatient or community-based care. Additionally, the law already provides the ability to transfer a civilly committed defendant from a maximum-security facility to a facility other than a maximum-security unit. The law, however, does not have a comparable provision for a defendant under an order of civil commitment with a finding of violence to modify to outpatient or community-based care, as the insanity-based commitments allow.

SB 1739/HB 4212: This bill adds a statute to permit a court to consider a possible further step down in the placement of a defendant under an order of civil commitment with a finding of violence. Thus, making the procedures for a possible step-down for civil commitment comparable to those for an insanity-based commitment. This addition would allow a court to hold a hearing and determine if a step down to outpatient mental health services is appropriate in modifying the defendant’s civil commitment order. The proposal also includes language to require consultation with the local mental health authority or local behavioral health authority before any court hearing.

Section 10: Expert Qualifications in Competency/Insanity Evaluations.

Issue: The qualifications for insanity experts were enacted in 2005 and provide that experts in insanity cases must be qualified by board certification or by certain training or experience. This statute also included a “legacy exception” for psychiatrists or psychologists who had five years of experience in performing forensic evaluations prior to the enactment of the statute. This language mirrored a comparable “five-year experience” exception that originally was a part of the qualifications for experts for competency evaluations; however, the exception for experts for competency evaluations was eliminated in 2011. Given that almost 16 years have passed since the enactment of the insanity laws, any expert appointed to provide these services should now be otherwise qualified, and the confusing five-year experience exception should be eliminated.

SB 1739/HB 4212: This section of the bill aligns the expert qualifications required for insanity evaluations with those required for competency evaluations.

Section 11: Psychiatric Stabilization at the Jail.

Issue: Part of the Sandra Bland Act of 2017 required the Commission on Jail Standards to adopt rules requiring jails to provide detainees with the ability to access mental health services either at the jail or through telemedicine twenty-four hours a day. Prompt access to appropriate prescribed medications, in turn, can often facilitate the detainee’s care, treatment, or stabilization of symptoms of mental illness and negate the need for a lengthy competency restoration process. In addition, continuity of medication is an ongoing issue when it comes to mental health defendants, especially those who are frequently transferred between facilities and jails. An all-too-common situation occurs when a patient is stabilized and restored to competency on medication in the state hospital system, but upon returning to jail the defendant may decompensate. Not only does this cause strain on the courts, jails, and state hospitals, but it does not provide the inmate with medically necessary care and treatment for their illness. This section of the bill aims to provide more efficient and effective care throughout the judicial system.

SB 1739/HB 4212: This section of the bill requires the Texas Commission on Jail Standards to adopt rules that an inmate with mental illness be provided prescription medication that a mental health professional has determined is necessary for the care, treatment, or stabilization of the prisoner. This section is aimed at having access to appropriate prescribed medication in jails, as well as providing continuity of medication in jails, especially when a defendant moves from jails to state hospitals or treatment centers and then returns to jail again.

¹ BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS: AN ANALYSIS AND GUIDE 31 (NAMI-Texas 6th ed. 2019), <http://texasjcmh.gov/media/1801/shannon-6th-edition-oct-2019-for-nami-texas-website-1.pdf> (last visited March 25, 2021).

² TONY FABELO, THE CHALLENGE OF IDENTIFYING, DIVERTING, AND TREATING JUSTICE-INVOLVED PEOPLE WITH MENTAL ILLNESS, at 42 (Dec. 3, 2018), https://mmhpi.org/wp-content/uploads/2018/12/Justice-involved_with_Mental_Illness_Review_and_Recommendations_TFabelo_WEB_12032018.pdf (last visited April 12, 2021).