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SUPREME COURT OF TEXAS
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NO. 19-0260

IN THE SUPREME COURT OF TEXAS

IN RE COMMITMENT OF GREGORY A. JONES

On Petition for Review from
Appeal No. 02-18-00019-CV
in the Court of Appeals, Second District, at Fort Worth

Trial Court Cause No. 185,786-C
89th District Court
Wichita County, Texas

RESPONDENT'S MERITS BRIEF

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ORAL ARGUMENT REQUESTED

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent, Gregory Jones, submits this merits brief in accordance with this Court's August 30 and September 24, 2019 requests.

STATEMENT OF FACTS

Mr. Jones adds these facts as being relevant to the harm question presented in ground two. In its brief, the State confirms that most of its case in Mr. Jones' 2017

civil-commitment trial is based on hearsay contained in various records (primarily police reports from Mr. Jones' criminal cases from the 1990s), which went well beyond Mr. Jones' guilty-plea admissions in these criminal cases.[1] (State's brief at 12-26). This hearsay was admitted without any judicial inquiry or oversight into its reliability or trustworthiness.[2] As in all of these Chapter 841 civil-commitment trials, the state experts (Dunham and Gaines in this case) relied heavily on this hearsay for such things as their diagnoses and to identify what they claimed were Mr. Jones' risk factors for reoffending which were critical to their opinions that he is a sexually violent predator.

In his brief in the Court of Appeals (attached as Appendix A to Mr. Jones' Response to State's petition for review), Mr. Jones claimed (through a type of "garbage in, garbage out" analysis) that the state-expert opinions in this case are of no probative value ("garbage out") because most of the hearsay upon which these opinions are based is on its face unreliable and untrustworthy ("garbage in"). (Mr. Jones' Brief at 4-16). Of particular importance (and not even mentioned in the

[1] The Texas Court of Criminal Appeals has described the hearsay in these types of records (particularly police reports prepared in anticipation of a criminal prosecution) as "inherently unreliable." *See generally Cole v. State*, 839 S.W.2d 798 (Tex. Crim. App. 1990) and 1992 Tex. Crim. App. LEXIS 196 at *7 n.9 (Tex. Crim. App. 1992) (op. on reh'g) (referring to these types of reports as "inherently unreliable").

[2] This is the subject of a petition for review in this Court in *In re Commitment of Farro*, No. 19-0875 (Tex., filed September 30, 2019) which essentially claims that the judiciary should exercise this type of oversight into the admission of this hearsay particularly since it is so critical to the State's case in these proceedings.

State's brief) is what a jury could reasonably have viewed as unreliable and untrustworthy hearsay involving the uncharged and unadjudicated offense that the State claimed Mr. Jones committed against the lady in the apartment laundry room which a jury could also have reasonably found was critical to the state-expert diagnoses that Mr. Jones is more or less a sexual sadist. (Mr. Jones' brief at 5, 12; 4 RR 78-81, 126-128, 138). If anything, this hearsay might even suggest that Mr. Jones is not even the one who committed this uncharged and unadjudicated offense. (Mr. Jones' Brief at 5, 12).

Thus, for purposes of the harm question presented in the second ground, the record in this case contains plenty of evidence from which a jury could rationally have rejected the State's case and the opinions of its experts as being based on unreliable and untrustworthy hearsay (even if some court ultimately decided that this hearsay is reliable and trustworthy enough for it to have been admitted into evidence since it is a jury that makes the ultimate call on its credibility). The jury's fourth note indicating that it was deadlocked lends some support for this.

In addition, when the jury sent out this fourth note after several hours of deliberations stating that it could not reach a unanimous verdict, the trial court submitted what it called a "baby Allen" charge and overruled Mr. Jones' objection to the submission of this "baby Allen" charge and his request for a mistrial. (5 RR 76-83). Mr. Jones also reurged the request he made earlier during the jury charge

conference for a 10-2 charge to be submitted with this "baby Allen" charge which the trial court also denied. (5 RR 81).

This "baby Allen" charge was based on the United States Supreme Court's decision in *Allen v. United States*, 164 U.S. 492 (1896). Mr. Jones claimed on appeal that this "baby Allen" charge was erroneously submitted to the jury (as being "inherently coercive") under this Court's decision in *Stevens v. Travelers Insurance Co.*, 563 S.W.2d 223, 226-27 (Tex. 1978) which, Mr. Jones argued, expressly disapproved of such a charge (or at least its parent) for Texas civil cases after noting that such a charge had "been the subject of much critical commentary since its approval" by the United States Supreme Court in *Allen* and had been "rejected by a majority of jurisdictions for use in criminal cases." (Mr. Jones' Brief at 17-20). The Court of Appeals found it unnecessary to address whether the trial court erroneously submitted the "baby Allen" charge in light of its disposition of the 10-2 charge issue even with Mr. Jones claiming on appeal that the erroneous submission of this "baby Allen" charge also had some bearing on whether he was harmed by the trial court's failure to submit the 10-2 charge. (Mr. Jones' Brief at 21). *See In re Commitment of Jones*, 571 S.W.3d 880, 892 n.6 (Tex. App.—Fort Worth 2019, pet. pending).

SUMMARY OF THE ARGUMENT

GROUND ONE: The Court of Appeals properly applied well-settled rules of statutory construction in deciding that the applicable statutes plainly and unambiguously entitled Mr. Jones to his requested 10-2 charge which is not an "absurd" result that the Legislature could not have possibly intended.

GROUND TWO: Under any reasonable application of the plain language of Rule 44.1(a)(1) of the Texas Rules of Appellate Procedure, error in failing to submit this 10-2 charge "probably caused the rendition of an improper judgment" and was not harmless.

ARGUMENT

GROUND ONE: Did the Court of Appeals err to construe the applicable statutory provisions to require a jury instruction allowing a 10-2 jury verdict that Mr. Jones is not a sexually violent predator?

Mr. Jones contends that the Court of Appeals properly applied well-settled rules of statutory construction in deciding that the applicable statutory provisions plainly and unambiguously require that a jury be charged that at least ten jurors can render a verdict that a person is not a sexually violent predator (usually referred to as a "10-2 charge" or "instruction" throughout this brief). *See Jones*, 571 S.W.3d at 889-91; *see also In re Commitment of Gipson*, 2019 Tex. App. LEXIS 6430 No. 03-18-00332-CV slip op. at 6-15 (Tex. App.—Austin, delivered July 26, 2019, no pet. history). Section 841.062 of the Texas Health and Safety Code plainly

requires a unanimous jury verdict only for a determination that a person is a sexually violent predator. *See Jones*, 571 S.W.3d at 889-91. This makes a 10-2 verdict authorized by Rule 292(a) of the Texas Rules of Civil Procedure applicable to a jury determination that a person is not a sexually violent predator under Section 841.146(b) of the Texas Health and Safety Code since this does not conflict with Section 841.062 or anything else in Chapter 841. *See Jones*, 571 S.W.3d at 889-91; Tex. Health & Safety Code § 841.146(b) (rules of civil procedure apply to Chapter 841 proceeding unless this conflicts with anything in Chapter 841 in which case Chapter 841 would control).

These statutory provisions should have made it plain enough to the legislators who enacted Chapter 841 that Rule 292(a) would apply to a verdict that a person is not a sexually violent predator. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (courts usually give effect to a statute's plain meaning "if the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it"). And it should also be presumed that these legislators knew that this rule authorized a 10-2 verdict as it does in other civil cases. *See Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) (Legislature is presumed to be aware of existing law when it enacts a statute).

Another way to approach this statutory-construction question might be to ask, what if the Legislature had enacted only subsection (a) of Section 841.062 providing that the factfinder "shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Without subsection (b) and applying Section 841.146(b), a jury determination that the person is a sexually violent predator could be by a 10-2 verdict and a jury determination that a person is not a sexually violent predator could also be by a 10-2 verdict. But, adding subsection (b) to Section 841.062, requiring only a unanimous jury verdict that the person is a sexually violent predator, changes only the former leaving the latter intact.

The State argues that construing the applicable statutory provisions to permit a 10-2 verdict that a person is not a sexually violent predator is an "absurd" result and inconsistent with the State's interest of protecting society from sexually violent predators. But the "absurd" result exception to the statutory-construction plain-meaning rule is a narrow exception and is meant to apply only "where application of a statute's plain language would lead to absurd consequences that the Legislature could not ***possibly*** have intended." *See Boykin*, 818 S.W.2d at 785 (emphasis in original). This narrow exception is not meant to empower courts to rewrite statutes just because they disagree with the Legislature's policy choices as being "absurd." *See University of Texas at Austin v. Garner*, No. 18-0740 slip op. at 7 (Tex., delivered October 18, 2019) (courts may not judicially revise statutes

because they believe they are bad policy). And, it is not an "absurd" result that the Legislature could not have possibly intended that the State cannot in a subsequent trial have another chance to persuade twelve jurors that a person is a sexually violent predator after the State failed to persuade at least three out of twelve jurors of this in a previous trial.

In addition, the Legislature had other things in mind when it enacted Chapter 841 besides protecting society from sexually violent predators such as providing safeguards against erroneous factual determinations that a person is a sexually violent predator with its significant impact on liberty interests (e.g., rights to appointed counsel, to appointment of defense experts, to beyond-a-reasonable-doubt burden of proof standard, to a jury trial, to a unanimous jury verdict that a person is a sexually violent predator, to cross-examine witnesses). *See generally Santosky v. State*, 455 U.S. 745 (1982) (discussing heightened standards of proof to reduce risk of erroneous factual determinations having significant impact on liberty interests). One of these safeguards is to permit at least ten jurors to determine that a person is not a sexually violent predator.

The State also cites various out-of-state authorities none of which really speak to the specific statutory-construction issue presented here except for the Iowa Supreme Court's decision in *In re Williams*, 628 N.W.2d 447, 454-55 (Io. 2001). Under the statute at issue in *Williams*, which was similar to Section 841.062, the

Iowa Supreme Court decided (contrary to the trial court in that case and also contrary to the Fort Worth Court's decision in this case and the Austin Court's decision in *Gipson*, *see also* State's brief at 11) that it would be "absurd to conclude" that its legislature permitted a less-than-unanimous verdict to find that a person is not a sexually violent predator in large part because there was no legislative intent "to hybridize the rules of civil and criminal procedure concerning the verdict" similar to Section 841.146(b). *See Williams*, 447 N.W.2d at 454-55; Iowa Code § 229A.7(3) (Supp. 1999) ("At trial, the court or jury shall determine whether, beyond a reasonable doubt, the respondent is a sexually violent predator. If the determination that the respondent is a sexually violent predator is made by a jury, the determination shall be by unanimous verdict of such jury.").

The statute at issue in *Williams* has since been amended "to hybridize the rules of civil and criminal procedure concerning the verdict" similar to Section 841.146(b). *See* Iowa Code § 229A.7(4) (2019) ("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."). It would seem that this amendment would require the Iowa Supreme Court to revisit its decision in *Williams* if called upon to do so.

More importantly, Texas Court of Appeals' decisions (including the one in this case) on this issue are much more persusasive (particularly their statutory-

construction analyses) than is the Iowa Supreme Court's decision in *Williams* which performed hardly any statutory-construction analysis similar to what Texas law requires and seemed to have arrived at its decision by judical fiat with hardly anything more than a bare conclusion declaring any other result to be "absurd." *See, e.g., Gipson*, slip op. at 15 (finding *Williams'* "reasoning inadequate, lacking both textual analysis and any substantive argument regarding absurdity"). Mr. Jones contends that this Court, applying well-settled rules of statutory construction, should also find *Williams'* reasoning "inadequate."

GROUND TWO: Did the Court of Appeals misapply the harm standard in Rule 44.1(a)(1) of the Texas Rules of Appellate Procedure when it decided that the trial court's failure to submit this jury instruction harmed Mr. Jones by "probably" causing the rendition of an improper judgment?

Rule 44.1(a)(1) provides that a court of appeals should not reverse a judgment on appeal because of an error of law unless this error "probably caused the rendition of an improper judgment." After rejecting the State's argument of no harm from the unsubmitted 10-2 charge because the record is silent on how the jurors were split (which the State seems to have abandoned on discretionary review),[3] the Court of Appeals, in reliance on Texas Supreme Court precedent,

[3] Mr. Jones contends that the Court of Appeals' decision on this point was correct because "polling a deadlocked jury is generally considered improperly coercive and therefore error." *See Jones*, 571 S.W.3d at 891. This is not to say that it would be irrelevant to the harm analysis if the record did show how the jurors were split. For example, a jury note indicating that the jury was split 10-2 that the person is not a sexually violent predator would undoubtedly be relevant to the question of harm even if the jury ultimately returned a unanimous verdict that the person is a

decided that this Rule 44.1(a)(1) harm standard was met because it could not "be reasonably certain that the verdict was not significantly influenced by the trial court's error" with this being based on the jury's temporary deadlock, the "record as a whole" and the unsubmitted 10-2 charge relating to the central and contested issue for the jury to resolve. *See Jones*, 571 S.W.3d at 891-92 *citing Romero v. KPH Consolidation, Inc*, 166 S.W.3d 212, 227-228 (Tex. 2005). The Court of Appeals did not find harm because the error "could have" or "possibly" affected the judgment as the State seems to argue.

The State also seems to suggest that this Court should follow three Beaumont Court of Appeals' decisions which, according to the State, focused on "the strength of the State's evidence" in deciding in these three cases that any error in failing to submit a 10-2 charge was harmless under Rule 44.1(a)(1). *See In re Commitment of Pickens*, 2016 Tex. App. LEXIS 2233 No. 09-14-00391-CV (Tex. App.—Beaumont 2016, pet. denied); *In re Commitment of Perez*, 2015 Tex. App. LEXIS 12536 No. 09-15-00126-CV (Tex. App.—Beaumont 2015, no pet.); *In re Commitment of Hatcher*, 2015 Tex. App. LEXIS 11470 No. 09-15-00068-CV (Tex. App.—Beaumont 2015, no pet.). The Beaumont Court decided that there was no harm in these cases from an unsubmitted 10-2 charge because "the record

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sexually violent predator (particularly if the trial court submitted a supplemental "inherently coercive" instruction like a "baby Allen" charge to encourage the deadlocked jury to reach a verdict).

did not indicate" that "the verdict[s] would have been different" had this 10-2 charge been submitted. *See Pickens*, slip op. at 8; *Perez*, slip op. at 19; *Hatcher*, slip op. at 16.

It would seem, however, that Rule 44.1(a)(1) would at least require this "the verdict would have been different" harm standard to be modified to the verdict "probably" would have been different since this Rule 44.1(a)(1) harm standard focuses on whether an error "probably" caused the rendition of an improper judgment. In addition, with the undefined term "probably" in Rule 44.1(a)(1) being synonymous with the term "likely," this undefined term "probably" should be given its ordinary meaning which would include "more than a mere possibility." *See In re Commitment of Weatherread*, 2012 Tex. App. LEXIS 9757 No. 09-11-00269-CV slip op. at 5-8 (Tex. App.—Beaumont 2012, pet. denied) (discussing various definitions of "likely" which would include "more than a mere possibility"); Roget's Desk Thesaurus at 319 (2001). With that meaning of "probably" applying here, the Beaumont Court's harm standard should be whether there is "more than a mere possibility that the verdict would have been different" had the 10-2 charge been submitted. This Court should reject the Beaumont Court's "the verdict would have been different" harm standard as being contrary to what Rule 44.1(a)(1) plainly requires.

In addition, the Beaumont Court's "the verdict would have been different" harm standard essentially amounts to a rule that the error from an unsubmitted 10-2 charge is automatic harmless error. The question, however, should be whether this error is automatic reversible error. For example, the failure to submit a 10-2 charge arguably is automatic reversible error under the reasoning of the United States Supreme Court's decision in *Sullivan v. Louisiana* which decided that the submission of a "defective reasonable-doubt instruction" in a criminal case violated the Sixth Amendment's right to jury trial and was automatic reversible error not subject to harmless-error review because this would require "appellate speculation about a hypothetical jury's action." *See Sullivan v. Louisiana*, 508 U.S. 275, 279-81 (1993); *Neder v. United States*, 527 U.S. 1, 30-40 (1999) (Scalia, J., dissenting).

Properly characterizing the instructional error in failing to submit a 10-2 charge in this case as violating a state-law jury trial right, this would, under *Sullivan's* reasoning that such an error is immune to harmless-error review for federal purposes, also have to be considered as having "probably caused the rendition of an improper judgment" for purposes of Rule 44.1(a)(1). *See also State v. Perry*, 2010 Ida. LEXIS 142 at *___ (Idaho 2010) (reading *Sullivan* and *Neder* together to require reversal when "improper jury instruction affected the entire deliberative process"). In other words, an instructional error that is immune from harmless-

error review for federal purposes would also have to be considered as having "probably caused the rendition of an improper judgment" for state-law purposes under Rule 44.1(a)(1).

Not having found any pertinent Texas case law addressing the specific question presented in ground two, Mr. Jones looked to other out-of-state cases. Mr. Jones sets out several of these cases that seem to be representative of these out-of-state cases none of which support the Beaumont Court's "the verdict would have been different" harm standard.[4]

In a Washington case where the trial court erroneously failed to instruct the jury that it could provide a non-unanimous "no" answer in a "special verdict," the Washington Court of Appeals decided that to find this error harmless, it had "to conclude beyond a reasonable doubt that the jury's verdict would have been the same absent the error" (which is not the same as "the verdict would have been different"). *See State v. Campbell*, 260 P.3d 235, 240 (Wash. Ct. App. 2011). The Court also decided that a unanimous "yes" answer to this verdict did not render the error harmless because the harm analysis should focus on the "flawed deliberative process" arising from the instructional error. *See id.* Apparently for this reason, the Court also rejected the State's argument that it should conclude that the error

[4] Mr. Jones used several Lexis Advance searches with the most productive one turning up 271 cases using these search terms: "harmless error from failing to instruct jury that it could reach non-unanimous verdict."

was harmless "on the basis of the strength of the State's evidence." *See id*. The Court recognized that this harm standard set "the bar high." *See id*.

The New Jersey Supreme Court's decision in *State v. Harvey*, 699 A.2d 596, 610-612 (N.J. 1997) can be read to support a decision that the Rule 44.1(a)(1) harm standard requires a reversal because of an unsubmitted 10-2 instruction "if the record below contains evidence that is 'minimally adequate to provide a rational basis for the jury to hold a reasonable doubt'" that Mr. Jones is not a sexually violent predator. Satisfaction of this "minimally adequate/rational basis" standard would require "more than a mere 'scintilla of the evidence.'" *See Harvey*, 699 A.2d at 610-12 (internal quotes omitted).

This is consistent with the New Jersey Supreme Court's decision in *State v. Brown*, 651 A.2d 19 (N.J. 1994) which decided in a death-penalty case that it was harmful error for the trial court not to submit a non-unanimity instruction even though the jury had unanimously made a finding on the critical issue making the defendant death-penalty eligible. *See Brown*, 651 A.2d at 36-58, 66-73. The Court's harm analysis in *Brown* turned primarily on a determination that the jury could have reasonably harbored a reasonable doubt on this critical finding that made the defendant death-penalty eligible. *See Brown*, 651 A.2d at 66-73. In *Brown*, the Court stated:

> Our review of the record convinces us that the testimony could have created a reasonable doubt among the jurors about whether the

> defendant or [his accomplice] Alexander had inflicted the fatal wounds. Because such a doubt, even in the mind of one juror, could have resulted in a permissible nonunanimous verdict on the [critical finding], the failure to inform the jury that it had the option of returning such a verdict was clearly capable of prejudicing the jury. Indeed, the only instruction that the court gave to the jury regarding unanimity not only failed to convey the non-unanimous option, it unequivocally mandated unanimity: "Now since this is a criminal case, your verdict must be unanimous, all 12 jurors deliberating must agree." Clearly, jurors could not have understood from that instruction that a nonunanimous decision on the [critical finding] was a permissible option that would have resulted in a final verdict.

See Brown, 651 A.2d at 73.

Mr. Jones also contends that another factor to consider in any harm analysis in this particular case is whether the jury might have been improperly coerced into returning the verdict it did by the submission of the "baby Allen" charge. With this having some bearing on the harm question, the issue of whether this "baby Allen" charge was erroneously submitted is properly before this Court in this proceeding. *See* Tex. R. App. P. 53.2(f) (statement of an issue in petition for review "treated as covering every subsidiary question that is fairly included"). Even if this charge was not improperly coercive, the trial court providing such a charge to a deadlocked jury should still have some bearing on the harm question from the unsubmitted 10-2 charge.

In conclusion, the failure to submit the 10-2 charge in this case "probably caused the rendition of an improper judgment" and was not harmless under any reasonable application of Rule 44.1(a)(1) that is consistent with its plain language.

Particularly so since there is more than a scintilla of evidence from which a jury could rationally conclude that the State did not present enough reliable and trustworthy evidence to prove beyond a reasonable doubt that Mr. Jones is a sexually violent predator. *See Brown*, 651 A.2d at 524 (considering it relevant to the harm analysis that much of the State's evidence on the critical finding making the defendant death-penalty eligible came from "uniquely untrustworthy sources").

PRAYER

Mr. Jones asks this court to affirm the Court of Appeals' decision and for such other relief that this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this pleading was served upon opposing counsel noted below, by one or more of the following: certified mail (return receipt requested), facsimile transfer, or electronic mail (e-mail), on this 28th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because this petition contains 3,975 words.

/s/ John Moncure
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