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SUPREME COURT OF TEXAS
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No. 19-0561

IN THE SUPREME COURT OF TEXAS

In re Commitment of Jeffery Lee Stoddard

On Petition for Review from
Appeal No. 02-17-00364-CV
In the Court of Appeals, Second District, at Fort Worth

Trial Court Cause No. D371-S-13391-16
371st Judicial District Court
Tarrant County, Texas

RESPONDENT'S BRIEF ON THE MERITS

State Counsel for Offenders
Kenneth Nash, Appellate Chief
State Bar of Texas No. 14811030
Teresa Simpson Dunsmore
State Bar of Texas No. 00794640
P. O. Box 4005
Huntsville, TX 77342-4005
Telephone no. 936-437-5252
Facsimile no. 936-437-5279
E-mail: Teresa.dunsmore@scfo.texas.gov

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Statement of Facts

The Court of Appeals' Statement of Facts is generally correct. Mr. Stoddard received two twenty year sentences for Aggravated Sexual Assault of a Child under 14 Years of Age, regarding a six and seven year old brother and sister, and one ten year sentence for Possession of Child Pornography. (RR 6:P.Ex. 1) The conviction involving the girl was for oral penetration and the conviction regarding the boy was for forcing him to perform sexual acts with the girl. (RR 4:55, 75).

The State's Petition and merits brief omit important facts and misstate the record in some respects. The State's contention, that Mr. Stoddard said that the girl "enjoyed it" is not accurate, although he did say that she wanted to do it. (State's petition, p.10; merits brief, p. 14; RR 176, 211).

The State's summaries left out Dr. Proctor's testimony that the "[a]ntisocial lifestyle" that he attributed to Mr. Stoddard described "somebody who's not living a stable law-abiding kind of life… that kind of thing" and applies to at least seventy-five percent of prison inmates, with twenty percent "or so" being psychopathic. (RR 4:53, 94; Stoddard's brief p. 25). He also gave the definition of "sexual deviancy" as "doing something with a person who -- who can't or didn't give their consent." (Stoddard's brief, p. 25; RR 4:157).

The Static-99 score by itself was not determinative, but is "a starting point" that "helps you collect the information in an objective research-based way" and that therefore "[y]ou can certainly have a very high score and not have a behavior abnormality" or have a "really low score" and not have one. (RR 4:104-105).

The State said that Mr. Stoddard's "pedophilia" condition "*causes* him serious difficulty controlling his behavior" as if it is a fact, but this is a conclusion and not the testimony of their expert. (State's merits brief, p. 18). The referenced colloquy with Dr. Proctor actually involved an affirmative answer to whether "it *caused* Mr. Stoddard to have serious difficulty controlling his behavior." (4 RR 92, *emphasis* added). Dr. Proctor diagnosed Mr. Stoddard with "pedophilic disorder," then clarified:

> Q. Is pedophilic disorder considered a chronic condition?
>
> A. Yes.
>
> Q. Will it lessen over time?
>
> A. In particular the -- there's a little bit of distinction. There's pedophilic disorder, and then there's pedophilia, and pedophilia is the interest in children. And the idea is that pedophilia itself, the interest in children, is a life-long condition, that is going to be present across time.
>
> (4 R.R. 91).

Dr. Proctor did not indicate that the pedophilic disorder diagnosis was based on current or recent episodes evincing a lack of control. *Id*.

The State acknowledges that Mr. Stoddard had not abused alcohol and drugs before committing the offenses he was convicted for, but it is also significant to note that he last had alcohol in 1994 and illegal drugs in 1984, so his abstention is longstanding. (State's merits brief, p.14; RR 4:49).

The State also described Mr. Stoddard as "not doing well" in treatment without acknowledging that Dr. Proctor cited the failure to answer benchmark questions as support for that assessment, yet later admitted that he did not actually know what had been covered in the program to that date[1], and that more recent concerns referenced Mr. Stoddard's anxiety over the civil commitment trial as being an impediment. (State's merits brief, p.19-20; RR 4:116-119, 140). When asked if he was required to complete sex offender treatment in order to meet the conditions to be released on parole, Stoddard was prevented from answering by an evidentiary ruling. (Stoddard's brief, p.35-39; RR 4:214, 223). During a subsequent offer of proof, he indicated that completing the treatment program was

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[1] The civil commitment process commonly begins before the accused candidate has had the opportunity to complete treatment and learn the answers to the questions that he will be accused of failing to properly respond to at trial. See e.g. *In re Commitment of Johnson,* No. 05-17-01171-CV, 2019 WL 364475, at *5 (Tex. App. Jan. 30, 2019); *In re Commitment of Rollings*, No. 05-17-00938-CV, 2018 WL 6695731, at *4 (Tex. App. Dec. 20, 2018)(treatment just started at time of testifying expert interview*);* *In re Commitment of Bassett*, No. 09-14-00403-CV, 2016 WL 536207, at *2 (Tex. App. Feb. 11, 2016)(treatment for approximately one month.*;* *In re Commitment of Pollard*, No. 09-14-00225-CV, 2015 WL 3898033, at *4 (Tex. App. June 25, 2015)(halfway through eighteen month program by trial)..

required before he could be released on parole. (Stoddard's brief, p.37-38; RR 4:223).

Summary of the Argument

Since the Sexually Violent Predator Act is designed to protect the public while providing therapeutic treatment for offenders, incarcerating an individual who poses little risk to others is not in accordance with the Legislature's directive that civil confinement be reserved for the "small but extremely dangerous group of sexually violent predators"[2] that the law was designed to protect the public from. The doctor's assessment emphasized that the two most important risk factors are anti-sociality and sexual deviancy, yet these labels apply to everyone convicted of a sexually violent offense by definition, so there is no hypothetical offender who could not be found to have a behavioral abnormality to the satisfaction of the legally sufficient standard. In the absence of any meaningful path to "legal sufficiency" oversight, "factual sufficiency" is a necessary protection to ensure that Sexually Violent Predator cases are within constitutional and legislative bounds.

The State's newly-adopted position that civil commitment cases should be treated the same as juvenile cases is a welcome change for those targeted as SVPs.

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[2] "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." § 841.001, Tex. Health & Safety Code (2017).

The State has spent years fighting the designation of civil commitment cases as "quasi-criminal." Because juvenile cases are subject to fundamental error review by this Court, as well as having more procedural protections than civil commitment cases, this could obviate many of the concerns that today necessitate a factual sufficiency review. However, even a "quasi" criminal designation could undermine the legal fiction that SVP cases are purely civil and hence, not subject to double jeopardy and ex post facto analysis.

The analysis of whether or not an offender has a behavioral abnormality consists of examination of risk factors that are supposed to be predictive of whether a subsequent act of sexual violence is likely and these factors are based on studies and comparisons regarding other sex offenders, so comparison to others is an inherent part of process.

Mr. Stoddard could only have been found beyond a reasonable doubt to suffer from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence if the legislative directive that civil commitment is designed for a small and extremely dangerous group was totally disregarded, as the State would have it be. Mr. Stoddard had no sexually abnormal history prior to the offenses that resulted in his imprisonment. He had been clean and sober since well before his incarceration, and has no violent or sexually-related disciplinary history. He is older and thus much less likely to re-offend; nonetheless, he is, has been and

continues to be willing to participate in treatment. He is not a psychopath and the anti-social behaviors attributed to him, such as lawbreaking and instability in life circumstances, were all based on events occurring a minimum of almost twenty years ago, prior to his incarceration. He had not been incarcerated and then re-offended, making him statistically much less likely to re-offend.

ARGUMENT

Response to First Ground for Review: Since Sexually Violent Predator proceedings are constitutional *because* they are civil proceedings, an additional layer of protection provided to other types of civil respondents when significant Due Process concerns are involved, cannot be removed in favor of the criminal law standard without jeopardizing Due Process and, if it is, given that criminal prosecutions require proof beyond a reasonable doubt of each element of a crime, but behavioral abnormality determinations leave juries with wide discretion, and the presentation of character, extraneous offense and hearsay evidence creates the potential that juries will use their verdict to express biases and further punish the respondent, then "quasi-criminal" status and rights should be afforded to civil commitment candidates.

Chapter 841 defines the term “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.” *See* Tex. Health & Safety Code, § 841.002(2). Under this Court’s decision in *In re Commitment of Bohannan*, the issue of whether a person has this “behavioral

abnormality" is a "single, unified issue" that focuses on "increased risk" of offending. *See In re Commitment of Bohannan*, 388 S.W.3d 296, 302-03 (Tex. 2012). The State has claimed that this "increased risk" of offending language in *Bohannan* means that Chapter 841's "behavioral abnormality" definition is met whenever there is *any* increased likelihood that a person will reoffend, because *likely* "has no numeric value and does not require that the State prove any specific percentage of risk." (State's merits brief, p.44). And since "proof that the person is a repeat sexually violent offender is proof of the person's past dangerousness," there is nothing more needed than the facts regarding the convictions themselves, since past behavior "is an important indicator of future violent tendencies." Id., citing *Kansas v. Hendricks*, 521 U.S. 346, 350, 117 S. Ct. 2072, 2076, 138 L. Ed. 2d 501 (1997).

Constitutionally required proof

The State ignores the rest of the Supreme Court's analysis, which makes it clear that, to show that Stoddard is a Sexually Violent Predator, the Constitution requires not just past convictions, but evidence "sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). This would include evidence a present difficulty in controlling his

behavior, although it need not be a total or complete inability to do so *Id*. at 410. It is not enough to show that an SVP candidate is merely more likely to offend than an ordinary person, he must be more apt to reoffend than another person who has also been convicted before. "A finding of dangerousness, standing alone, is ordinarily no a sufficient ground upon which to justify indefinite involuntary commitment." *Hendricks* at 358. In the case of Mr. Hendricks, there was forty year history of repeated assaults and his own testimony that he could not "control the urge" and only death would stop him for sure. *Id*. at 355. This brought him within those "narrow circumstances" that have justified the "forcible civil detainment of people who are unable to control their behavior. *Id*. at 356.

Legislative Findings

To clarify that civil commitment is not meant to be applied to every recidivist sex offender, and is therefore compatible with Constitutional constraints, the legislative findings in Section 841.001 of the Texas Health and Safety Code state:

> 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, 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, Tile 7. 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.

It is proper for a court to consider Chapter 841's legislative history and the legislative findings in Section 841.001 as guides to what the Legislature meant by the inherently ambiguous term "behavioral abnormality." *See City of Rockwall v. Hughes*, 246 S.W.3d 261, 265-66 (Tex. 2008) (courts may resort to extrinsic aids such as legislative history to construe an ambiguous statute). A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 220 (2012) (statement of a statute's purpose in its preface is an appropriate guide to the meaning of the statute's operative provisions); *see also Gundy v. United States*, No. 17-6086 Slip. op. at 11-12 (U.S. 2019) (relying on such a prefatory statement in construing the federal Sex Offender Registration and Notification Act and also stating that statutory interpretation is a "holistic endeavor" which "determines meaning by looking not to isolated words, but to text in context, along with purpose and history").

Legal Sufficiency Standard Alone is Inadequate

Legal sufficiency of the evidence in SVP cases is reviewed under the standard for criminal cases, due to the SVP's requirement of proof beyond a reasonable doubt. *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied). The reviewing court "look[s] to see if a

rational fact finder could have found, beyond a reasonable doubt, the elements required for commitment." *Id.*

The United States Supreme Court has discussed how the standard of reasonable doubt operates to give "concrete substance" to "reduce the risk of factual error in a criminal proceeding" and to ensure that a conviction is secured by "sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). Pointing to the Texas Court of Criminal Appeals adoption of *Jackson*, the State would have "factual sufficiency" be jettisoned in these cases since the "beyond a reasonable doubt" burden of proof and legal sufficiency have been adjudged enough protection for defendants accused of crimes. (State's merits brief, p. .25-26). However the "legally sufficient" standard in SVP cases is an exceedingly low bar to hurdle, if it can even be called a bar at all. Therefore, factual sufficiency is necessary to protect the defendant and to preserve the civil nature of SVP cases.

Risk can always be found in SVP cases, so "beyond a reasonable doubt" imparts solemnity, but legal sufficiency is a foregone conclusion

The State points out that "no Texas court has applied any other standard or questioned the reasoning of the *Mullens* Court" which determined that the criminal standard for legal sufficiency should apply to SVP cases. (State's merits brief,

p.24). Since "beyond a reasonable doubt" is the highest standard of proof, it makes sense that a high review standard be applied.[3] However, as the law has been applied, as long as there is *some* indication of increased risk, the burden is met because the risk is above "mere possibility." For all practical purposes, the review standard might as well be that there "more than a scintilla" of proof[4] because the practical effect on respondents is the same.

Behavioral Abnormality determinations are judgements about acceptable risk levels, not guilt or innocence

A behavioral abnormality finding does not have “elements” that must be proven, as a criminal case does. See *Brooks v. State*, 323 S.W.3d 893, 902 n.19 (Tex. Crim. App. 2010). Under this Court’s precedent, it is a “single, unified issue” that requires a jury to be sure that the accused respondent has characteristics that make him a threat to cause harm in the future. *Bohannan*, 388 S.W.3d at 302-03.

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[3] "[B]by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Jackson at 316, citing In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring).

[4] *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)(evidence as a whole would enable reasonable and fair minded people to differ).

But how much of a threat is legally enough? Since the issue of whether a person has a behavioral abnormality focuses on "increased risk" of reoffending, findings against respondents can accurately be described as predictions about future possibilities. *Id* No appellate court has yet found that the evidence of future risk is so minimal or uncertain as to be legally insufficient to support a verdict. And it is difficult to conceive of circumstances where one would, because the level of risk required for legal sufficiency was already satisfied by the time the prison doors first closed behind the newly convicted sex offender.[5]

The risk level will always be high enough for legal sufficiency

A sexually violent predator 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."[6] Juries do not have crystal balls and cannot determine that a defendant *will* actually offend again, so what they are really

[5] Often, the doors are closing for the first time, since SVP cases involving simultaneous convictions are quite common and have been found to satisfy the "repeat offender" element, even when involving one victim and one criminal episode. See, e.g. *In re Commitment of Smith*, No. 07-17-00147-CV, 2018 WL 5832178 (Tex. App. Nov. 7, 2018); *In re Commitment of Hall*, No. 09-09-00387-CV, 2010 WL 3910365, at *2 (Tex. App. Oct. 7, 2010). These opinions ignore the common sense meaning of "repeat" in favor of a hyper technical reading that , since not specifically prohibited by Section 841.003(d), actual repetition is not required.

[6] § 841.003(a), Tex. Health & Safety Code.

determining is that there is no reasonable doubt that the accused does fit the description of "likely" to offend again.

In the view of many of the State's experts, "likely" is equated with a level of probability as low as "beyond a mere possibility."[7] "Unfortunately, a "mere possibility" refers to that which is possible *only* because it is not presently capable of being proved impossible, so any fact indicating an increased risk can be said to make recidivism "beyond a mere possibility." While from a commonsense standpoint, there is considerable daylight between "not merely possible" and "likely,[8]" from an SVP case standpoint, they are the same.[9] As a result, the minimum risk legally sufficient to support finding a "behavioral abnormality" is exceedingly low.

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7 See e.g., *In re Commitment of Williams*, 539 S.W.3d 429, 434 (Tex. App. 2017), *reh'g denied* (Jan. 4, 2018); *In re Commitment of Mendoza*, No. 05-18-01202-CV, 2019 WL 5205710, at *4 (Tex. App. Oct. 16, 2019). *In re Lopez,* 462 S.W. 3d 106, 114 (Tex. App.—Beaumont 2015, pet. denied).

8 For example, it has not been proven that the Loch Ness Monster does not exist, so 'Nessie' is "possible," as in "not impossible." Were the lack of dispositive proof against her existence the only indicia available, then Nessie could be termed "merely possible." However, since there are grainy photos and reports of sightings and deep enough water, Nessie's existence could rightfully be termed as something more than "merely possible." Never mind that the photos could be fake and the witnesses delusional—any fact at all is enough and the factors that make Nessie beyond "merely possible" do not have to rule out other possibilities in order to elevate her status. And yet, people would not tend to agree that a sea monster is "likely" to be hiding in a lake in Scotland, just because it is slightly more than barely possible that there indeed is one there.

9

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The Beaumont Court of Appeals, stated years ago that "something that is probable is beyond a mere possibility or potential for harm" which correctly indicates that the minimum threshold for probable cannot be "mere possibility." *Beasley v. Molett*, 95 S.W.3d 590, 600 (Tex. App. 2002). However, this truism does not indicate that that anything above merely possible will even rise to the level of "plausible," let alone probable. While, mathematically speaking, probable is over 50%, or "more likely than not," that standard has been rejected as the level of likelihood required to civilly commit. *Id*. This makes sense, since even someone who has a twenty percent chance of reoffending could still be quite menacing. Nonetheless, the fact that such a broad definition treats the twenty-percent-likely respondent and the one percent likely respondent as equally dangerous leaves a lot of room for injustice.

Because all repeat offenders have an elevated risk of re-offense, they are all "beyond a mere possibility" of reoffending, since it has been defined in a manner that encompasses virtually any risk of re-offense, no matter how small. See e.g. *In re Commitment of Muzzy*, 2014 WL 1778254, at *2 (Tex. App.—Beaumont, 2014, pet denied (mem. op.)). Some experts, including Dr. Proctor, refuse to even use the statistics that have been developed or discuss statistical evidence with the jury,

so their recommendation has no context other than their own words.[10] So, barring a tragic accident that renders the defendant totally and permanently incapacitated, a rational jury can always find that the defendant is likely to offend again. This makes legal sufficiency essentially a given, which means that factual sufficiency is not merely an additional layer of protection for the respondent's liberty interest, it is the only protection.

All convicted sex offenders have what the State's expert says are the two biggest risk factors.

This is even clearer when one considers the standards used by the experts in forming their opinions. For instance, Dr. Proctor has said that the two biggest predictors for re-offense are antisociality and sexual deviancy. (4 R.R. 52). It is reasonable to believe that just about every inmate could be described as "not living a stable law-abiding" life at some point in their existence, which is how the doctor defined antisociality. *Id.* It It's also reasonable to assume that every sex offender that has committed a listed offense is sexually deviant, since every one of these crimes involves "doing something with a person who -- who can't or didn't give their consent" as the doctor defined deviancy. (4 R.R. 53). Therefore, since this

[10] "It is saying in general what the recidivism rates are for a particular score. And, you know, there are multiple sources you can even get that information from." (4 R.R. 100, Stoddard's brief, p.22-23). On cross examination, Dr. Proctor acknowledged that the recidivism rate for a person with a Static score of four in Texas is 5.5 percent. Another doctor had scored Mr. Stoddard as a three, which would, presumably, result in a percentage even lower than that. *Id.*

doctor, and others, describe traits that necessarily apply to every sex offender, "dangerous but typical recidivist[11]" there will always be at least some evidence from which a rational jury can conclude that any sex offender is likely to re-offend and hence has a behavioral abnormality. This hardly engenders confidence that an expert's opinion alone is sufficient to ensure that civil commitment is confined to "the very few most dangerous sex offenders who have serious difficulty controlling behavior and not to just a "dangerous but typical recidivist." *Crane*, 534 U.S. at 412-13.

With the term "likely" having been defined in a manner that encompasses virtually any risk, any and all SVP candidates can be found to have a "behavioral abnormality," irrespective of the proof presented at trial, because all repeat offenders have an elevated risk of re-offense.[12] So, barring a tragic accident that renders the defendant totally and permanently incapacitated, a rational jury can always find that the defendant is likely to offend again. And—perhaps aided by

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[11] Civil commitment is meant for the very few most dangerous sex offenders who have serious difficulty controlling behavior and not to just a "dangerous but typical recidivist." *Crane*, 534 U.S. at 412-13.

[12] U.S. Department of Justice research states that released from prison are arrested at rates 30 to 45 times higher than the general population. A review of studies on sex offender recidivism notes that sex offenders have been found to have a lower overall rearrest rate than non-sex offenders (43 percent to 68 percent), but a sex crime rearrest rate that is four times higher than the rate for non-sex offenders (5.3 percent to 1.3 percent). Przybylski, R. Recidivism of Adult Sexual Offenders, SEX OFFENDER MGMT. & PLAN. INITIATIVE, Research Brief (July 2015). https://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf

ignorance that they are condemning someone to continued incarceration, almost certainly for a long period, if not for life[13]--juries uniformly do.

Behavioral abnormality determinations do not require finding facts that are susceptible to being proven or disproven

With the only matter it is necessary to have "concrete" proof of in the entire SVP process being the historical fact of the respondent's prior convictions, "beyond a reasonable doubt" is almost entirely in the eye of the beholder when it comes to a behavioral abnormality decision. There is no list of elements or benchmarks indicating how much of a threat is enough to justify removing someone's freedom. The only guidance is the predictive value of prior convictions and "the application of a "soft" science that calls for the exercise of a considerable amount of intuitive judgment on the part of experts with specialized training." *In re Day*, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011).

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[13] State Counsel for Offenders currently has 494 committed clients that undergo biennial reviews to determine if they qualify for release. Only six offenders placed in the SVP civil commitment program have been released from it. The first was Paul Keen, in January, 2016. He was in his eighties and had been committed in 2002. *In re Commitment of Keen*, 2003 WL 22259440 (Tex. App.-Beaumont, 2003). Kenneth Fields was released at about the same time, he had been committed in 2008. Darryl Wayne Day was committed in February, 2010 and released in August, 2017, *In re Commitment of Day*, 342 S.W.3d 193 (Tex. App.--Beaumont, 2011). Terry McClanahan was committed in March, 2010 and released in February, 2018. *In re Commitment of McClanahan*, No, 2011 WL 3505276. (Tex. App.Beaumont--2011). Erik Joel Games was civilly committed in March, 2009 and released in July, 2018 and Carl Robinson was committed in January, 2014 and released in May, 2019, Nos. 08-09-08589 and 13-07-07692. 435th District Court of Montgomery County.

There are too many variables at play to have a bright line rule about who does and who does not constitute a threat and how much certainty regarding terrible consequences is enough to force someone to continue forgoing their freedom when they have already paid for their crimes. The State wants to treat a "behavioral abnormality" in isolation, as if it is a case of the measles and someone either has it or does not have it. For this reason, it claims that facts like Mr. Stoddard being forced to complete treatment before parole are irrelevant, even though that would significantly lower his risk by the time he is ready to be released—or he'd fail out and be denied parole. This information is only not relevant if "behavioral abnormality" is being distorted away from its purpose, which is protection of the public.

The State's proposal to give civil commitment cases "quasi-criminal" status like that enjoyed by juvenile adjudications could make legal sufficiency alone adequate to protect accused SVP'

The State's argument suggests that this Court treat civil commitment cases like juvenile adjudications. (State's merits brief, p. 21). If this Court were to determine that civil commitment cases should be treated in the same manner as "quasi-criminal" juvenile adjudications, a number of the concerns that militate in favor of factual sufficiency review would be mitigated. For instance, allowing SVP's to avoid error preservation waiver on the grounds of the "fundamental error"

exception in the same manner that juvenile defendants are sometimes able to would allow a more fulsome contemplation of the rights of the defendant. *See In re B.L.D.*, 113 S.W.3d 340, 350–51 (Tex. 2003). Given the large number of cases where SVP appellant's have sought and been denied the privilege of this review, it is reasonable to assume that it would be beneficial in making sure injustice does not occur.[14]

In addition, the newly "quasi-criminal" civil commitment candidate could make a "blanket assertion of the Fifth Amendment privilege," as is now prohibited. See e.g. *In re Commitment of Chapman*, 2013 WL 4773231, at *10 (Tex. App.—Beaumont, 2013). Being able to sit quietly and avoid the suspicious-looking torment of continually refusing to answer—or being forced to answer—highly inflammatory questions about every detail of their sordid criminal pasts would go a long way toward making the civil commitment process more fair. So would

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[14] See, e.g. *See In re Commitment of Martinez,* 98 S.W.3d 373, 375 (Tex.App.-Beaumont 2003, pet. denied) ("Chapter 841 is a civil, not a criminal or quasi-criminal, statute."). *In re Commitment of Fontenot*, 536 S.W.3d 906, 917 (Tex. App.—Houston, 2017*); In re Commitment of Slama*, No. 09-13-00497-CV, 2014 WL 6488943, at *4 (Tex. App. Nov. 20, 2014); *In re Commitment of Simmons*, No. 09-11-00507-CV, 2013 WL 2285865, at *4 (Tex. App. May 23, 2013); *In re Commitment of Adame*, No. 09-11-00588-CV, 2013 WL 3853386, at *3 (Tex. App. Apr. 18, 2013)

Brady[15] claims and extension of the *Crawford*[16] confrontation right, both of which have also been denied to civil commitment candidates on the basis that the cases are not criminal or quasi criminal. Perhaps with these protections, the backstop of a factual review by a higher court would no longer be necessary to ensure a fair trial.

Further, criminal juries always are aware that prison or other sanctions are riding on their decisions and civil commitment juries are almost never told what the consequences of their judgements will be. At least if these cases are treated as quasi-criminal, they will realize the true stakes and not, perhaps, be under the illusion that the respondent will be forced to register or attend more treatment, or have some type of restriction short of continued incarceration, likely for the rest of his life[17].

However, without such a major change, factual sufficiency is not merely an additional layer of protection for the respondent's liberty interest, it is the only

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[15] *In re Commitment of Alexander,* No. 09-12-00236-CV, 2013 WL 2444184, at *1–2 (Tex. App. May 30, 2013)(disclosure of exculpatory evidence not required in civil commitment cases under *See Brady v. Maryland,* 373 U.S. 83, 87, 83 (1963)).

[16] See *In re Commitment of Polk*, 187 S.W.3d 550, 555 (Tex. App. 2006)(declining to extend holding that testimonial statements of a witness are not admissible unless the defendant had the opportunity to cross-examine from *Crawford v. Washington*, 541 U.S. 36 (2004)).

[17] See note 13, supra

protection. This makes factual sufficiency even more necessary than it is in other civil cases where the courts have not hesitated to step in and protect the due process rights of unpopular defendants[18]. The right to liberty should not be accorded less protection than the right to property or other civil rights.

Some of the other Courts of Appeals appear to agree with the *Stoddard* analysis of the legislative findings

No court has found factual insufficiency since Stoddard, but the Sixth Court of Appeals noted the Stoddard reasoning and distinguished the factual circumstances of the appellant in front of it. *In re Commitment of Renshaw*, No. 06-19-00069-CV, 2020 WL 559292, at *6 (Tex. App. Feb. 5, 2020). Prior to the *Stoddard* decision, the First Court of Appeals rejected a request to require the State to prove the inappropriateness of regular mental health care reference 841.001; however, the appellant had claimed that such proof was an additional element. *In re Commitment of Williams*, 539 S.W.3d 429, 438 (Tex. App. 2017). Dissenting from the denial of *en banc* reconsideration in light of Stoddard, Justice Goodman wrote:

> *Williams* was incorrectly decided. The panel in the present case consequently applied a definition of

[18] See e.g. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417, 123 S. Ct. 1513, 1520, 155 L. Ed. 2d 585 (2003)("Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses.")

> "sexually violent predator" that is broader than the one that the civil commitment statute requires us to apply. *Stoddard* states the correct definition of "sexually violent predator" and I therefore would grant Farro's motion for en banc reconsideration in order to overrule *Williams* and remand Farro's case back to the trial court for a new trial applying the correct definition of "sexually violent predator," one that incorporates the limitations imposed by section 841.001.
> A contrary interpretation of Chapter 841 reads section 841.001 out of the statute, contrary to established principles of statutory interpretation, which require us to interpret statutes as a whole so that no part is made meaningless. *See TIC Energy & Chem. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016). Nor can section 841.001 be interpreted as having no bearing on the definition of "sexually violent predator" merely because it consists of "Legislative Findings" rather than appearing in the statute's definitions section or in section 841.003(a). *See* Tex. Gov't Code § 311.024 (section headings do "not limit or expand the meaning of a statute"); *Fredericksburg Care Co. v. Perez*, 461 S.W.3d 513, 522–25 (Tex. 2015) (looking to legislative findings in interpreting statute's purpose). *Williams*, however, erroneously does so, treating section 841.001 as surplusage.
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> *In re Commitment of Farro,* No. 01-18-00164-CV, 2018 WL 6696567, at *8 (Tex. App. Dec. 20, 2018), *review denied* (Dec. 13, 2019)(Goodman, G. dissenting)

The thirteenth Court of Appeals also noted the Stoddard court's analysis with approval, although it ultimately did not reach the issue of factual sufficiency:

> As explained by our sister court, our review in SVP commitment cases must necessarily be informed by these constitutional restrictions:

> That Chapter 841 applies only to a member of a small group of extremely dangerous sex offenders is a necessary component of Chapter 841 precisely because it provides the constitutional mooring without which Chapter 841 might not withstand a constitutional challenge. In considering the constitutionality of the current generation of sexually violent predator civil commitment laws, the United States Supreme Court upheld the civil restraint on liberty precisely because the statute in question was limited to "narrow circumstances" and "a limited subclass of dangerous persons." *Hendricks*, 521 U.S. at 357 .... Indeed, without such limitation, a serious question would arise whether Chapter 841 could pass constitutional muster. *Stoddard*, 2019 WL 2292981, at *12. Failing to consider these restrictions "risks ripping Chapter 841 from its constitutional foundation, thus opening the door to civil commitments of sex offenders based solely on their predicate sex offenses." *Id.*
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> *In re Commitment of Hull,* No. 13-17-00378-CV, 2019 WL 3241883, at *2 (Tex. App. July 18, 2019)(rev'd on other grounds).

And the Sixth Court of Appeals found that an appellant was entitled to a free record because his appeal was non-frivolous, on the basis of Stoddard:

> In that case, our sister court reversed the trial court's judgment because it found that the evidence was factually insufficient to support the jury's finding that Stoddard was a sexually violent predator. *Id.* at *1. Stoddard scored a 27 on the PCL-R and a 4 on the Static-99R. *Id.* at *8. According to our sister court, "Chapter 841 requires that [a sexual predator] suffer from a behavioral abnormality that renders him a member of the small group of extremely dangerous sex offenders that require civil commitment because they are likely to engage in future predatory acts of sexual violence." *Id.* at *11. Moreover, "to interpret the statute without regard to

> Section 841.001 ... risks ripping Chapter 841 from its constitutional foundation, thus opening the door to civil commitments of sex offenders based solely on their predicate sex offenses." *Id.* at *12.
>
> An appeal is frivolous if it lacks an arguable basis either in law or in fact. *De La Vega*, 974 S.W.2d at 154. Here, the reasoning expressed in *Stoddard* provides an arguable basis in law for Metcalf's appellate point. Metcalf's test scores, which are similar to those in *Stoddard*, likewise present an arguable basis in fact for his appellate point. Because Metcalf's appeal is not frivolous and a statement of facts and the clerk's transcript are needed to decide the issues presented by the appeal, Metcalf is entitled to a free record.
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> *In re Commitment of Metcalf*, 579 S.W.3d 828, 830 (Tex. App. 2019)

The Fifth Court of Appeals chose to view arguments that referenced *Stoddard* as presenting claims that the statute required an additional element of more than two offenses, which it then denied, without discussing the *Stoddard* reasoning. *In re Joiner*, No. 05-18-01001-CV, 2019 WL 4126602, at *9 (Tex. App. Aug. 30, 2019), *review denied* (Jan. 31, 2020); *In re Commitment of Mendoza*, No. 05-18-01202-CV, 2019 WL 5205710, at *8 (Tex. App. Oct. 16, 2019), *review denied* (Feb. 14, 2020).

<u>Second Ground for Review Response</u>: Since a behavioral abnormality determination is a "single unified issue" and is almost entirely supported by generalizations drawn from comparing the respondent to similarly situated others and attributing risk to him based on their behaviors, and since juries have wide discretion and significant potential for bias exists, and the constitutionality of the SVP law rests on its limitation to a

small, extremely dangerous group, an SVP determination is in n that category of civil cases where an appellate court is permitted or required to consider constitutional constraints and public policy as expressed by the legislature when determining whether the verdict is supported by factually sufficient evidence.

When a Court of Appeals reverses a judgment on insufficiency grounds, the court must "detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias." *Day*, 342 S.W.3d 193, 211 quoting *Pool v. Ford Motor Co*., 715 S.W.2d 629, 635 (Tex. 1986). The court must also "state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict." *Id*.

The State's petition claims that "Stoddard's brief never discussed the evidence or argued that the evidence was factually insufficient." (State's petition, p. 17). This is patently false. While challenging Dr. Proctor's opinion, Mr. Stoddard's brief said that it had not been proven that he was "not shown beyond a reasonable doubt to be incapable of controlling his behavior and is not a member of the "small but extremely dangerous group of sexually violent predators" that the law was designed to protect the public from." (Stoddard's brief, p. 29). The brief also discussed factors weighing against finding of a behavioral abnormality in detail while challenging Dr. Proctor's opinion, including that: Mr. Stoddard was not scored as a psychopath, did not have anti-social personality disorder, was less

anti-social than almost thirty percent of all inmates, had scores of three and four on the Static-99, had been in prison for nineteen years without showing instability, had only very minor violations while incarcerated, had been drug free for twenty years and alcohol free for ten. (Appellant's brief, p.26-27). Repetition of these factors under a different issue heading was unnecessary and would have been cumulative. Further, an argument that these factors were so insufficient that the expert's opinion should be rejected, and legal insufficiency found necessarily includes the argument that these same factors would weigh in favor of a factual insufficiency finding, since a factual sufficiency review requires that a court "weigh all the evidence." *In re Commitment of Short*, 521 S.W.3d 908, 911 (Tex. App. Fort Worth June 8, 2017).

Mr. Stoddard's brief did discuss the standard of review for factual insufficiency at length, endeavoring to persuade the Second Court of Appeals to examine the entire record with the goals of the statute in mind, rather than, in effect, presuming that factual sufficiency is satisfied when legal sufficiency is found.

As prelude to this argument, Mr. Stoddard's brief discussed what he believes this Court and the United States Supreme Court require before a state deprives someone of a significant right, such as freedom from confinement, or the right to parent a child. (Stoddard's brief, p. 32-33). This Court has not discussed

factual sufficiency standards with regard to a Sexually Violent Predator case, but there has been discussion of such standards and of another civil commitment opinion, in a parental termination case. *In the Interest of J.F.C.,* 96 S.W.3d 256 (Tex. 2002), discussing *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804 (1979)).

In *J.F.C.*, language very similar to the Ninth Court of Appeals "reflects a risk of injustice that would compel ordering a new trial" was found to be inadequate to address even the lower "clear and convincing" burden of proof required to terminate parental rights[19]. Mr. Stoddard pointed out in his brief that this Court had found that an increased burden should be accompanied by an increased level of scrutiny, and argued for this approach as opposed to the lesser (or non-existent) factual sufficiency scrutiny practiced by some courts and advocated for by the State. (Stoddard's brief, p. 32).

The 2nd Court of Appeals embraced the spirit of this approach in that it reviewed Mr. Stoddard's case while keeping the legislative direction that the statute should apply to a small group in mind, even though it did so under the common extrapolation of the factual sufficiency standard. *In re Commitment of Stoddard,* 2019 WL 2292981, at *11 (Tex. App. May 30, 2019)(op. on rhg.). The

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[19] Under traditional factual sufficiency standards, a court determines if a finding is so against the great weight and preponderance of the evidence that it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *In the Interest of J.F.C.,* 96 S.W.3d 256, 264 (Tex. Dec. 31,2002)

Court reviewed the entire record in a neutral light and found the State's evidence lacking. *Id*.

The State complains that the Second Court's neutral-light viewing considered facts outside of the record, because, in part, the opinion referenced other cases when it determined that Stoddard was not one of the "small group" of predators that is targeted under the Statute. (State's merits brief, p.35-36). However, the entire SVP process is an exercise in comparison and appellate courts are required, in many cases where significant rights are at stake, to detail their thought process or risk remand with an order to do so. *Ellis Cty. State Bank v. Keever*, 888 S.W.2d 790, 798 (Tex. 1994).

When the State finds fault with considering "facts outside the record" it is misconstruing what the court in *Stoddard* did in looking at other cases, which was try to ascertain the parameters of an inherently ambiguous statute. They did not consider facts about a party or dispute that were not in the record, rather, the Stoddard court looked for guidance in an area that has extremely little. To illustrate the problem with the State's position , one need only contemplate what would happen if there was a blanket prohibition on considering the facts of other cases, such as the State appears to be advocating. This would fundamentally alter legal argument and judicial decision-making. Consider, for instance, that the "basic formula [for distinguishing holding from dictum] is to take account of facts

treated by the judge as material and determine whether the contested opinion is based upon them." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988)(citation omitted). To understand which determinations were "necessary," and hence compel that the result applies to a subsequent case, often requires analysis of the facts and circumstances of other cases and comparison to the case at hand.[20] For example, this Court recently determined that TDCJ "used" a tear-gas gun when a guard was instructed to address an incident in a prison dorm with it. *Texas Dep't of Criminal Justice v. Rangel*, No. 18-0721, 2020 WL 596876, at *6 (Tex. Feb. 7, 2020). The opinion distinguished a case, urged by TDCJ as controlling, where a deputy shot someone and the holding was that the gun was not "used" by the county because it merely made the gun available, noting additional facts, such as that the guard was on duty and the deputy was not. See Id., discussing *Harris Cty. v. Annab*, 547 S.W.3d 609, 612 (Tex. 2018).

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[20] " In the United States, like in any common law system, legal reasoning relies on the basic assumption that similar cases should be decided similarly. Consequently, how prior courts have decided cases, and the facts underpinning their reasoning, represents important legal authority, and a legal writer must be prepared to analogize to or distinguish from legal precedent. Although there are several ways to accomplish this goal, the case comparison is one such method. A legal writer using a case comparison demonstrates that the facts and reasoning of a precedential case should (or should not) produce a specific outcome in the present case." Djandii, M. How to Craft An Effective Case Comparison, The Writing Center at Georgetown Law (2017). https://www.law.georgetown.edu/wp-content/uploads/2018/07/How-to-Craft-an-Effective-Case-Comparison.pdf

The very essence of a behavioral abnormality determination is the risk of re-offense[21] and—short of credible confessions of assaultive intent—every measurement of this risk already requires comparison to other sex offenders. (RR 4:98). The State's experts opine that the respondent has this or that characteristic, which makes them more or less likely to offend. *Id*. They use clinical judgement based on experiences with others' behavior and "actuarial measures" which are assessment tools that have been formulated based on the study of other sex offenders. (RR 4:92). For instance, the Static 99 categorizes an SVP respondent's risk as low, average, high or extremely high, depending upon the answers to ten questions which are based on characteristics that sex offenders that reoffend were found to share. [22](RR 4:98).

The statute directs that its application is intended to be for a small but extremely dangerous group[23] and, as the Second Court of Appeals ably explained,, this limitation is central to the constitutionality of the entire program.[24] The State

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21 *In re Commitment of Bohannan*, 388 S.W.3d 296, 303 (Tex. 2012).

22 One of the State's complaints is that the Stoddard court failed to look at people with lower Static scores. (State's merits brief. p. 42). An opinion released by the *Stoddard* court on the same day upheld the verdict against an appellant whose Static score was as low as three. *In re Commitment of Hayes*, No. 02-18-00018-CV, 2018 WL 4627064, at *6 (Tex. App. Sept. 27, 2018)

23 841.001, Texas Health and Safety Code.

24 " The United States Supreme Court upheld the civil restraint on liberty precisely because the statute in question was limited to "narrow circumstances" and "a limited subclass of

would have courts dismiss an entire section of the statute as irrelevant, ignoring that "[w]hen interpreting a statute, a court presumes the legislature intended the entire statute to be effective and none of its language to be surplusage." *Tafel v. State*, 536 S.W.3d 517, 519 (Tex. 2017).

Further, courts have not hesitated to make comparisons outside of the record with regard to other factual sufficiency determinations, such as the amount of exemplary damages. The State complains that the appellate court "found the evidence factually insufficient in part because Stoddard did not offend against as many people or as long as the other sexually violent predators" and claims that this happens "in no other type of case." (State's petition, p.36). However, this Court in examining the constitutional propriety of a punitive damages award, compared the amount awarded by the jury to "civil penalties authorized in comparable cases." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 309 (Tex. 2006). This Court has also described a defendant's reprehensible behavior with reference to how it could have been worse under other circumstances:

> This is a money-damages case, and certainly cases involving death, physical injury, or financial ruin might warrant "greater punishment" than cases lacking such harms. However, exemplary damages are not reserved

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dangerous persons." Indeed, without such limitation, a serious question would arise whether Chapter 841 could pass constitutional muster." *Stoddard* at 12, quoting *Kansas v. Hendricks*, 521 U.S. 346, 357, 117 S. Ct. at 2079–80 (1997).

> solely for cases that inflict ruinous physical or fiscal calamity.
>
> *Bennett v. Reynolds*, 315 S.W.3d 867, 872 (Tex. 2010)

The U.S. Supreme Court's thoughts on this issue could just as easily apply to an examination of an SVP case:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.
>
> *Pacific Mutual. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-19, 111 S. Ct. 1032, 1043 (1991).

The State further complains that appellate consideration of the legislative findings underpinning the SVP Act amounts to adding another element that must be proved, apparently contending that the positioning of the "*small but extremely dangerous group"* language somehow makes it entirely irrelevant. (State's petition, p.39). On the contrary, whether or not there is a behavioral abnormality remains a "single unified issue" and considering the larger statutory and constitutional framework in making that determination does not challenge *Bohannan*'s assessment that "condition and predisposition cannot be separate things." *Bohannan*, 388 S.W.3d at 303. The State takes language from *Bohannan* decreeing that behavioral abnormality is "the only fact issue to be resolved by the

jury" and extrapolates from that line that the intent of the law has been deemed irrelevant and beyond consideration by either juries or higher courts[25]. (State's petition, p.18; *Bohannan* at 303). However this position ignores the necessity of case by case analysis where there are competing public and private rights. See e.g. *Pacific Mutual*, 499 U.S. at 18-19. Factual insufficiency allows court intervention when a jury's decision is compatible with the evidence presented to it, but incompatible with the Constitution. *Id.* It is the backdrop without which the whole civil commitment program could justifiably be deemed too punitive to qualify as a civil matter.

Summary

To support a verdict beyond a reasonable doubt, there must still have been sufficient evidence, both factually and legally, presented to show that Stoddard was not capable of controlling his behavior and that he should be accorded the extraordinary treatment permitted only for those who are truly belong to "a limited subclass of dangerous persons" that "find it difficult, if not impossible" to control their dangerous behavior. *In re Commitment of Fisher*, 164 S.W.3d 637, 646 (Tex 2005) (quoting *Hendricks*, 521 U.S. at 357.

[25] The State has been asking trial courts to prohibit mention of the language in 841.001 in front of juries. See e.g. *In re Commitment of David Delacruz*, 03-19-00420-CV, currently pending before the Third Court of Appeals.

Looked at in a neutral light there is not enough evidence upon which to predicate a decision that may indefinitely deprive someone of their liberty and the appellate court was correct in so finding.

Prayer

Mr. Stoddard prays that this Court "Refuse" the State's Petition as to both grounds and grant him such other relief as it deems appropriate.

Respectfully submitted,

State Counsel for Offenders,
Attorney for Stoddard
/s/ Teresa Simpson Dunsmore
Texas Bar No. 00794640
P. O. Box 4005
Huntsville, TX 77342
Telephone no. 936-437-5252
Facsimile no. 936-437-5279
E-mail address: Teresa.Dunsmore@scfo.texas.gov

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Melinda Fletcher
Special Prosecution Unit
P. O. Box 1744
Amarillo, TX 79501
Facsimile no. 866-923-9253
E-mail address: mfletcher@sputexas.org

/s/ Teresa Dunsmore

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Associated Case Party: Special Prosecution Unit

Name	BarNumber	Email	TimestampSubmitted	Status
Melinda Fletcher		mfletcher@sputexas.org	3/9/2020 4:11:01 PM	SENT

Associated Case Party: Jeffery Stoddard

Name	BarNumber	Email	TimestampSubmitted	Status
Teresa Dunsmore		Teresa.Dunsmore@tdcj.texas.gov	3/9/2020 4:11:01 PM	SENT