

**PRESCRIBING A BALANCE: THE TEXAS LEGISLATIVE  
RESPONSES TO *SELL V. UNITED STATES***

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I. Introduction . . . . .	309
II. The <i>Sell</i> Factors . . . . .	312
III. The 2003 Legislation . . . . .	318
IV. Legislative Fine-Tuning . . . . .	327
A. The 2005 Amendments. . . . .	327
B. The 2007 Amendments. . . . .	336
V. The 2009 Legislation . . . . .	337
VI. Conclusion . . . . .	349

I. INTRODUCTION

A large percentage of persons in our nation’s jails and prisons have diagnosable mental illnesses. A September 2006 Department of Justice report stated that as of mid-2005 “more than half of all prison and jail inmates had a mental health problem.”<sup>1</sup> Indeed,

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1. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf>

“[p]eople with mental illness are overrepresented in all parts of the criminal justice system—in their contact with law enforcement, in the courts, in jails and prisons, and in parole and probation caseloads across the country.”<sup>2</sup> One Texas study revealed that 29.29% of incarcerated persons age twenty-two or over within the prison system of the Texas Department of Criminal Justice had also received services for mental illness from the Texas Department of State Health Services.<sup>3</sup> Moreover, individuals with mental illness “not only end up in jail more often than non-mentally ill ones, but they also stay longer” and are “disproportionately arrested for minor crimes.”<sup>4</sup> Correspondingly, because of the symptoms of their illnesses, many pretrial detainees with mental illness are not competent to stand trial.<sup>5</sup> Once a court adjudicates such a defendant with mental illness as being incompetent to stand trial, the court will then order the person to be transferred from the local jail to an inpatient facility or outpatient program to receive competency restoration treatment.<sup>6</sup>

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(reporting that inmates with mental health problems included “705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails”).

2. COUNCIL OF STATE GOV'TS JUSTICE CTR., *ADVOCACY HANDBOOK: A GUIDE FOR IMPLEMENTING RECOMMENDATIONS OF THE CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 5* (2006), available at [http://consensusproject.org/jc\\_publications/the-advocacy-handbook-a-guide-to-implementing-recommendations-of-the-criminal-justice-slash-mental-health-consensus-project/advocacy\\_handbook\\_all.pdf](http://consensusproject.org/jc_publications/the-advocacy-handbook-a-guide-to-implementing-recommendations-of-the-criminal-justice-slash-mental-health-consensus-project/advocacy_handbook_all.pdf).

3. See TEX. CORR. OFFICE ON OFFENDERS WITH MED. AND MENTAL IMPAIRMENTS, *BIENNIAL REPORT 27–28* (Feb. 2007), available at <http://www.tdcj.state.tx.us/publications/tcomi/Biennial%20Report%202007%20-%20Final.pdf> (identifying inmates with diagnoses including major depression, bipolar disorder, and schizophrenia, but acknowledging that the data could be underinclusive because it did not identify offenders with mental illness who may have received services from other private or public providers).

4. E. FULLER TORREY, *THE INSANITY OFFENSE* 131 (2008).

5. Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S55 (2007 Supp.), available at [http://www.jaapl.org/cgi/reprint/35/Supplement\\_4/S3?ijkey=178ebcae202d4fab50239e5954510343608cce6a](http://www.jaapl.org/cgi/reprint/35/Supplement_4/S3?ijkey=178ebcae202d4fab50239e5954510343608cce6a) (“Psychoses and mental retardation are the most frequent causes of adjudicative incompetence.”).

6. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 46B.072–.073 (Vernon Supp. 2008) (directing the criminal court to transfer an incompetent defendant with mental illness either to an outpatient program or inpatient mental health facility); see also Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S55 (2007 Supp.) (“Courts send most criminal defendants found incompetent to psychiatric hospitals for restoration, that is, for psychiatric treatment and/or education aimed at enabling the defendants to proceed with adjudication.”). Indeed, if a defendant is incompetent to stand trial “because of psychosis, restoration is unlikely without antipsychotic medication.”

In turn, the most typical and effective treatments for serious mental illnesses such as schizophrenia, bipolar disorder, and major depression are an array of antipsychotic medications.<sup>7</sup> Challenges can arise, however, when a defendant refuses to take prescribed antipsychotic medication either at the treatment facility or upon return to the local jail following competency restoration treatment.

In 2003, the United States Supreme Court addressed the question of “whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes.”<sup>8</sup> The Court concluded that the Constitution does permit doing so “in limited circumstances . . . upon satisfaction of conditions” that the Court delineated.<sup>9</sup> This Article will first address the Court’s parameters for determining when the administration of antipsychotic medications on an involuntary basis is permissible. The remainder of the Article, however, will discuss the various approaches taken by the Texas Legislature to codify certain hearing mechanisms to address the thorny issues raised by *Sell v. United States*.<sup>10</sup> Specifically, after briefly addressing *Sell*, this Article will analyze an array of Texas legislative enactments from 2003, 2005, 2007, and 2009, all of which have addressed the issue of a defendant’s refusal to take antipsychotic medication after having been adjudicated incompetent to stand trial, but prior to the criminal trial on the merits.

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Joan B. Gerbasi & Charles L. Scott, *Sell v. U.S.: Involuntary Medication to Restore Trial Competency—A Workable Standard?*, 32 J. AM. ACAD. PSYCHIATRY & L. 83, 83 (2004).

7. See Brief for American Psychiatric Ass’n and American Academy of Psychiatry and the Law as Amici Curiae Supporting Respondent at 13–14, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) (“Antipsychotic medications are not only an accepted but often essential, irreplaceable treatment for psychotic illnesses, as most firmly established for schizophrenia, because the benefits of antipsychotic medications for patients with psychoses, compared to any other available means of treatment, are so palpably great compared with their generally manageable side effects.”). In addition, as two medical commentators more recently noted, “[f]or illnesses such as schizophrenia, there may be no less restrictive alternative for rendering a defendant competent than by administering antipsychotic medication.” Robindra Paul & Stephen Noffsinger, *Involuntary Medication to Restore Competence to Stand Trial: Sell Revisited*, 36 J. AM. ACAD. PSYCHIATRY & L. 583, 584 (2008).

8. *Sell v. United States*, 539 U.S. 166, 169 (2003).

9. *Id.*

10. *Sell v. United States*, 539 U.S. 166 (2003).

II. THE *SELL* FACTORS

Charles Sell was a former dentist with a long history of mental illness.<sup>11</sup> The federal government charged him with mail fraud, Medicaid fraud, and money laundering in connection with the submission of “fictitious insurance claims for payment.”<sup>12</sup> In 1998, “the grand jury issued a new indictment charging Sell with attempting to murder the FBI agent who had arrested him and a former employee who planned to testify against him in the fraud case.”<sup>13</sup> In 1999, a federal magistrate found Sell not competent to stand trial and ordered him to be hospitalized for competency restoration treatment.<sup>14</sup> Thereafter, the treatment facility sought permission to administer antipsychotic medication after Sell refused to do so voluntarily.<sup>15</sup> After a hearing, the federal magistrate found that Sell was a danger to himself and others, that the drugs would render him less dangerous, and that there was a substantial probability that the medication would restore Sell’s competency.<sup>16</sup> The district court found the magistrate’s factual determination that Sell was dangerous to be clearly erroneous, but nonetheless upheld the medication order on the grounds that the antipsychotic medications were “medically appropriate” and were “necessary to serve the government’s compelling interest in obtaining an adjudication of defendant’s guilt or innocence of numerous and serious charges.”<sup>17</sup> A divided panel of the court of appeals affirmed the judgment upholding the order, but agreed with the district court’s determination that the evidence did not support a finding that Sell was a danger to himself or others while at the treatment facility.<sup>18</sup> The Supreme Court granted certiorari to consider whether the lower courts had erred in “allowing the government to administer antipsychotic medication [to Sell] against his will solely to render him competent to stand trial for

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11. *Id.*

12. *Id.* at 170.

13. *Id.*

14. *Id.* at 171.

15. *Sell*, 539 U.S. at 171.

16. *Id.* at 173. The magistrate stayed the order to administer the medication to allow Sell a chance to appeal to the district court. *Id.*

17. *Id.* at 173–74.

18. *Id.* at 174.

non-violent offenses.”<sup>19</sup>

In framing its analysis, the Court in *Sell* observed that two earlier cases had determined

that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.<sup>20</sup>

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19. *Sell v. United States*, 539 U.S. 166, 175 (2003) (quoting Brief for the Petitioner at i, *Sell*, 539 U.S. 166 (No. 02-5664)).

20. *Id.* at 179. The two prior cases were *Washington v. Harper*, 494 U.S. 210 (1990), which addressed the involuntary administration of antipsychotic medication to prison inmates who either were gravely disabled or posed a danger to themselves or others, and *Riggins v. Nevada*, 504 U.S. 127 (1992), which is closer on point to the issue addressed in *Sell*. *Riggins* faced murder charges and was voluntarily taking antipsychotic medications in the jail. *Riggins*, 504 U.S. at 129–30. After the court found him competent to stand trial, his defense moved for a suspension of the medications that he had been taking. *Id.* at 130. He urged that—as part of offering an insanity defense at trial—he should have the right to show jurors a more accurate view of his mental state at the time of the underlying offense. *Id.* The trial court denied the motion, and *Riggins* was convicted of murder and sentenced to death. *Id.* at 131. The Court in *Riggins* relied on *Harper* to declare that “Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of *Riggins*’ own safety or the safety of others.” *Id.* at 135. The Court also reasoned that the state could have justified “medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of *Riggins*’ guilt or innocence by using less intrusive means.” *Riggins*, 504 U.S. at 135. The Court, however, appeared troubled by the fact in *Riggins* that the trial court had “denied *Riggins*’ motion to terminate medication with a one-page order that gave no indication of the court’s rationale.” *Id.* at 131. The Court described the order as “laconic” and expressed concern that the order made no determination about the need for continuing the medication and included no “findings about reasonable alternatives.” *Id.* at 136. Given the sketchy record, the Court commented, “Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if *Riggins*’ motion had been granted would be purely speculative.” *Id.* at 137. The Court remanded the case after concluding the following: “Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy . . . , we have no basis for saying that the substantial probability of trial prejudice was justified.” *Id.* at 138. The *Riggins* Court, however, left unresolved the issue of whether the government can order the administration of antipsychotic medication to a defendant with mental illness for the sole purpose of assuring that the defendant is competent to stand trial. Douglas Mossman et

Accordingly, the Court in *Sell* concluded that the foregoing “standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances.”<sup>21</sup> The Court then provided a framework for trial courts to apply when analyzing and balancing the competing interests as part of considering whether to order the administration of antipsychotic medication for the sole purpose of rendering a defendant competent to stand trial.<sup>22</sup> In particular, the Court identified four areas for trial courts to consider:

(1) Significance of governmental interests. Is the government’s interest in bringing the individual to trial important?<sup>23</sup> Is the offense a serious crime against a person or property?<sup>24</sup> Would the “defendant’s failure to take drugs voluntarily . . . mean lengthy confinement in an institution for the mentally ill” and thereby “diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime”?<sup>25</sup> Would it “be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost”?<sup>26</sup>

(2) Furtherance of governmental interests. Will the involuntary medication serve to further the governmental interests?<sup>27</sup> That is, will the administration of the drugs be “substantially likely to render the defendant competent to stand trial,” but be “substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense”?<sup>28</sup>

(3) Consideration of alternatives. Is the involuntary medication necessary to further the governmental interests?<sup>29</sup> In this regard, has the trial court considered “any alternative, less intrusive treatments” and whether these “are unlikely to achieve

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al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S10 (2007 Supp.).

21. *Sell*, 539 U.S. at 180. The Court, however, indicated that “those instances may be rare.” *Id.*

22. *Id.* at 180–81.

23. *Id.* at 180.

24. *Id.*

25. *Sell*, 539 U.S. at 180.

26. *Id.*

27. *Id.* at 181.

28. *Id.*

29. *Id.*

2009]

PRESCRIBING A BALANCE

315

substantially the same results”?<sup>30</sup>

(4) Medical appropriateness. Will the “administration of the drugs” be “*medically appropriate, i.e., in the patient’s best medical interest in light of his medical condition*”?<sup>31</sup>

The Court, however, emphasized that *prior to* applying the foregoing test, a trial court should first consider whether forced medication would be permissible or warranted on other grounds.<sup>32</sup> In this regard, the Court observed that “courts typically address involuntary medical treatment as a civil matter, and justify it” on grounds such as when it is “in the best interests of a patient who lacks the mental competence to make such a decision” or “where the patient’s failure to accept treatment threatens injury to the patient or others.”<sup>33</sup> Accordingly, the Court opined that a criminal court “should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other . . . grounds” before approving “forced administration of drugs for purposes of rendering a defendant competent to stand trial[.]”<sup>34</sup>

After setting forth this analytical approach, the Court determined that the orders affecting Sell could not stand and that the case should be remanded for further proceedings consistent with its opinion.<sup>35</sup> The magistrate’s orders had been premised primarily on a finding that Sell was dangerous.<sup>36</sup> But because the district and circuit courts had determined that the findings of dangerousness were clearly erroneous, the Court was of the view that the “lower courts had not adequately considered trial-related side effects, the impact on the sentence of Sell’s already-lengthy confinement, and any potential future confinement that might

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30. Sell v. United States, 539 U.S. 166, 181 (2003).

31. *Id.*

32. *See id.* at 181–82 (“A court need not consider whether to allow forced medication” for the purpose of rendering a criminal defendant competent to stand trial “if forced medication is warranted for a *different* purpose, such as . . . the individual’s dangerousness, or . . . where refusal to take drugs puts his health gravely at risk.”).

33. *Id.* at 182.

34. *Id.* at 183.

35. *Sell*, 539 U.S. at 186.

36. *Id.* at 183.

lessen the importance of prosecuting him.”<sup>37</sup>

Numerous articles have been published that address and analyze *Sell*.<sup>38</sup> It is not the purpose of this Article, however, to provide yet another lengthy discussion and analysis of the decision. Instead, the remainder of this Article is an examination of the Texas

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37. See Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S11 (2007 Supp.) (summarizing *Sell*).

38. The author of this Article conducted a Shepard's search on LexisNexis on July 28, 2009, which revealed 187 law review articles or student-written works as of that date that discussed or cited *Sell*. Several of these articles provide thorough and insightful analyses of the *Sell* decision. See generally Dora W. Klein, *Curiouser and Curiouser: Involuntary Medications and Incompetent Criminal Defendants After Sell v. United States*, 13 WM. & MARY BILL RTS. J. 897 (2005) (discussing the involuntary medicating of incompetent criminal defendants following the Supreme Court's decision in *Sell*); Veronica J. Manahan, *When Our System of Involuntary Civil Commitment Fails Individuals with Mental Illness: Russell Weston and the Case for Effective Monitoring and Medication Delivery Mechanisms*, 28 LAW & PSYCHOL. REV. 1, 28-32 (2004) (exploring the failings of the civil commitment system in relation to Russell Weston and the possible effect of the *Sell* decision on his case); Jeffrey Manske & Mark Osler, *Crazy Eyes: The Discernment of Competence by a Federal Magistrate Judge*, 67 LA. L. REV. 751 (2007) (illustrating the process for discerning competence by providing a case study of a defendant brought before Judge Jeffrey Manske, a federal magistrate judge in Waco, Texas); David M. Siegel, *Involuntary Psychotropic Medication to Competence: No Longer an Easy Sell*, 12 MICH. ST. U. J. MED. & L. 1, 2 (2008) (reviewing court decisions subsequent to *Sell*, but also observing that “[m]ental health commentators have viewed *Sell* positively, insofar as it can provide a clear decision point channeling mentally ill persons from the criminal justice to the mental health system, while legal commentators have focused on the limited protection for the criminal defendant's right to refuse medication”); Stewart B. Harman, *Restoration of Competency Through Involuntary Medication: Applying the Sell Factors*, 4 APPALACHIAN J. L. 127, 133-43 (2005) (identifying flaws in *Sell* relating to the Court's “failure to provide a definition of what constitutes a serious crime” and “failure to define a standard for determining medical appropriateness” or what might be reasonable side effects from the medications); Kristin L. Henrichs, Note, *Forcible Antipsychotic Medication: Should the Mentally Ill Criminal Defendant Celebrate or Fear Sell v. United States*, 90 IOWA L. REV. 733 (2005) (exploring how the Court's oversights in the *Sell* decision may make it possible for a defendant to avoid involuntary medication when the forcible medication of the defendant is sought under the justifications of dangerousness and *parens patriae*); Kelly Hilgers & Paula Ramer, Current Development, *Forced Medication of Defendants to Achieve Trial Competency: An Update on the Law After Sell*, 17 GEO. J. LEGAL ETHICS 813 (2004) (discussing the implications of *Sell* and the difficulties attorneys face in representing mentally incompetent individuals); Dina E. Klepner, Note, *Sell v. United States: Is the Supreme Court Giving a Dose of Bad Medicine?: The Constitutionality of the Right to Forcibly Medicate Mentally Ill Defendants for Purposes of Trial Competence*, 32 PEPP. L. REV. 727, 762 (2005) (“[T]hough essentially recognizing greater rights for mentally ill defendants, *Sell* actually permits defendants to remain in a sickened, unmedicated state, thereby making the alleged benefits earned by the decision questionable.”).

Legislature's various statutory initiatives that have been enacted since 2003 to implement *Sell's* analytical framework. Although numerous judicial decisions from around the country have construed and applied *Sell*,<sup>39</sup> Texas stands alone in terms of repeated, deliberate efforts to codify *Sell's* principles and is one of just a few states to have enacted statutory coverage subsequent to

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39. A full canvassing of judicial interpretations and application of *Sell* from all federal and state courts is beyond the scope of this Article. Within the Fifth Circuit, however, the leading cases are *United States v. White*, 431 F.3d 431 (5th Cir. 2005), and *United States v. Palmer*, 507 F.3d 300 (5th Cir. 2007). In *White*, the court determined that the federal government needs to exhaust administrative procedures under 28 C.F.R. § 549.43 (2009), relating to involuntary medication of federal inmates who are hospitalized for psychiatric treatment, prior to seeking a court order for involuntary medication to render a defendant with mental illness competent to stand trial. *White*, 431 F.3d at 433–35. The court opined that, under this regulation, when a federal “inmate refuses medication, he is entitled to an *administrative* hearing at the facility to determine whether he may be medicated against his will.” *Id.* at 433. The court reasoned that requiring exhaustion of the administrative hearing process was consistent with “the Supreme Court’s admonition in *Sell* to consider whether involuntary medication is appropriate on grounds of dangerousness *before* considering whether doing so would be appropriate to restore an inmate’s competence to stand trial.” *Id.* at 435. Then, two years later in *Palmer*, the Fifth Circuit considered an interlocutory appeal of the district court’s grant of a motion to medicate involuntarily a defendant to render him competent to stand trial. *Palmer*, 507 F.3d at 301. On appeal, the defendant challenged the district court’s application of “three *Sell* factors: (1) that important governmental interests are at stake; (2) that involuntary medication will further the government’s interest; and (3) that forced medication is necessary to further the government’s interest.” *Id.* at 303 (noting that the defendant did not contest the finding that the administration of drugs was medically appropriate, but urged that newer generation drugs should be used in the event the order was sustained). The court applied a *de novo* review to the issue of “whether the government’s asserted interests are sufficiently important,” given that such an issue involves a question of law, but decided that “the other *Sell* factors involve factual findings which are [to be] reviewed for clear error.” *Id.* In reviewing the merits of the order and assessing the importance of the governmental interests, the court followed other federal courts in concluding “that crimes authorizing punishments of over six months are ‘serious’” and “that it is appropriate to consider the maximum penalty, rather than the sentencing guidelines range, in determining ‘seriousness’ in involuntary medication proceedings.” *Id.* at 304. The court also concluded that there was no error below in the district court’s determinations that the likely side effects of the medication, if any, would not undermine the defendant’s ability to assist in his defense, and that the medication was “necessary under the circumstances” of the case to ensure that the defendant was “brought to trial.” *Id.* at 304–05; *see also* David M. Siegel, *Involuntary Psychotropic Medication to Competence: No Longer an Easy Sell*, 12 MICH. ST. U. J. MED. & L. 1, 6–14 (2008) (discussing and categorizing an array of cases in which courts have applied *Sell* to criminal defendants with mental illnesses identified primarily as schizophrenia, delusional disorder, or psychotic disorder).

*Sell*.<sup>40</sup> Sections III, IV, and V of this Article describe the Texas legislative undertakings.

### III. THE 2003 LEGISLATION

During the 2003 legislative session, the Texas Legislature enacted Senate Bill 1057.<sup>41</sup> Senate Bill 1057 repealed article 46.02 of the Texas Code of Criminal Procedure,<sup>42</sup> and replaced it with chapter 46B.<sup>43</sup> In sum, this legislation represented a complete overhaul and rewrite of the criminal competency process, and the changes in the law were effective for any offense committed on or after January 1, 2004, the effective date of the act.<sup>44</sup> Accordingly, since that time chapter 46B has set forth the procedures relating to a criminal defendant's competency to stand trial.<sup>45</sup> Moreover, and as it pertains to the subject of this Article, only one small portion of this major piece of legislation addressed forcible medication

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40. California and Washington have also enacted legislation in the wake of the *Sell* decision. See CAL. PENAL CODE § 1370(a)(2)(B)(ii) (West Supp. 2009) (authorizing the criminal court to consider ordering the administration of antipsychotic medication and specifying hearing procedures and factors for decision-making); WASH. REV. CODE ANN. § 10.77.092 (West Supp. 2009) (defining "serious offense").

41. Act of April 30, 2003, 78th Leg., R.S., ch. 35, 2003 Tex. Gen. Laws 57, amended by Act of May 25, 2005, 79th Leg., R.S., ch. 717, 2005 Tex. Gen. Laws 1738, amended by Act of May 17, 2007, 80th Leg., R.S., ch. 1307, 2007 Gen. Laws 4385, amended by Act of May 26, 2009, 81st Leg., R.S., ch. 624, 2009 Tex. Sess. Law Serv. 1405 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B (Vernon Supp. 2009)).

42. *Id.* § 15, 2003 Tex. Gen. Laws at 72.

43. *Id.* § 1, 2003 Tex. Gen. Laws at 57.

44. See Act of April 30, 2003, 78th Leg., R.S., ch. 35 §§ 16–17, 2003 Tex. Gen. Laws 57, amended by Act of May 17, 2007, 80th Leg., R.S., ch. 1307, 2007 Tex. Gen. Laws 4385 (describing the application of the statute and establishing an effective date of January 1, 2004).

45. A defendant is presumed competent to stand trial. TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (Vernon 2006). However, as set forth in article 46B.003(a):

(a) A person is incompetent to stand trial if the person does not have:

(1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or

(2) a rational as well as factual understanding of the proceedings against the person.

TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (Vernon 2006). The Supreme Court first established these standards in *Dusky v. United States*, 362 U.S. 402 (1960). In a subsequent decision, *Drope v. Missouri*, 420 U.S. 162, 171 (1975), the Court addressed the importance of a criminal defendant's capability of consulting with an attorney and observed that the defendant must be able "to assist in preparing his defense."

issues.<sup>46</sup>

The passage of Senate Bill 1057 was the culmination of a two-year process.<sup>47</sup> During the preceding legislative session in 2001, concerns surfaced “regarding (1) inconsistencies in competency evaluations and evaluation reports around the state, and (2) wide variations in the expertise, qualifications, and skills of the evaluators conducting competency exams.”<sup>48</sup> Accordingly, in 2001 the legislature passed Senate Bill 553 which created a task force to review the competency evaluation process.<sup>49</sup> Senate Bill 553 established the task force primarily “to review the methods and procedures used to evaluate a criminal defendant’s competency to stand trial.”<sup>50</sup> This “task force was led by Senator Robert Duncan and former Representative Patty Gray, and included representatives from the judiciary, medical schools, agencies, prosecutors, defense attorneys, psychologists, psychiatrists, and law schools . . . .”<sup>51</sup> From the outset, the task

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46. See Act of April 30, 2003, 78th Leg., R.S., ch. 35, § 1, 2003 Tex. Gen. Laws 57, 64 (enacting article 46B.086 of the Texas Code of Criminal Procedure), *amended by* Act of May 25, 2005, 79th Leg., R.S., ch. 717, § 8, 2005 Tex. Gen. Laws 1738, 1740, *amended by* Act of May 17, 2007, 80th Leg., R.S., ch. 1307, § 9, 2007 Tex. Gen. Laws 4385, 4391, *amended by* Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 4, 2009 Tex. Sess. Law Serv. 1405, 1406 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)).

47. See generally Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 1057, 78th Leg., R.S. (2003), *available at* <http://www.capitol.state.tx.us/tlodocs/78R/analysis/html/SB01057I.htm> (implementing revisions by a task force regarding the determination of competency in criminal and juvenile justice cases); Sen. Crim. Justice Comm., Bill Analysis, Tex. S.B. 553, 77th Leg., R.S. (2001), *available at* <http://www.capitol.state.tx.us/tlodocs/77R/analysis/html/SB00553F.htm> (authorizing the creation of a task force to review standards for evaluating competency of criminal defendants and use of the insanity defense).

48. BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 46 (NAMI-Texas 4th ed. 2008).

49. Act of May 11, 2001, 77th Leg., R.S., ch. 350, § 1, 2001 Tex. Gen. Laws 641, *available at* <http://www.capitol.state.tx.us/tlodocs/77R/billtext/html/SB00553F.htm>.

50. Sen. Crim. Justice Comm., Bill Analysis, Tex. S.B. 553, 77th Leg., R.S. (2001), *available at* <http://www.capitol.state.tx.us/tlodocs/77R/analysis/html/SB00553F.htm>.

51. BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 46 (NAMI-Texas 4th ed. 2008). Lieutenant Governor Larry Ratliff appointed the author of this Article as a member of the task force. See S.B. 553 TASK FORCE, REPORT PREPARED FOR THE 78TH LEGISLATURE, S. 553–77, R.S., at 2 (Tex. 2002), *available at* <http://www.lrl.state.tx.us/scanned/interim/77/sb1.pdf> (reflecting that one of the members of the task force was to be an expert in mental health law from a public or private law school in the State of Texas).

force identified that the former “statutory provisions surrounding [criminal] competency [to stand trial were] not easily understood, consistently applied, or monitored for adherence or compliance.”<sup>52</sup> Accordingly, the task force concluded “that a major overhaul of the governing statutes was warranted.”<sup>53</sup> To that end, the task force drafted a complete rewrite of the former provisions regarding competency to stand trial,<sup>54</sup> which Senator Duncan then filed as Senate Bill 1057 during the 2003 legislative session.<sup>55</sup>

During the task force process, the members worked out their differing points of view through numerous drafts of a proposed bill.<sup>56</sup> Accordingly, once the legislative session began, Senate Bill 1057 “was supported by prosecutors, the defense bar, the judiciary, and organizations of psychiatrists and psychologists, [and it] moved rapidly through the legislative process with little debate or controversy.”<sup>57</sup> Notwithstanding the cooperative development of the legislation, perhaps the one somewhat controversial aspect of Senate Bill 1057 was article 46B.086, which authorizes a court, following a due process hearing, to order medications in certain exceptional situations.<sup>58</sup> The provision was the “subject of mild

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52. See S.B. 553 TASK FORCE, REPORT PREPARED FOR THE 78TH LEGISLATURE, S. 553–77, R.S., at 4 (Tex. 2002), available at <http://www.lrl.state.tx.us/scanned/interim/77/sb1.pdf> (identifying concerns with the then-current processes for determining competency).

53. *Id.* at 11.

54. See *id.* (reporting the need for total revision of the statute for filing in the next legislative session).

55. Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 1057, 78th Leg., R.S. (2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/analysis/html/SB01057I.htm>.

56. See S.B. 553 TASK FORCE, REPORT PREPARED FOR THE 78TH LEGISLATURE, S. 553–77, R.S., at 7 (Tex. 2002) (discussing numerous meetings throughout the year to develop the task force’s recommendations). The author of this Article served on the Statutory Work Group that was one of three work groups within the overall task force. See *id.* at 5, 7 (describing the three work groups and setting out the specific duties of the Statutory Work Group). Accordingly, the author participated in all of the bill-drafting efforts prior to the 2003 legislative session. See *id.* at 10 (detailing the extensive work undertaken by the Statutory Work Group leading to its recommendations).

57. BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 46–47 (NAMI-Texas 4th ed. 2008).

58. See Act of April 30, 2003, 78th Leg., R.S., ch. 35, § 1, 2003 Tex. Gen. Laws 57, 64, (adding article 46B.086 as part of chapter 46B of the Texas Code of Criminal Procedure) (amended 2005, 2007, 2009) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)).

debate during the 2003 Senate Jurisprudence Committee hearing on [Senate Bill] 1057,”<sup>59</sup> but no amendments were offered relating to that subsection.<sup>60</sup> Accordingly, the task force, and later the Texas Legislature, included article 46B.086 as part of Senate Bill 1057

to address concerns regarding so-called “revolving door” commitments in which a defendant who, after having been restored to competency at the treatment facility, refuses to take medication prescribed as part of the defendant’s individualized treatment/continuity of care plan after returning to the county jail and awaiting further criminal proceedings. Not surprisingly, in many such cases, the person’s mental condition then deteriorates and he or she again becomes incompetent to be tried.<sup>61</sup>

The legislature intended that article 46B.086 establish a due process hearing procedure to allow the criminal court to compel a defendant to take antipsychotic medication to maintain the defendant’s competency to stand trial and avoid any deterioration in mental state upon return to the jail from the treatment facility.<sup>62</sup>

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59. BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 106–07 (NAMI-Texas 4th ed. 2008). The hearing took place on March 19, 2003, and the author of this Article was one of the witnesses who testified on the bill. Tex. Sen. Jurisprudence Comm. Witness List 1, 78th Leg., R.S. (Mar. 19, 2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/witlistbill/html/SB01057S.htm>. Senator Royce West asked several questions of the author about article 46B.086. Tex. Sen. Jurisprudence Comm. Minutes 2, 78th Leg., R.S. (Mar. 19, 2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/minutes/html/C5502003031913301.htm>. This section of Senate Bill 1057 had also been the subject of “intensive scrutiny and discussions during the [Senate Bill] 553 task force process.” BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 107 (NAMI-Texas 4th ed. 2008).

60. See generally Tex. Sen. Jurisprudence Comm. Minutes 2, 78th Leg., R.S. (Mar. 19, 2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/minutes/html/C5502003031913301.htm> (reporting no amendments proposed to article 46B.086).

61. BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 107 (NAMI-Texas 4th ed. 2008).

62. See *id.* (explaining the reason for adoption of a due process hearing procedure). As originally enacted as part of Senate Bill 1057, article 46B.086 provided the following:

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

(a) This article applies only to a defendant:

- (1) who after having been determined under this chapter to be incompetent to stand trial is subsequently determined to be competent to stand trial; and
- (2) for whom a continuity of care plan has been prepared by a facility that requires

After the legislature enacted Senate Bill 1057, which of course included article 46B.086, Governor Rick Perry signed the bill into law on May 14, 2003.<sup>63</sup> As of that date, however, *Sell v. United States* was still pending before the United States Supreme Court, and the Court did not hand down its opinion until slightly more than one month later on June 16, 2003.<sup>64</sup> Nonetheless, during the 2003 legislative process the task force and bill drafters had been

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the defendant to take 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 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 court, after notice and after a hearing that is held as soon as practicable, may authorize the director of a correctional facility to have the medication administered to the defendant, by reasonable force if necessary.

(c) 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 the correctional facility 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.

(d) 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 maintaining competency to stand trial;

(3) no other less invasive means of 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.

(e) A statement made by a defendant to a physician during an examination under Subsection (c) 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.

*See* Act of April 30, 2003, 78th Leg., R.S., ch. 35, § 1, 2003 Tex. Gen. Laws 57, 64 (delineating the due process hearing procedure) (amended 2005, 2007, 2009) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)).

63. S.J. of Tex., 78th Leg., R.S. 1744 (2003).

64. *Sell v. United States*, 539 U.S. 166, 186 (2003).

mindful that *Sell* was pending before the Court.<sup>65</sup> In addition, in undertaking its drafting work, the task force had before it the lower court opinion in *Sell*,<sup>66</sup> as well as an opinion by another circuit court of appeals in a very comparable case.<sup>67</sup> Accordingly, the task force incorporated as part of Senate Bill 1057 a process by which the criminal court could order the administration of psychoactive medication only in a specific type of situation, and only following a due process hearing that included a balancing of factors that had been discussed in these lower court opinions.<sup>68</sup> As originally enacted, article 46B.086 allowed a court to issue a medication order only to a defendant who had previously been found incompetent to stand trial, but who was “subsequently determined to be competent to stand trial” after competency restoration treatment and “for whom a continuity of care plan ha[d] been prepared by a facility that require[d] the defendant to take psychoactive medications.”<sup>69</sup> Accordingly, the statute applied to a defendant whose competency had been restored following treatment, who had returned to the county jail to await further criminal proceedings, and who was supposed to continue to

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65. See BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 107 (NAMI-Texas 4th ed. 2008) (citing *Sell*, 539 U.S. 166) (acknowledging that *Sell* was decided after article 46B.086 was originally enacted).

66. *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002), *vacated*, 539 U.S. 166 (2003).

67. See *United States v. Weston*, 255 F.3d 873, 886–87 (D.C. Cir. 2001) (applying a multi-factored due process balancing test and upholding the lower court’s ruling that a mentally ill criminal defendant who, in 1998, killed two United States Capitol police officers and wounded another, could be administered antipsychotic medication so he could be rendered competent to stand trial); see also Veronica J. Manahan, *When Our System of Involuntary Civil Commitment Fails Individuals with Mental Illness: Russell Weston and the Case for Effective Monitoring and Medication Delivery Mechanisms*, 28 LAW & PSYCHOL. REV. 1, 28–32 (2004) (comparing *Weston* to *Sell*).

68. See Act of April 30, 2003, 78th Leg., R.S., ch. 35, § 1, 2003 Tex. Gen. Laws 57, 64 (enacting article 46B.086 of the Texas Code of Criminal Procedure) (amended 2005, 2007, 2009) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)); see also *United States v. Sell*, 282 F.3d 560, 567 (8th Cir. 2002) (stating that the Government must prove it has an essential state interest outweighing *Sell*’s interest in not being medicated), *vacated*, 539 U.S. 166 (2003); *United States v. Weston*, 255 F.3d 873, 880 (D.C. Cir. 2001) (explaining the standard necessary for the Government to meet in order to force-medicate the defendant). These latter amendments from 2005, 2007, and 2009 will be discussed at length in Sections IV and V of this Article.

69. See *id.* (enacting article 46B.086(a)(1)–(2) of the Texas Code of Criminal Procedure).

take psychoactive medications under a continuity of care plan established at the treatment facility prior to discharge, but who had stopped taking such medication(s).<sup>70</sup> Thus, the original focus of the Texas medication legislation was narrower in its application than that which the Supreme Court addressed in *Sell*.<sup>71</sup> In *Sell*, the Court addressed the government's request to administer antipsychotic medication to Sell after his refusal in the "United States Medical Center for Federal Prisoners . . . at Springfield, Missouri,"<sup>72</sup> but not in a jail following successful competency restoration treatment and pending the resumption of the criminal proceedings.

Under the original 2003 version of article 46B.086(b), if a defendant whose competency had been restored returned to the local jail to await further criminal proceedings, but then refused to continue taking psychoactive medications identified in the continuity of care plan, the statute authorized jail officials to notify the criminal court, which in turn notified the prosecution and defense counsel.<sup>73</sup> The prosecution could then file a motion to compel medication, which would trigger notice and a hearing.<sup>74</sup> Senate Bill 1057 then required testimony at the hearing by "two physicians, one of whom is the physician at the correctional facility who is prescribing the medication as a component of the defendant's continuity of care plan and another who is not

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70. TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2008). The treatment facility is tasked with developing an individualized treatment program for each defendant who has been ordered to receive competency restoration treatment. TEX. CODE CRIM. PROC. ANN. art. 46B.077(a) (Vernon Supp. 2009). And, of course, antipsychotic medication is normally a key part of any treatment program for a person with mental illness. See BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS 16 (NAMI-Texas 4th ed. 2008) (discussing medication treatment options for persons with mental illness).

71. See *Sell v. United States*, 539 U.S. 166, 171–73 (2003) (discussing the facts of the case).

72. *Id.* at 171.

73. Act of April 30, 2003, 78th Leg., R.S., ch. 35, § 1, 2003 Tex. Gen. Laws 57, 64 (amended 2005, 2007, 2009) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(b) (Vernon Supp. 2009)).

74. *Id.* (adding a reference to the prospect of a treating physician at an outpatient treatment program and giving the prosecution the ability to file a motion to compel after receiving notice from the criminal court of the defendant's refusal to take medication).

otherwise involved in proceedings against the defendant.”<sup>75</sup> Thereafter, the court could issue an order to compel medication only upon finding “by clear and convincing evidence” the following four factors:

- (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 maintaining competency to stand trial;
- (3) no other less invasive means of 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.<sup>76</sup>

This section allocated a heavy burden to the state. On the other hand, it represented an attempt to avoid or limit the prospect of “revolving-door” commitments and to help assure that a defendant’s competency could be maintained following competency restoration treatment and a return to the criminal court for further proceedings. Shortly after the enactment of Senate Bill 1057, however, and prior to its effective date, the United States Supreme Court handed down its opinion in *Sell*.<sup>77</sup> As described in detail above, the Court in *Sell* found the involuntary medication of a defendant for purposes of trial competency impermissible when that defendant was not dangerous, that defendant was competent, and the experts had not focused on the need to bring the

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75. *Id.*; see also Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 4 (requiring testimony at the defendant’s hearing) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(d) (Vernon Supp. 2009)).

76. Act of April 30, 2003, 78th Leg., R.S., ch. 35, § 1, 2003 Tex. Gen. Laws 57, 64 (amended 2005, 2007, 2009); see also Act of May 17, 2007, 80th Leg., R.S., ch. 1307, § 9, 2007 Tex. Gen. Laws 4391 (identifying the proof needed to compel medication), amended by Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 4, 2009 Tex. Sess. Law Serv. 1405, 1406 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(e) (Vernon Supp. 2009)).

77. S.B. 1057 established an effective date of January 1, 2004. Act of April 30, 2003, 78th Leg., R.S., ch. 35, § 17, 2003 Tex. Gen. Laws 72, available at <http://www.capitol.state.tx.us/tlodocs/78R/billtext/pdf/SB01057F.pdf>. The Court’s opinion in *Sell* was delivered on June 16, 2003. See generally *Sell v. United States*, 539 U.S. 166 (2003) (concluding that the Constitution permits the government to administer antipsychotic drugs to mentally-ill criminal defendants against their will in limited circumstances).

individual to trial.<sup>78</sup> Additionally, the Court in *Sell* indicated that prior to considering whether to approve forced medication for “rendering a defendant competent to stand trial,” a court should determine whether the government had first sought forced administration of medication on other grounds.<sup>79</sup> Thereafter, when a criminal court addresses the issue of approving medication for trial competency purposes, it should query whether the state has, “in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual’s protected interest in refusing it[.]”<sup>80</sup> Although the factors delineated in Senate Bill 1057’s original version of article 46B.086 were comparable to the Court’s requirements in *Sell*, the process did not entirely square with the approach in *Sell*.<sup>81</sup> In particular, Senate Bill 1057 did not include any mechanism for first considering whether the state had sought an order for involuntary medication on the basis of other recognized grounds, such as dangerousness to self or others, or when medication would be “in the best interests of a patient who lacks the mental competence to

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78. *Sell v. United States*, 539 U.S. 166, 183–86 (2003). Section II of this Article contains a detailed discussion of *Sell*.

79. *See id.* at 182–83 (suggesting the issue of forced administration of medication should typically be handled as a civil matter). The Court noted that justifications for the involuntary medication of a patient would include the threat of “injury to the patient or others” or when medication is “in the best interests of a patient who lacks the mental competence to make such a decision.” *Id.*

80. *Id.* at 183.

81. The author of this Article and his colleague, Daniel Benson, provided the following comments about the original version of article 46B.086 in the 2005 edition of their guidebook:

The criteria set forth in new Art. 46B.086 for medication hearings appear to square with the standard set forth in *Sell*; however, *Sell* likely places some limits on the employment of the new statute—particularly if the defendant is not dangerous to self or others. Indeed, Mr. Sell was a dentist charged with fraud. Thus, before a prosecutor endeavors to seek an order under Art. 46B.086, a close examination of *Sell* is important.

BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS: AN ANALYSIS AND GUIDE 94 (NAMI-Texas 3d ed. 2005).

make” medication-related decisions.<sup>82</sup> Further legislative refinements would be necessary.<sup>83</sup>

#### IV. LEGISLATIVE FINE-TUNING

Given the Court’s decision in *Sell*, the Texas Legislature returned to the medication hearing provisions in the next regular legislative session in 2005. Thereafter, the legislature made further refinements in 2007. The following subsections discuss this legislative activity.

##### A. *The 2005 Amendments*

Because of concerns about *Sell*, in 2005 the Texas Legislature enacted Senate Bill 465, which, inter alia, modified article 46B.086 to require an additional preliminary medication hearing in cases in which a criminal court had previously ordered competency restoration treatment.<sup>84</sup> In particular, Senate Bill 465 added subsection (a)(3) to article 46B.086 to require an initial threshold medication hearing under section 574.106 of the Texas Health and

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82. See *Sell*, 539 U.S. at 182–83 (indicating the differences between the Court and legislature’s proposed solutions to the problem of involuntary medication of incompetent defendants).

83. The necessity to revamp the statutory framework would not prove too burdensome, however. As one commentator observed, “While the [C]ourt’s opinion [in *Sell*] cancels the forced-medication order [in that case], it does so only in the context of providing a how-to-manual for the next time[.]” and that the bulk of “the opinion is a detailed road-map of the right way to make a forced medication decision stick.” Jennifer S. Bard, Editorial, *Court Ruling on Forced Medication Is No Victory for Mental Illness Advocates*, AUSTIN AM.-STATESMAN, June 21, 2003, at 13A. Professor Bard is the Alvin R. Allison Professor of Law and Director of the Health Law Program at the Texas Tech University School of Law and an adjunct professor in the Department of Neuropsychiatry at the Texas Tech University School of Medicine.

84. Act of May 25, 2005, 79th Leg., R.S., ch. 717, § 8, 2005 Tex. Gen. Laws 1738, 1740, amended by Act of May 17, 2007, 80th Leg., R.S., ch. 1307, § 9, 2007 Tex. Gen. Laws 4385, 4391, amended by Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 4, 2009 Tex. Sess. Law Serv. 1405, 1406 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)). The legislation also made amendments to the Health and Safety Code. Act of May 25, 2005, 79th Leg., R.S., ch. 717, §§ 1–7, 2005 Tex. Gen. Laws 1738–40, amended by Act of May 17, 2007, 80th Leg., R.S., ch. 1307, § 20, 2007 Tex. Gen. Laws 4385, 4395, amended by Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 3, 2009 Tex. Sess. Law Serv. 1405, 1405–06 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009)).

Safety Code.<sup>85</sup> Senate Bill 465 also amended subsection (a)(1) of article 46B.086,<sup>86</sup> and after these 2005 modifications, article 46B.086(a) provided the following:

- (a) This article applies only to a defendant:
- (1) who is ~~[after having been]~~ determined under this chapter to be incompetent to stand trial ~~[is subsequently determined to be competent to stand trial]; [and]~~
  - (2) for whom a continuity of care plan has been prepared by a facility that requires the defendant to take psychoactive medications; and
  - (3) who, after a hearing held under Section 574.106, Health and Safety Code, has been found not to meet the criteria prescribed by Sections 574.106(a) and (a-1), Health and Safety Code, for court-ordered administration of psychoactive medications.<sup>87</sup>

Thus, after these amendments, article 46B.086 mandated a threshold medication hearing under chapter 574 of the Health and Safety Code to be held by the probate court before the criminal court could conduct a medication hearing under article 46B.086. This aspect of Senate Bill 465 reflected the Court's admonition in *Sell* that a criminal court not consider requiring medication as a means of restoring or maintaining a defendant's competency to stand trial until after the government had first sought an order compelling medication under grounds normally considered in the civil courts.<sup>88</sup> Moreover, the Texas Legislature took this language from *Sell* literally and placed this hearing responsibility in the

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85. *Id.* § 8, 2005 Tex. Gen. Laws at 1740 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(4) (Vernon Supp. 2009)).

86. *Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a) (Vernon Supp. 2009)).

87. *Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a) (Vernon Supp. 2009)). The underlined language from the bill's text represents additions to the former provisions, and the crossed-out wording reflects deletions from the former law.

88. See *Sell v. United States*, 539 U.S. 166, 181–82 (2003) (“A court need not consider whether to allow forced medication” for the purpose of rendering a criminal defendant competent to stand trial “if forced medication is warranted for a different purpose, such as . . . the individual's dangerousness, or . . . where refusal to take drugs puts his health gravely at risk.”). As one commentary on *Sell* observed, “The Supreme Court emphasized that alternative grounds [normally handled by a civil court] for involuntary medication should be pursued before even addressing forced medication to restore competency. These grounds include capacity to consent to medication and dangerousness.” Joan B. Gerbasi & Charles L. Scott, *Sell v. U.S.: Involuntary Medication to Restore Trial Competency—A Workable Standard?*, 32 J. AM. ACAD. PSYCHIATRY & L. 83, 88 (2004).

hands of a civil court (the probate court) under section 574.106 of the Texas Health and Safety Code.<sup>89</sup>

Accordingly, Senate Bill 465 amended subsection 574.106(a) of the Texas Health and Safety Code to expand the jurisdiction of the probate court to allow that court to consider whether to issue an order authorizing the administration of antipsychotic medications to a person who “is in custody awaiting trial in a criminal proceeding and [who] was ordered to receive inpatient mental health services in the six months preceding a hearing under . . . section [574.106].”<sup>90</sup> In turn, Senate Bill 465 made further changes to section 574.106(a) to create section 574.106(a-1) to authorize such an order vis-à-vis the defendant in two alternative situations:

(a-1) The court may issue an order under this section only if the court finds by clear and convincing evidence after the hearing:

(1) that [:

~~[(1) the patient is under an order for temporary or extended mental health services under Section 574.034 or 574.035;~~

~~[(2)]the patient lacks the capacity to make a decision regarding the administration of the proposed medication[;] and~~

~~[(3)]treatment with the proposed medication is in the best interest of the patient; or~~

(2) if the patient was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient, that:

(A) the patient presents a danger to the patient or others in the inpatient mental health facility in which the patient is being treated as a result of a mental disorder or mental defect as determined under Section 574.1065; and

(B) treatment with the proposed medication is in the best

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89. TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009). By way of contrast, California’s codification of the *Sell* requirements provides the criminal court with the authority to make the type of threshold determinations about medication that would normally be considered by a civil court. See CAL. PENAL CODE § 1370(a)(2)(B)(ii)(I)–(II) (West Supp. 2009) (authorizing the criminal court to order the administration of antipsychotic medication and to consider whether the “defendant lacks capacity to make decisions regarding antipsychotic medication” or poses a danger to others).

90. Act of May 25, 2005, 79th Leg., R.S., ch. 717, § 4, sec. 574.106(a), 2005 Tex. Gen. Laws 1739, amended by Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 1, 2009 Tex. Sess. Law Serv. 1405 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009)). Prior to Senate Bill 465, the probate court had jurisdiction to consider medication orders only with respect to persons who were receiving court-ordered mental health services through *civil* commitment proceedings.

interest of the patient.<sup>91</sup>

Thus, after these amendments to subsections (a) and (a-1), the probate court became vested with the authority to consider issuing an order directing the administration of psychoactive medications to a criminal defendant receiving inpatient mental health services if either (1) the defendant lacked capacity to make a decision regarding the medication and treatment with the medication was in the patient's best interest or (2) the defendant presented a danger to self or others in the inpatient mental health facility because of the patient's mental disorder, and treatment with the medication was in the patient's best interest.<sup>92</sup> These two

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91. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1) (Vernon Supp. 2009)). The underlined language from the bill's text represents additions to the former provisions, and the crossed-out wording reflects deletions from the former law.

92. *Id.* The statute also sets forth a lengthy list of factors for the probate court to consider in determining whether the proposed medication is in the best interest of the patient. TEX. HEALTH & SAFETY CODE ANN. § 574.106(b) (Vernon Supp. 2009). In this regard, the subsection requires the court to consider:

- (1) the patient's expressed preferences regarding treatment with psychoactive medication;
- (2) the patient's religious beliefs;
- (3) the risks and benefits, from the perspective of the patient, of taking psychoactive medication;
- (4) the consequences to the patient if the psychoactive medication is not administered;
- (5) the prognosis for the patient if the patient is treated with psychoactive medication;
- (6) alternative, less intrusive treatments that are likely to produce the same results as treatment with psychoactive medication; and
- (7) less intrusive treatments likely to secure the patient's agreement to take the psychoactive medication.

*Id.* With respect to the statute's inclusion of two alternative prongs for consideration of whether to order the administration of medication, the statutory language is somewhat confusing. After Senate Bill 465's amendments, subsection 574.106(a) vested the probate court with authority to issue medication orders for a patient who is either under a "court order to receive inpatient mental health services" or who "is in custody awaiting trial in a criminal proceeding and was ordered to receive inpatient mental health services in the six months" prior to the medication hearing. Act of May 25, 2005, 79th Leg., R.S., ch. 717, § 4, 2005 Tex. Gen. Laws 1739 (amended 2009) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a) (Vernon Supp. 2009)). Then, in new subsection 574.106(a-1), Senate Bill 465 authorized the court to grant medication orders after hearing and upon clear and convincing evidence of either prong as described in the text above (lack of capacity or dangerousness). *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1) (Vernon Supp. 2009)). The confusing aspect of the language, however, is that set forth in the preface to the second prong. By its terms, subsection

574.106(a-1)(2), relating to dangerousness, applies only to a patient who “was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient.” *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1)(2) (Vernon Supp. 2009)). Accordingly, this limitation on the “dangerousness” prong means that it does *not* apply to a person described in subsection 574.106(a)(1) who is receiving inpatient mental health services pursuant to a *civil* commitment order. For those individuals, only the “lack of capacity” prong set forth in subsection 574.106(a-1)(1) is applicable. In contrast, however, for criminal defendants who are subject to court-ordered mental health services, both prongs appear to apply. The “dangerousness” prong set forth in subsection 574.106(a-1)(2) is applicable by its very terms, but the “capacity” alternative also applies because subsections 574.106(a) and 574.106(a)(2) grant authority to the probate court over such criminal defendants generally. And furthermore, subsection 574.106(a-1)(1) provides the court with authority to issue medication orders on the ground of lack of capacity for any person defined in subsections 574.106(a)(1) *or* (a)(2). This construction is also consistent with *Sell*'s directive that prior to a criminal court's consideration of ordering the administration of medication for trial competency purposes, an inquiry should be made as to whether the state had first sought a medication order on the basis of other recognized grounds such as dangerousness to self or others *or* when medication would be “in the best interests of a patient who lacks the mental competence to make” medication-related decisions. *Sell v. United States*, 539 U.S. 166, 182–83 (2003).

A 2008 decision by the Austin Court of Appeals, however, involved a challenge to the foregoing statutory construction. *R.M. v. State*, No. 03-08-00317-CV, 2008 Tex. App. LEXIS 7242, at \*6 (Tex. App.—Austin Sep. 26, 2008, no pet.) (mem. op., not designated for publication). In *R.M.*, the probate court had authorized the state to administer psychoactive medication to the defendant, a pretrial detainee for whom the criminal court had previously ordered inpatient competency restoration services at a state hospital. *Id.* at \*1. The probate court issued its medication order consistent with the “capacity” prong set forth in subsection 574.106(a-1)(1) after finding, “by clear and convincing evidence, [that] R.M. lacked the capacity to make a decision regarding the administration of psychoactive medication and that it was in R.M.'s best interest to be treated with medication.” *Id.* at \*5. On appeal, R.M. argued that section 574.106, per subsection 574.106(a-1)(2), “required a finding that R.M. presented a danger to himself or others before the court was authorized to order the administration of psychoactive medication.” *Id.* at \*13. In effect, R.M. appears to have been asserting that section 574.106(a-1)(1), which allows the probate court to issue a medication order upon a finding “that the patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment . . . is in the best interest of the patient[,]” is inapplicable to a patient for whom a criminal court has ordered inpatient mental health services. TEX. HEALTH & SAFETY CODE ANN. § 574.106 (a-1)(1) (Vernon Supp. 2009). The probate court had made findings under this subsection that R.M. lacked capacity to make a decision regarding the administration of psychoactive medication and that medication treatment was in R.M.'s best interest. *R.M.*, 2008 Tex. App. LEXIS 7242, at \*5. The probate court's findings directly tracked the authorization set forth in section 574.106(a-1)(1). *See id.* at \*5 (listing the factors employed by the probate court). On appeal, however, R.M. asserted that in cases in which a criminal court has ordered inpatient competency restoration treatment, a probate court could issue a medication order only under section 574.106(a-1)(2), which requires a finding of dangerousness. *Id.* at \*13. The Austin Court of Appeals did not address the statutory construction issue. Instead, the court examined the entire record and concluded that “even if we were to adopt R.M.'s construction of section 574.106, the evidence before the probate court showed that R.M. was a danger to himself and to others in the inpatient mental health facility.” *Id.* at \*14.

alternatives directly comported with the Supreme Court's language in *Sell* that "courts typically address involuntary medical treatment as a civil matter, and justify it" on grounds such as when it is "in the best interests of a patient who lacks the mental competence to make such a decision" or "where the patient's failure to accept treatment threatens injury to the patient or others."<sup>93</sup> In Senate Bill 465, the legislature placed this authority

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In contrast, the Tyler Court of Appeals has construed probate court orders issued under the "lack of capacity" prong as set forth in section 574.106(a-1)(1) in several cases involving persons who were under criminal court orders for competency restoration. *E.g.*, *State ex rel. J.C.*, No. 12-05-00426-CV, 2006 Tex. App. LEXIS 3594, at \*8-9, \*11-15 (Tex. App.—Tyler Apr. 28, 2006, no pet.) (recognizing the probate court's authority under section 574.106(a-1)(1) to issue an order upon finding that the patient lacks capacity and that treatment is in the patient's best interest, but reversing such an order given a lack of factual support for the findings); *accord State ex rel. E.G.*, 249 S.W.3d 728, 730-31 (Tex. App.—Tyler 2008, no pet.) (recognizing the probate court's authority, but reversing a section 574.106(a-1)(1) order for lack of factual support); *State ex rel. B.L.*, No. 12-08-00081-CV, 2008 Tex. App. LEXIS 6725, at \*7, \*11 (Tex. App.—Tyler Sep. 3, 2008, no pet.) (similarly recognizing the probate court's authority, but reversing a section 574.106(a-1)(1) order for lack of factual support); *see State ex rel. M.H.*, No. 12-06-00042-CV, 2006 Tex. App. LEXIS 6762, at \*9-12 (Tex. App.—Tyler July 31, 2006, no pet.) (upholding an order to issue medication based on the defendant's lack of capacity and the fact that the medication was in the patient's best interest; rejecting a factual sufficiency complaint); *see also State ex rel. N.P.N.*, No. 12-06-00283-CV, 2007 Tex. App. LEXIS 2933, at \*2-5 (Tex. App.—Tyler Apr. 18, 2007, no pet.) (rejecting a constitutional vagueness challenge regarding the term "capacity" as used in section 574.106 (a-1)(1)). On the other hand, the Tyler Court of Appeals has also decided a few cases involving appeals of forced medication orders by directly analyzing and applying the factors set out in *Sell*, but with *absolutely no mention* of the legislature's statutory process established by House Bill 465: a probate court hearing under section 574.106 followed, if necessary, by a criminal court hearing under article 46B.086 of the Texas Code of Criminal Procedure. *See State ex rel. F.B.*, No. 12-05-00423-CV, 2007 Tex. App. LEXIS 6058, at \*6-10 (Tex. App.—Tyler July 31, 2007, no pet.) (reversing a medication order under *Sell* after finding that there was no evidence that F.B. was a danger to himself or others and reasoning that the misdemeanor charge of possession of marijuana was not a serious offense; no mention of section 574.106 or article 46B.086); *State ex rel. D.B.*, 214 S.W.3d 209, 212-13 (Tex. App.—Tyler 2007, no pet.) (reversing a medication order under *Sell* after finding that there was no evidence that D.B. was dangerous and no evidence that the medication would be likely to make D.B. competent to stand trial; no mention of section 574.106 or article 46B.086); *State ex rel. F.H.*, 214 S.W.3d 780, 782-83 (Tex. App.—Tyler 2007, no pet.) (reviewing and reversing a medication order under *Sell* after finding that there was no evidence that F.H. was dangerous and reasoning that the misdemeanor charge of criminal trespass was not a serious offense; no mention of section 574.106 or article 46B.086).

93. *Sell v. United States*, 539 U.S. 166, 182 (2003). The structure of Senate Bill 465, first having a civil court proceeding to consider medication orders under the two traditional civil grounds and only thereafter permitting the criminal court to consider issuing a medication order for the purpose of rendering the defendant competent to stand trial, also squares with the Court's direction in *Sell* that a criminal court "should ordinarily

and the two alternative bases for issuing orders in the hands of a civil court—the probate court.<sup>94</sup>

As an aspect of the second alternative prong relating to the defendant’s possible dangerousness, Senate Bill 465 also added section 574.1065 to the Texas Health and Safety Code.<sup>95</sup> This provision, which was included as part of the effort to conform to *Sell*, provided a narrow definition of dangerousness that was linked to the alternative basis for issuing a medication order under subsection 574.106(a-1)(2):

Sec. 574.1065. FINDING THAT PATIENT PRESENTS A DANGER. In making a finding under Section 574.106 (a-1)(2) that the patient presents a danger to the patient or others in the inpatient mental health facility in which the patient is being treated as a result of a mental disorder or mental defect the court shall consider:

- (1) an assessment of the patient’s present mental condition;
- (2) whether the patient has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to the patient’s self or to another while in the facility; and
- (3) whether the patient, in the six months preceding the date the patient 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 patient being placed in the facility.<sup>96</sup>

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determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other . . . grounds” before approving “forced administration of drugs for purposes of rendering a defendant competent to stand trial[.]” *Id.* at 183.

94. Senate Bill 465 also vested this authority in the probate court for any criminal defendant for whom a criminal court had ordered inpatient mental health services. Tex. S.B. 465, § 4, 81st Leg., R.S. (2005) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a) (Vernon Supp. 2009)). In doing so, the legislature was aware, of course, that per 2003’s Senate Bill 1057, “[a] pretrial detainee found incompetent to stand trial and, once restored to competency, awaiting trial in a jail can only be medicated against his or her will after a court holds a hearing and determines by clear and convincing evidence that certain factors have been met.” Research Ctr., Bill Analysis, Tex. S.B. 465, 79th Leg., R.S., (2005), available at <http://www.legis.state.tx.us/tlodocs/79R/analysis/html/SB00465I.htm>. This official bill analysis, however, also recognized that the prior “law in Texas, in contravention of United States Supreme Court rulings, [otherwise] require[d] no hearing before a person who is found incompetent to stand trial . . . can be medicated against his or her will while detained in a mental health facility.” *Id.*

95. Act of May 25, 2005, 79th Leg., R.S., ch. 717, § 5, 2005 Tex. Gen. Laws 1738, 1739, amended by Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 2, 2009 Tex. Sess. Law Serv. 1405, 1405 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.1065 (Vernon Supp. 2009)).

96. *Id.*

In summary, the enactment of Senate Bill 465 vested the probate court with authority in the first instance to consider issuing medication orders after notice and hearing to persons previously ordered by a criminal court to receive inpatient mental health services for competency restoration.<sup>97</sup> Additionally, with regard to a defendant who returns to the county jail after successful competency restoration treatment, but who thereafter refuses to continue taking antipsychotic medications prescribed as part of that defendant's continuity of care plan, Senate Bill 465's passage also impacted the process that must unfold should the state wish to seek an order to compel the administration of the medication. Per Senate Bill 465, the state must first seek a medication order in the probate court under section 574.106 of the Texas Health and Safety Code and identify and prove either of the two alternative bases set forth in subsection 574.106(a-1)—lack of capacity to make medication decisions or dangerousness to self or others without treatment (with medication being in the defendant's best interest in either case).<sup>98</sup> Then, should the probate court determine that the defendant does not meet either of these alternative criteria, Senate Bill 465 has authorized the state to seek an order from the criminal court for the administration of medication under article 46B.086 of the Texas Code of Criminal Procedure for the purpose of maintaining the defendant's competency to stand trial.<sup>99</sup> As also established in Senate Bill 465, the state must file any such motion to compel medication in the criminal court "not later than the 15th day after the date a [probate court] judge issues an order stating that the defendant does not meet the criteria for court-ordered administration of psychoactive medications under Section 574.106,

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97. *Id.* § 4, 2005 Tex. Gen. Laws at 1739 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009)).

98. *Id.* (adding § 574.106(a-1) to the Texas Health and Safety Code); *see also supra* notes 92–94 and accompanying text (discussing other changes made by Senate Bill 465 to the Texas Health and Safety Code and how different courts interpreted the changes).

99. Act of May 25, 2005, 79th Leg., R.S., ch. 717, § 8, 2005 Tex. Gen. Laws 1738, 1740–41 (adding article 46B.086(a)(3) to the Texas Code of Criminal Procedure) (amended 2007, 2009) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)).

Health and Safety Code.”<sup>100</sup> Although this statutory structure comports with *Sell*, the requirement for the state to pursue the issue through two different courts is cumbersome and could lead to many prosecutors simply not making the effort.<sup>101</sup>

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100. *Id.* (amending article 46B.086(b) of the Texas Code of Criminal Procedure) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(b) (Vernon Supp. 2009)).

101. One possible deleterious aspect of inaction, of course, is that a defendant with mental illness, whose competency has been restored through treatment, might decompensate once he or she stops taking the antipsychotic medication prescribed in the continuity of care plan. If serious symptoms of the defendant’s mental illness then recur, the defendant might no longer be competent to be tried, and further commitment for competency restoration treatment will be necessary. The state, accordingly, has an interest in endeavoring to provide a continuity of care to such a defendant. *See* TEX. CORRECTIONAL OFF. ON OFFENDERS WITH MED. AND MENTAL IMPAIRMENTS BIENNIAL REP. 25–26 (Feb. 2007) (discussing continuity of care efforts vis-à-vis defendants who are returned to the county in which charges are pending following competency restoration treatment). Senate Bill 465’s two-hearing requirement, however, may lead to inertia on the part of the state. In contrast to the approach taken by the Texas Legislature, the California Legislature vested the criminal court with the authority to make all of the various *Sell* determinations. *See* CAL. PENAL CODE § 1370(a)(2)(B)(ii) (West Supp. 2009) (establishing the elements that courts must use in making determinations about the involuntary administration of antipsychotic medication). The California statute provides the following structure, in pertinent part:

(ii) If the defendant does not consent to the administration of medication, the court shall hear and determine whether any of the following is true:

(I) The defendant lacks capacity to make decisions regarding antipsychotic medication, the defendant’s mental disorder requires medical treatment with antipsychotic medication, and, if the defendant’s mental disorder is not treated with antipsychotic medication, it is probable that serious harm to the physical or mental health of the patient will result. Probability of serious harm to the physical or mental health of the defendant requires evidence that the defendant is presently suffering adverse effects to his or her physical or mental health, or the defendant has previously suffered these effects as a result of a mental disorder and his or her condition is substantially deteriorating. The fact that a defendant has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the defendant.

(II) The defendant is a danger to others, in that the defendant has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another while in custody, or the defendant had inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another that resulted in his or her being taken into custody, and the defendant presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others. Demonstrated danger may be based on an assessment of the defendant’s present mental condition, including a consideration of past behavior of the defendant within six years prior to the time the defendant last attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence.

(III) The people have charged the defendant with a serious crime against the

### B. *The 2007 Amendments*

In 2007, the Texas Legislature enacted Senate Bill 867 as a means of expanding and encouraging the use of outpatient programs as alternatives for providing criminal competency restoration treatment.<sup>102</sup> As part of that bill, the legislature further modified article 46B.086 of the Texas Code of Criminal Procedure.<sup>103</sup> In pertinent part, Senate Bill 867 amended article 46B.086(a)(2) to extend the statute's coverage to a defendant for whom an "outpatient treatment program provider has prepared a continuity of care plan that requires the defendant to take psychoactive medications[.]"<sup>104</sup> Senate Bill 867 also added subsection 46B.086(a)(4), which specifically makes the 46B.086 medication hearing process applicable to persons ordered to outpatient treatment for competency restoration under article 46B.072.<sup>105</sup>

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person or property; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition.

(iii) If the court finds any of the conditions described in clause (ii) to be true, the court shall issue an order authorizing the treatment facility to involuntarily administer antipsychotic medication to the defendant when and as prescribed by the defendant's treating psychiatrist. The court shall not order involuntary administration of psychotropic medication under subclause (III) of clause (ii) unless the court has first found that the defendant does not meet the criteria for involuntary administration of psychotropic medication under subclause (I) of clause (ii) and does not meet the criteria under subclause (II) of clause (ii).

*Id.*

102. See Act of May 17, 2007, 80th Leg., R.S., ch. 1307, §§ 3–19, 2007 Tex. Gen. Laws 4385, 4387–95 (amending procedures within the Texas Code of Criminal Procedure concerning defendants with mental illness) (amended 2009) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)).

103. *Id.* § 9, 2007 Tex. Gen. Laws at 4391 (amended 2009) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)).

104. *Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(3) (Vernon Supp. 2009)).

105. *Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(2)(D) (Vernon Supp. 2009)). Senate Bill 867 also added language to section 574.107 of the Texas Health and Safety Code requiring the "county in which the applicable criminal charges are pending or were adjudicated" to pay "the costs of a hearing that is held under section 574.106 to evaluate the court-ordered administration of psychoactive medication. . . ." Act of May 17, 2007, 80th Leg., R.S., ch. 1307, § 20, 2007 Tex. Gen. Laws 4385, 4395, amended by Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 3, 2009 Tex. Sess. Law Serv. 1405, 1405–

## V. THE 2009 LEGISLATION

Prior to the 2009 regular session of the Texas Legislature, it became apparent that there was a gap in the statutory scheme vis-à-vis persons found incompetent to stand trial who need treatment for mental illness.<sup>106</sup> Once a court determines that a defendant is incompetent to stand trial, the court will typically commit the individual “to a mental health facility or residential care facility for a period not to exceed 120 days for further examination and treatment toward the specific objective of attaining competency to stand trial.”<sup>107</sup> Correspondingly, the court’s commitment order must place the defendant in the custody of the sheriff for transportation and transfer to the treatment facility.<sup>108</sup> Although chapter 46B does not specifically state a date certain for such a transfer, the statute appears to contemplate that the transporting of the defendant will occur on the day of the order.<sup>109</sup> Nonetheless, “[d]ue to the limited availability of inpatient competency restoration beds, many individuals who do not otherwise qualify for outpatient release remain housed in correctional facilities for weeks and months while awaiting transfer to an inpatient competency restoration facility or residential care

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06 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.107 (Vernon Supp. 2009)). The probate court hearing under section 574.106 will usually be conducted in the county in which the defendant is being hospitalized or treated on an outpatient basis, which often will not be the county in which the criminal charges are pending. See TEX. HEALTH & SAFETY CODE ANN. § 574.104(d) (Vernon Supp. 2009) (addressing proper jurisdiction when “the patient is transferred to a mental health facility in another county”).

106. See Research Ctr., Bill Analysis, Tex. H.B. 1233, 81st Leg., R.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/html/HB01233E.htm> (discussing the legislature’s reasoning for enacting House Bill 1233).

107. TEX. CODE CRIM. PROC. ANN. art. 46B.073(b) (Vernon Supp. 2009). Alternatively, article 46B.072 permits an outpatient commitment, “if the court determines that a defendant found incompetent to stand trial is not a danger to others and may be safely treated 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[.]” *Id.* art. 46B.072(a).

108. See TEX. CODE CRIM. PROC. ANN. art. 46B.076(a) (Vernon Supp. 2009) (“If the defendant is found incompetent to stand trial, not later than the date of the order of commitment or of release on bail, as applicable, the court shall send a copy of the order to the facility of the department to which the defendant is committed . . .”).

109. See *id.* (suggesting that if the court must send a copy of the commitment order to the facility on the date the order is entered, surely the transfer of the individual should occur then, as well).

facility.”<sup>110</sup> Accordingly, a shortfall of available state hospital beds has resulted in long delays before individuals who have been found incompetent can be transferred for treatment.<sup>111</sup> These same individuals, however, continue to have treatment needs while they remain in jail awaiting transfer to an appropriate treatment facility.<sup>112</sup> Indeed, “[a] vast majority of these individuals continue to suffer from the effects of their mental illness without benefit of psychoactive medication.”<sup>113</sup> Nonetheless, under the former statutory structure the courts had “no jurisdiction to intercede, as these inmates neither reside[d] at an inpatient facility nor . . . had a continuity of care plan prepared on their behalf.”<sup>114</sup>

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110. Sen. Research Ctr., Bill Analysis, Tex. H.B. 1233, 81st Leg., R.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/html/HB01233E.htm>.

111. Advocacy, Inc. has filed a lawsuit against the leadership of the Texas Department of State Health Services challenging the state's delays in providing prompt transfers and competency restoration treatment to individuals who have been found incompetent to stand trial but who remain incarcerated in jails awaiting treatment beds. See *Lakey v. Taylor*, 278 S.W.3d 6, 9–11 (Tex. App.—Austin 2008, no pet.) (upholding the district court's denial of a plea to the jurisdiction by petitioner, David Lakey, M.D., Commissioner of the Texas Department of State Health Services, and remanding for trial). Advocacy, Inc. is a not-for-profit legal services organization whose mission is “to advocate for, protect and advance the legal, human and service rights of people with disabilities.” See [AdvocacyInc.org](http://www.advocacyinc.org), Protecting Residents with Developmental Disabilities, <http://www.advocacyinc.org/index.cfm> (last visited Nov. 11, 2009) (setting forth the priorities and goals for the assistance and advocacy of people with disabilities). This organization and comparable entities in other states are funded, in part, under the power vested in the Secretary of Health and Human Services by the Protection and Advocacy for Individuals with Mental Illness Act. See 42 U.S.C. §§ 10801–10851 (2006) (allowing federal funds to be allotted to eligible state systems that will advocate for individuals with mental illness). This enabling statute authorizes Advocacy, Inc. to pursue legal remedies on behalf of persons with mental illness while receiving federal funds. See *id.* § 10805(a)(1)(B)–(C) (allowing funding to be given to any agency or organization that meets specific statutory eligibility requirements). The author of this Article is a former member of the board of directors of Advocacy, Inc.

112. Sen. Research Ctr., Bill Analysis, Tex. H.B. 1233, 81st Leg., R.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/html/HB01233E.htm>.

113. *Id.*

114. *Id.* Under the former version of the relevant statutes, a medication hearing was available only if the defendant was already receiving services in an inpatient mental health facility or for whom the treatment facility or an outpatient treatment program had prepared a continuity of care plan requiring that the defendant take psychoactive medication. See Act of May 25, 2005, 79th Leg., R.S., ch. 717, § 4, 2005 Tex. Gen. Laws 1738, 1739 (adding § 574.106(a) to the Texas Health and Safety Code) (amended 2009) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a) (Vernon Supp. 2009)); see also Act of May 17, 2007, 80th Leg., R.S., ch. 1307, § 9, 2007 Tex. Gen. Laws 4385, 4391 (providing conditions and procedural requirements attendant upon a

To address this statutory gap, Representative Jose Menendez sponsored legislation during the 2009 Texas legislative session to provide for additional hearing opportunities.<sup>115</sup> Representative Menendez's bill, House Bill 1233,<sup>116</sup> was filed at the urging of officials from the San Antonio-based Center for Health Care Services and members of the Bexar County judiciary.<sup>117</sup> A group headed by the center's director, Leon Evans, and Associate Bexar County Probate Judge Oscar Kazen provided significant drafting assistance to Representative Menendez.<sup>118</sup> This legislative initiative sought to provide the commencement of in-jail treatment of defendants with mental illness who had already been adjudicated as incompetent to stand trial but who were awaiting transfer to a mental health facility or outpatient treatment program for competency restoration treatment.<sup>119</sup> Holding a

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medication hearing), *amended by* Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 2, 2009 Tex. Sess. Law Serv. 1405, 1406 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)).

115. Sen. Research Ctr., Bill Analysis, Tex. H.B. 1233, 81st Leg., R.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/html/HB01233E.htm>.

116. Act of May 26, 2009, 81st Leg., R.S., ch. 624, 2009 Tex. Sess. Law Serv. 1405 (Vernon).

117. The Center for Health Care Services is a community mental health and mental retardation center based in San Antonio, Texas. CHCS Homepage, <http://www.chcsbc.org/> (last visited Dec. 15, 2009). Members of the San Antonio-area judiciary who were involved in encouraging the bill's introduction included Bexar County Probate Court Judges Polly Jackson Spencer and Oscar Kazen. Bexar County and the Center for Health Care Services have been leaders in efforts to create meaningful diversion programs for offenders with mental illness caught up in the criminal justice system. See *Providing Jail Diversion for People with Mental Illness*, 57 PSYCHIATRIC SERVS. 1521, 1521–23 (2006) (acknowledging that the success of the Bexar County Jail Diversion program led to statutory changes during the 78th legislative session). In 2006, the American Psychiatric Association recognized the Bexar County Jail Diversion Program of the Center for Health Care Services in San Antonio, Texas, by bestowing its "Gold Achievement Award in the category of community-based programs because of its development of an innovative system of jail diversion involving community partnerships and collaborations, which has improved services, enhanced access to and continuity of care for persons with mental illness, and resulted in financial savings." *Id.* at 1521.

118. The author of this Article participated in the drafting efforts for House Bill 1233. Judge Kazen provided significant leadership and was the principal drafter. Others who played key roles included Dr. Sally Taylor, a psychiatrist who provides mental health services to detainees in the Bexar County Jail, and Beth Mitchell, an attorney with Advocacy, Inc. In addition, some of the ensuing discussion about the legislative efforts related to House Bill 1233 is based on the author's personal recollections and involvement in the bill-drafting process.

119. See Sen. Research Ctr., Bill Analysis, Tex. H.B. 1233, 81st Leg., R.S. (2009), available at <http://www.capitol.state.tx.us/tlodocs/81R/fiscalnotes/pdf/HB01233E.pdf> (comparing House Bill 1233 with past legislation and noting the expansion of provisions

person in jail without treatment for a lengthy period of time did not seem humane, even though the criminal court had already adjudicated the individual as being incompetent.<sup>120</sup> In addition, the drafting committee was of the view that, at least for some defendants, a regimen of antipsychotic medications could enable those defendants to be transferred to an outpatient program for competency restoration treatment rather than to a state hospital.<sup>121</sup>

House Bill 1233 amended both of the medication hearing procedures described above.<sup>122</sup> The first section of the bill amended subsection 574.106(a-1) of the Texas Health and Safety Code,<sup>123</sup> and the bill also added an entirely new subsection (I) to that section, as follows:

(a-1) The court may issue an order under this section only if the

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relating to court-ordered medications). Of course, a hearing to obtain an order to administer medication is unnecessary if the defendant voluntarily assents to receiving antipsychotic medication.

120. *See id.* (“[The] vast majority of these individuals continue to suffer from the effects of their mental illness without the benefit of psychoactive medication.”). However, treatment can be successful—as one recent commentary concluded:

[Antipsychotic medications] are beneficial treatments that uncontrovertibly improve cognition among patients with psychotic disorders, including schizophrenia. Whether the task involves making competent and informed treatment decisions, assisting defense counsel during trial, or enduring the hardships of prolonged incarceration, these medicines enhance a person’s ability to make rational decisions. There is [also] evidence that antipsychotic medications may prevent further clinical deterioration  
....

Steven K. Erickson et al., *Legal Fallacies of Antipsychotic Drugs*, 35 J. AM. ACAD. PSYCHIATRY & L. 235, 242 (2007).

121. An outpatient treatment program is, of course, a less restrictive alternative to an inpatient mental health facility. Article 46B.072 authorizes, and in the case of misdemeanor charges, requires, outpatient commitment for competency restoration treatment “if the court determines that a defendant found incompetent to stand trial is not a danger to others and may be safely treated 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...” TEX. CODE CRIM. PROC. ANN. art. 46B.072(a) (Vernon Supp. 2009).

122. *Supra* notes 84–95 and accompanying text. Because House Bill 1233 passed unanimously in both houses of the state legislature, it became effective immediately. *See* Tex. H.B. 1233, § 5, 81st Leg., R.S. (2009) (declaring that this act is to take “effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution”).

123. Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 1, 2009 Tex. Sess. Law Serv. 1405, 1405 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1) (Vernon Supp. 2009)).

2009]

## PRESCRIBING A BALANCE

341

court finds by clear and convincing evidence after the hearing:

(1) that the patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment with the proposed medication is in the best interest of the patient; or

(2) if the patient was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient, that treatment with the proposed medication is in the best interest of the patient and either:

(A) the patient presents a danger to the patient or others in the inpatient mental health facility in which the patient is being treated as a result of a mental disorder or mental defect as determined under Section 574.1065; ~~or~~

(B) the patient:

(i) has remained confined in a correctional facility, as defined by Section 1.07, Penal Code, for a period exceeding 72 hours while awaiting transfer for competency restoration treatment; and

(ii) presents a danger to the patient or others in the correctional facility as a result of a mental disorder or mental defect as determined under Section 574.1065 [and

~~[(B) treatment with the proposed medication is in the best interest of the patient].~~

....

(1) For a patient described by Subsection (a-1)(2)(B), an order issued under this section:

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

(2) does not constitute authorization to retain the patient in a correctional facility for competency restoration treatment.<sup>124</sup>

Subsection 574.106(a-1) previously authorized medication orders by the probate court for a patient who had been “ordered to receive inpatient mental health services by a criminal court” and who lacked “capacity to make a decision regarding the administration of the proposed medication” or posed “a danger to the patient or others in the inpatient mental health facility. . . .”<sup>125</sup>

124. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1), (1) (Vernon Supp. 2009)). The underlined language from the bill’s text represents additions to the former provisions, and the crossed-out wording reflects deletions from the former law.

125. Act of May 25, 2005, 79th Leg., R.S., ch. 717, § 4, 2005 Tex. Gen. Laws 1738, 1739 (adding subsections 574.106(a)(2) and (a-1)(2) of the Texas Health and Safety Code,

House Bill 1233 extended this latter “dangerousness” basis for ordering the administration of medication under subsection 574.106(a-1)(2) to authorize the probate court to consider ordering medication for a patient who remains in a jail for more than “72 hours while awaiting transfer for competency restoration treatment[.]”<sup>126</sup> The court’s authority under this subsection is limited to a detainee who “presents a danger to the patient or others in the correctional facility as a result of a mental disorder or mental defect as determined under Section 574.1065.”<sup>127</sup> Accordingly, this hearing process retains the dangerousness element that the Court identified in *Sell* as one of the traditional bases on which a court could order the administration of

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and amending subsection 574.106(a-1)(1) (amended 2009) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1)(1)–(2) (Vernon Supp. 2009)). The court also had to make findings by clear and convincing evidence that “treatment with the proposed medication” was “in the best interest of the patient.” *Id.* (amending subsection 574.106(a-1)(1) and adding subsection 574.106(a-1)(2)(B) to the Texas Health and Safety Code) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a), (a-1) (Vernon Supp. 2009)). For a discussion of the former version of these subsections, see *supra* notes 90–94 and accompanying text.

126. Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 1, 2009 Tex. Sess. Law Serv. 1405, 1405 (adding subsection 574.106(A-1)(2)(B)(i) to the Texas Health and Safety Code) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1) (Vernon Supp. 2009)).

127. *Id.* House Bill 1233 also made corresponding amendments to section 574.1065 of the Texas Health and Safety Code, which defines “dangerousness” for purposes of medication orders by the probate court:

Sec. 574.1065. FINDING THAT PATIENT PRESENTS A DANGER. In making a finding under Section 574.106(a-1)(2) that, as a result of a mental disorder or mental defect, the patient presents a danger to the patient or others in the inpatient mental health facility in which the patient is being treated or in the correctional facility, as applicable, ~~[as a result of a mental disorder or mental defect]~~ the court shall consider:

- (1) an assessment of the patient’s present mental condition;
- (2) whether the patient has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to the patient’s self or to another while in the facility; and
- (3) whether the patient, in the six months preceding the date the patient 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 patient being placed in the facility.

*Id.* § 2, 2009 Tex. Sess. Law Serv. at 1405 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.1065 (Vernon Supp. 2009)). The underlined language from the bill’s text represents additions to the former provisions, and the crossed-out wording reflects deletions from the former law.

medication in a civil proceeding.<sup>128</sup>

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128. See *Sell v. United States*, 539 U.S. 166, 182 (2003) (admonishing courts to make initial determinations as to whether forced medication is warranted on grounds other than rendering the defendant competent to stand trial, such as “when in the best interests of a patient who lacks the mental competence to make such a decision” or “where the patient’s failure to accept treatment threatens injury to the patient or others”). Although House Bill 1233 specifically amended the “dangerousness” prong set forth in section 574.106(a-1)(2) to extend its coverage to a patient who (1) remains confined in a jail for more than seventy-two hours while awaiting transfer for court-ordered competency restoration services, and (2) presents a danger to self or others in the jail due to the patient’s untreated mental illness, Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 1, 2009 Tex. Sess. Law Serv. 1405, 1405 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009)), it is nonetheless arguable that the “lack of capacity” alternative for ordering medication should also apply to such an individual. Section 574.106(a) vests the probate court with authority generally to issue medication orders for a patient who is either under a “court order to receive inpatient mental health services” or who “is in custody awaiting trial in a criminal proceeding and was ordered to receive inpatient mental health services in the six months” prior to the medication hearing. TEX. HEALTH & SAFETY CODE ANN. § 574.106(a) (Vernon Supp. 2009). In turn, subsection 574.106(a-1) authorizes the court to grant medication orders after hearing and upon clear and convincing evidence that “treatment with the proposed medication is in the best interest of the patient” and either the patient lacks capacity to make medication-related decisions or, in the case of a patient who is under a criminal court order, the patient presents a danger to self or others. *Id.* § 574.106(a-1)(1)–(2). By its terms, subsection 574.106(a-1)(2), relating to dangerousness, is restricted only to a patient who “was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient,” and House Bill 1233 amended that subsection to extend its coverage to persons in a jail who have been awaiting transfer for competency restoration treatment for more than seventy-two hours. Compare TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1)(2) (Vernon Supp. 2008) (enumerating the prior limitation in the Texas Health and Safety Code), with Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 1, 2009 Tex. Sess. Law Serv. 1405, 1405 (amending subsection 574.106(a-1)(2) of the Texas Health and Safety Code) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009)). Correspondingly, subsection 574.106(a-1)(2) does not apply to a person described in subsection 574.106(a)(1) who is receiving inpatient mental health services pursuant to a civil commitment order. TEX. HEALTH & SAFETY CODE ANN. §§ 574.106(a)(1), (a-1)(2) (Vernon Supp. 2009). For those individuals, only the “lack of capacity” prong set forth in subsection 574.106(a-1)(1) is applicable. *Id.* § 574.106(a-1)(1).

In contrast, however, for criminal defendants who are subject to court-ordered mental health services, both prongs arguably apply. The “dangerousness” prong set forth in subsection 574.106(a-1)(2) is applicable by its very terms, but the “capacity” alternative should also be applicable because subsections 574.106(a) and 574.106(a)(2) grant authority to the probate court over such criminal defendants generally, and subsection 574.106(a-1)(1) provides the court with authority to issue medication orders on grounds of lack of capacity for any person defined in subsections 574.106(a)(1) or (a)(2). See TEX. HEALTH & SAFETY CODE ANN. § 574.106(a), (a-1) (Vernon Supp. 2009) (enumerating the requirements for a court order to administer psychoactive medication to a patient). This construction is also consistent with *Sell*’s directive that prior to a criminal court’s consideration of whether to order the administration of medication for trial competency

purposes, there should be an inquiry regarding whether the state has first sought a medication order on the basis of other recognized grounds such as dangerousness to self or others or when medication would be “in the best interests of a patient who lacks the mental competence to make” medication-related decisions. *Sell*, 539 U.S. at 182–83. Although House Bill 1233 amended only the “dangerousness” prong set forth in section 574.106(a-1)(2) to extend its coverage to a jailed individual who is awaiting transfer for competency restoration treatment, the bill did not make any changes to the remaining structure of subsections 574.106(a) and 574.106(a-1). *See* Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 1, 2009 Tex. Sess. Law Serv. 1405, 1405 (amending section 574.106(a-1)(2) of the Texas Health and Safety Code) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009)). Accordingly, the “capacity” alternative set forth in subsection 574.106(a-1)(1) should also be applicable to such an individual based on the foregoing analysis.

This construction diverges, however, from the Texas State Senate Research Center’s analysis prepared during the 2009 legislative session, which stated the following in pertinent part:

The current statutory scheme of Section 574.106 (a-1) . . . provides that psychoactive medication may be compelled during an involuntary mental health civil commitment if among other requirements, the “patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment with the proposed patient is in the best interest of the patient.” However, if the patient was ordered to receive treatment from a criminal court, whose goal is to restore competency, the probate court must additionally find that “the patient is a danger to himself or others in the inpatient mental health facility in which the patient is being treated.” Often the patient is not a danger to himself or others, as the word “danger” has been interpreted by the court, but the patient’s actions do pose a threat to his or her own health, safety, and well-being.

Sen. Crim. Justice Comm., Bill Analysis, Tex. H.B. 1233, 81st Leg., R.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/pdf/HB01233E.pdf>. This construction is unduly narrow, however, and likely incorrect. It does not mention, and appears to ignore, the predicate language in subsection 574.106(a) that grants the probate court the general authority to issue medication orders to persons who are under *either* a civil or criminal court order for inpatient mental health services and provides no recognition that subsection 574.106(a-1) must be considered in tandem with subsection 574.106(a). TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009). Plus, the analysis attempts to engraft words to subsection 574.106(a-1) that are simply not there; subsection 574.106(a-1) does not include language requiring additional findings in criminal matters. Although the legislative intent regarding this portion of House Bill 1233 may have been solely to expand the scope of the dangerousness prong to extend to persons in jail who have been adjudicated incompetent and who have been awaiting a transfer for competency restoration treatment for more than seventy-two hours, there is a demonstrable argument that the “capacity” prong is also available to the probate court for such persons given the language in subsections 574.106(a) and 574.106(a-1)(1). On the other hand, the initially filed version of House Bill 1233 included a straightforward amendment of subsection 574.106(a-1)(1), which would have explicitly made the “capacity” prong applicable to any “patient, including a patient who has been determined to be incompetent to stand trial or who has been acquitted of an offense by reason of insanity[.]” Tex. H.B. 1233, § 1, 81st Leg., R.S. (2009) (introduced version of bill). The final legislation as ultimately enacted, however, did not include any amendment of subsection 574.106(a-1)(1) and, accordingly, made no change to the “capacity” provision.

In addition, during the drafting process, a representative from Advocacy, Inc. raised a concern that granting a court the authority to order medication to a defendant who remains in jail awaiting transfer to a state mental hospital should not be viewed as a license for the jail to be employed as a competency restoration facility.<sup>129</sup> Accordingly, the drafting group that worked behind the scenes to assist Representative Menendez on House Bill 1233 added subsection (1) to section 574.106 to underscore that a medication order issued for a person in jail who is awaiting transfer to a mental health treatment facility is intended to authorize “the initiation of . . . appropriate mental health treatment for the patient awaiting transfer” and not “to retain the patient in a correctional facility for competency restoration treatment.”<sup>130</sup> The sole purpose of the medication order is to enable the beginning of medical/psychiatric treatment for the jailed individual’s mental illness.

But what if the court with probate jurisdiction determines that there is no basis for issuing a medication order under the newly revised provisions? As described above, a hearing by the probate court under section 574.106(a-1) of the Texas Health and Safety Code is a prerequisite to consideration by the criminal court of a medication order under the authority of article 46B.086 of the Texas Code of Criminal Procedure.<sup>131</sup> To address the statutory gap in coverage with regard to persons with mental illness who remain housed in jails for lengthy periods while awaiting space for competency restoration treatment at a mental health facility, House Bill 1233 also amended article 46B.086(a) as follows:

- (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

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129. *Supra* note 118. Beth Mitchell represented Advocacy, Inc. during the bill-drafting process.

130. Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 1, 2009 Tex. Sess. Law Serv. 1405, 1405 (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(l) (Vernon Supp. 2009)).

131. TEX. CODE CRIM PROC. ANN. art. 46B.086(a)(4) (Vernon Supp. 2009).

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

(4) who is subject to Article 46B.072].<sup>132</sup>

These amendments were intended to cover several situations. First, as with the amendments pertaining to the probate court's power under the Texas Health and Safety Code's hearing provisions, House Bill 1233 extended the criminal court's authority under article 46B.086 to a defendant who has been found incompetent to stand trial, yet who remains in jail awaiting transfer to a treatment facility or outpatient program for longer than seventy-two hours following the incompetency determination.<sup>133</sup> As with the Texas Health and Safety Code amendments, the legislature intended to provide jurisdiction to the courts to intercede to consider authorizing medication treatment for appropriate defendants who remain in jail while awaiting a treatment slot.<sup>134</sup>

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132. Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 4, 2009 Tex. Sess. Law Serv. 1405, 1406 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a) (Vernon Supp. 2009)). The underlined language from the bill's text represents additions to the former provisions, and the crossed-out wording reflects deletions from the former law.

133. *Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(2)(A) (Vernon Supp. 2009)).

134. In another parallel provision to the amendments to the Texas Health and Safety Code, an order permitting medication under the revised article 46B.086 does not authorize

As amended, article 46B.086(a)(3) requires that there be a continuity of care plan in place “that requires the defendant to take psychoactive medications.”<sup>135</sup> To allow the article 46B.086 hearing process to be applicable to defendants who have been found incompetent but who remain in jail while awaiting transfer for competency restoration treatment, House Bill 1233 amended subsection (a)(3) to authorize “a correctional facility that employs or contracts with a licensed psychiatrist” to develop the continuity of care plan.<sup>136</sup> The amended language is noteworthy in two respects. First, a physician psychiatrist—not a county bureaucrat—must develop the continuity of care plan on behalf of the jail. Alternatively, for those counties that do not employ a licensed psychiatrist, a psychiatrist with whom the county contracts for services within the jail may prepare the continuity of care plan.<sup>137</sup>

Another subsection of article 46B.086(a), as amended by House Bill 1233, is worthy of mention. House Bill 1233 added subsection 46B.086(a)(2)(C), which purports to make article 46B.086 applicable to a defendant who was previously found incompetent who “is confined in a correctional facility while awaiting further criminal proceedings following competency restoration treatment.”<sup>138</sup> Although this language is set forth in House Bill 1233 as an addition to the previous text, in reality, it is simply a re-codification of the existing law. As discussed above, the original purpose of article 46B.086 was to provide a basis for authorizing

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retaining a defendant in the jail for competency restoration treatment. The new subsection (g) provides the following:

(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.

*Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(g) (Vernon Supp. 2009)).

135. Prior to 2009, this language appeared in article 46B.086(a)(2) of the Texas Code of Criminal Procedure. *Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(3) (Vernon Supp. 2009)).

136. Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 4, 2009 Tex. Sess. Law Serv. 1405, 1406 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(3) (Vernon Supp. 2009)).

137. *Id.*

138. *Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(2)(C) (Vernon Supp. 2009)).

court-ordered medication in a situation in which a court finds the defendant to be incompetent, the treatment facility successfully provides competency restoration treatment, and the defendant returns to the local jail to await the resumption of the criminal proceedings, but then the defendant stops taking psychoactive medications.<sup>139</sup> The language set forth in article 46B.086(a)(2)(C) restores that intent.

A trenchant question is why the drafters of House Bill 1233 opted to include medication hearing mechanisms in both section 574.106 of the Texas Health and Safety Code and article 46B.086 of the Texas Code of Criminal Procedure. The short answer is that the provisions of House Bill 1233 were amendments to the existing statutory framework that had first been established by Senate Bill 465 in 2005.<sup>140</sup> Subsequent to *Sell*, the legislature has required an initial hearing by the probate court to consider the appropriateness of ordering a regimen of psychoactive medications on grounds of either the defendant's lack of capacity to make medication decisions or the person's dangerousness to self or others without treatment and, in either case, that the medication is in the defendant's best interest.<sup>141</sup> Thereafter, if the probate court does not find a medication order justified under the provisions of the Texas Health and Safety Code, the government can seek a forced medication order in the criminal court under the grounds articulated in article 46B.086 of the Texas Code of Criminal Procedure.<sup>142</sup> House Bill 1233 did not change the structural approach of this dual court requirement. Instead, the bill simply amended the existing structure to extend the probate court's and

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139. TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon 2009); *see supra* notes 60–61 and accompanying text (discussing original legislative intent regarding this article).

140. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 717, 2005 Tex. Gen. Laws 1738, 1739–40 (adding a section to the Texas Health and Safety Code stating that “the court may issue an order . . . after the hearing” and a section to the Texas Code of Criminal Procedure stating that the criminal court may proceed “after a hearing under Section 574.106”) (amended 2009) (current versions at TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009) and TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)).

141. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a)–(a-1) (Vernon Supp. 2009)).

142. Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 4, 2009 Tex. Sess. Law Serv. 1405, 1406 (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a)(4) (Vernon Supp. 2009)).

criminal court's authority, respectively, to consider issuing medication orders for persons who have been adjudicated incompetent to stand trial, yet who remain in jail without treatment for their mental illness for more than seventy-two hours while they await a slot for competency restoration treatment.<sup>143</sup>

## VI. CONCLUSION

The Texas Legislature made significant strides during the 2003, 2005, and 2007 legislative sessions to adopt statutory guidelines and procedures to implement *Sell v. United States*.<sup>144</sup> Thereafter, the enactment of House Bill 1233 in 2009 represented a noble effort to fill a critical gap in coverage. It makes very little sense and raises questions of basic decency for the state to adjudicate a criminal defendant with a mental illness as being incompetent to stand trial, yet not provide a prompt transfer to a mental health treatment facility or outpatient treatment program and simply retain that individual in the jail with no medical treatment while the person awaits a treatment slot. In many such cases, because of the symptoms of the person's mental illness, the individual—already adjudicated to be incompetent to stand trial—may also be incompetent to make informed medical decisions about the appropriateness of taking antipsychotic medications. House Bill 1233 endeavors to address this scenario, while at the same time remains mindful of the restrictions and parameters the Supreme Court established in *Sell*. In particular, House Bill 1233 allows a

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143. *Id.* §§ 1, 4, 2009 Tex. Sess. Law Serv. at 1405–06 (current versions at TEX. HEALTH & SAFETY CODE ANN. § 574.106 (Vernon Supp. 2009) and TEX. CODE CRIM. PROC. ANN. art. 46B.086 (Vernon Supp. 2009)). In contrast, California has vested authority to consider these various grounds for issuing medication orders in a single court. CAL. PENAL CODE § 1370(a)(2)(B)(ii) (West Supp. 2009). The Texas Legislature considered that possibility in 2009 in the initial version of a bill filed by Representative Jerry Madden that would have given the criminal courts the authority to consider the medication issues normally determined by the probate courts under section 574.106 of the Texas Health and Safety Code. See Tex. H.B. 3907, 81st Leg., R.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB03907I.pdf> (attempting to amend article 46B.086 to allow “the court in which the criminal matter is pending” to conduct hearings and make determinations under section 574.106 of the Texas Health and Safety Code). Later versions of the bill dropped this provision, and the entire bill died in the waning days of the legislative session. *Id.*

144. See *Sell v. United States*, 539 U.S. 166, 166 (2003) (providing a constitutional framework for the consideration of court-ordered administration of psychoactive medications to prisoners to enable them to be competent to stand trial).

probate court to make a decision about the appropriateness of ordering antipsychotic medication in such a case.<sup>145</sup> In addition, if the probate court finds no basis for issuing such an order, House Bill 1233 allows the state to seek an order before the criminal court by means of the process established in article 46B.086 of the Texas Code of Criminal Procedure.<sup>146</sup> In granting this leave for issuing medication orders, however, the legislature struck a balance by setting forth explicitly in the statute that the authority vested in either the probate court or criminal court under the new law is to ensure “appropriate mental health treatment for the defendant awaiting transfer” and not “to retain the defendant in a correctional facility for competency restoration treatment.”<sup>147</sup> Moreover, the new provisions will be neither relevant nor necessary should the state promptly make a hospital or outpatient placement option available to enable the expeditious transfer of the individual from the jail setting into treatment. Although the statute’s requirement to hold one or even two hearings might be cumbersome, it ensures that the defendant’s constitutional rights under *Sell* are protected, yet enables the state to pursue appropriate medical treatment for the defendant’s mental illness when necessary. It is to be hoped that Texas counties and courts endeavor to pursue the newly revised procedures.

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145. See Act of May 26, 2009, 81st Leg., R.S., ch. 624, § 1, 2009 Tex. Sess. Law Serv. 1405, 1405 (establishing that if “the patient: has remained confined in a correctional facility, as defined by Section 1.07, Penal Code, for a period exceeding 72 hours while awaiting transfer for competency restoration treatment” the court may issue an order directing the administration of medication, but it does not authorize retention of that patient “in a correctional facility for competency restoration treatment”) (current version at TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1) (Vernon Supp. 2009)).

146. See *id.* § 4, 2009 Tex. Sess. Law Serv. at 1406 (creating a process by which the attorney representing the state will receive notice of a defendant’s refusal to take psychoactive medications and be allowed to file a written motion to compel medication in the court in which the defendant’s criminal proceedings are pending) (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(a) (Vernon Supp. 2009)).

147. *Id.* (current version at TEX. CODE CRIM. PROC. ANN. art. 46B.086(g) (Vernon Supp. 2009)).