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SUPREME COURT OF TEXAS
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Cause Number 19-0561

In re the Commitment of

Jeffery Lee Stoddard

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State's Brief on the Merits

As Petitioner

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On Appeal from Cause # D371-S-13391-16

In the 371st District Court of

Tarrant County, Texas

Judge Don Chrestman, Presiding

And

Cause # 02-17-00364-CV

In the Court of Appeals, Second Judicial District

Fort Worth, Texas

Chief Justice Sudderth, Justices Walker and Birdwell, originally Presiding

Chief Justice Sudderth, Justices Gabriel and Birdwell, finally Presiding

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Cause Number 19-0561

In re the Commitment of

Jeffery Lee Stoddard

To the Honorable Justices of the Supreme Court:

Petitioner, the State of Texas, seeks abolishment of factual sufficiency reviews in cases civilly committing sexually violent predators, which require proof beyond a reasonable doubt. In the alternative, the State seeks a single standard for factual sufficiency review for these cases and an appropriate review of the factual sufficiency of the evidence in this case.

Statement of the Case

The State of Texas sought the civil commitment of Stoddard, an alleged sexually violent predator, pursuant to Chapter 841 of the Health & Safety Code. Judge Don Chrestman, visiting judge of the 371st Judicial District Court of Tarrant County, presided over the case. A jury unanimously found beyond a reasonable doubt that Stoddard is a sexually violent predator and Judge Chrestman signed a judgment and an order of civil commitment.

Stoddard appealed the case to the Second Court of Appeals in Fort Worth under its Cause Number 02-17-00364-CV. The original opinion found the evidence is legally sufficient but factually insufficient, reversed the judgment, and remanded the case for a new trial. *See In re Commitment of Stoddard,* 02-17-00364-CV, 2018 WL 4625428, at *2 (Tex. App.—Fort Worth Sept. 27, 2018, no pet.) (mem. op.). That opinion was authored by Chief Justice Sudderth with Justice Birdwell joining the majority opinion and Justice Walker filing a dissenting opinion. The State filed a motion for en banc reconsideration. Justice Walker's term then expired.

Justice Gabriel was designated to take Justice Walker's place on the panel. The appellate court withdrew their original opinion, again found the evidence is legally sufficient but factually insufficient, reversed the judgment, remanded the case for a new trial, and dismissed the State's motion as moot. *See In re Commitment of Stoddard*, 02-17-00364-CV, 2019 WL 2292981, at *1 (Tex. App.—Fort Worth May 30, 2019) (mem. op.). The second opinion was also authored by Chief Justice Sudderth with Justice Birdwell joining the majority opinion. This time, Justice Gabriel filed a dissenting opinion.

The State filed a petition for review in this Court and briefs on the merits were ordered.

Statement Regarding Oral Argument

The State requests oral argument. This case necessarily involves both the existing civil and criminal case law and standards for review, as well as the Texas Constitution. It also involves attempts to express complex and important legal concepts using small phrases. The law in this matter would best be discussed in oral argument.

Statement of Jurisdiction

This Court has jurisdiction over this case because it involves legal issues important to the jurisprudence of the state, including whether factual sufficiency reviews should be conducted in civil cases with proof beyond a reasonable doubt and, if so, the proper standard for review. The *Stoddard* opinion contravenes this Court's *Bohannon* decision and all prior holdings of all other appellate courts.[1]

[1] *In re Commitment of Bohannan*, 388 S.W.3d 296, 299 (Tex. 2012).

Issues Presented

First Ground for Review: Because the SVP Act requires proof beyond a reasonable doubt, appellate courts have always applied the criminal standard for legal sufficiency reviews. They applied the criminal standard for factual sufficiency reviews until it was abolished by the Court of Criminal Appeals in *Brooks v. State*. Should factual sufficiency reviews also be abolished in these civil cases that require proof beyond a reasonable doubt?

Second Ground for Review: In all sufficiency reviews, the evidence presented at trial is compared to the elements required to be proven. The appellate court improperly conducted the factual sufficiency review when it considered evidence outside of the record and created new elements not mandated by this Court or the SVP Act. Did the appellate court employ an improper standard for review and substitute the jury's determinations with its own?

Statement of Facts

Evidence from Stoddard

Stoddard was in prison at the time of trial, serving two sentences for aggravated sexual assault of a child. (RR 4:170) While serving these concurrent sentences, Stoddard completed a sentence for possession of child pornography. (RR 4:170)

Stoddard's first contact with police came when he was only ten years old. (RR 4:171) Stoddard shot a neighborhood girl with a BB gun, because she was beating up his brother. (RR 4:171) He thinks that he had to do some community service for this act, but can't remember for sure. (RR 4:171) Stoddard can't remember all of his convictions, but knows that he has convictions for "unlawful use of a vehicle, assault, under the influence of drugs." (RR 4:171) The assault conviction was for violence against his bipolar wife. (RR 4:171-172) She would not let him out of the house, and so he picked her up and moved her to the side. (RR 4:173) In the process, he stepped on her foot. (RR 4:173) He got into legal trouble for stepping on her foot. (RR 4:173) As an adult, Stoddard has been arrested 10-12 times. (RR 4:202) He has always successfully completed his probations. (RR 4:203)

Stoddard and his girlfriend moved in with her family, which included a boy and a girl. (RR 4:174) Stoddard told this jury that he had done nothing inappropriate with the six-year-old boy, but he does have a conviction for aggravated sexual assault of the boy. (RR 4:170, 174)

Stoddard told this jury that he committed four acts of aggravated sexual assault against the seven-year-old girl, over a two-day period. (RR 4:63, 174-175) He still does not know why he did it, and is not sure whether he was sexually attracted to her. (RR 4:175, 179-180) He is sure, however, that the girl instigated everything and enjoyed it. (RR 4:176, 211) She found his pornography, followed him into the bathroom, watched him masturbate, and willingly had pretend sex with her brother on multiple occasions. (RR 4:176-178)

Stoddard admits that pornography, including child pornography, was on his computer. (RR 4:182) However, he did not put it there – he searched for Japanese anime and the pornography just loaded itself onto his computer. (RR 4:182-183) He thinks that he remembers seeing pictures of naked children engaged in sexual acts. (RR 4:184)

Stoddard says the kids were groomed, and were taught to do sexual stuff, but not by him. (RR 4:181) He sees all of these sexual assaults of these two kids simply as one mistake he made. (RR 4:180) The boy is not a victim of Stoddard's. (RR 4:181)

Stoddard abused alcohol and various drugs in the past. (RR 4:204-206) He stopped decades ago, with the help of AA and NA. (RR 4:204-206) He plans on continuing in AA and NA. (RR 4:207) He said, "I believe both alcoholism and drug addiction are – it's a disease, and you've got to have some form of treatment to handle it." (RR 4:207)

Stoddard is now in a nine-month sex offender treatment program, but admits that his treatment provider is not happy with his progress in treatment. (RR 4:185, 211) He identified his trigger as "a naked child wanting to have sex with me." (RR 4:185) Being around a naked child would be a high-risk situation for him, judged by his track record. (RR 4:187) He is not sure what his offense cycle is. (RR 4:186) Stoddard says he needs more treatment, but not because he has a problem dealing with sex, but because of what he did with the girl. (RR 4:190-191) Stoddard asserts that he had sex with children, but he was not sexually attracted to them. (RR 4:192) Or maybe he was. (RR 4:175, 220)

Evidence from the Expert

The State's expert was Dr. Timothy Proctor, a licensed psychologist who is board-certified in forensic psychology. (RR 4:18, 22) He is also a licensed sex offender treatment provider. (RR 4:18, 22)

Dr. Proctor was asked to examine Stoddard and render an opinion about whether Stoddard suffers from a behavioral abnormality. (RR 4:25-26) The doctor has been performing behavioral-abnormality evaluations since 2006, and has performed about 60 of them. (RR 4:30) He gave the jury the legal definition of the term *behavioral abnormality*, and explained his understanding of the meanings of the components of the definition. (RR 4:26-33) It is Dr. Proctor's expert opinion that Stoddard suffers

from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. (RR 4:43-44)

A Standard Methodology was Employed

Dr. Proctor explained his methodology for performing these evaluations. (RR 4:30) This methodology is in accordance with Proctor's training and in accordance with the accepted standards in forensic psychology. (RR 4:35-36)

The first step in the process is to review records about the person being evaluated. (RR 4:34) Dr. Proctor identified the types of records he reviewed in this case, including a prior behavioral-abnormality evaluation by another doctor. (RR 4:37-38, 40, 44-46) These are the same kinds of records typically relied upon by other forensic psychologists. (RR 4:38) Proctor relied on the facts and data in Stoddard's records, and explained why. (RR 4:38-39)

Dr. Proctor evaluated Stoddard in the Beto Unit of TDCJ. (RR 4:41) The evaluation was conducted in accordance with the doctor's training, and in accordance with the accepted standards in the field of forensic psychology. (RR 4:43) Proctor does not see Stoddard as a typical sex offender, but as one with multiple convictions, multiple victims, and extensive risk factors. (RR 4:47)

Stoddard's Sexual Criminal History was Reviewed

Stoddard has two convictions for aggravated sexual assault of a child. (RR 4:55) He was convicted of putting his sexual organ into a girl's mouth, and of making a boy

have sexual contact with the girl. (RR 4:55) The girl was seven years old, and the boy was six. (RR 4:63, 74) The records indicate that Stoddard sexually assaulted the girl 10 or 11 times, on different occasions. (RR 4:64-65) The assaults began nearly immediately after Stoddard moved in with the children. (RR 4:65-66) Stoddard understood that the girl couldn't legally consent, but he claims that she was interested and willing. (RR 4:67)

The boy reported that Stoddard made him get naked and lay on top of his naked sister. (RR 4:75) Stoddard also made them perform oral sex on each other. (RR 4:75) Stoddard, on the other hand, says that he did not make the children do anything, but he did catch them engaging in sexual activity with one another. (RR 4:75)

When the kids made allegations against Stoddard, the allegations included that he showed them pornography. (RR 4:80) The police found over 100 images of child pornography on Stoddard's computer. (RR 4:80-81) The computer indicated that the images had been viewed over a period of at least three years. (RR 4:82) Many of the pictures were of young boys, which suggests that Stoddard is interested in young boys. (RR 4:81-82) Stoddard told the first evaluator that he had viewed the child pornography. (RR 4:83) However, he told Dr. Proctor that he was not interested in child pornography and that the pictures automatically appeared on his computer when he was looking at Japanese anime. (RR 4:83) Dr. Proctor considers it significant that Stoddard was viewing child pornography before escalating to committing sexual

assaults against children. (RR 4:85-86) The pornography speaks to the strength of Stoddard's pedophilia. (RR 4:85)

Diagnoses were Made of Stoddard

Stoddard is a pedophile with antisocial or psychopathic traits, and a significant history of substance abuse. (RR 4:49, 89) Pedophilic disorder is a life-long, chronic condition. (RR 4:91) The diagnosis is supported by Stoddard's history of viewing child pornography and sexually offending against the two young kids. (RR 4:91) Stoddard's pedophilia is an acquired or congenital condition that affects his emotional or volitional capacity, and causes him serious difficulty controlling his behavior. (RR 4:92)

Stoddard's sexual criminal history, along with his non-sexual criminal history, are evidence of his antisocial personality traits. (RR 4:94) Dr. Proctor told the jury about Stoddard's versatile non-sexual criminal history, and about his probation revocation. (RR 4:95-96) Stoddard's institutional adjustment is not bad, which is typical of a pedophile. (RR 4:114-115) Stoddard's antisocial traits are chronic, they affect his behavior, and they are a risk factor for him. (RR 4:97-98)

Dr. Proctor also diagnosed Stoddard with substance abuse disorders. (RR 4:107) Stoddard abused significant amounts of substances for a long time, and they caused him problems. (RR 4:107) Stoddard reports that he stopped all substance abuse before committing the offenses for which he is in prison. (RR 4:107) His

substance abuse is still a small concern to Dr. Proctor, because substances disinhibit people. (RR 4:108) A person with a sexual deviance should not be disinhibited. (RR 4:108)

Stoddard's Risk Factors and Protective Factors were Identified

Risk factors are things about a person that increase their risk of doing a particular thing. (RR 4:49) They have been studied by experts and are based on scientific research. (RR 4:50-51) Stoddard possesses the two most significant risk factors for sexually reoffending: sexual deviance and an antisocial lifestyle. (RR 4:52) Additional risk factors Stoddard possesses are having a male victim, having multiple victims, grooming his victims, having victims not related to him, persisting in his sexual assaults, escalating from thoughts to actions, a diversity of sexual violence, and not understanding the extent of his offending. (RR 4:55, 71-72, 78, 88, 90) Minimization and denial are risk factors for Stoddard. (RR 4:69) They are not big risk factors, but they have importance and need to be considered. (RR 4:69) It is significant that Stoddard is denying all wrongs with the boy. (RR 4:77) It is especially significant for treatment: a patient can't progress in treatment while denying his problems. (RR 4:77)

Protective factors are the opposite of risk factors – they reduce risk. (RR 4:50) Stoddard's main protective factor is his age, 52. (RR 4:116, 147) Being in sex offender treatment is a protective factor, but Stoddard is in a short program and he is not

doing well. (RR 4:116-117) He cannot yet identify his triggers or his offense cycle. (RR 4:121-122) Nor can he follow the rules of treatment. (RR 4:122-124)

Psychological Testing Instruments were Employed

There is no one measure or test that will determine if a person suffers from a behavioral abnormality. (RR 4:103-104) Rather, instruments provide information for the evaluator to use in forming his opinion. (RR 4:104)

Dr. Proctor scored the Static-99 for Stoddard. (RR 4:98-99) The Static-99 is a list of ten risk factors associated with reoffending sexually. (RR 4:98) The doctor explained which risk factors the instrument included, and which ones it did not. (RR 4:101-102) Stoddard scored a 4, which places him in the above-average-risk group. (RR 4:99-200)

Dr. Proctor completed the Risk of Sexual Violence Protocol (RSVP) for Stoddard, which is a checklist of risk factors. (RR 4:102-103) The doctor told the jury all of the risk factors on this list that Stoddard possessed. (RR 4:102-103)

Dr. Proctor completed the Psychopathy Checklist Revised (PCL-R) for Stoddard. (RR 4:105) The PCL-R measures strength of psychopathy in a person. (RR 4:105) The average person's score is below 10. (RR 4:106) The cut-off for a finding of true psychopathy is 30. (RR 4:155) Stoddard scored a 27 out of a possible 40. (RR 4:105) Stoddard's score is higher than 70 percent of other prison inmates. (RR 4:106) This score supports the doctor's finding that Stoddard has antisocial personality traits

and is at increased risk to reoffend. (RR 4:106) Dr. Varela's scoring of Stoddard with a 25 is "within the standard error … those are almost the same score." (RR 4:155)

Conclusion: Stoddard Suffers from a Behavioral Abnormality.

Stoddard suffers from a behavioral abnormality, as defined in the Texas Healthy and Safety Code. (RR 4:26, 35, 43-44, 113, 126-127) He has a lot of risk factors and only limited protective factors. (RR 4:115) He is likely to engage in a predatory act of sexual violence, he suffers from a congenital or acquired condition that affects his volitional or emotional capacities, and he is a menace to others. (RR 4:113, 127, 135)

Summary of the Argument

Factual sufficiency reviews should be abolished in these civil cases that carry a burden of proof beyond a reasonable doubt. Reviewing courts historically applied the criminal standards for review because of the heightened burden of proof in these civil commitment cases. The Court of Criminal Appeals abolished separate factual sufficiency reviews in criminal cases, ultimately reasoning a proper *Jackson v. Virginia* review, which gives deference to the jury's determinations of weight and credibility, is constitutionally sufficient. Reviewing courts considering juvenile cases have since voluntarily abolished factual sufficiency reviews when considering an adjudication made upon proof beyond a reasonable doubt. Separate factual sufficiency reviews

should likewise be abolished in cases seeking the civil commitment of a sexually violent predator with proof beyond a reasonable doubt. There is nothing to justify continuing to use two separate standards.

If this Court rules against the State's first argument, the State then contends a single standard for factual sufficiency review should be established for these unique civil cases carrying a traditionally-criminal burden of proof. This Court has consistently held standards for review must be heightened when burdens of proof are heightened, but has not established a standard for review when a civil case requires the highest proof. Once a standard for review is established, the case should be remanded to the original reviewing court with instructions to conduct a proper factual sufficiency review. The previous factual sufficiency review not only used an incorrect standard for review, it went beyond the record and did a case-to-case analysis, required proof of things not required by the statute or the jury charge, improperly assigned a heinous motive to the State, and substituted the court's judgment for the jury's.

Under either ground for review, the opinion of the lower appellate court should be reversed.

Argument

First Ground for Review: Because the SVP Act requires proof beyond a reasonable doubt, appellate courts have always applied the criminal standard for legal sufficiency reviews. They applied the criminal standard for factual sufficiency reviews until it was abolished by the Court of Criminal Appeals in *Brooks v. State.* Should factual sufficiency reviews also be abolished in these civil cases that require proof beyond a reasonable doubt?

The Civil Commitment of Sexually Violent Predators statute is civil, not punitive.[2] It requires that the State prove beyond a reasonable doubt that the person is a sexually violent predator.[3] A jury verdict to commit must be unanimous.[4] A *sexually violent predator* is a repeat sexually violent offender who suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.[5] Statutory definitions are provided for *repeat sexually violent offender* and *behavioral abnormality.*[6]

Evolution of Standards for Review in SVP Cases

In 2002, the Beaumont Court of Appeals reasoned that, because the SVP Act requires proof beyond a reasonable doubt, it should adopt the *Jackson v. Virginia*

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[2] *In re Commitment of Fisher,* 164 S.W.3d 637, 645-653 (Tex. 2005).

[3] Tex. Health & Safety Code §§ 841.061; 841.062. All statutory references are to the Tex. Health & Safety Code unless otherwise specified.

[4] § 841.062(b).

[5] § 841.003(a).

[6] § 841.002(2); § 841.003(b).

standard of review in criminal cases for legal sufficiency.[7] To this day, no Texas court has applied any other standard or questioned the reasoning of the *Mullens* Court.

A few years later, the Beaumont Court of Appeals applied the criminal standard of review to a challenge of the factual sufficiency of the evidence.[8] In 2011, after the Court of Criminal Appeals issued its opinion in *Brooks v. State,* the Beaumont Court found it necessary to adopt a different standard for review of the factual sufficiency of the evidence.[9] The *Day* Court dropped the criminal standard of review for factual sufficiency because the Court of Criminal Appeals declared it unnecessary.[10] The Beaumont Court then determined it still had to conduct a factual sufficiency review, as mandated by art. V, § 6 of the Texas Constitution.[11] Following *In re King's Estate,* the Beaumont Court determined it should weigh the evidence "to determine whether a verdict that is supported by legally sufficient evidence nevertheless reflects a risk of injustice that would compel ordering a new trial."[12] In doing so, the Court remarked that the risk of injustice in these cases is "essentially slight."[13]

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[7] *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied).

[8] *In re Commitment of Hall*, 09-05-482 CV, 2006 WL 1682194, at *5 (Tex. App.—Beaumont June 15, 2006, no pet.) (mem. op.), citing *Threadgill v. State*, 146 S.W.3d 654, 664 (Tex. Crim. App. 2004) (holding reviewing court should consider all of the evidence in a neutral light and determine whether the evidence supporting "the verdict is too weak to support the finding of guilt beyond a reasonable doubt or if evidence contrary to the verdict is strong enough that the beyond-a-reasonable-doubt standard could not have been met.").

[9] *In re Commitment of Day*, 342 S.W.3d 193 (Tex. App.—Beaumont 2011, pet. denied).

[10] *Brooks v. State,* 323 S.W.3de 893, 894-895 (Tex. Crim. App. 2010).

[11] *Day* at 211, 213.

[12] *Day* at 213.

[13] *Id.*

Every appellate court in Texas has followed the standard set in *Day* until 2019. In 2019, the Fort Worth Court determined in this case that it should not only follow *Day,* but also determine if the evidence is against the great weight and preponderance as to be manifestly unjust, shocks the conscience, clearly demonstrates bias, or the risk of injustice is too great to allow the verdict to stand.[14]

Thus, both the Beaumont Court and the Fort Worth Court adopted civil standards for review set in cases with the lowest burdens of proof —preponderance of the evidence — for these civil cases that require proof beyond a reasonable doubt. These determinations were erroneous because this Court and the Court of Criminal Appeals have both determined the standard for review must be elevated when the burden of proof is elevated.[15]

Jackson v. Virginia requires a thorough review of all of the evidence.

The United States Supreme Court sat the standard for sufficiency-of-the-evidence reviews in criminal cases.[16] It requires appellate courts "to determine whether the record evidence could reasonably support a finding of guilt beyond a

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[14] *In re Commitment of Stoddard*, 02-17-00364-CV, 2019 WL 2292981, at *11 (Tex. App.—Fort Worth May 30, 2019, pet. filed) (mem. op.), *citing Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *Wise v. SR Dallas, LLC*, 436 S.W.3d 402, 408 (Tex. App.—Dallas 2014, no pet.), *and Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2003).

[15] *See Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004) (finding a different standard for review in this case that carried a burden of proof by clear and convince evidence); *and see Moon v. State*, 451 S.W.3d 28, 45 (Tex. Crim. App. 2014) (considering the standard of review for the appeal of a transfer order from a juvenile court, which requires proof only by a preponderance of the evidence).

[16] *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89, 61 L. Ed. 2d 560 (1979).

reasonable doubt."[17] It is still the responsibility of the trier-of-fact to weigh the evidence, draw reasonable inferences, and resolve conflicts in testimony. [18] The question for reviewing courts is, after reviewing all of the evidence in a light most favorable to the verdict, thereby giving the jury the deference it deserves, could *any* rational trier of fact have found all of the elements necessary for conviction.[19] If the evidence is sufficient to meet this standard, it cannot be manifestly unjust or clearly wrong.

Jackson demands that all of the evidence be reviewed, whether favorable to the prosecution or the defense. The determination of sufficiency can only be made after applying the presumption that the jury resolved conflicting evidence in the prosecution's favor and made appropriate determinations of weight and credibility to reach its verdict. Reversal is mandated only when the reviewing court determines that *no* rational juror could have reached the given verdict on the evidence presented.[20]

The deference due the jury's determinations effectively eliminates the necessity for factual-sufficiency review.

The United States Supreme Court and this Court both declare jurors are the sole judges of the credibility of the witnesses and the weight to be given to their

[17] *Jackson* at 319.
[18] *Jackson* at 319.
[19] *Jackson* at 319, *emphasis in original.*
[20] *Emphasis* added to match the emphasis in *Jackson* that the evidence is sufficient if *any* rational juror could have found the defendant guilty.

testimony.[21] Reviewing courts cannot impose their own opinions to the contrary.[22] Therefore, an appellate court cannot conduct a neutral review and sit as a 13th juror.

Allowing appellate courts to determine sufficiency of the evidence without deference to the jury is allowing them to be a 13th juror with the power of veto over the other 12 jurors.[23] It might also violate the Texas constitution's right to a jury trial.[24]

Conducting a review of all of the evidence, giving deference to the jury, is the *Jackson* standard. Recognizing this, the Court of Criminal Appeals determined that the *Clewis* standard — reviewing of all of the evidence in a neutral light while also giving "appropriate deference" to the jury's determinations — was unworkable as written.[25] When appropriate deference was given to the jury's determinations, the *Jackson* standard and the *Clewis* standard were "barely distinguishable."[26]

Only two other states require what we consider separate legal and factual sufficiency reviews in criminal cases carrying a burden of proof beyond a reasonable doubt. Both require the reviewing court to sit as a 13th juror.[27] The approach of

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[21] *Jackson* at 319; *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).
[22] *Id.*
[23] *Brooks* at 915, Justice Cochran concurring and Justice Womack joining.
[24] *Brooks* at 905; Tex. Const. art. 1 §15 ("The right of trial by jury shall remain inviolate.").
[25] *Brooks* at 894, *considering Clewis v. State,* 922 S.W.2d 126, 128 (Tex. Crim. App. 1996).
[26] *Brooks* at 894-895.
[27] N.Y. Crim. Proc. Law § 470.15 (McKinney); *People v. Cahill*, 2 N.Y.3d 14, 56-62, 809 N.E.2d 561, 587 (2003); Ohio Const. Article IV, Section 3; *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 546-547.

neither state is workable in Texas because our highest courts mandate the jury is the sole judge of the weight and credibility to assign the evidence and the resolution of conflicting testimony.[28]

The Texas Constitution will not be offended by a single standard for review.

The Beaumont Court established a standard for factual sufficiency review of SVP cases post-*Brooks* because it believed it was constitutionally mandated to do so.[29] Article V, § 6 of the Texas Constitution provides that decisions of courts of appeals "shall be conclusive on all questions of fact brought before them on appeal or error." For well over a century, this Court has described this constitutional provision as one limiting its own jurisdiction, not one granting authority to courts of appeals.[30]

Much more recently, this Court reiterated that whether evidence supports an issue is a question of law, not fact.[31] This is true regardless of the standard of proof required at trial.[32]

It was the Dallas Court of Appeals and the Court of Criminal Appeals that originally declared art. V § 6 required courts of appeals to conduct factual sufficiency

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[28] *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 833 (Tex. 2014).

[29] *Day*, 342 S.W.3d at 211.

[30] *Choate v. San Antonio & A.P. Ry. Co.*, 91 Tex. 406, 44 S.W. 69 (1898); *and Cropper v. Caterpillar Tractor Co.,* 754 S.W.2d 646, 648 (Tex. 1988).

[31] *Sw. Bell Tel. Co. v. Garza,* 164 S.W.3d 607, 626–27 (Tex. 2004)Id. at 627, *citing Choate,* 44 S.W. 69 (1898) *and citing Muhle v. New York, T. & M. Ry.,* 86 Tex. 459, 25 S.W. 607 (1894) (stating that "whether or not there was evidence from which the jury might have [made a finding] is a question of law which we are called upon to determine.").

[32] *Garza* at 627.

reviews in criminal cases.[33] The Court of Criminal Appeals reversed that decision in *Brooks.*[34] In doing so, it explained that reading the constitution to demand appellate courts to sit as 13th jurors would contravene over 150 years of civil and criminal jurisprudence.[35] In making this decision, the *Brooks* Court found it important that the constitution never set out the standard for reviewing questions of fact.[36] Therefore, the Court reasoned, the *Jackson* standard for review would satisfy the constitutional provision.[37]

The majority of appellate courts have followed *Brooks* and eliminated factual sufficiency reviews of adjudications in juvenile cases, which are civil in nature but require adjudications of criminal conduct to be made upon proof beyond a reasonable doubt.[38] This Court should likewise dictate a single standard for reviewing the

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[33] *See Clewis,* 922 S.W.2d at 128-129; *also see Clewis v. State*, 876 S.W.2d 428, 430 (Tex. App.—Dallas 1994), vacated, 922 S.W.2d 126 (Tex. Crim. App. 1996) (both also relying on articles in the Code of Criminal Procedure).

[34] *Brooks* at 907-912.

[35] *Id.* at 911

[36] *Id.*

[37] *Id.* at 911-912.

[38] *See Matter of D.A.K.,* 536 S.W.3d 845, 847 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *In re M.C.S., Jr.,* 327 S.W.3d 802, 805 (Tex. App.—Fort Worth 2010, no pet.); *In re R.A.,* 03-11-00054-CV, 2012 WL 2989224, at *3 (Tex. App.—Austin July 20, 2012, no pet.) (mem. op.); I*n re H.T.S.,* 04-11-00847-CV, 2012 WL 6743562, at *8 (Tex. App.—San Antonio Dec. 31, 2012, pet. denied) (mem. op.); *In re A.O.,* 342 S.W.3d 236, 239 (Tex. App.-Amarillo 2011, pet. denied); *Matter of R.R.S.,* 536 S.W.3d 67, 72 (Tex. App.—El Paso 2017, no pet.); *Matter of C.Z.S.,* 09-14-00480-CV, 2015 WL 3407250, at *2 (Tex. App.—Beaumont May 28, 2015, pet. denied) (mem. op.); *In re L.J.S.*, 2012 WL 1365961, at *2 (Tex. App.—Eastland Apr. 19, 2012, no pet.); *In Matter of M.W.,* 513 S.W.3d 9, 11 (Tex. App.—Tyler 2015, pet. denied); *In re C.D.,* 13-12-00644-CV, 2013 WL 3203220, at *2 (Tex. App.—Corpus Christi June 20, 2013, no pet.) (mem. op.); *In re R.R.,* 373 S.W.3d 730, 734

sufficiency of the evidence in civil SVP cases carrying a burden of proof beyond a reasonable doubt.

Conclusion

Neither the United States Constitution nor the Texas Constitution would be offended by abolishing factual sufficiency reviews in these civil cases that require proof beyond a reasonable doubt. The single *Jackson v. Virginia* standard for review is sufficient for criminal cases, the cases carrying the most protection against improper state action. It is equally sufficient for these civil cases that carry the same burden.

The current double standards for review impermissibly allow reviewing courts to sit as 13th jurors while simultaneously demanding that they not do so. As demonstrated in the case at bar, reviewing courts have a hard time finding the line of distinction and remaining on the correct side of it. Factual sufficiency reviews should be abolished in these cases.

This Court should hold that when an appellate court reviews the sufficiency of the evidence in a case under Chapter 841 of the Texas Health and Safety Code requiring proof beyond a reasonable doubt to civilly commit a sexually violent predator, it should follow the standard set in *Jackson v. Virginia.* All of the evidence should be reviewed in the light most favorable to the petitioner to determine if *any*

(Tex. App.—Houston [14th Dist.] 2012, pet. denied). Neither concurring nor dissenting cases could be found from the 5th, 6th, or 10th Courts of Appeal.

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rational trier-of-fact could have found beyond a reasonable doubt the person is a sexually violent predator — a repeat sexually violent offender who suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.[39]

If this standard is set by this Court, the second ground for review need not be reached.

Second Ground for Review: In all sufficiency reviews, the evidence presented at trial is compared to the elements required to be proven. The appellate court improperly conducted the factual sufficiency review when it considered evidence outside of the record and created new elements not mandated by this Court or the SVP Act. Did the appellate court employ an improper standard for review and substitute the jury's determinations with its own?

Stoddard asserted the evidence was legally insufficient because the expert's opinion amounted to no evidence.[40] Stoddard argued the expert's opinion was misleading, conclusory, and speculative.[41] The appellate court conducted its legal-sufficiency review using the standard for criminal cases: viewing the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find the statutory elements required for commitment beyond a reasonable

[39] § 841.003(a) defining *sexually violent predator*.
[40] *In re Commitment of Stoddard*, 02-17-00364-CV, 2019 WL 2292981, at *9 (Tex. App.—Fort Worth May 30, 2019, pet. filed).
[41] *Id.*

doubt.[42] The first prong, that Stoddard be proven a repeat sexually violent offender, was satisfied by his criminal convictions.[43] The second prong, that Stoddard be proven to suffer from a behavioral abnormality, was satisfied by the expert's opinion, diagnoses, review of records, interview of Stoddard, and use of actuarial tests.[44] The reviewing court concluded, "Because [the expert] provided evidence-based support for his opinion, we therefor decline Stoddard's request to exclude all of Proctor's testimony from our consideration based on his contention it was conclusory or speculative."[45] The appellate court found the expert's testimony was neither misleading, conclusory, nor speculative.[46] The evidence was determined legally sufficient.[47]

The reviewing court purportedly followed *Day* and found it had to conduct a separate factual sufficiency review.[48] It then reviewed all of the evidence in a neutral light to determine whether the jury's finding was factually insufficient or so against the great weight and preponderance as to be manifestly unjust, shocks the conscience, or

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[42] *Id.*
[43] *Id.* at *10.
[44] *Id.*
[45] *Id.*
[46] *Stoddard* at *10.
[47] *Id.*
[48] *Id.*

clearly demonstrated bias.[49] The court determined the risk of injustice was too great to let the commitment stand and remanded the case for a new trial.[50]

In arriving at its conclusion, the reviewing court erred in at least three ways: (1) it went outside of the record and compared the evidence in this case to the evidence in a handful of other SVP cases; (2) it required the State to prove more than mandated by statute or this Court's opinion in *Bohannan*; and (3) it reviewed the evidence in a neutral light, substituting its opinion for the jury's and overriding the jury's determinations of weight and credibility.

The Civil Commitment of Sexually Violent Predators statute requires proof beyond a reasonable doubt that the person is a sexually violent predator.[51] A *sexually violent predator* is a repeat sexually violent offender who suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.[52] A *repeat sexually violent offender* is a person with more than one conviction for a sexually violent offense who has a sentence imposed in at least one case.[53] 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

[49] *Id.*
[50] *Id.* at *16.
[51] § 841.061 and § 841.062.
[52] § 841.003(a).
[53] § 841.003(b).

offense, to the extent that the person becomes a menace to the health and safety of another person.[54]

Every sufficiency review should begin with a review of the jury charge to get a clear understanding of the evidence that is pertinent to the inquiry.[55] The jury was given the statutory definitions of *sexually violent predator, repeat sexually violent offender, behavioral abnormality, predatory act,* and *sexually violent offense.* (CR 1:174-175) The jury was posed a single question, "Do you find beyond a reasonable doubt that JEFFERY LEE STODDARD is a sexually violent predator?" (CR 1:177). The jury unanimously answered yes. (CR 1:177)

On appeal, Stoddard challenged only the finding that he suffers from a behavioral abnormality. The State's expert opined that Stoddard suffers from a behavioral abnormality. (R.R. 4:43) The expert also provided "evidence-based support" for his opinion.[56] Stoddard did not present an expert on his behalf. The only other witness at trial was Stoddard. Stoddard could not say why the jury should think he does not have a behavioral abnormality. (R.R. 4:218)

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[54] § 841.002(2).
[55] *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 762 (Tex. 2003).
[56] *Stoddard* at *10.

The appellate court went outside of the record to evaluate factual sufficiency.

Evidence reviews entail an examination of the record of the case to determine whether the evidence is sufficient to answer the question(s) in the manner the jury answered.[57] The purpose of the review is for the reviewing court to determine whether the jury functioned correctly in resolving disputed issues of fact.[58]

After finding the evidence legally sufficient, the appellate court improperly compared Stoddard's history of sexual offenses against those of five other people previously civilly committed in Texas as sexually violent predators.[59] The court also compared Stoddard's history to that of sexually violent individuals civilly committed in other states.[60] The court seemingly ignored the hundreds of other Texas cases affirming civil commitments of sexually violent predators.[61] As the dissent declared, this type of case-to-case comparison is inappropriate in a sufficiency review — each case should be evaluated on its own merits based on the governing standards of review.[62] The "facts" the court reviewed were not facts the jury had to resolve.

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[57] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

[58] *In re Commitment of Day*, 342 S.W.3d at 207, *citing generally Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651–52 (Tex.1988); *and Bailey v. Haddy, Dallam* 376, 379 (Tex.1841) (To reverse a judgment on the facts, "the illegality or abuse of the verdict ought to be manifest.").

[59] *Stoddard* at *12-13.

[60] *Stoddard* at *2.

[61] As an extreme example, consider the case of *In re Commitment of Hall*, 09-09-00387-CV, 2010 WL 3910365 (Tex. App.—Beaumont Oct. 7, 2010, no pet.) (mem. op.), wherein the court found the evidence sufficient despite Hall committing his two offenses on the same day against the same victim.

[62] *Stoddard* at *24-25.

The court found the evidence factually insufficient in part because Stoddard did not offend against as many people or as long as the few other sexually violent predators whose cases it reviewed. This was one of the ways the reviewing court erred and conducted an improper factual sufficiency review. According to the SVP Act, the jury charge, and this Court, these were not things that the State had to prove and they were not a part of the record.[63] Nor were they conflicts the jury had to resolve.

The appellate court required proof of elements not mandated by this Court or the Legislature.

This Court previously examined the SVP Act to determine exactly what had to be proven at trial.[64] The *Bohannan* opinion held:

> In SVP commitment proceedings, the only fact issue to be resolved by the trier-of-fact is whether a person has the behavioral abnormality required for an SVP.[65]

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

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[63] *See In re Commitment of Bohannan*, 388 S.W.3d 296, 305 (Tex. 2012) ("In SVP commitment proceedings, the only fact issue to be resolved by the trier-of-fact is whether a person has the behavioral abnormality required for an SVP.");*see also* § 841.002(2) (defining *behavioral abnormality* as " 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.")..

[64] *Bohannan,* 388 S.W.3d 296 *Id.* (considering whether an expert was qualified to testify regarding a behavioral abnormality).

[65] *Id.* at 305.

violent offense, to the extent that the person becomes a menace to the health and safety of another person." [66]

Rather than determining whether the evidence was factually sufficient to support the jury's determination that Stoddard suffers from a behavioral abnormality, the reviewing court strayed from *Bohannan* and from the applicable statutes.

The court focused on Legislative Findings and ignored the remainder of the statute.

The reviewing court determined that it could not ignore the Legislative Findings, expressed at the beginning of the statute.

> The legislature finds that a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence. The legislature finds that the existing involuntary commitment provisions of Subtitle C, Title 7.1 are inadequate to address the risk of repeated predatory behavior that sexually violent predators pose to society. The legislature further finds that treatment modalities for sexually violent predators are different from the traditional treatment modalities for persons appropriate for involuntary commitment under Subtitle C, Title 7.1 Thus, the legislature finds that a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.[67]

The lower court wrote that the Legislative Findings "cannot be dismissed as merely evidence of legislative intent."[68] According to the reviewing court, if it did not

[66] § 841.002 (2).
[67] § 841.001.
[68] *Stoddard* at *11.

focus on the legislative findings, the entire statute might be unconstitutional.[69] This is not true. The Texas statute is already constitutional.

In 1997, two years before the Texas SVP Act was passed into law, the United States Supreme Court issued its first opinion regarding the Kansas law providing for the civil commitment of sexually violent predators. The Kansas Supreme Court found the law unconstitutional because the requirement of a *mental abnormality* did not satisfy what it perceived to be substantive due process.[70] The United States Supreme Court reversed the finding, holding substantive due process was provided Hendricks and the statute did not punish him in violation of the constitution.[71]

Very similar to Texas, the Kansas law defines a *sexually violent predator* as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.[72] *Mental abnormality* was defined as a "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[73]

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[69] *Stoddard* at *12.
[70] *Kansas v. Hendricks*, 521 U.S. 346, 350, 117 S. Ct. 2072, 2076, 138 L. Ed. 2d 501 (1997).
[71] *Id.*
[72] *Hendricks* at 352, *citing* Kan. Stat. Ann. § 59-29a02(a).
[73] Kan. Stat. Ann. § 59-29a02(b).

The Supreme Court summarized the Kansas law as requiring evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated.[74] The Court noted that it had always sustained civil commitment statutes when they coupled proof of dangerousness with proof of some additional factor, such as a mental illness or mental abnormality.[75] In Texas, proof that the person is a *repeat sexually violent offender* is proof of the person's past dangerousness and "an important indicator of future violent tendencies."[76] Proof of the person's *behavioral abnormality* is proof of the "present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."[77] It is the requirements of a *behavioral abnormality* and that the person be a *repeat sexually violent offender* that constitutionally restricts the Texas civil commitment laws.

The reviewing court erroneously focused its entire factual-sufficiency review on the phrase *a small but extremely dangerous group*. It repeatedly found a lack of evidence to prove Stoddard was a part of that *small but extremely dangerous group.*[78] The court began by stating Stoddard must suffer from a behavioral abnormality that makes him a member of the small but extremely dangerous group.[79] Yet the court's analysis was

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[74] *Hendricks* at 357.
[75] *Hendricks* at 358.
[76] *Hendricks* at 357.
[77] *Id.*
[78] *Stoddard* at *11, 12, 14, 16.
[79] *Stoddard* at *11.

backwards — they inquired only into whether he is part of a small but extremely dangerous group. They found he was not and therefore they leapt to the conclusion he could not be a sexually violent predator. The court missed or ignored the legislative declaration that a person with a behavioral abnormality is part of that small but extremely dangerous group.[80]

Erroneously, the reviewing court then found the evidence insufficient to prove Stoddard belongs in that small but extremely dangerous group "who should have their liberty taken from them."[81] In doing so, the court never once found the evidence insufficient to support the one thing the jury had to determine, whether Stoddard suffers from a behavioral abnormality.[82] Instead, it focused on what it perceived to be a lack of evidence that Stoddard is part of a small but extremely dangerous group, while simultaneously ignoring the expert's acknowledgement and assertion that only "a very small amount" of sex offenders have a behavioral abnormality. (RR 4:46-47) The expert's testimony was that Stoddard is not a typical sex offender: he has been convicted of multiple sex offenses, has multiple victims, has a conviction for possession of child pornography, and is at a higher level of risk than the typical sex offender. (RR 4:38, 47)

The court required diagnoses the statute does not.

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[80] § 841.001 ("The legislature finds that a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality…").

[81] *Stoddard* at *12.

[82] *Bohannan* at 305-306 (holding a behavioral abnormality is the only question for the jury).

The reviewing court found it significant that Stoddard was not diagnosed with antisocial disorder or psychopathy.[83] According to the court, the lack of this disorder undermines the expert's opinion that Stoddard is part of the small but extremely dangerous group.[84] Two months earlier, the same court determined no diagnosis was required for commitment.[85] Yet in Stoddard's case they found the lack of a particular diagnosis factually insufficient evidence, despite testimony that he did lead an antisocial lifestyle. (RR 4:101)

The court similarly found Stoddard's lack of psychopathy to render the evidence insufficient. In doing so, the court ignored the evidence and the law. The SVP Act does not require those being civilly committed to by psychopathic. Dr. Proctor scored Stoddard a 27 on the PCL-R, an instrument that reviews 20 personality traits to assess a person's degree of psychopathy. (RR 4:105) Scores can range from 0 to 40. (RR 4:105) The typical cut-off for true psychopathy is 30 — Stoddard's score fell just short. (RR 4:105) Dr. Proctor explained how Stoddard's score fit into the doctor's overall opinion:

> "Well, this is supportive of the fact that there's antisocial psychopathic traits here. Even if he's not at the full level of being a psychopath because he's not a score of around 30, he's close to that.

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[83] *Stoddard at *7*

[84] *Id.* at *14.

[85] *In re Commitment of Dever*, 521 S.W.3d 84, 87 (Tex. App.—Fort Worth 2017, no pet.) ("… the SVP Act plainly does not require the State to establish a mental diagnosis to prove that a person suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence…").

> And having these personality characteristics speaks to increased risk. That's something we've talked about a lot, is having this antisocial lifestyle, and the things that go with that increased risk."

(RR 4:106)

As correctly stated in *Dever,* the statute does not require a diagnosis. Nor does the statute require testifying experts to even test for psychopathy.[86] The lack of proof of an element never mentioned in the statute or the jury charge does not render the evidence insufficient.

The court focused on a handful of people with higher scores on the Static-99R.

The reviewing court found Stoddard's score on an actuarial instrument was only one or two points above typical, further proof he is not part of the small group of extremely dangerous sex offenders.[87] The court looked at three other persons civilly committed with higher scores and determined Stoddard's was not high enough.[88] Going outside of the record was improper, as discussed above. Even if it was proper, it was improperly done. The court failed to look at all of the people civilly committed whose evidence was determined legally and factually sufficient with lower scores on the same instrument.[89] The reviewing court also ignored *In re Commitment of*

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[86] *In re Commitment of H.L.T.*, 549 S.W.3d 656, 660 (Tex. App.—Waco 2017, pet. denied).
[87] *Stoddard* at *14.

[88] *Id.*

[89] There are many other documented cases where evidence was found legally and factually sufficient to civilly commit people who scored lower than Stoddard on the Static-99R. For example: *In re Commitment of Ramshur,* 09-17-00286-CV, 2018 WL 6367529, at *2 (Tex. App.—Beaumont Dec. 6, 2018, no pet.) (mem. op.) (score of zero); *In re Commitment of Harris*, 541 S.W.3d 322, 326 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (score of one); *In re Commitment of Brown*, 05-16-01178-

Fisher, 164 S.W.3d 637 (Tex. 2005), wherein this Court found no constitutional issues with committing Fisher, who scored a 4, the same score as Stoddard's, on the Static-99R.

In making this determination, the court ignored not only *Bohannan,* but also pertinent pieces of the expert's testimony. Perhaps the most pertinent being that the instrument does not determine if a person suffers from a behavioral abnormality. (RR 4:104) People with low scores on the Static-99R may have a behavioral abnormality and people with high scores may not. (RR 4:104)

The instrument considers 10 risk factors and then places a person into a risk-level group. (RR 4:98) Stoddard scored a 4, which placed him in the above-average risk range. (RR 4:99) The doctor explained which of Stoddard's risk factors the instrument included, and which ones it did not. (RR 4:101-102) Among Stoddard's risk factors not considered by the Static-99R are chronicity of sexual violence, diversity of sexual violence, escalation of the sexual violence, psychological coercion, attitudes condoning sexual violence, sexual deviancy, psychopathic traits, and problems with substance abuse, relationships, treatment, planning, and employment. (RR 4:103)

The court found Stoddard not likely enough to reoffend.

CV, 2018 WL 947904, at *6 (Tex. App.—Dallas Feb. 20, 2018, no pet.) (mem. op.) (score of two); *In re Commitment of Rollings*, 05-17-00938-CV, 2018 WL 6695731, at *3 (Tex. App.—Dallas Dec. 20, 2018, no pet.) (mem. op.) (score of three). There are others.

The appellate court found that Stoddard is not likely enough to reoffend to meet the requirements for civil commitment.[90] *Likely* is not defined in the SVP Act. This Court previously determined a behavioral abnormality is a predisposition and a predisposition is the same as being likely.[91] Prior to *Bohannan,* the Legislature similarly declared that behavioral abnormalities do make people likely to engage in repeated predatory acts of sexual violence.[92]

The Supreme Court of the United States, while considering the Kansas statute for civil commitment, wrote that "'inability to control behavior' will not be demonstrable with mathematical precision."[93] *Likely,* as used in the SVP Act, has no numeric value and does not require that the State prove any specific percentage of risk. Prior to Stoddard, all appellate courts have refused to assign a number to *likely* or to construe it to mean "more likely than not" in SVP cases. [94]

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[90] *Stoddard* at *14.

[91] *In re Commitment of Bohannan*, 388 S.W.3d 296, 303 (Tex. 2012) ("We think the import of predisposition and likelihood is exactly the same: increased risk.").

[92] § 841.001.

[93] *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 870, 151 L. Ed. 2d 856 (2002).

[94] *See In re Commitment of Riojas,* 04-17-00082-CV, 2017 WL 4938818, at *4 (Tex. App.—San Antonio Nov. 1, 2017, no pet.). Other courts have held the same: *In re Commitment of Manuel*, 01-18-00650-CV, 2019 WL 2458986, at *5 (Tex. App.—Houston [1st Dist.] June 13, 2019, no pet. h.) (mem op.) ("[T]here is no numeric value or label that can be used to determine whether an offender is 'likely' to reoffend."); *In re Commitment of Brown,* 05-16-01178-CV, 2018 WL 947904, at *9 (Tex. App.—Dallas Feb. 20, 2018, no pet.) (mem. op.) ("[U]se of the term 'likely' in the Act does not require evidence of a specific percentage of risk, and the term should not be interpreted to mean 'more likely than not'."); *In re Commitment of Kalati*, 370 S.W.3d 435, 439 (Tex. App.—Beaumont 2012, pet. denied) (Chapter 841, which employs the term 'likely,' does not define it and does not require a numerical or percentage statement of whether a person is 'likely' to reoffend."). The dissenting opinion in *Stoddard* agrees with all of the other courts. *Stoddard* at *22 (dissenting Justice Gabriel writing, "The State was not tasked with showing 'a specific percentage of risk.'").

The appellate court defined *likely* in a way contrary to the jury and assigned the Static-99R's numeric value to it. This finding contradicts the jury, the statute, this Court, and the United States Supreme Court.

The court improperly assigned a motive to the State.

The appellate court found the State's motive to civilly commit Stoddard was improper, unconstitutional, and meant to further punish Stoddard by civilly committing him.[95] According to the court, the State had "buyer's remorse" after giving Stoddard light criminal sentences and therefore attempted to civilly commit him and enforce a longer or indefinite sentence.[96] As this Court and the United States Supreme Court have previously held, civil commitment is not punishment and is not unconstitutional.[97] The United States Supreme Court explained that the person's prior criminal conduct is used solely for evidentiary purposes in a civil commitment case, not to affix culpability for those prior crimes.[98] The State's motive is not a part of the record, not part of the statute, and not what the jury had to determine. These were all improper considerations in the factual sufficiency review.

The appellate court substituted its opinion for the jury's.

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[95] *Stoddard* at *12-13.

[96] *Stodard* at *13.

[97] *See In re Commitment of Fisher*, 164 S.W.3d 637, 653 (Tex. 2005); *also see Kansas v. Hendricks*, 521 U.S. 346, 371, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (determining the nearly-identical Kansas statute was constitutional).

[98] *Hendricks* at 347 (rejecting argument that civil commitment violated ban against double jeopardy).

An appellate court should not substitute its own judgment for the jury's.[99] Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony.[100] They may choose to believe one witness and disbelieve another.[101] Reviewing courts cannot impose their own opinions to the contrary.[102] The jury chose to adopt Dr. Proctor's opinion; the reviewing court did not.

The reviewing court's ultimate determination was that, although the evidence was legally sufficient, the expert's testimony did not provide "the necessary evidence to show, beyond a reasonable doubt, that Stoddard should be considered one of the small but extremely dangerous sex offenders for which civil commitments are warranted."[103] That opinion never stated that evidence was insufficient to prove Stoddard suffers from a behavioral abnormality, the only fact issue the jury had to decide.[104]

The State's expert opined Stoddard suffers from a behavioral abnormality. There was no other expert opinion and Stoddard could give no reason why the jury

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[99] *Windrum v. Kareh*, ---S.W.3d---, 17-0328, 2019 WL 321925, at *13 (Tex. Jan. 25, 2019), reh'g dismissed (May 24, 2019)*; see also Braughton v. State,* 569 S.W.3d 592, 610 (Tex. Crim. App. 2018), reh'g denied (Jan. 30, 2019) (because the jury's determination depended almost entirely on the credibility of the witnesses, "it would have been improper for the court of appeals to apply its own view of the weight and credibility of the witness testimony, thereby substituting its own view for that of the jury.").

[100] *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005).

[101] *Id.*

[102] *Id.*

[103] *Stoddard* at *16 (finding to hold otherwise would be unconstitutional); contravening *Bohannan* at 305 (behavioral abnormality is the only question for the jury) and § 841.002 (2) (defining behavioral abnormality).

[104] *Bohannan,* 388 S.W.3d at 305.

should think he does not have a behavioral abnormality. (R.R. 4:218) Despite the court's claim of lack of evidence, the record reveals only evidence to support the jury's verdict. The evidence just was not sufficient for these two particular justices to vote the same way as the jury. This is not an appropriate sufficiency review.

The second ground for review should be granted and a single, proper standard of review should be assigned, properly considering the elevated burden of proof in this case.

Prayer

The State prays that this Honorable Court grant review and oral argument in this case. Further, the State prays that this Honorable Court find the *Jackson v. Virginia* standard for review is the only standard for review in these civil cases that require proof beyond a reasonable doubt. Because the lower appellate court has already determined the evidence in this case meets that standard, the judgment of the trial court should be affirmed and the judgment of the appellate court reversed.

In the alternative, the State prays that this Honorable Court establish a standard for factual sufficiency reviews in these cases, giving due consideration to the elevated standard of proof. The case should then be remanded to the lower appellate court with instructions to conduct a proper factual sufficiency review.

Respectfully Submitted,

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