

The original article "Civil Commitment of Sexually Violent Predators: Indeterminate Life Sentencing" was initially written by David O'Neil when he was the first Acting Director of the State Counsel for Offenders Division that represented offenders who were facing civil commitment as sexually violent predators. That article was published in Voice for the Defense, a publication of the Texas Criminal Defense Lawyers Association. In 2008, the article was updated by Mr. O'Neil and Mr. Scott Pawgan, who was then a member of Habern, O'Neil & Pawgan, LLP. It is that 2010 updated article that appears below.

The 84th Legislature recently enacted substantial changes to the Civil Commitment statute and those changes are not incorporated in the below article. The recent legislature should be consulted.

CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS: A PRIMER FOR THE UNINITIATED

By

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INTRODUCTION

Joe reluctantly accepted his plea agreement. His attorney presented strong arguments to convince Joe it was in his best interest, all factors considered. Without the agreement, Joe, if convicted by a jury of his conservative rural Texas neighbors, faced the possibility of life in prison.

His attorney explained that although there were inconsistencies in the statements of the state's reluctant witnesses, the prosecutor would portray Joe as a sexual predator of the worst sort, victimizing two innocent 14-year-old girls. His attorney also explained how difficult it would be to present an alibi defense, as the state really wasn't bound by the "on or about" dates alleged in the indictment.ⁱ Although Joe wasn't sure about the soundness of those arguments, there was one fact he couldn't dispute - his conviction for credit card fraud would be admissible if he testified. That alone was enough to tip the scales against him, and was what ultimately led him to accept the plea offer.

The offer was particularly appealing considering the nature of the offenses. Of course, Joe knew the prosecutor made it so attractive only because the state lacked any physical evidence to support the charges. Still, despite all the horror stories he had heard about life behind the walls of the Texas penitentiary, he tried to be upbeat. Joe's attorney assured him that, with good behavior, he could make parole. Then he could move from his small rural town and get a fresh start. He would still be young enough to put this behind him.

The advice was sound. Many other attorneys would have provided the same advice under the circumstances. What Joe and his attorney were unaware of, however, was that the state was going to change many of the circumstances that induced Joe to accept the plea offer.

After his plea, the Texas Legislature passed a law requiring sex offenders to register with their local law enforcement authorities.ⁱⁱ Furthermore, wherever Joe moved in Texas, it would be a matter of public record that he was, in essence, a child molester. This, however, paled in comparison to the legislature's latest initiative. It confronted Joe with the potential of lifelong "treatment" and rigorous supervision under a law for the civil commitment of certain sex offenders.

Under the Texas commitment law, if Joe is identified as a "sexually violent predator" (SVP), he could not actually be "committed" in the usual sense of the term. He could, however, be ordered to undergo treatment and supervision, the terms of which **must** include: residing in a particular location; prohibiting the use of alcohol; participating in a treatment program that could require regular Plethysmograph; participating in a tracking program (ankle monitoring bracelets or similar devices); **"and any other requirements determined necessary by the judge."**

While Joe is commiserating over his present woes, he is told to consider himself fortunate that he is not living in one of the handful of states that civilly commits sexually violent predators. As he is counting this blessing, Joe is unaware that under the new Texas SVP law a technical violation of any of the terms of supervision constitutes a third degree felony, punishable (if the state alleges and proves Joe's two prior final convictions) by a minimum of 25 and a maximum of 99 years in prison. TEX. PEN CODE ANN. § 12.42(d).

SCOPE

This fictional scenario is one that has taken on very real dimensions for some of the nearly 1,500 sex offenders scheduled for release from the Texas Department of Criminal Justice and the Texas Department of Mental Health and Retardation (MHMMR) during 2000.ⁱⁱⁱ This article will

focus on the specific provisions of the Texas statute for the Civil Commitment of Sexually Violent Predators; practical considerations for attorneys representing clients who, **at any time in their past, have ever been convicted of a sex offense** (regardless of whether sentence was deferred or probated, and regardless of whether adjudication occurred in a juvenile court, U.S. federal court, *U.S. military court*. or the court of another state); and some of the constitutional issues raised by the Texas statute. This article does not address the policy arguments for and against such legislation.

The Legislature passed the SVP law to address only the worst sexually violent offenders. Their intent was that only 15 persons per year would face SVP civil commitment hearings.^{iv} The imminent departure of nearly 1,500 sexual offenders from TDCJ during the upcoming year will make meeting that legislative goal impossible. Other states with SVP commitment laws have conducted anywhere from 10 to 30 times the rate of commitment proceedings than that projected by the Texas Legislature.^v This program has grown well beyond the Legislature's originally stated aims; even with the legislature creating the 435th Judicial District Court in Montgomery County dedicated solely to dealing with SVP cases.

SUBSTANCE OF THE ACT

The Texas statute is similar in many respects to the Kansas statute reviewed by the U.S. Supreme Court in *Kansas v. Hendricks*.^{vi} In that case, Hendricks was civilly committed for treatment as a "sexually violent predator." Based upon a long history of sexually molesting children," Kansas sought to civilly commit Hendricks, who was scheduled for release from prison. After considering issues of ex post facto application, due process, separation of powers, and double jeopardy, the Court upheld the Kansas statute. The Legislature passed the Texas SVP statute at its next regular session. Act of June 1, 1999, 76th Leg., R.S., S.B. 365. § 4.01 (codified at TEX. HEALTH & SAFETY CODE ANN., ch. 841).

1. LEGISLATIVE HISTORY

The statute begins with legislative findings, deemed essential in *Hendricks*, that there is a small group of sexually violent predators that have a behavioral abnormality that is not amenable to traditional treatment and that makes them likely to repeat their predatory acts of sexual violence. The findings also note that present involuntary commitment provisions cannot adequately address this threat, and that a long-term supervision and treatment program for these SVPs is "necessary and in the interest of the state." § 841.001. With this predicate, the Legislature established the SVP civil commitment program.

2. WHAT IS A SEXUALLY VIOLENT PREDATOR?

An SVP is any repeat sexual offender who suffers from a behavioral abnormality that makes the offender likely to engage in predatory acts of sexual violence. § 841.003.

The first prong of the SVP definition is based on the nature of the prior offenses. The "sexually violent offenses" that may qualify a person as an SVP are:

1. § 21.11(a)(1): Indecency With a Child (sexual contact);
2. § 22.011: Sexual Assault;
3. § 22.021: Aggravated Sexual Assault;
4. § 20.04(a)(4): Aggravated Kidnapping (intent to sexually abuse or violate);
5. § 30.02: Burglary (if punishable under § 30.02(d), i.e. premises was a habitation and was entered with intent to commit (or did commit or attempt to commit) a felony in 1-4. above;
6. A murder that, during the guilt or innocence phase or the punishment phase for the offense, during the adjudication or disposition of delinquent conduct constituting the offense, or subsequently during a civil commitment proceeding under Subchapter D, is determined beyond a reasonable doubt to have been based on sexually motivated conduct;
7. Attempt. conspiracy, or solicitation to commit any offense in 1-5, above;

8. Offenses under prior state law with elements substantially like 1-6, above; and
9. Offenses under other state law, federal law, or the Uniform Code of Military Justice with elements substantially like 1-6, above. § 841.002(8).

The second prong of this definition requires a look at the nature of the adjudications. Although the statute includes those convicted of more than one sexually violent offense, "sentence need only be imposed for one of the offenses." § 841.003(b). Thus, a single conviction on a multiple count indictment may qualify a person as an SVP.

Qualifying sexually violent offenses may also include deferred adjudications, cases where a person is adjudged not guilty by reason of insanity, and juvenile adjudications of delinquent conduct constituting a sexually violent offense and resulting in commitment to the Texas Youth Commission. This later group of offenses qualifies a person as an SVP only where the person subsequently commits a sexually violent offense for which he is found not guilty by reason of insanity, or for which he is convicted and a sentence is imposed. § 841.003(b)(2).

The third prong of the SVP definition focuses on whether the repeat sexual offender suffers from a "behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." § 841.003(a)(2).

This will be the terrain on which the battle of the experts will be fought. The state will bear the burden of proving that the repeat sexually violent predator has 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." § 841.002(2). As a practical matter, it is likely that the state will always be able to find some expert to opine that a person's multiple sexually violent offenses evidence a behavioral abnormality that predisposes him to commit a future sexually violent offense. This done, the state will have presented a prima facie case on the final prong of the commitment standard.

3. CIVIL COMMITMENT PROCEDURES

a. THE CULLING PROCESS

The "multidisciplinary team" is at the core of the initial SVP review process. Established by the SVP civil commitment legislation, the team has the Herculean task of reviewing all cases referred to it by the Texas Department of Criminal Justice and the Texas Department of Mental Health and Mental Retardation. TDCJ is required to give the team written notice of the anticipated discharge of any person who "is serving a sentence for a sexually violent offense; and...may be a repeat sexually violent offender." § 841.021(a). This wording creates an unforeseen gap by failing to require that TDCJ give the team written notice of the anticipated discharge of an offender who has a history of sexually violent offenses, but is presently pending release on a non-sexually violent offense. § 841.021(a)(1). MHMR is required to give the team written notice of the anticipated discharge of a person who is committed to MHMR after a finding of not guilty by reason of insanity of a sexually violent offense. § 841.021(b).

Although TDCJ and MHMR must give the required notice to the team 16 months prior to the anticipated release date, exigent circumstances permit notice any time before the anticipated release or discharge date. The notification must include documentation of institutional adjustment and treatment, as well as an assessment of the likelihood of further sexually violent offenses. § 841.021(c).

The multidisciplinary team includes representatives from the following: MHMR (2), TDCJ (3), DPS (1), and the Interagency Council on Sex Offender Treatment (Council) (1). Within 30 days of the notice provided by TDCJ or MHMR, the team must reply' to the appropriate department if it determines the person is a sexually violent offender who is likely to commit a sexually violent offense after release or discharge. The team must also recommend a behavioral abnormality assessment. § 841.022.

TDCJ or MHMR, as appropriate, must determine if the person suffers from a behavioral

abnormality that makes the person likely to engage in a predatory act of sexual violence.^{vii} They must forward that determination and the underlying documentation to the SVP division of the Prison Prosecution Unit, which is responsible for initiating and pursuing civil commitments under the SVP civil commitment legislation. The Legislature was well aware of the importance of making the thrust of the commitment proceedings appear non-punitive, as evidenced by the requirement for a "special division... separate from that part of the unit responsible for prosecuting criminal cases." § 841.004.

b. COMMITMENT PROCEEDINGS

The Prison Prosecution Unit attorney, has 90 days to file a petition alleging SVP status and stating facts sufficient to support the allegation. The attorney for the state has discretion in deciding whether to file any case referred by TDCJ or MHMR. Venue lies in Montgomery County, and petitions for civil commitment may be filed in any Montgomery County district court other than a family district court. § 841.041. However all cases filed will be filed in the 435th Judicial District Court of Montgomery County, Texas.

Within 270 days of the filing, the judge shall conduct a trial on the SVP issue. Upon a showing that the person is not "substantially prejudiced" the judge may grant a party's continuance request based upon good cause, or may order a continuance "in the due administration of justice." The person or the state may demand a jury trial by filing the written demand at least 10 days before the scheduled trial date. § 841.061.

A person facing commitment is entitled to counsel at all stages of the proceeding. If indigent, the court must appoint counsel from the Office of State Counsel for Offenders. § 841.144. Other rights of such persons include: the right to be examined by an expert (a right also enjoyed by the state); the right to be present at trial; the right to present evidence and cross examine witnesses who testify; and the right to view and copy all petitions and reports in the file. The state may supplement the petition at trial with documentary or live testimony. § 841 .061.

Although the proceedings are subject to the rules of procedure and appeal for civil cases, the number and selection of jurors is governed by Chapter 33, Code of Criminal Procedure; the state bears the burden of proving beyond a reasonable doubt that the person is a sexually violent predator; and the jury verdict must be unanimous. §841.146. If a mistrial is declared, retrial must begin within 90 days. § 841.064

c. COMMITMENT AND TREATMENT

The Interagency Council on Sex Offender Treatment is responsible for providing treatment to and supervising management of any person determined, at trial, to be an SVP. § 841.007. After a trial where a person is found to be an SVP, but before ordering the person to outpatient civil commitment, the judge **must** impose on the person the following requirements necessary to insure compliance with treatment and supervision:

- (1). residing in a particular location (which may include supervised housing);
- (2). prohibiting contact with a victim or potential victim;
- (3). prohibiting use of alcohol or controlled substances;
- (4). participating in treatment (including Plethysmograph and polygraphs);
- (5). submitting to a tracking service and any other appropriate supervision;
- (6). obtaining prior court permission before changing residence or leaving *the state*;
- (7). abiding by a child safety zone (only if deemed appropriate);
- (8). notifying the case manager within 48 hours of any change in status affecting treatment or supervision; and
- (9). **any other requirements determined necessary by the judge.** § 841.082(a).

Upon commitment the court retains jurisdiction of the case with respect to the biennial review process or petitions to release one from the civil commitment program. § 841.082(d) The Council will contract for a treatment provider to develop a treatment plan for the SVP at a cost not to exceed \$6,000 per year. § 841.083. That provider will give regular reports on the person's

compliance to the case manager, whom the Council will employ or contract to supervise the SVP. The SVP will continue outpatient treatment and supervision until their behavioral abnormality has changed "to the extent that the person is no longer likely to engage in a predatory act of sexual violence." § 841.081.

At least semiannually the case manager must report to the Council. The report must include any known change in the person's status affecting treatment or supervision, as well as any recommendations made to the judge. § 841.083(e)(3).

The statute provides an enforcement mechanism by making it a third degree felony to violate any of the above listed requirements imposed by the court to insure compliance with treatment and supervision. § 841.085. Most violators will have at least two prior felony convictions, and thus will face 25-99 years in prison as habitual offenders.^{viii}

d. RELEASE FROM COMMITMENT

Once committed, the SVP may obtain relief from the terms of supervision in two ways: through the biennial review process, or through a petition for release. §§ 841.101-841.103.

The Council must contract for an expert to conduct a biennial review of the SVP. The case manager will forward to the judge a report of the biennial review with comments on whether to modify or terminate the supervision. The judge will conduct a biennial review at which counsel for the SVP (but not the SVP) is entitled to be present. A hearing will be scheduled if the judge determines that the supervision should be modified or that probable cause exists to believe it should be terminated.^{ix} The same rules, rights, procedures, and standards of proof applicable at the initial commitment trial will apply at the hearing, including the right to a jury trial. Hearsay deemed trustworthy by the court may be admitted at a hearing to modify a requirement of supervision. § 841.103(b).

Either the case manager or the SVP may petition for a hearing at any time if either believes the behavioral abnormality of the SVP has changed to the extent that the SVP is no

longer likely to engage in a predatory act of sexual violence. The SVP must serve a copy of the petition on the court and the attorney representing the state.

Where the case manager "authorized" the petition, a hearing will be conducted within 30 days. The SVP or the state may demand the hearing be conducted before a jury. If the case manager did not authorize the petition, the court will review it "as soon as practicable." Unless the court finds probable cause to believe petitioner is no longer an SVP, the court must deny the unauthorized petition without a hearing if it finds that the petition is frivolous, or if the SVP previously filed an unauthorized petition that was either frivolous or unsuccessful.^x

e. MISCELLANEOUS PROVISIONS

The Legislature gave the Council rule-making authority to administer the SVP commitment statute. It also requires the Council to develop standards of care and case management for those committed under the statute. § 841.141. Further, privacy rights of persons subject to determinations under the statute are substantially relaxed, including the availability of certain juvenile records. § 841.142-841.143.

Of particular importance to the counties involved are the provisions for court costs, expert witnesses' fees, and attorney fees related to the commitment proceedings. Reasonable compensation for these expenses is to be paid by the state. § 841.145 and 841.146.

LEGAL AND PRACTICAL CONSIDERATION

1. CONSTITUTIONAL ISSUES

The Kansas SVP Act is similar to that of Texas in its retroactive application, but it differs in its provision for commitment versus supervision. In a 5-4 decision, the Court in *Hendricks* found that the retroactive application of the Kansas statute violated neither the double jeopardy nor the ex post facto provisions of the constitution. The Court further determined that the definition of "mental abnormalities" in the Kansas SVP Act satisfied substantive due process.^{xi}

Similarities between the Texas and Kansas SVP statutes evidence the intention of the

Texas legislature to insure compliance with constitutional protections. The Texas definition of "behavioral abnormality" is virtually identical to the Kansas definition of "mental abnormalities."^{xii} Further, by requiring out-patient treatment and supervision versus commitment, Texas satisfies even the concerns of the dissenting Justices, who noted that use of measures less restrictive than commitment (such as supervision) is an important consideration in guaranteeing protection from double jeopardy and ex post fact violations.^{xiii}

Hendricks, however, is not dispositive of the constitutional issues that will surround application of the Texas SVP statute. The Court relied heavily upon the uncontested facts that Hendricks was a diagnosed pedophile and that he would molest again. This fulfilled the requirement that there be a mental abnormality to support the prediction of future dangerousness.^{xiv} Substantive due process issues may still exist, depending upon the specific diagnosis under which the person is committed.

Further, the Court's resolution of double jeopardy and ex post fact claims was based in large part upon a determination that the Kansas SVP law was civil, as opposed to criminal. Although generally deferring to the legislature's stated intent to create a civil statute, a "civil label is not always dispositive."^{xv} The Court will reject the Legislature's stated intent upon a showing of "the clearest proof" that the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'^{xvi}

The Texas SVP statute meets even the dissenting Justices' concern that states first employ measures less restrictive than commitment. However, other factors cited and relied upon in the majority opinion do not apply to the Texas SVP statute. These factors may provide the "clearest proof" that the Texas SVP statute is punitive, and thus violates the double jeopardy and ex post facto provisions of the constitution.

First, the Court viewed favorably the Kansas provision that guaranteed annual review of the committed person's status, noting: "[t]he maximum amount of time an individual can be

incapacitated pursuant to a single judicial proceeding is one year."^{xvii} Each year "the court must once again determine beyond a reasonable doubt that that the detainee satisfies the same standards as required for the initial confinement."^{xviii}

Texas provides no such guarantee. Instead, an elected judge conducts a biennial review and only grants a new trial on the supervision issue if he determines the supervision should be modified, or if he finds probable cause to terminate supervision. § 841.102. The person's right to petition the court for a review also fails to meet the Kansas standard because it relies upon either the case manager's findings or the limited discretion of the judge."^{xix}

Second, the Court looked to the Kansas statute and determined that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme." *Hendrick at 2082*. The Texas statute, however, also creates a felony offense for the violation of any requirement of commitment. § 841.085. Thus, an SVP could face felony prosecution as an habitual offender for a technical violation of supervision. This is regardless of whether the term of supervision was one established by the Legislature, one created ad hoc by the court, or one that was created by a third party as part of a treatment or monitoring program. This statutory scheme raises several constitutional issues."^{xx}

The application of the SVP felony enforcement mechanism in this manner, especially if coupled with consistent prosecutions of insignificant technical violations of the terms of commitment, could well evidence "a statutory scheme so punitive... in effect, as to negate [the State's] intention" to deem it "civil." *Hendricks, 2082*.

b. PRACTICAL CONSIDERATIONS

I. Plea Agreements

Although the Legislature tasked State Counsel for Offenders with representing indigent persons under the SVP statute, all criminal defense attorneys should understand the subtleties of the statute. Every day defendants in Texas enter pleas of guilty to sex offenses, or they enter

pleas to other crimes, but have a history of sex offenses. Defense attorneys have an obligation to advise their clients on the consequences of their plea. This includes how the SVP statute can apply to them.

Prosecutors familiar with the statute may seek to maximize a defendant's exposure to it when negotiating plea agreements. They may insist on guilty pleas to multiple counts or indictments in order to immediately bring the defendant under the terms of the statute. They may insist on stipulations that can later facilitate SVP determinations.

The defense attorney will not only have to advise his client on the consequences of these tactics, but will also have to discuss whether it might be preferable to offer such pleas or stipulations to the prosecutor in return for a reduced sentence. The knowledge that the defendant has subjected himself to the SVP statute might dissuade the prosecutor from seeking a stiffer sentence.

On the other hand, with the felony enforcement provision, it is a distinct possibility that SVP commitment may be tantamount to a life sentence. Further, a person who meets the definition of an SVP may well decide that the conditions of treatment and supervision will be so onerous, and the stigma of registration under the Sex Offender Registration Act so insurmountable, that a guilty plea is not an option.

Defense attorneys also need to know when their clients are not exposing themselves to SVP commitment. For example, even multiple deferred adjudications, multiple probations, and multiple juvenile adjudications of sexually violent offenses cannot serve as the basis of SVP commitment, unless there is a conviction for which sentence is imposed, or a subsequent finding of not guilty by reason of insanity.

Certainly no lawyer is expected to advise a client about what the Legislature will do in the future, but the legislative history of the SVP statute and practical realities leave little doubt that there will be future initiatives to change or extend the statute to actual commitment. The

original SVP bill called for commitment. Fiscal concerns (perhaps the foremost of which was the focus given to a \$1.7 billion tax cut going into the presidential primary season) were a key reason for the present form of the statute.^{xxi} What will happen when the first SVP under "supervision" molests a small child?

2. The Commitment Process

The SVP statute does not guarantee that a person who meets the definition of an SVP will have a trial on their SVP status before discharge from TDCJ. Although notice of release of a sex offender "shall" be provided by TDCJ 16 months prior to the release date, exigent circumstances allow notification any time prior to the release date. Attorneys representing sex offenders should require the state to make the exigent circumstances a part of the record of the proceedings. This may be useful in subsequent litigation.

To insure the continued incarceration until commitment, TDCJ's notice must be adequate to permit the multidisciplinary assessment and report; to conduct a behavioral assessment; to file a commitment petition; to give 10 days' notice so jury trial may be demanded; and to conduct an examination of the person. Even then, a mistrial will require setting another trial date. After the date of discharge from TDCJ or MI-IMR, there is no provision for detaining the person while awaiting these proceedings or while pending appeal. Attempts to detain the person beyond the release date should be countered with a writ of habeas corpus. If the state has been unable to show exigent circumstances, that failure will reinforce the equity claim. Further, if the anticipated date of release has passed, challenge the applicability of the statute to such persons.^{xxii}

Once the person is committed, there are no provisions in the statute for appealing the court's determination in the biennial review or on a petition for release of whether or not to grant another trial. The court may deny a hearing on a petition for release even if the court finds probable cause to believe the person is no longer an SVP. That denial may be based upon

punitive reasons, i.e. the person filed a previous unsuccessful petition.^{xxiii} Arguably the court's determination not to grant a trial based upon the biennial review or on a petition for release is appealable. Attorneys should make every effort to obtain a final order on this determination, or consider filing a writ of mandamus in an appropriate case.

Finally, the commitment process will include supervised housing contracted for by the Council. Attorneys are likely to encounter clients who are irate about housing sexually violent predators in their neighborhood. The Sex Offender Registration Act guarantees the place of residence of SVPs will be public record. In seeking injunctive action or in a civil suit for damages for a client sexually victimized by an SVP, be aware that for every SVP under supervision there is a state pleading and a court finding that it was not only foreseeable that the SVP would commit a future predatory act of sexual violence, but that it was likely.

CONCLUSION

Joe has now had plenty of time to contemplate the sex offender legislation of the 90s. As he laments the limitations that it will place on his mandatory release in 2002, he at least considers how lucky he is that the Texas SVP statute does not require civil commitment to a mental institution. The next Legislature may pass that change, but Joe is confident they can't apply it to him - but will they?

ⁱ See *Hoffman v. State*, 922 S.W.2d 663 (Tex. App.-Waco 1996, pet. ret. d); *Garcia v. State*, 907 S.W.2d 635 (Tex. App.-Corpus Christi 1995), off d, 981 S.W.2d 683 (Tex. Crim. App. 1998)..

ⁱⁱ See Keith S. Hampton, *Retroactivity Challenges to the Sex Offender Program*. VOICE FOR THE DEFENSE, April 1998, at 25 (for an excellent discussion of the Sex Offender Registration Program and its retroactive application).

ⁱⁱⁱ As of July, 1999, Data Services. TDCJ, reports 1,474 offenders currently serving time in TDCJ. are scheduled for release in calendar year 2000.

^{iv} Paul Burka and Patricia Hart, *The Best and the Worst Legislators: 1999, TEX. MONTHLY*. July 1999, at 88, 100.

^v In January, 1999 Department of Corrections officials provided the following information on their respective states: California: in the preceding 16 preceding months 630 cases referred to prosecutor, 495 probable cause hearings conducted or pending, 273 commitment trials conducted or pending.

Kansas: Filed petitions to commit only 10% of sexual offenders (from a total prison population of 8,167), resulting in 11 jury trials per year.

Illinois: Tried 75 commitment cases in first year. Total prison population of 43,000.

Wisconsin: Tried 212 civil commitments in 4 years.. Total prison population of 17,000.

^{vi} 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

^{vii} §841.023. Experts must do a clinical assessment based on testing for psychopathy, a clinical interview, and other

"appropriate" assessments and techniques.

^{viii}TEX. PEN. CODE ANN. § 12.42(d)(Vernon 1994 & Supp. 1998). Any underlying conviction that the state must plead in the indictment or information cannot also be used to enhance the offense. *See McWilliams v. State*, 782 S.W.2d 871 (Tex. Crim. App. 1990) (*en bane*). Defense attorneys should attempt to quash indictments that do not allege the conviction(s) serving as the basis for the supervision. Where there are other convictions that could be pled, trial tactics dictate waiting until sentencing to object. *See Wilt v. State*, 787 S.W.2d 511 (Tex. App.-Houston [1st Dist.] 1990, no pet.).

^{ix}§ 841.102(c). There are no specific provisions for appealing the court's determination, but it is arguably final. Attorneys should make every effort to obtain an appealable order at the biennial review, or consider filing a writ of mandamus in an appropriate case.

^x§ 841.123(d). This scheme permits the court to deny a hearing even. if the court believes probable cause exists to believe the person is no longer a SVP based upon punitive reasons, i.e., the person filed a previous frivolous or unsuccessful petition. This also is arguably an appealable decision. Try to obtain an appealable order, or consider a writ of mandamus in an appropriate case.

^{xi}*Hendricks*, 117 S.Ct. at 2079.

^{xii}Compare *Hendricks*, 117 S.Ct. at 2077, with § 841.002(2).

^{xiii}*See Hendricks*, 117 S.Ct. at 2094-95.

^{xiv}*Id.*, at 2081.

^{xv}*Id.*, at 2082 (quoting *Allen v. Illinois*, 478 U.S. 364, 369, 106 S.Ct. 2988, 2992 (1986)).

^{xvi}*Id.*, at 2082 (quoting *United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980) (emphasis added)).

^{xvii}*Id.*, at 2083.

^{xviii}*Id.* At 2078.

^{xix}*See supra* notes ix, x and accompanying text.

^{xx}Arguably, the SVP law violates the separation of powers prohibition by impermissibly permitting the judiciary and executive to create the elements of an offense, i.e., letting those branches determine "a requirement imposed under § 841.082." *See* § 841.085. If, as a result of his behavioral abnormality the SVP cannot "participate" in a treatment program under § 841.082, prosecution for that failure may be barred by *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed. 2d 758 (1962) (statute punishing person for status as a drug addict held cruel and unusual). Laws that impermissibly delegate basic policy matters to others on an ad hoc basis are unconstitutionally vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, 228 (1972); *Ex parte Giles*, 502 S.W.2d 774 (Tex. Crim App. 1973).

^{xxi}*See* Paul Burka and Patricia Hart, *The Best and the Worst Legislators: 1999*, TEX. MONTHLY, July 1999, 88 at 100. The original bill called for actual commitment of only 15 persons, at a projected cost of \$20 million. As passed, the SVP law carried a fiscal note of \$4 million for the anticipated 15 persons. One can only wonder who will make the hard calls to winnow the 1474 projected releases down to just 15 lucky winners!?!

^{xxii}§ 841.081 requires treatment and supervision to begin on the person's release from a secure correctional facility. §841.021(c) requires notice before the anticipated release date.

^{xxiii}*See supra* text accompanying notes ix, x.