

Cause Number 19-0260

In re the Commitment of

Gregory Jones

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Brief on the Merits

Of Petitioner, The State of Texas

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On Appeal from Cause # 185,786-C

In the 89th District Court of

Wichita County, Texas

Judge Charles Barnard, Presiding

And

Cause # 02-18-00019-CV

In the Court of Appeals, Second Judicial District

Fort Worth, Texas

Chief Justice Sudderth, Justices Kerr and Pittman, Presiding

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Oral Argument is Requested

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Cause Number 19-0260

In re the Commitment of

Gregory Jones

To the Honorable Justices of the Supreme Court:

Petitioner, the State of Texas, respectfully presents this brief on the merits in support of its contention that jury verdicts must always be unanimous in cases seeking the civil commitment of a sexually violent predator. If the Court disagrees, the State seeks guidance on the proper harm analysis when the jury returns a unanimous verdict finding the person to be a sexually violent predator but the charge failed to inform the jury it could return a verdict finding the person is not a sexually violent predator with just 10 jurors agreeing.

Statement of the Case

The State of Texas sought the civil commitment of Jones, an alleged sexually violent predator, pursuant to Chapter 841 of the Texas Health & Safety Code. Judge Charles M. Barnard, presiding judge of the 89th Judicial District Court of Wichita County, presided over the case. A jury unanimously found beyond a reasonable doubt that Jones is a sexually violent predator and Judge Barnard signed a judgment and an order of civil commitment.

Jones appealed the case to the Second Court of Appeals in Fort Worth under its Cause Number 02-18-00019-CV. Chief Justice Sudderth authored an opinion, joined by Justices Kerr and Pittman, reversing the judgment and remanding the case for a new trial.¹

This Court requested briefs on the merits after receiving the petition for review and a response from Jones. The State now seeks a reversal of the appellate court's opinion and an affirmation of the trial court's judgment.

Statement Regarding Oral Argument

The State requests oral argument. The complexities of Chapter 841 of the Health & Safety Code, the similar statutes of other states, and the interplay of various Texas statutes would be best discussed in a live format.

¹ *In re Commitment of Jones*, 571 S.W.3d 880 (Tex. App.—Fort Worth Feb. 28, 2019).

Statement of Jurisdiction

This Court has jurisdiction over this issue of statutory construction that is important to the jurisprudence of the state. Appellate courts and trial courts are struggling with the issue on a regular basis. Two appellate courts have issued rulings on this topic and the issue is pending in at least 5 other appellate courts.²

The Austin Court of Appeals was presented two cases in which the trial courts instructed the juries that they could return a finding that the person was not a sexually violent predator with a vote of only 10 jurors.³ In each case, 10 people determined the person on trial was not a sexually violent predator. The Austin Court found no error.

In Jones's case, and in all other cases now on appeal, the juries were not given such an instruction and returned unanimous verdicts finding the people on trial to be sexually violent predators.

² Five appellate courts have not yet issued opinions on pending cases containing the issue of whether juries should be allowed to return non-unanimous verdicts finding the person is not a sexually violent predator. See:

In the Commitment of Daniel Hernandez Guzman, # 01-19-00045-CV;

In re the Commitment of Oscar Lares, # 04-19-00240-CV;

In re the Commitment of Anthony Henderson # 05-19-00068-CV;

In re the Commitment of Randall Mark Driggers, # 13-19-00158-CV; and

In re the Commitment of K.H., # 14-09-00043-CV.

The same issue is also back before the Fort Worth Court of Appeals in In re the Commitment of Justin Shelton, # 02-19-00033-CV.

³ See *In re Commitment of Gipson*, ---S.W.3d---, 03-18-00332-CV, 2019 WL 3367549, at *1 (Tex. App.—Austin July 26, 2019, no pet. h.); and *In re Commitment of Garcia*, 03-18-00331-CV, 2019 WL 3367547, at *1 (Tex. App.—Austin July 26, 2019, no pet. h.).

Issues Presented

First Ground for Review: Threshold jury decisions in all other Texas cases require the same number of jurors to make any decision. A unanimous verdict is statutorily required to commit a person as a sexually violent predator. Is a unanimous verdict also required to not commit an alleged predator?

Second Ground for Review: Error is only harmful if it probably resulted in an improper verdict. The jury returned a unanimous verdict finding beyond a reasonable doubt that Jones is a sexually violent predator. Did the Court of Appeals apply an incorrect harm analysis when it found harm because the trial court's refusal to give Jones the requested instruction "could have" affected the judgment?

Statement of Facts

If this Court determines that unanimous verdicts are always required in cases seeking the civil commitment of an alleged sexually violent predator, the facts of this case are irrelevant. However, if this Court reaches the second ground for review, the facts are relevant to the standard for review and harm analysis.

Three witnesses testified at trial: Jones, Dr. Jason Dunham, and Dr. Sheri Gaines. Criminal judgments were introduced into evidence proving that Jones is a *repeat sexually violent offender*—he has convictions for attempted sexual assault,

attempted aggravated sexual assault, and burglary of a habitation with intent to commit sexual assault.⁴ (RR 6:8-11) These three crimes are statutorily defined as *sexually violent offenses*.⁵ The doctors appeared as expert witnesses for the State and each opined that Jones does suffer from a *behavioral abnormality*. (RR 4:49, 114-115, 176-177, 203)

The experts followed standard methodologies and each opined that Jones suffers from a behavioral abnormality.

The State presented Dr. Jason Dunham, a forensic psychologist, and Dr. Sheri Gaines, a medical doctor with a specialty in psychiatry. Dr. Dunham has been practicing forensic psychology for over 15 years. (RR 4:31-32) Dr. Gaines is board certified in psychiatry and in child-and-adolescent psychiatry. (RR 4:162) Each expert was retained in this case to evaluate Jones and determine whether he suffers from a behavioral abnormality. (RR 4:38, 166) Dr. Dunham and Dr. Gaines have each performed well over 100 behavioral-abnormality evaluations. (RR 4:41-42, 168)

The experts gave the statutory definition of a *behavioral abnormality* and explained their interpretations of the legal term. (RR 4:38-40, 166-168) Their methodologies for behavioral-abnormality evaluations include reviewing materials about the person and conducting a face-to-face evaluation. (RR 4:43, 172) Dr. Dunham also employs psychological testing instruments as aids. (RR 4:44) Both experts identify risk factors

⁴ Tex. Health & Safety Code § 841.0003(b).

⁵ Id. § 841.002(8)(A), (C), and (E); Tex. Penal Code §§ 22.011, 22.021, and 30.02.

that increase the odds this person will reoffend and positive factors that protect the person against reoffending. (RR 4:44) Both experts consider whether the person has diagnosable disorders. (RR 4:44) Finally, the experts arrive at their independent opinions. (RR 4:44) Other experts performing behavioral-abnormality evaluations also use this same methodology. (RR 4:44, 172)

The materials reviewed typically include documents from prosecutors, victims, courts, law enforcement, medical personnel, the prison, parole, and other experts. (RR 4:45-46) These are the same types of records typically used by other experts performing behavioral-abnormality evaluations. (RR 4:47, 173) The experts reviewed and relied upon similar records in this case. (RR 4:47, 173)

Based on their respective educations, trainings, experiences, and the procedures employed in this case, the experts independently opined that Jones does suffer from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. (RR 4:49, 114-115, 176-177, 203)

Jones's past sexual offenses were detailed in the records upon which the experts relied. The details gave the experts the information they needed to complete the evaluation.

Jones was convicted of attempting to sexually assault D. in 1996.⁶ ((RR 4:51) The records indicate that he was then 30 years old and she was 24. (RR 4:53) Wearing a latex glove, Jones grabbed the woman as she tried to enter her apartment. (RR 4:54) She fell, hit her head, and dropped her baby. (RR 4:54) Jones then dragged her across a lawn until neighbors responded to the noise and came to the lady's rescue. (RR 4:54)

Jones told Dr. Dunham that Jones was at the apartment complex going to visit a friend. (RR 4:55) He accidentally bumped into a woman and she overreacted. (RR 4:55) She started to fall and he attempted to help her up. (RR 4:55) She panicked and began trying to scoot away from him on the grass. (RR 4:55) Her pants came down as she scooted. (RR 4:55) Jones became aware of how bad the situation looked when the neighbors began coming out, and so he took off running. (RR 4:55) He might have heard a baby but he never saw one. (RR 4:55) Despite Jones's version of events, he pled guilty to the attempted sexual assault of D. and received a 10-year sentence in prison. (RR 4:56)

Dr. Dunham sees this as a callous sexual act. (RR 4:56) Jones attempted to rape a woman that was clearly holding a baby. (RR 4:56) The crime occurred in a public place where it was likely to be detected, indicating Jones's inability to control his

⁶ In an effort to protect the victims, their names are not included in this brief.

urges. (RR 4:56) He was hanging around an apartment complex at 3:00 in the morning with a ski mask and a latex glove when he sexually assaulted a stranger. (RR 4:53, 57)

Two years later, Jones attempted to sexually assault H. with a deadly weapon. (RR 4:58) According to the records, Jones approached H. from behind in the laundry room of an apartment complex. (RR 4:59) He pointed a gun to her head and threatened to kill her. (RR 4:59) He unfastened her belt and reached inside of her shirt. (RR 4:59) Jones put the gun in his pocket and fled when another lady came into the room. (RR 4:59) Jones told Dr. Dunham that he was not the person that committed this offense. (RR 4:60) Even so, Jones pled guilty to attempted aggravated sexual assault and received 20 years in prison. (RR 4:60)

Dr. Dunham sees this as another callous sexual act. (RR 4:61) Jones used a gun to place a stranger in fear for her life. (RR 4:60-61) The crime occurred in the afternoon and in a public place. (RR 4:61) Jones's use of violence was escalated and his sexual urge must have been uncontrollable. (RR 4:61)

Jones offended against K. about three months later when he burglarized her home with intent to commit aggravated sexual assault. (RR 4:62, 122) According to the records, K. was asleep in her apartment around 1:00 in the morning when she awoke to find Jones entering her bedroom. (RR 4:62) As she dialed 911, he put a gun to her head and made her hang up the phone. (RR 4:62) He stole some things from

the apartment and fondled her vagina. (RR 4:62) He remarked that they could have had sex but he had to leave because she called the police. (RR 4:62)

Jones told Dr. Dunham that he was passing through town at night and needed a place to crash. (RR 4:63) The person who lived in the apartment had told him he was welcome there anytime and to come in through the window if the door was locked. (RR 4:63) He entered the apartment and was scared when K. walked in. (RR 4:63) He pulled a gun on her to protect himself. (RR 4:64) He patted down her underwear to see if she had a gun. (RR 4:64) She gave him things from the apartment and he pawned them. (RR 4:64) Despite his version of events, Jones pled guilty to burglary of a habitation with intent to commit aggravated sexual assault and received a 20-year sentence. (RR 4:65)

Dr. Dunham now sees a pattern of offending for Jones. (RR 4:65) He seeks out young adult women in apartment complexes. (RR 4:65) He graduated to using a weapon. (RR 4:65-66) Jones's risk increased exponentially as his number of victims increased. (RR 4:66)

Three months after the offense against K., Jones offended against C. (RR 4:66-67) According to the records, Jones pretended to be a maintenance man to gain access to C.'s apartment. (RR 4:67) He held a screwdriver to her throat and grabbed her arm. (RR 4:68) She broke free from Jones and broke out a window to escape. (RR 4:68) To Dr. Dunham, Jones denied ever pretending to be a maintenance man and ever

entering C.'s apartment. (RR 4:68) Jones pled guilty to burglary of a habitation with intent to commit assault, which is not a sexually violent offense. (RR 4:68-69) Dr. Dunham considered it a sexually-related offense due in part to Jones's other offenses and in part to the victim's statement that she felt like Jones was going to rape her. (RR 4:69) Jones got a 20-year sentence for this crime. (RR 4:69)

Jones also has three convictions for offensive and provocative contact. (RR 4:73) These are not sexually violent offenses, as defined in the Health and Safety Code, but they are sexual offenses and they occurred in the two years between Jones's first and second sexually violent offenses. (RR 4:73, 122) According to the records, Jones approached one victim from behind, lifted up her skirt, and grabbed her buttocks. (RR 4:74) Jones pulled on the bottom of a second woman's shorts. (RR 4:75) He lifted up a third woman's skirt. (RR 4:74) Jones was caught and detained for these offenses. (RR 4:76) There were numerous police reports of similar conduct by a man matching Jones's description. (RR 4:78-80) Jones was never arrested for these other crimes because the victims couldn't make positive identifications. (RR 4:78-80) But Jones told police that he had committed more offenses and he enjoyed seeing the shocked looks on the women's faces. (RR 4:78, 81)

Jones's non-sexual offenses were also important to the evaluators. These offenses were indicators of Jones's antisocial personality – a major risk factor for reoffending sexually.

The two biggest risk factors for sexually reoffending are a sexual deviance and an antisocial orientation -- general law-breaking behavior and the inability to follow rules. (RR 4:82)

Jones's most significant non-sexual offense is a conviction for assault causing bodily injury to his ex-wife. (RR 4:83) He was on probation for this offense when he committed the offensive-and-provocative-contact offenses described above. (RR 4:83) Other antisocial behaviors of Jones are unlawful possession of a weapon, DWI, driving without a license, not paying traffic tickets, and driving without insurance. (RR 4:83, 193) These show Jones's pattern of irresponsible behavior. (RR 4:84) These behaviors may seem mild compared to his sexual offenses, but they are significant when compared to most people's behaviors. (RR 4:84) Because they occurred before his sexual offenses, they also help to demonstrate the escalation of his offenses. (RR 4:84)

Jones was diagnosed using information from the records.

The experts used the Diagnostic and Statistical Manual of Mental Disorders and the information from Jones's records to make diagnoses of Jones. (RR 4:93, 94 178, 180) Dr. Dunham diagnosed Jones with: (1) an unspecified paraphilic disorder with special and sadistic features; (2) a history of cannabis and alcohol abuse; and (3)

adult antisocial behavior. (RR 4:92) Similarly, Dr. Gaines diagnosed Jones with: (1) sexual sadism disorder; (2) alcohol use disorder in remission in a controlled environment; (3) cannabis use disorder in remission in a controlled environment; and (4) antisocial personality traits. (RR 4:178)

A paraphilic disorder is a chronic sexual deviancy that is part of a person's personality. (RR 4:92) Dunham opines that Jones's paraphilia is a sexual deviancy towards nonconsenting women that borders on sexual sadism. (RR 4:93) Dunham supported the diagnosis with specifics from the records. (RR 4:94) Although Jones has not offended during his 20 years in prison, he was offending regularly when in the free world. (RR 4:144) Jones's paraphilia is either an acquired or a congenital condition that affects his emotional and volitional capacity and makes him a menace to the health and safety of others. (RR 4:96)

Sexual sadism disorder is sexual satisfaction from someone else's suffering or humiliation. (RR 4:185) It must last for at least 6 months and cause the person problems in life. (RR 4:185) Dr. Gaines supported this diagnosis with particulars from Jones's records. (RR 4:185-187)

Adult antisocial behavior is a criminal mindset that starts in adulthood. (RR 4:97) Dunham supported the description of Jones's behaviors with specifics from the records. (RR 4:97) This is not a true diagnosis, but more of a description of his behaviors. (RR 4:141) Jones has behaved well in prison and he seemed to have

behaved well in his childhood home. (RR 4:155) His illegal behaviors surfaced only when he was on his own in the free world. (RR 4:155) Dr. Gaines echoed that Jones has features of antisocial personality disorder but not the full-blown disorder. (RR 4:178)

Jones admitted using alcohol and marijuana in the past, but there is no evidence that he has done so in prison. (RR 4:99, 188-189) He recounts that he was abusing the substances when he was offending, so they are pertinent to the evaluation. (RR 4:99, 194) Jones had a substance abuse class in prison but couldn't remember anything he had learned. (RR 4:188) Dr. Gaines opines that Jones currently needs treatment to keep him from relapsing in the free world. (RR 4:195)

The records show that Jones has numerous risk factors for sexually reoffending.

Risk factors are shown in research and the literature to have a high correlation to future sexual offending. (RR 4:57-58) The two biggest risk factors for sexually reoffending are deviant sexual behavior and antisocial traits. (RR 4:193) Other risk factors Dr. Dunham found in the records for Jones include:

- The total number of victims;
- Having strangers as victims;
- The force used;
- The use of weapons;
- Sexual preoccupation when in an unstructured environment;
- Lack of remorse or empathy;
- Denial / minimization;

- Portraying himself as the victim;
- Lack of a desire for treatment;
- A history of substance abuse; and
- Poor appraisal of his own risk.

(RR 4:84-85, 132) These risk factors are support for Dunham's ultimate opinion that Jones suffers from a behavioral abnormality. (RR 4:90) They show that he is a menace to the health and safety of others.

Risk factors Dr. Gaines identified for Jones include:

- Multiple offenses;
- Multiple victims;
- Stranger victims
- Using weapons;
- Using physical violence;
- Using verbal threats; and
- Offending in a public place.

(RR 4:181-184)

Protective factors statistically reduce a person's level of risk. (RR 4:87) Dr. Dunham could identify only one protective factor for Jones, good behavior in prison. (RR 4:87-88) Dr. Gaines also identified Jones's age, family support, education, employment history, and prison training as positive for him. (RR 4:196) Dr. Gaines cautioned that Jones had most of these same protective factors when he was offending. (RR 4:196-197)

Dr. Dunham used the information from the records to score psychological tests relating to Jones.

Dunham scored the Static-99R for Jones. (RR 4:104) It measures a person's risk of committing and being convicted of a new sexual offense. (RR 4:104) Jones scored a 5, which placed him in the above-average-risk range. (RR 4: 107) Dunham agrees that Jones is at above-average risk to reoffend and be reconvicted for a new sexually violent offense. (RR 4:107)

Dunham scored the Hare Psychopathy Checklist Revised (PCLR) for Jones. (RR 4:104) It is a measure of degree of psychopathy. (RR 4:104) Psychopaths don't have much of a conscience. (RR 4:110) Jones scored a 20, indicating a moderate level of psychopathy. (RR 4:111) Dunham did not diagnose Jones as a true psychopath. (RR 4:111)

There is no test for a behavioral abnormality. (RR 4:172)

Jones is an untreated sex offender.

Jones doesn't see himself as either a sex offender or a person in need of sex offender treatment. (RR 4:86, 112-113, 202) The experts agree that he needs treatment to reduce his risk of reoffending. (RR 4:112, 201)

Jones testified in this case.

Jones admitted to pleading guilty to, and doing prison time for, attempted aggravated sexual assault, burglary of a habitation with intent to commit aggravated

sexual assault, and burglary of a habitation with intent to commit assault. (RR 4:267, 269-270) He pled guilty to the felony offenses only to get less time. (RR 4:270, 282, 288) He did not actually commit any of them. (RR 4:268-290) Nevertheless, he regrets having victims and feels guilt [sic] for them. (RR 4:300)

Jones raised one stranger's dress and grabbed her buttocks. (RR 4:273) His watch got caught on another stranger's skirt. (RR 4:276-277) He did nothing else wrong, admitted nothing else wrong, and does not remember ever going to court for any of the other provocative-touching offenses. (RR 4:275, 277-278) He was convicted of three provocative-touching offenses and set up a payment plan for his fines. (RR 4:279-280) He made his first payment but not the others because he was locked up. (RR 4:280)

Before getting locked up, Jones used alcohol and drugs regularly but not daily. (RR 4:292-293) He showed up for work while "[t]ipsy." (RR 4:294) He did not feel then that he ever had a real problem with any substance and he does not need treatment now because he's sober. (RR 4:294-296) He took the treatment course in TDCJ because it was the only one available to him. (RR 4:295-296)

Charge Conference and Jury Questions

The jury was asked to determine whether Jones is a sexually violent predator. (CR 1:664) At the charge conference, Jones sought an instruction that would allow the jury to return a non-unanimous "no" verdict but require them to return a unanimous

“yes” verdict. (RR 5:8-10) The State opposed the instruction. (RR 5:6) The trial court ruled:

Logically, it --- it seems to me that if it’s unanimous on one, it should be unanimous on both, and it’s my understanding from looking into this question --- and I have looked into it --- that the majority have gone with unanimous both ways and that’s the way I’m going to rule in this case.

(RR 5:10-11)

The jury sent out a note asking for a definition and for a transcript of an expert’s testimony. (RR 5:67) The trial court returned instructions to which Jones’ counsel agreed. (RR 5:71) The jury sent out a second note asking whether an objection was sustained or overruled. (RR 5:72) The court reporter was unable to locate the described testimony. (RR 5:74) The jury sent out a third note asking to review two psychological tests and Dr. Dunham’s scoring of them. (RR 5:74) The trial court returned instructions to which Jones’ counsel agreed. (RR 5:75-76) The jury sent out a fourth note stating, “We are unable to come to a unanimous decision. How shall we proceed?” (RR 5:77) The note indicated neither the split nor the majority position. (RR 5:77) The trial court returned a “baby Allen Charge” to which Jones’s counsel objected. (RR 5:79-83)

More than an hour after receiving the supplemental charge, the jury returned a unanimous verdict finding beyond a reasonable doubt that Jones is a sexually violent

predator. (RR 5:85) The jury was polled and each juror affirmed that the verdict reflected the juror's individual decision. (RR 5:85-87)

Summary of the Argument

First Ground for Review

The SVP statute requires a unanimous jury verdict to civilly commit a person. The Rules of Civil Procedure allow any civil verdict by a vote of 10 of 12 jurors. The Rules of Civil Procedure apply to civil commitment cases unless they conflict. In case of conflict, the SVP statute controls. The question before this court is whether a jury verdict not to civilly commit a person is required to be unanimous? The State asserts that it is.

The statutory ambiguity arises in two different ways. First, if Rule 292 operates to allow a less-than-unanimous negative verdict, by its plain language it also operates to allow a less-than-unanimous positive verdict. Second, the SVP statute requires a unanimous positive verdict. Because of the ambiguity, this Court should analyze the statute *de novo*, using the rules of statutory construction. The State will show that the analysis leads to the conclusion that the Legislature intended that unanimous verdicts always be required in these civil cases that carry a burden of proof beyond a reasonable doubt.

Second Ground for Review

If this Court disagrees with the State and finds only unanimous positive verdicts are required, the State seeks clarification on the standard for review of harm when a jury unanimously finds beyond a reasonable doubt the person is a sexually violent predator after the trial court failed to charge the jury that it could return a non-unanimous negative verdict.

The only other lower appellate court to perform such a harm analysis essentially performed a sufficiency of the evidence analysis. The *Jones* Court's determination that the alleged error "could have" affected the verdict does not meet the standard required by Rule 44.1 that it probably affected the verdict.

Argument

Juries are asked one question in these cases: Do you find beyond a reasonable doubt that the person is a sexually violent predator?⁷ An affirmative vote leads to civil commitment.⁸ A negative vote does not.

A person is a *sexually violent predator* if the person is a *repeat sexually violent offender* and suffers from a *behavioral abnormality* that makes the person likely to engage in a predatory act of sexual violence.⁹ A *repeat sexually violent offender* is a person who "is convicted of more than one sexually violent offense and a sentence is imposed for at

⁷ This question was posed to Jones' jury. (CR 1:664)

⁸ Texas Health & Safety Code § 841.081(a).

⁹ Tex. Health & Safety Code § 841.003(a).

least one of the offenses.”¹⁰ A *behavioral abnormality* is “a congenital or acquired condition that, by affecting a person’s emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.”¹¹

First Ground for Review: Threshold jury decisions in all other Texas cases require the same number of jurors to make any decision. A unanimous verdict is statutorily required to commit a person as a sexually violent predator. Is a unanimous verdict also required to not commit an alleged predator?

In Texas and most other states, threshold jury decisions always require the same number of jurors to return any and all possible verdicts. The same should be true in cases seeking the civil commitment of a sexually violent predator. The SVP Act explicitly requires unanimous verdicts to find a person to be a sexually violent predator but is vague on the alternative verdict. Analyzing the statute according to the rules of statutory construction, the State will show that the statutes are ambiguous and this Court should declare that verdicts always have to be unanimous in these cases. If a unanimous verdict cannot be reached, a mistrial should be declared.

A statutory quandary created the ambiguity

¹⁰ Id. § 841.003(b). There are other ways a person may qualify as a *repeat sexually violent offender*, but this is the most common way and it is the way Jones qualified.

¹¹ Id. § 841.002 (2).

The SVP Act requires that “[t]he judge or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.”¹² “A jury determination that the person is a sexually violent predator must be by unanimous verdict.”¹³ The SVP Act further provides that the rules of procedure and appeal for civil cases apply unless they conflict with the SVP Act.¹⁴ The Rules of Civil Procedure provide, in part, “a verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve....”¹⁵

While the SVP Act explicitly requires a unanimous verdict to civilly commit a person, the Rules of Civil Procedure allow any verdict by a vote of 10 of the 12 jurors. The conflict in these statutes results in the SVP Act controlling.¹⁶ Yet the SVP Act does not explicitly mention verdicts finding a person is not a sexually violent predator. So the question the courts are struggling with is whether to always require a unanimous verdict, or to require one party to succeed only upon 12 votes and the other party to succeed with only 10 votes.

Disparate verdicts are not allowed on any other threshold jury question in Texas law. The *Jones* Court rejected this argument, pointing out that Rule 292(b) allows exemplary damages only if the jury unanimously agrees to them. There are two

¹² Tex. Health & Safety Code § 841.062 (a).

¹³ Id. § 841.062(b).

¹⁴ Id. § 841.146(b).

¹⁵ Tex. R. Civ. P. Rule 292 (a).

¹⁶ Tex. Health & Safety Code § 841.146 (b).

reasons the appellate court's determination is incorrect. First, Rule 292(b) explicitly states the exception to the Rule in the case of exemplary damages – there is no such exception for civil commitments. Second, even under 292(b), the jury's threshold determination of gross negligence could have been made either way by a non-unanimous verdict. It is only past the threshold question that disparate verdicts may be rendered.¹⁷

The State will show that the statute's explicit requirement of a unanimous affirmative verdict is also an implicit requirement of a unanimous negative verdict.

The standard for review: de novo

Statutory construction is a legal question and should be reviewed *de novo*.¹⁸ When the application of the plain language of statutory text leads to ambiguity or absurd results, the Court must analyze further.¹⁹ “Ambiguity exists when a statute may be understood by reasonably well-informed persons to have two or more different meanings.” *Cortez* at 598. As this trial court found, the trial courts are split on how to interpret these statutes.²⁰

¹⁷ Similarly, in criminal law, a unanimous jury must find a person guilty or not guilty of capital murder. If the person is found guilty, it takes 12 jurors to assess the death penalty but only 10 to spare the person's life. The threshold question, that of guilt, requires unanimous verdicts regardless of the jury's finding.

¹⁸ *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008).

¹⁹ *City of Rockwall*, 246 S.W.3d at 626; *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015).

²⁰ (RR 5:10-11)

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble, and emergency provision.²¹

There are no administrative constructions of this statute. An analysis of the other factors shows the Legislative intent was to always require unanimous verdicts.

The goal of statutory construction is to ascertain legislative intent.²² The laws should be liberally construed to achieve their purpose and to promote justice.²³ The old law, the evil, and the remedy should always be considered.²⁴

²¹ Tex. Gov't. Code § 311.023.

²² Tex. Gov't Code Ann. § 312.005.

²³ Id. § 312.006.

²⁴ Id. § 312.005.

The Legislature sought to protect society while supervising and treating sexually violent predators.

The object sought to be attained is a consideration in statutory construction.²⁵

The Civil Commitment of Sexually Violent Predators Act specifies that it was enacted “to address the risk of repeated predatory behavior that sexually violent predators pose to society.”²⁶ The Legislature concluded its Findings by stating a “procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.”²⁷

This Court must presume that the Legislature intended a just and reasonable result.²⁸ Considering the Legislative Findings and the rules of statutory construction, this Court must also presume that the Legislature favored the public interest over any private interest.²⁹ The public interest is best served by a unanimous verdict that dictates whether a sexually violent person will be committed, supervised, and treated as a sexually violent predator or released into society, possibly with no treatment or supervision.

A non-unanimous verdict neither protects society nor supervises and treats a person whom multiple professionals and some jurors determined to be a sexually

²⁵ Tex. Gov't. Code § 311.023(1).

²⁶ Tex. Health & Safety Code § 841.001.

²⁷ Id.

²⁸ Tex. Gov't Code Ann. § 311.021(1).

²⁹ Id. § 311.021(5).

violent predator. This factor weighs in favor of finding unanimous verdicts are always required.

The Legislature found existing laws were inadequate to address the risk to society posed by sexually violent predators.

The circumstances under which the statute was enacted is a factor in statutory construction.³⁰ The Legislature found that the existing involuntary commitment provisions of the Texas Mental Health Code were inadequate to address the societal risk of sexually violent predators.³¹ The Legislature also found that traditional mental health treatment did not work for sexually violent predators.³² It was therefore necessary to enact statutes specifically for the supervision and treatment of sexually violent predators.³³

Although other treatment is available, sexually violent predators need their own specialized treatment. Society is not protected when a non-unanimous jury verdict results in a sexually violent person being returned to society without that specialized supervision and treatment. This factor weighs in favor of finding unanimous verdicts are always required.

³⁰ Tex. Gov't. Code § 311.023.

³¹ Tex. Health & Safety Code § 841.001.

³² Id.

³³ Id.

The Legislature amended the SVP Act when it determined the then-existing treatment programs left society at risk.

The legislative history of the statute is a factor to consider in statutory construction.³⁴ The legislative history of this Act stresses the importance of protecting society from sexually violent predators.

As discussed above, the Act was initially enacted to protect society. In 2015, the Legislature made major changes to the SVP Act.³⁵ The final committee report said the statutory changes were designed to protect the growing crisis of the then-existing treatment program and the major threat it posed to the public safety of Texas.³⁶ The committee reported, “[A] public safety crisis is in our very near future.”³⁷

The committee reported that there were over 25,000 sex offenders in prison and nearly 400 in civil commitment. Rather than abolishing the civil-commitment program or allowing the federal courts to step in, the Legislature chose to amend the statute in an effort to protect society.³⁸

³⁴ Tex. Gov’t. Code § 311.023 (4).

³⁵ See CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS; AMENDING PROVISIONS SUBJECT TO CRIMINAL PENALTIES, 2015 Tex. Sess. Law Serv. Ch. 845 (S.B. 746) (VERNON’S).

³⁶ See 2015 Texas Senate Bill No. 746, Texas Eighty-Fourth Legislature, Texas Committee Report, attached as Appendix A.

³⁷ Id.

³⁸ Id.

Society is not protected when a non-unanimous jury verdict results in a sexually violent person being returned to society without specialized supervision and treatment.³⁹ This factor weighs in favor of always requiring unanimous verdicts.

Courts of other states have interpreted their similar laws to always require unanimous verdicts.

This Court may consider common law, former statutory provisions, and the laws on the same or similar subjects.⁴⁰ There was no equivalent common law or former statute. However, several states have civil commitment statutes nearly identical to ours and courts in several states have discussed the verdicts in these cases.

Some courts have assumed unanimous verdicts are always required.

When outlining the commitment process, this Court previously wrote that the judge or jury must determine whether, beyond a reasonable doubt, the person is a sexually violent predator and “a jury determination must be unanimous.”⁴¹ There was no mention of only certain verdicts being unanimous. Courts of other states have made similar statements about their nearly-identical civil commitment statutes.

Kansas’s law has always had a provision indistinguishable from ours. The Kansas statute reads:

³⁹ Only sexually violent offenders are ever considered for commitment. Tex. & Health & Safety Code § 841.021. Before a person reaches the trial stage of civil commitment, the person has been determined to be a *repeat sexually violent offender*. Id. §841.022 (c)(1). *Also see In re Commitment of Bobannan*, 388 S.W.3d 296, 298 (Tex. 2012) (“Before the State files suit, a person must be administratively determined to be an SVP.”).

⁴⁰ Tex. Gov’t. Code § 311.023(4).

⁴¹ *In re Commitment of Fisher*, 164 S.W.3d 637, 641 (Tex. 2005).

The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury.⁴²

The Supreme Court of Kansas determined that their statute satisfies due process, in part because it provides “a jury trial requiring a unanimous decision.”⁴³

Also similar to Texas, Missouri law provides that “[t]he court or jury shall determine whether, by clear and convincing evidence, the person is a sexually violent predator” and “[i]f such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury.”⁴⁴

Presuming that the statute also required a unanimous verdict to not commit a person, the Supreme Court of Missouri wrote in an *en banc* opinion, “Because the jury was unable to reach a unanimous verdict, as required by section 632.495, the trial court declared a mistrial.”⁴⁵ The Texas SVP Act has a provision for retrial after a mistrial has been declared.⁴⁶

Other courts have analyzed the statutes and determined unanimous verdicts are always required.

⁴² Kan. Stat. Ann. § 59-29a07 (West).

⁴³ *In re Sykes*, 303 Kan. 820, 824, 367 P.3d 1244, 1246 (2016), *see also In re Care & Treatment of Foster*, 280 Kan. 845, 853, 127 P.3d 277, 284 (2006) (declaring that the statute “requires a unanimous verdict of a jury.”).

⁴⁴ Mo. Ann. Stat. § 632.495 (West).

⁴⁵ *Bernat v. State*, 194 S.W.3d 863, 865 (Mo. 2006).

⁴⁶ Tex. Health & Safety Code § 841.064.

Only the *Jones* court and the Supreme Court of Iowa have directly addressed the issue of whether to reverse a unanimous jury verdict to civilly commit a person because the jury was not given the option of a non-unanimous verdict to not commit the person. The courts' interpretations of nearly identical statutes are diametrically opposed.

The *Jones* Court reasoned that § 841.062(b), which requires a unanimous affirmative verdict, intentionally omitted a non-unanimous verdict.⁴⁷ The Supreme Court of Iowa stringently disagreed.⁴⁸

The Iowa and Texas laws are nearly identical on the jury-verdict issue.

Texas Statutes	Iowa Statutes
The judge or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. ⁴⁹	At trial, the court or jury shall determine whether, beyond a reasonable doubt, the respondent is a sexually violent predator. ⁵⁰
A jury determination that the person is a sexually violent predator must be by unanimous verdict. ⁵¹	If the case is before a jury, the verdict shall be unanimous that the respondent is a sexually violent predator. ⁵²

The general rules of civil procedure apply and control unless the civil	The general rules of civil procedure apply and control unless the civil
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⁴⁷ *Jones*, 571 S.W.3d at 890.

⁴⁸ *See In re Det. of Williams*, 628 N.W.2d 447, 454-455 (Iowa 2001).

⁴⁹ Tex. Health & Safety Code § 841.062(a).

⁵⁰ Iowa Code Ann. § 229A.7 5.a.

⁵¹ Tex. Health & Safety Code § 841.062(b).

⁵² Iowa Code Ann. § 229A.7 5.a.

commitment statute conflicts with them. ⁵³	commitment statute conflicts with them. ⁵⁴
[A] verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve or of the same five or more members of an original jury of six. ⁵⁵	[A] general verdict, special verdict, or answers to interrogatories may be rendered by all jurors excepting one of the jurors if the jurors have deliberated for a period of not less than six hours after the issues to be decided have been submitted to them. ⁵⁶

Williams and Jones both argued that because the general civil rules allow less-than-unanimous verdicts, and because the statutes require only that affirmative verdicts have to be unanimous, their juries could return non-unanimous negative verdicts under the general civil rules.⁵⁷

The Iowa Supreme Court reasoned that the liberty interests at stake prompted the Legislature to impose a higher burden of proof than normally seen in civil cases. The unanimous verdict required to commit corresponded to the higher burden of proof. “That does not mean the Legislature intended to hybridize the rules of criminal

⁵³ Tex. Health & Safety Code § 841.146 (b).

⁵⁴ Iowa R. Civ. P. 1.101 (“The rules in this chapter shall govern the practice and procedure in all courts of the state, except where they expressly provide otherwise or statutes not affected hereby provide different procedure in particular courts or cases.”) Iowa Coe Ann § 229A was later amended to echo this general rule.

⁵⁵ Tex. R. Civ. P. 292(a).

⁵⁶ Iowa R. Civ. P. 1.931 (2).

⁵⁷ *Williams*, 628 N.W.2d at 454-455; *Jones*, 571 S.W.3d at 889-891.

procedure concerning the verdict.”⁵⁸ The Court held that the civil-procedural rule did not apply to the civil commitment cases.⁵⁹ The Court concluded:

There is only one issue on trial in a case like this—whether the respondent is a sexually violent predator under section 229A.7(3). Given that fact, and the fact that commitment requires a unanimous verdict, we think it would be absurd to conclude the legislature intended to permit a less-than-unanimous verdict to release the respondent. Such a result finds no support in this legislative scheme.⁶⁰

The Supreme Court of Washington went further and found jury verdicts always have to be unanimous in SVP cases, despite any statutory direction on verdicts.⁶¹ Like Iowa, Washington reasoned that the beyond-a-reasonable-doubt standard requires unanimous verdicts.⁶²

Jones’s response asserts that the Iowa statute was amended post-*Williams* in a manner that makes *Williams* outdated and inapplicable.⁶³ The State disagrees. The *Williams* decision addressed two jury issues: size and unanimity. When addressing the size of the jury, *Williams* argued that the silent commitment statute resulted in the criminal laws applying and providing for a twelve-person jury. The Court noted that the commitment statute was civil and the general civil rules of Iowa provide for an eight-person jury. The Court held, “[W]e presume the legislature intended the rules of civil procedure to apply in actions brought under chapter 229A unless the statute

⁵⁸ *Williams* at 455.

⁵⁹ *Id.*

⁶⁰ *Id.* at 455.

⁶¹ See *In re Young*, 122 Wash. 2d 1, 47-48, 857 P.2d 989, 1012 (1993).

⁶² *Id.*

⁶³ See p. 8 of Jones’s response to the petition for review.

specifically states otherwise.”⁶⁴ In 2002, the commitment statute was amended to include the statement, “Except as otherwise provided, the Iowa rules of evidence and the Iowa rules of civil procedure shall apply to all civil commitment proceedings initiated pursuant to this chapter.”⁶⁵ The amendment wrote into statute exactly what the Supreme Court judicially declared. Had the legislature intended to nullify the *Williams*’ requirement of unanimity, it would have done so in a direct manner. Eighteen years later, it still has not.

No state allows disparate verdicts to commit or not commit an alleged sexually violent predator. Therefore, the State asserts that the interpretations of this Court and other state supreme courts on laws nearly identical to ours weighs in favor of this Court confirming its previous statement — “[A] jury determination must be unanimous.”⁶⁶ When a unanimous verdict cannot be reached, a mistrial should be declared.

This factor weighs in favor of always requiring unanimous verdicts in these Texas cases.

The consequences of allowing a non-unanimous verdict to set an alleged predator free without appropriate treatment or supervision goes against Legislative intent.

⁶⁴ *Williams*, 628 N.W.2d at 454.

⁶⁵ SEXUALLY VIOLENT PREDATORS—CIVIL COMMITMENT, 2002 Ia. Legis. Serv. Ch. 1139 (WEST) (S.F. 2286).

⁶⁶ *Fisher*, 164 S.W.3d at 641.

This Court may consider the consequences of any particular construction.⁶⁷

There are two primary consequences to the appellate court's interpretation of the law in this case: (1) courts can effectively rewrite the Rules so that they apply to a given situation; and (2) the public is not protected.

First, to hold that Rule 292 applies to “no” votes in SVP cases, courts must ignore that the rule allows any verdict by only a portion of the jury. Perhaps more importantly, the Rule must be rewritten in order to impose the narrow application the *Jones* Court selected, while the history and intent of the Rule must be ignored. Taking the *Jones* Court's analysis, Rule 292 would have to be construed in this manner:

(a) Except as provided in subsections (b) and (c), a verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve or of the same five or more members of an original jury of six. However, where as many as three jurors die or be disabled from sitting and there are only nine of the jurors remaining of an original jury of twelve, those remaining may render and return a verdict. If less than the original twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein.

(b) A verdict may be rendered awarding exemplary damages only if the jury was unanimous in finding liability for and the amount of exemplary damages.

(c) In a case seeking the civil commitment of a sexually violent predator, a verdict may be rendered finding the person is not a sexually violent predator by the concurrence of ten or more members of an original jury of twelve.

⁶⁷ Tex. Gov't. Code § 311.023(5).

This seems to be what the *Jones* Court did, as they identified (b) as an exception to the general rule allowing non-unanimous verdicts in all cases and then decided that civil commitments were another exception.⁶⁸

If the Rule applies to SVP cases, according to Rule itself, it applies to all possible verdicts in these cases. We know it doesn't because the SVP statute explicitly requires a unanimous verdict under some circumstances, thereby making Rule 292 inapplicable.

Second, as discussed previously, to allow Rule 292 to apply only to "no" verdicts is to avoid supervising and treating a person some jurors and some professionals have determined to be a sexually violent predator who is a danger to society. The Legislature proclaimed its concern for the safety of the public and, at the same time, wove into the statute many explicit layers of protection for the individual. Release by a non-unanimous jury is not one of them.

The statutory screening process is meant to eliminate those who should not be committed. Only those who are thought to be repeat sexually violent offenders ever enter the screening process.⁶⁹ A multi-disciplinary team assesses whether the person is likely to commit a sexually violent offense after release.⁷⁰ The MDT notifies TDCJ of

⁶⁸ *Jones*, 571 S.W.3d at 890.

⁶⁹ Tex. Health & Safety Code §§ 841.003(a); 841.021(b).

⁷⁰ Id. § 841.022. The MDT is composed of representatives from the Department of State Health Services, the Department of Criminal Justice's victim services and sex offender rehabilitation

its findings and recommends an assessment for a behavioral abnormality, if appropriate.⁷¹

Upon recommendation from the MDT, TDCJ must assess whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.⁷² TDCJ must have an expert examine the person.⁷³ If, after the expert's examination, TDCJ believes that the person does suffer from a behavioral abnormality, it refers the case to the attorney representing the state.⁷⁴ The attorney representing the state may, but is not required to, file a petition seeking civil commitment of the person.⁷⁵ If the State files a petition, both sides are immediately entitled to examination of the person by an expert.⁷⁶ Either the judge or the jury determines whether, beyond a reasonable doubt, the State has proven the person to be a sexually violent predator.⁷⁷

Allowing alleged predators to avoid commitment by a non-unanimous jury goes against legislative intent and endangers the public. Before a person ever gets to a jury, many professionals and one or more experts have already determined that the person does suffer from a behavioral abnormality. To allow a person who has passed

divisions; the Department of Public Safety; the Civil Commitment Office, and a licensed sex offender treatment provider.

⁷¹ Id.

⁷² Id. § 841.023.

⁷³ Id.

⁷⁴ Id. § 841.023.

⁷⁵ Id. § 841.041 (a).

⁷⁶ Id. § 841.061(c).

⁷⁷ Id. § 841.062.

through numerous layers of safeguards to avoid commitment by a less-than-unanimous jury does not protect the public.

This rule of construction weighs in favor of always requiring unanimous verdicts in SVP cases.

The statutory titles weigh in favor of requiring unanimous verdicts.

In construing a statute, this Court may consider the title of the statute, the preamble to it, and any emergency provisions enacted.⁷⁸ The first section of the SVP Act is Legislative Findings and includes a recognition of the danger to society posed by a small but extremely dangerous group of sexually violent predators.⁷⁹ “[L]ong-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.”⁸⁰

The title of the procedural rule is “Verdict by Portion of Original Jury.”⁸¹ The body of § 841.062 of the SVP Act makes clear that unanimous verdicts are required to civilly commit a person. The title of Rule 292 makes clear any verdict can be made by only a portion of the original jury and so it directly conflicts with § 841.062. When the statutes conflict, the SVP Act controls.⁸²

⁷⁸ Tex. Gov’t. Code § 311.023(7).

⁷⁹ Tex. Health & Safety Code § 841.001.

⁸⁰ Id.

⁸¹ Tex. R. Civ. Proc. 292.

⁸² Tex. Health and Safety Code § 841.146(b).

The SVP Act’s “Determination of Predator Status” appears to encompass determinations of both whether the person is or is not a sexually violent predator.⁸³ The section ends by declaring that a jury verdict must be unanimous.⁸⁴ The title, “Determination of Predator Status” must apply to both (a) and (b). Subsection b explicitly requires a unanimous verdict for commitment. It implicitly requires the same for non-commitment.⁸⁵

Section 841.061 is entitled “Trial.” Within this section, the alleged predator is specifically granted numerous rights: (1) the right to be tried in a timely manner; (2) the right to a jury trial; (3) the right to an evaluation by the person’s own expert; (4) the right to appear; (5) the right to present evidence on the person’s own behalf; (6) the right to cross-examine witnesses; and (7) the right to view and copy the court’s file.⁸⁶ There is no grant of a right to a non-unanimous verdict to avoid commitment.

This factor also weighs in favor of the State’s position that Rule 292 should not apply to jury verdicts in SVP cases and all jury verdicts regarding civil commitment of sexually violent predators must be unanimous. The Legislature granted numerous rights to the person on trial, required the State to prove cases beyond a reasonable doubt, and required a unanimous verdict. There is nothing to indicate the Legislature

⁸³ Id. § 841.062.

⁸⁴ Id. at § 841.062(b).

⁸⁵ See *In re Det. of Williams*, 628 N.W.2d 447, 454-455 (Iowa 2001) (declaring it “absurd” to interpret an Iowa statute worded the same as the Texas statute to require only a unanimous affirmative verdict).

⁸⁶ Tex. Health & Safety Code § 841.061(a), (b), (c), and (d).

intended to grant the right to have the petition denied based on a non-unanimous verdict.

Conclusion: Unanimous verdicts should always be required.

Texas's laws must be liberally construed to achieve their purpose and promote justice.⁸⁷ The purpose of the SVP Act is to protect society by supervising and treating sexually violent predators.⁸⁸ This is not accomplished by letting a less-than-unanimous jury determine that society is safe with this person in it, even without appropriate supervision and treatment.

When the letter of the law leads to contradiction and absurdity, the legislative intent must prevail.⁸⁹ Although the SVP Act only specifically addresses verdicts to commit, the lower appellate court's determination—that the plain words end the inquiry—erroneously ignores both the plain language of Rule 292 and the legislative intent.⁹⁰ The plain words of the statute do not end the inquiry because they are ambiguous and they lead to absurd results the legislature never intended.⁹¹

The Government Code demands the old law, the evil, and the remedy be considered.⁹² The Legislature found the old law didn't work for sexually violent

⁸⁷ Tex. Gov't Code § 312.006.

⁸⁸ Tex. Health & Safety Code § 841.001.

⁸⁹ *Cannon v. Vaughn*, 12 Tex. 399, 402 (Tex. 1854).

⁹⁰ *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 134 (Tex. 1994).

⁹¹ See *Baumgart v. State*, 512 S.W.3d 335, 339 (Tex. Crim. App. 2017) (holding plain words should not prevail under these circumstances).

⁹² *Id.* § 312.005.

predators.⁹³ The evil is the threat sexually violent predators pose to society.⁹⁴ The remedy is to protect society by supervising and treating sexually violent predators.⁹⁵

Always requiring unanimous verdicts in these cases:

- facilitates the legislative intent of protecting society;
- protects society over the individual;
- aligns this statute with all other Texas statutes; and
- aligns the interpretation of the Texas statutes with the interpretations of similar statutes by other appellate-courts.

Holding the jury must return a unanimous verdict to civilly commit but the person may avoid commitment with a less-than-unanimous verdict does none of these four things.

Unanimous verdicts should always be required in cases seeking the civil commitment of an alleged sexually violent predator.

⁹³ Tex. Health & Safety Code § 841.001.

⁹⁴ Id.

⁹⁵ Id.

Second Ground for Review: Error is only harmful if it probably resulted in an improper verdict. The jury returned a unanimous verdict finding beyond a reasonable doubt that Jones is a sexually violent predator. Did the Court of Appeals apply an incorrect harm analysis when it found harm because the trial court's refusal to give Jones the requested instruction "could have" affected the judgment?

If this Court holds all verdicts must be unanimous, the second ground for review need not be reached. However, if this Court agrees with the lower appellate court that non-unanimous verdicts are allowed, this Court should establish a standard for evaluating harm to ensure that Rule 44.1 is equally and accurately applied to this case and others similarly situated. The only existing law on harm analysis under this situation is the *Jones* opinion, which does not follow statutory law.

It cannot be presumed that Jones' jury switched from a majority voting "no" to all twelve voting "yes." Unless a majority of the jury was desiring to cast "no" votes, the absence of the charge allowing him non-unanimous verdicts could not have probably caused the rendition of an improper verdict. Nor can it be presumed that an error probably caused the rendition of an improper verdict when there is no showing that the alleged error ever came into play, nor that it probably came into play. Error is

only reversible if it *probably* caused the rendition of an improper verdict.⁹⁶ An error that possibly caused an improper verdict is not sufficient to show harm.⁹⁷

Jones's lower appellate court decided that because the jury was split at one time, as shown by the fourth note, an instruction that 10 of them could return a "no" verdict "could have a significant impact on the situation."⁹⁸ The State asserts the appellate court used the wrong standard for finding error. Rule 44.1 requires a finding that the alleged error probably caused the rendition of an improper verdict, not that it could have.

Jones urges this court to follow the New Jersey Supreme Court's decision in *State v. Brown*, 651 A.2d 19 (N. J. 1994), in which the court found harmful error in failing to instruct a capital murder jury that it could spare Brown's life with a less-than-unanimous verdict. Under that situation, a single juror could have negated the death penalty. In contrast, Jones needed 10 jurors to negate his civil commitment. The harm analyses are necessarily different.

The Beaumont Court of Appeals found no harm in cases like Jones's, wherein unanimous affirmative verdicts were returned after the appellant's request to allow

⁹⁶ Tex. R. App. Proc. Rule 44.1 (a)(1), *emphasis added*.

⁹⁷ See *Stevens v. Nat'l Educ. Centers, Inc.*, 990 S.W.2d 374, 380 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (finding appellant's theory of harm could be correct, but it was only a possibility and a possibility is insufficient for a finding of harm under Rule 44.1).

⁹⁸ *Jones* at 891-892.

non-unanimous negative verdicts was overruled.⁹⁹ Neither the *Perez* nor the *Hatcher* court directly determined whether non-unanimous verdicts should be allowed. Both opinions proceeded directly to harm analyses because unanimous verdicts for commitment were returned in those cases. The analyses consisted of a review of the strength of the State's evidence.

The lower appellate court found the evidence legally sufficient to support the jury's determination that Jones is a sexually violent predator.¹⁰⁰ The two experts' opinions did not conflict with each other's and no other person testified to the alleged *behavioral abnormality*. The only conflicting evidence in the case came from Jones himself, who denied committing the crimes of which he was convicted and to which he pled guilty. (RR 4:270, 282, 288) There were no other witnesses and Jones's guilt of the prior offenses was previously adjudicated.

Jones asserted in his response to this Court that the opinions of the experts were based on unreliable and untrustworthy hearsay, making the opinions worthless.¹⁰¹ Therefore, he reasoned, harm is a given. The jury disagreed and the lower appellate court ruled against Jones's hearsay argument.¹⁰²

⁹⁹ See *In re Commitment of Perez*, 09-15-00126-CV, 2015 WL 8470522, at *7 (Tex. App.—Beaumont Dec. 10, 2015, no pet.) (mem. op.) and see *In re Commitment of Hatcher*, 09-15-00068-CV, 2015 WL 6745399, at *6 (Tex. App.—Beaumont Nov. 5, 2015, no pet.) (mem. op.).

¹⁰⁰ *Jones* 571 S.W.3d at 889.

¹⁰¹ See p. 8 of Jones' response to the State's petition.

¹⁰² *Jones* at 888.

There is nothing in the record of this case to indicate that the alleged charge error probably resulted in an improper verdict. To have probably resulted in an improper verdict, the error would have had to probably made 10 jurors vote differently than they did. The appellate court's opinion that the error could have caused an improper verdict is statutorily insufficient for a finding of harm.

Prayer

The State prays that the SVP Act be construed to require unanimous jury verdicts, regardless of what the verdict may be. In the alternative, the State prays for a standard of harm analysis when the jury charge was incorrect and a unanimous verdict was returned.

The State prays that the opinion of the lower appellate court be reversed and the judgment of the trial court be affirmed.

Respectfully Submitted,

/s/ Melinda Fletcher

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Certificate of Compliance

I hereby certify that, according to Microsoft Word, this entire brief, excluding the Appendix, contains 10,958 words. The length of this document is in compliance with the Texas Rules of Appellate Procedure.

/s/ Melinda Fletcher

Melinda Fletcher

Certificate of Service

I hereby certify that a true and correct copy of the foregoing State's Brief on the Merits was served on John Moncure and Kenneth Nash, the attorneys for Jones, via e.file.txcourts.gov, on this the 4th day of October, 2019, addressed to:

Ken.Nash@tdcj.texas.gov and John.Moncure@tdcj.texas.gov .

/s/ Melinda Fletcher

Melinda Fletcher

Cause Number 19-0260

In re the Commitment of

Gregory Jones

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Appendix to Brief on the Merits

Of Petitioner, The State of Texas

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Appendix A: 2015 Legislative Committee Report

2015 TX S.B. 746 (NS)
2015 Texas Senate Bill No. 746, Texas Eighty-Fourth Legislature

TEXAS COMMITTEE REPORT

TITLE: Relating to the civil commitment of sexually violent predators; amending provisions subject to criminal penalties.

VERSION: General

May 21, 2015

Version Date May 21, 2015

Whitmire, Perry, Turner, Sylvester

TEXT:

BILL ANALYSIS

Senate Research Center S.B. 746

By: Whitmire; Perry

Criminal Justice

6/5/2015

Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 746 as introduced is designed to address the growing crisis of the civil commitment of sexually violent predators program that could result in a major threat to the public safety in Texas. The civil commitment process is designed to provide a safety net for high risk repeat sex offenders who have a legislatively created diagnoses of a brain amorality that could lead to future sex assaults. Horrible mismanagement of the Office of Violent Sex Offender Management (OVSOM) has led to the total replacement of that office's management and restructure of its oversight board. Among the findings by the State Auditor's Office are:

1. OVSOM did not plan for treatment services.
2. OVSOM did not monitor contractor performance.
3. OVSOM has not implemented a budgeting process to identify or plan for services it provides, and it did not ensure that funds would be available to meet its needs.
4. OVSOM did not have adequate controls over access to the system that it uses to manage case managers caseloads. Auditors identified 14 former employees and contractors who still had access to the case management system, and two of those individuals had administrator access.
5. OVSOM did not have controls over the management of certain contracting processes.
6. By not planning for the transportation services, OVSOM did not develop the contracts properly and was not maximizing its use of state funds.

7. OVSOM did not have policies and procedures addressing conflicts of interest.
8. OVSOM did not have contingency plans if a provider was no longer able to provide housing services.
9. OVSOM had no evidence of its monitoring of the vendors that house sexually violent predators through memorandums of understanding.
10. OVSOM had not implemented certain processes for budgeting, review of expenditures, fee processing, and access to its case management system. Those issues hindered OVSOMs ability to maximize the use of state funds.
11. Auditors tested 115 OVSOM expenditures totaling \$1,110,140. For 45 (39 percent) of those 115 expenditures, OVSOM did not have adequate supporting documentation for the associated services and/or the services provided were not specified on the contract.
12. OVSOM also did not have policies and procedures for its review of expenditures, and it could not specify which staffs were responsible for reviewing invoices from transportation contractors.
13. Auditors could not find evidence that OVSOM used the revenue from the fees it had collected to offset the cost of GPS, as statute requires.

The court that conducts the civil commitment trial is a specialty court, the 435th District Court of Montgomery County, with state employees serving as Special Prosecutors and the Texas Board of Criminal Justice, Office of State Counsel for Offenders as defense attorneys. The court is currently in complete disarray. Public statements by the elected judge from Montgomery County have rendered him ineffective and led to his recusal from hearing cases that he is designated by statute to hear. This is having a negative impact on the entire Second Administrative Judicial Region impacting 35 other counties.

Also, due to the above mismanagement issue, all major vendors who currently house these individuals have notified OVSOM that they will no longer house them after August 2015.

The legislature can fix these problems, wait until the federal courts step in, or abolish the program. Considering that we have over 25,000 sex offenders in prison and approximately 1,800 discharging their sentences each year, and over 380 already civilly committed, a public safety crisis is in our very near future. (Original Authors/Sponsors Statement of Intent)

S.B. 746 amends current law relating to the civil commitment of sexually violent predators; amends provisions subject to criminal penalties.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Civil Commitment Office is modified in SECTION 26 (Section 841.141), Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Sections 841.002(1), (3), and (4), Health and Safety Code, as follows:

- (1) Redefines "attorney representing the state."
- (3) Redefines "case manager."

(4) Redefines "office" to mean the Texas Civil Commitment Office, rather than the Office of Violent Sex Offender Management.

SECTION 2. Amends Section 841.003(b), Health and Safety Code, as follows:

(b) Provides that a person is a repeat sexually violent offender for the purposes of this chapter if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses or if:

(1) the person:

(A) is convicted of a sexually violent offense, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the person was subsequently discharged from community supervision;

(B) enters a plea of guilty or nolo contendere for a sexually violent offense in return for a grant of deferred adjudication; or

(C) is adjudicated by a juvenile court as having engaged in delinquent conduct constituting a sexually violent offense and is committed to the Texas Juvenile Justice Department (TJJD) under Section 54.04(d)(3) or (m), Family Code; and

(2) after the date on which under Subdivision (1) the person is convicted, receives a grant of deferred adjudication, or is adjudicated by a juvenile court as having engaged in delinquent conduct, the person commits a sexually violent offense for which the person is convicted, but only if the sentence for the offense is imposed.

Deletes existing designations of Subdivisions (1)(D), (2)(A), and (2)(B). Deletes references to is adjudged not guilty by reason of insanity. Deletes a reference to is adjudged not guilty by reason of insanity of a sexually violent offense.

SECTION 3. Amends Section 841.007, Health and Safety Code, as follows:

Sec. 841.007. New heading: DUTIES OF TEXAS CIVIL COMMITMENT OFFICE. Provides that the Texas Civil Commitment Office (office), rather than the Office of Violent Sex Offender Management, is responsible for providing appropriate and necessary treatment and supervision for committed persons through the case management system, and developing and implementing a sex offender treatment program for persons committed under this chapter.

SECTION 4. Amends Section 841.021, Health and Safety Code, by amending Subsections (a) and (c) and adding Subsections (a-1) and (d), as follows:

(a) Requires the Texas Department of Criminal Justice (TDCJ), subject to Subsection (a-1) and except as provided by Subsection (d), before the person's anticipated release date, to give to the multidisciplinary team established under Section 841.022 (Multidisciplinary Team) written notice of the anticipated release of a person who meets certain requirements as set forth.

(a-1) Authorizes TDCJ, regardless of whether any exigent circumstances are present, to give notice under this section with respect to a person who is scheduled to be released on parole or to mandatory supervision only if the person's anticipated release date is not later than 24 months after the date on which the notice will be given. Prohibits TDCJ from giving notice with respect to a person who is currently released on parole or to mandatory supervision, but provides that the multidisciplinary team may perform the functions described by Section 841.022(c) within the applicable period required by that subsection if the written notice required by this section was received by the team before the date of the person's release.

(c) Requires TDCJ to give the notice described by Subsection (a) not later than the first day of the 24th month before the person's anticipated release date, but provides that, under exigent circumstances, TDCJ may give the notice at any time before that date, except as provided by Subsection (a-1). Deletes existing text requiring TDCJ or the Department of State Health Services (DSHS), as appropriate, to give the notice described by Subsection (a) or (b) not later than the first day of the 16th month before

the person's anticipated release or discharge date, but under exigent circumstances may give the notice at any time before the anticipated release or discharge date. Makes conforming changes.

(d) Prohibits TDCJ from providing notice under Subsection (a) of the anticipated release date of a person for whom TDCJ has previously provided notice under this section and who has been previously recommended for an assessment under Section 841.022 unless, after the recommendation for assessment was made:

- (1) the person is convicted of a new sexually violent offense; or
- (2) the person's parole or mandatory supervision is revoked based on the commission of a new sexually violent offense, failure to adhere to the requirements of sex offender treatment and supervision, or failure to register as a sex offender.

SECTION 5. Amends Section 841.022, Health and Safety Code, as amended by S.B. No. 219, Acts of the 84th Legislature, Regular Session, 2015, by amending Subsections (a) and (c) and adding Subsection (a-1), as follows:

(a) Requires the executive director of TDCJ, rather than the executive director of TDCJ and the commissioner of state health services jointly, to establish a multidisciplinary team to review available records of a person referred to the team under Section 841.021. Requires the team to include:

- (1) a mental health professional, rather than one person, from DSHS;
- (2) two persons from TDCJ as follows:
 - (A) one person from the victim services division; and
 - (B) one person from the sex offender rehabilitation program in the rehabilitation programs division;
- (3) a licensed peace officer who is employed by Department of Public Safety of the State of Texas (DPS) and who has at least five years' experience working for DPS or the officer's designee;
- (4) two persons from the office; and
- (5) a licensed sex offender treatment provider, rather than one person, from the Council on Sex Offender Treatment.

Makes nonsubstantive changes.

(a-1) Requires TDCJ, in consultation with the office, to provide training to the members of the multidisciplinary team regarding the civil commitment program under this chapter, including training regarding eligibility criteria for commitment, the process for evaluating persons for commitment, and the sex offender treatment program for persons committed under this chapter.

(c) Makes conforming changes.

SECTION 6. Amends Section 841.023, Health and Safety Code, as follows:

Sec. 841.023. ASSESSMENT FOR BEHAVIORAL ABNORMALITY. (a) Requires TDCJ (department), not later than the 60th day after the date of a recommendation under Section 841.022(c), to assess whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. Requires the department, rather than the department required to make the assessment, to aid in the assessment, to use an expert to examine the person. Authorizes the department to contract for the expert services required by this subsection. Requires the expert to make a clinical assessment

based on testing for psychopathy, a clinical interview, and other appropriate assessments and techniques to aid TDCJ in its assessment. Deletes references to DSHS.

(b) Requires the department, if as a result of the assessment the department believes that the person suffers from a behavioral abnormality, not later than the 60th day after the date of a recommendation under Section 841.022(c), to give notice of that assessment and provide corresponding documentation to the attorney representing the state for the county in which the person was most recently convicted of a sexually violent offense. Deletes existing text requiring the department making the assessment, if as a result of the assessment TDCJ or DSHS believes that the person suffers from a behavioral abnormality, to give notice of that assessment and provide corresponding documentation to the attorney representing the state not later than the 60th day after the date of a recommendation under Section 841.022(c).

SECTION 7. Amends Section 841.041(a), Health and Safety Code, as follows:

(a) Authorizes an attorney, if a person is referred to the attorney representing the state under Section 841.023 (Assessment for Behavioral Abnormality), to file, in the court of conviction for the person's most recent sexually violent offense, rather than in a Montgomery County district court other than a family district court, a petition alleging that the person is a sexually violent predator and stating facts sufficient to support the allegation.

SECTION 8. Amends Subchapter C, Chapter 841, Health and Safety Code, by adding Section 841.042, as follows:

Sec. 841.042. ASSISTANCE FROM SPECIAL PROSECUTION UNIT. Requires the special prosecution unit, on request of the attorney representing the state, to provide legal, financial, and technical assistance to the attorney for a civil commitment proceeding conducted under this chapter.

SECTION 9. Amends Section 841.061(a), Health and Safety Code, as follows:

(a) Requires the judge to conduct a trial to determine whether the person is a sexually violent predator:

(1) not later than the 270th day after the date a petition is served on the person under Section 841.041; and

(2) not later than the person's sentence discharge date.

Makes a nonsubstantive change.

SECTION 10. Amends Section 841.063, Health and Safety Code, as follows:

Sec. 841.063. CONTINUANCE. (a) Authorizes the judge, except as provided by Subsection (b), to continue a trial or hearing conducted under this chapter if the person is not substantially prejudiced by the continuance and:

(1) on the request of either party and a showing of good cause; or

(2) on the judge's own motion in the due administration of justice.

(b) Prohibits the judge from continuing a trial conducted under this chapter to a date occurring later than the person's sentence discharge date.

Makes a nonsubstantive change.

SECTION 11. Amends Subchapter D, Chapter 841, Health and Safety Code, by adding Section 841.065, as follows:

Sec. 841.065. AGREED ORDER. Requires an agreed order of civil commitment to require the person to submit to the treatment and supervision administered by the office.

SECTION 12. Amends Section 841.081, Health and Safety Code, to change references to outpatient treatment to treatment, to change references to case manager to office, and to delete a reference to discharge from a state hospital.

SECTION 13. Amends Sections 841.082(a) and (b), Health and Safety Code, as follows:

(a) Changes a reference to a person's outpatient civil commitment to a person's civil commitment. Requires the requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community to include:

(1) requiring the person to reside where instructed by the office, rather than requiring the person to reside in a Texas residential facility under contract with the office or at another location or facility approved by the office;

(2) prohibiting the person's contact with a victim, rather than with a victim or potential victim, of the person;

(3) requiring the person's participation in and compliance with the sex offender treatment program, rather than with a specific course of treatment, provided by the office and compliance with all written requirements imposed by the office, rather than imposed by the case manager or otherwise by the office;

(4) requiring the person to submit to tracking under a particular type of tracking service and to any other appropriate supervision, and refrain from tampering with, altering, modifying, obstructing, or manipulating the tracking equipment; and

(5) prohibiting the person from leaving the state without prior authorization from the office, rather than prohibiting the person from changing the person's residence without prior authorization from the judge and from leaving the state without that prior authorization.

Deletes existing text of Subdivision (3) including prohibiting the person's possession or use of alcohol, inhalants, or a controlled substance in the necessary requirements.

Deletes existing Subdivision (7) including that if determined appropriate by the judge, establishing a child safety zone in the same manner as a child safety zone is established by a judge under Section 13B (Defendants Placed on Community Supervision for Sexual Offenses Against Children), Article 42.12, Code of Criminal Procedure, and requiring the person to comply with requirements related to the safety zone in the necessary requirements.

Deletes existing Subdivision (8) including any other requirements determined necessary by the judge in the necessary requirements.

(b) Requires that a tracking service to which a person is required to submit under Subsection (a)(4), rather than under Subsection (a)(5):

(1) track the person's location in real time;

(2) be able to provide a real-time report of the person's location to the office on request, rather than to the case manager at the case manager's request; and

(3) periodically provide a cumulative report of the person's location to the office, rather than to the case manager.

SECTION 14. Amends Subchapter E, Chapter 841, Health and Safety Code, by adding Sections 841.0821 and 841.0822, as follows:

Sec. 841.0821. SEX OFFENDER TREATMENT BEFORE RELEASE FROM SECURE CORRECTIONAL FACILITY. (a) Requires TDCJ to prioritize enrolling in a sex offender treatment program established by TDCJ any committed person who has not yet been released by TDCJ.

(b) Requires TDCJ and the office to adopt a memorandum of understanding that establishes their respective responsibilities to institute a continuity of care for committed persons enrolled in a sex offender treatment program established by TDCJ.

Sec. 841.0822. REQUIRED PROCEDURES BEFORE RELEASE FROM SECURE CORRECTIONAL FACILITY. Requires TDCJ, before a committed person is released from a secure correctional facility, to ensure that:

- (1) DPS issues a personal identification card to the person; and
- (2) the person completes an application for the following federal benefits, as appropriate, for which the person may be eligible:
 - (A) social security benefits, including disability benefits, administered by the United States Social Security Administration; and
 - (B) veterans benefits administered by the United States Department of Veterans Affairs.

SECTION 15. Amends Section 841.083, Health and Safety Code, as follows:

Sec. 841.083. TREATMENT; SUPERVISION. (a) Requires the office to determine the conditions of supervision and treatment of a committed person, rather than requires the office to approve and contract for the provision of a treatment plan for the committed person to be developed by the treatment provider. Deletes existing text authorizing a treatment plan to include the monitoring of the person with a polygraph or plethysmograph. Deletes existing text authorizing the treatment provider to receive annual compensation in an amount not to exceed \$10,000 for providing the required treatment.

(b) Requires the office, rather than the case manager, to provide supervision to the person. Requires the provision of supervision to include a tracking service and, if determined necessary by the office, rather than if required by court order, supervised housing.

(c) Changes a reference to DPS to TDCJ.

(d) Requires the office to enter into appropriate contracts, rather than memoranda of understanding, for the provision of any necessary supervised housing and other related services and provides that the office may enter into appropriate contracts for medical and mental health services and sex offender treatment. Deletes existing text requiring the office to reimburse the applicable provider for housing costs under this section.

(e) Requires the case manager to:

(1) coordinate the treatment, rather than outpatient treatment, and supervision required by this chapter, including performing a periodic assessment of the success of that treatment and supervision; and

(2) provide a report to the office, semiannually or more frequently as necessary, which is required to include any known change in the person's status that affects proper treatment and supervision.

Deletes existing text providing that the report is required to include any recommendations made to the judge.

Deletes existing Subdivision (2) text requiring the case manager to make timely recommendations to the judge on whether to allow the committed person to change residence or to leave the state and on any other appropriate matters. Makes nonsubstantive changes.

SECTION 16. Amends Subchapter E, Chapter 841, Health and Safety Code, by adding Sections 841.0831, 841.0832, 841.0833, 841.0834, 841.0835, and 841.0836, as follows:

Sec. 841.0831. TIERED PROGRAM. (a) Requires the office to develop a tiered program for the supervision and treatment of a committed person.

(b) Requires that the tiered program provide for the seamless transition of a committed person from a total confinement facility to less restrictive housing and supervision and eventually to release from civil commitment, based on the person's behavior and progress in treatment.

Sec. 841.0832. HOUSING FACILITIES. (a) Requires the office to operate, or contract with a vendor to operate, one or more facilities provided for the purpose of housing committed persons.

(b) Requires the office to designate a facility under Subsection (a) to serve as an intake and orientation facility for committed persons on release from a secure correctional facility.

Sec. 841.0833. SECURITY AND MONITORING. Requires the office to develop procedures for the security and monitoring of committed persons in each programming tier.

Sec. 841.0834. MOVEMENT BETWEEN PROGRAMMING TIERS. (a) Requires the office to transfer a committed person to less restrictive housing and supervision if the transfer is in the best interests of the person and conditions can be imposed that adequately protect the community.

(b) Authorizes a committed person to file a petition with the court for transfer to less restrictive housing and supervision without the office's approval. Requires the court to grant the transfer if the court determines that the transfer is in the best interests of the person and conditions can be imposed that adequately protect the community.

(c) Requires the office to return a committed person who has been transferred to less restrictive housing and supervision to a more restrictive setting if the office considers the transfer necessary to further treatment and to protect the community. Requires that the decision to transfer the person be based on the person's behavior or progress in treatment.

(d) Entitles a committed person returned to a more restrictive setting under Subsection (c) to file a petition with the court seeking review of the office's determination. Requires the court to order the office to transfer the person to less restrictive housing and supervision only if the court determines that the office's determination was not made in accordance with Subsection (c).

Sec. 841.0835. COMMITTED PERSONS WITH SPECIAL NEEDS. Requires the Health and Human Services Commission (HHSC) to coordinate with the office to provide psychiatric services, disability services, and housing for a committed person with an intellectual or developmental disability, a mental illness, or a physical disability that prevents the person from effectively participating in the sex offender treatment program administered by the office.

Sec. 841.0836. RELEASE FROM HOUSING. Requires a committed person released from housing operated by or under contract with the office to be released to the county in which the person was most recently convicted of a sexually violent offense.

SECTION 17. Amends Section 841.084, Health and Safety Code, as follows:

Sec. 841.084. New heading: PAYMENT OF COSTS BY COMMITTED PERSON. (a) Creates this subsection from existing text. Provides that, notwithstanding Section 841.146(c), a civilly committed person who is not indigent:

(1) is responsible for the cost of:

(A) housing and treatment provided under this chapter; and

(B) the tracking service required by Section 841.082 (Commitment Requirements); and

(2) monthly is required to pay to the office the amount that the office determines will be necessary to defray the cost of providing the housing, treatment, and service with respect to the person, rather than to defray the cost of operating the service with respect to the person during the subsequent month. Deletes existing text requiring the office to immediately transfer the money to the appropriate service provider.

(b) Requires that money collected under this section be deposited to the credit of the account from which the costs were originally paid.

SECTION 18. Amends Subchapter E, Chapter 841, Health and Safety Code, by adding Section 841.0845, as follows:

Sec. 841.0845. NOTICE OF INTENT REGARDING NEW RESIDENCE OR FACILITY. (a) Requires the office to provide advance notice of any intent to house one or more committed persons at a new residence or facility that has not previously served as housing for committed persons under this chapter.

(b) Requires a vendor to advance notice of any intent to submit a proposal to the office for the construction or renovation of a residence or facility that will serve as a new location for housing committed persons under this chapter.

(c) Requires that notice be provided in writing to each member of the legislature who represents a district containing territory in the affected county as follows:

(1) by a vendor, not later than the 30th day before the date that the vendor will submit a proposal described by Subsection (b) to the office; and

(2) by the office:

(A) as soon as practicable after awarding a contract for the construction or renovation of a residence or facility that will serve as a new location for housing committed persons under this chapter; or

(B) if a construction or renovation contract is unnecessary for the purpose, not later than the 30th day before the date that the residence or facility will first be used as housing for committed persons under this chapter, except as provided by Subsection (d).

(d) Authorizes the office to provide notice required by Subsection (c)(2)(B) not later than 72 hours before transferring a committed person to the residence or facility if the transfer is necessary due to:

(1) a medical emergency;

(2) a serious behavioral or health and safety issue; or

(3) release from a secure correctional facility.

SECTION 19. Amends Section 841.085(a), Health and Safety Code, to provide that a person commits an offense if, after having been adjudicated and civilly committed as a sexually violent predator under this chapter, the person violates a civil commitment requirement imposed under Section 841.082(a)(1) (requiring a person who will begin an outpatient civil commitment to reside in a Texas residential facility under contract with the office or at another location or facility approved by the office), (2) (prohibiting a person who will begin an outpatient civil commitment from contacting a victim or potential victim of the person), (4) (requiring the participation in and compliance with a specific course of treatment provided by the office and compliance with all written requirements imposed by the case manager or otherwise by the office by a person who will begin an outpatient civil commitment), or (5) (requiring a person who will begin an outpatient civil commitment to submit to tracking under a particular type of tracking service and to any other appropriate supervision, and refrain from tampering with, altering, modifying, obstructing, or manipulating with tracking equipment), rather than under Section 841.082.

SECTION 20. Amends Section 841.101(b), Health and Safety Code, as follows:

(b) Requires the office, rather than the case manager, in preparation for a judicial review under Section 841.102, to provide a report of the biennial examination to the judge and to the person. Deletes existing text requiring the case manager to provide a copy of the report to the office.

SECTION 21. Amends Section 841.102(a), Health and Safety Code, to require the judge, not later than the 60th day after the date of receipt of the report submitted under Section 841.101 (Biennial Examination), to conduct a biennial review of the status of the committed person and issue an order concluding the review or setting a hearing under Subsection (c).

SECTION 22. Amends Section 841.121(a), Health and Safety Code, to change references to case manager to office.

SECTION 23. Amends Section 841.122, Health and Safety Code, to change references to case manager to office.

SECTION 24. Amends Sections 841.123(a), (b), and (c), Health and Safety Code, as follows:

(a) Changes a reference to the case manager's authorization to the office's authorization.

(b) Requires the judge to review and issue a ruling on a petition for release filed by the committed person without the office's authorization not later than the 60th day after the date of filing of the petition, rather than on receipt of a petition. Deletes existing text requiring the judge to attempt as soon as practicable to review the petition. Makes a conforming change.

(c) Makes conforming changes.

SECTION 25. Amends Section 841.124(a), Health and Safety Code, to require the judge to conduct a hearing on the petition not later than the 60th day after the date of filing of the petition if as authorized by Section 841.123 the judge does not deny a petition for release filed by the committed person without the office's, rather than the case manager's, authorization. Deletes existing text requiring the hearing to be conducted as soon as practicable.

SECTION 26. Amends Section 841.141(b), Health and Safety Code, to require the office to adopt rules to develop standards of care and case management for persons committed under this chapter, determine the conditions of supervision and treatment of a committed person, and develop and implement the tiered program described by Section 841.0831, including rules regarding a committed person's transition between programming tiers. Makes a nonsubstantive change.

SECTION 27. Amends Sections 841.142(b), (c), and (d), Health and Safety Code, as follows:

(b) Changes a reference to case manager to office.

(c) Requires TDCJ, the office, a service provider contracting with one of those agencies, the multidisciplinary team, and the applicable attorney representing the state, on the written request of any attorney for another state or for a political subdivision in another state, to release to the attorney any available information relating to a person that is sought in connection with an attempt to civilly commit the person as a sexually violent predator in another state.

(d) Authorizes TDCJ, the office, a service provider contracting with one of those agencies, the multidisciplinary team, and the applicable attorney representing the state to exchange any available information relating to the person to protect the public and to enable an assessment or determination relating to whether a person is a sexually violent predator or to enable the provision of supervision and treatment to a person who is a sexually violent predator.

SECTION 28. Amends Section 841.146(c), Health and Safety Code, to change a reference to outpatient treatment to treatment.

SECTION 29. Amends Section 841.147, Health and Safety Code, as follows:

Sec. 841.147. IMMUNITY. Provides that the following persons are immune from liability for good faith conduct under this chapter:

(1) an employee or officer of TDCJ or the office, rather than an employee or officer of TDCJ, DSHS, the Department of Aging and Disability Services, or the office;

(2) Makes no change to this subdivision;

(3) the applicable attorney representing the state and an employee of the attorney, rather than an employee of the civil division of the special prosecution unit charged with initiating and pursuing civil commitment proceedings under this chapter; and

(4) Makes no change to this subdivision.

SECTION 30. Amends Section 841.150, Health and Safety Code, as amended by S.B. No. 219, Acts of the 84th Legislature, Regular Session, 2015, as follows:

Sec. 841.150. New heading: EFFECT OF SUBSEQUENT DETENTION, CONFINEMENT, OR COMMITMENT ON ORDER OF CIVIL COMMITMENT. (a) Provides that the duties imposed on the office and the judge by this chapter are suspended for the duration of a detention or confinement of a committed person in a correctional facility, secure correctional facility, or secure detention facility, or if applicable any other commitment of the person to a community center, mental health facility, or state supported living center, by governmental action. Makes nonsubstantive changes.

(b) Defines "correctional facility," "secure correctional facility," and "secure detention facility" in this section. Renumbers existing subdivisions accordingly.

SECTION 31. Amends Sections 841.151(b) and (c), Health and Safety Code, to change a reference to Section 841.082 to Section 841.082(a)(1), (2), (4), or (5), and to include the office as an entity required to be notified in writing by the facility of the anticipated date and time of the release of a person who was civilly committed under this chapter as a sexually violent predator.

SECTION 32. Amends Article 13.315, Code of Criminal Procedure, as follows:

Art. 13.315. FAILURE TO COMPLY WITH SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT REQUIREMENT. Authorizes an offense under Section 841.085 (Criminal Penalty; Prosecution of Offense), Health and Safety Code, to be prosecuted in the county in which any element of the offense occurs or in the court that retains jurisdiction over the civil commitment proceeding under Section 841.082, Health and Safety Code, rather than authorizes an offense under Section

841.085, Health and Safety Code, to be prosecuted in the county in which any element of the offense occurs or in Montgomery County.

SECTION 33. Amends Section 24.579(c), Government Code, as follows:

(c) Requires the state, notwithstanding any other law and only to the extent that the duties of those individuals relate to civil commitment proceedings under Chapter 841 (Civil Commitment of Sexually Violent Predators), Health and Safety Code, or to criminal cases involving offenses under Section 841.085, Health and Safety Code, and Article 62.203 (Failure to Comply: Individuals Subject to Commitment), Code of Criminal Procedure, to pay the salaries of and other expenses related to the court reporter appointed for the 435th District Court under Section 52.041 (Appointment of Official Court Reporter) and the court coordinator appointed for the court under Section 74.101 (Court Coordinators).

SECTION 34. Amends Section 411.1389, Government Code, as follows:

Sec. 411.1389. New heading: ACCESS TO CRIMINAL HISTORY RECORD INFORMATION: TEXAS CIVIL COMMITMENT OFFICE. (a) Entitles the Texas Civil Commitment Office, rather than the Office of Violent Sex Offender Management, to obtain from the DPS criminal history record information that is maintained by DPS and that relates to a person who has applied with the office to be an employee of the office, or a contracted service provider with the office.

(b)-(c) Makes conforming changes.

SECTION 35. Amends the heading to Chapter 420A, Government Code, to read as follows:

CHAPTER 420A. TEXAS CIVIL COMMITMENT OFFICE

SECTION 36. Amends Section 420A.001, Government Code, as follows:

Sec. 420A.001. DEFINITIONS. Redefines "board" and "office" to incorporate conforming changes.

SECTION 37. Amends Sections 420A.002(a), (b), and (c), Government Code, as follows:

(a) Makes a conforming change.

(b) Provides that the office is governed by a board composed of five, rather than three, members, appointed by the governor, including one member experienced in the management of sex offenders, one member experienced in the investigation or prosecution of sex offenses, and one member experienced in counseling or advocating on behalf of victims of sexual assault.

(c) Provides that members of the governing board of the office serve staggered two-year terms. Provides that three, rather than two, members' terms expire February 1 of each even-numbered year and two members' terms expire, rather than one member's term expires, February 1 of each odd-numbered year.

SECTION 38. Amends Section 420A.004, Government Code, to provide that the Texas Civil Commitment Office, rather than the Office of Violent Sex Offender Management, is subject to Chapter 325 (Texas Sunset Act), Government Code.

SECTION 39. Repealer: Section 24.579(b) (requiring the 435th District Court to give preference to civil commitment proceedings, criminal cases involving certain offenses, and matters assigned by the administrative judge), Government Code.

Repealer: Section 841.004 (Special Prosecution Unit), Health and Safety Code.

Repealer: Section 841.021(b) (requiring DSHS, before the person's anticipated discharge date, to give to the multidisciplinary team established under Section 841.022 written notice of the anticipated discharge of a person who is committed to DSHS after having been adjudged not guilty by reason of insanity of a sexually violent offense described by Section 841.002(8)(A), (B), or (C), or what is, or as described by this chapter what DSHS reasonably believes may be determined to be, a sexually violent offense described by Section 841.002(8)(D), and may be a repeat sexually violent offender), Health and Safety Code.

Repealer: Section 841.085(c) (authorizing an attorney employed by the civil division of the special prosecution unit described by Section 841.004, at the request of the local prosecuting attorney, to assist in the trial of an offense under this section), Health and Safety Code.

SECTION 40. (a) Provides that, except as provided by Subsection (a-1) of this section, the changes in law made by this Act to Chapter 841, Health and Safety Code, apply to a civil commitment proceeding under that chapter that is initiated on or after the effective date of this Act, regardless of when the applicable petition for civil commitment was filed. Makes a nonsubstantive change.

(a-1) Provides that the jurisdiction of a district court, the representation of the state by the civil division of the special prosecution unit, and the representation of a respondent by the Office of State Counsel for Offenders or other court-appointed counsel in any civil commitment trial, any review of a petition for release, or any biennial review under Chapter 841, Health and Safety Code, that is pending on the effective date of this Act remain unaffected by this Act until the conclusion of that proceeding.

(b) Requires the applicable court with jurisdiction over the committed person, if a civil commitment requirement imposed under Chapter 841, Health and Safety Code, before the effective date of this Act differs from any of the civil commitment requirements listed in Section 841.082, Health and Safety Code, as amended by this Act, to, after notice and hearing, modify the requirement imposed as applicable to conform to that section.

SECTION 41. Provides that the change in law made by this Act in amending Section 841.085, Health and Safety Code, applies to an offense committed before, on, or after the effective date of this Act, except that a final conviction for an offense under that section that exists on the effective date of this Act remains unaffected by this Act.

SECTION 42. Requires the governor, as soon as practicable after the effective date of this Act, to appoint the additional members to the governing board of the Texas Civil Commitment Office, as required by Section 420A.002, Government Code, as amended by this Act. Requires the governor, in making those appointments, to appoint one member to a term expiring February 1, 2016, and one member to a term expiring February 1, 2017.

SECTION 43. Provides that to the extent of any conflict, this Act prevails over another Act of the 84th Legislature, Regular Session, 2015, relating to nonsubstantive additions to and corrections in enacted codes.

SECTION 44. Effective date: upon passage or September 1, 2015.

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