

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF

LAMB

[PRINT the first name of the county where this statement is being notarized.]

BEFORE ME, the undersigned, on this day personally appeared

ALDIZO MAY

, who

[PRINT the first and last names of the person who will sign this statement.]

Swore or affirmed to tell the truth, and stated as follows:

"My name is ALDIZO MAY

[PRINT the first and last names of the person who will sign this statement.]

I am of sound mind and capable of making this sworn statement. I have personal knowledge of the facts written in this statement. I understand that if I lie in this statement I may be held criminally responsible. This statement is true:

Since my arrival, here at Texas Civil Commitment Center on 12/18/15, I have been wrongly subjected to unfair (biased) *Disciplinary practices and policies*. Which have been used against me by this administration, in a "discriminatory" manner; with intent to punish and cause me emotional distress. This has resulted from my refusal to enroll in the Tiered Treatment Program offered here at this facility, and attend the same classes as other Residents. Which is my right; because Ms. Marsha McLane (Executive Director of Texas Civil Commitment Office) promised me that, I would not have to participate in like treatment. Attesting to this in a court of law via Sworn Affidavit. These unfair ***"Practice and Policies range from obstruct of my everyday mail and maliciously abuse of civil process and abuse of their discretion of my outgoing correspondence and incoming mail."*** Restricting my package and sending my phone call money back home to call my elderly mother she's 81 years old. ***Once again by their own conflicting grooming policies with one another I been illegally confined for a minor infraction on June 28, 2018 I was lock up in solitary confinement for 30 days let me reiterate for the minor infraction."*** They let me go for 4, days, and "Michael Searcy," said that the Littlefield investigator had enough evidence to filed criminal charges against me for a hate crime that I didn't commit. I must admit that Mr. Ted Tolleson, do indeed suffer from Post-Traumatic Stress Disorder that no excuse for his behavior just check his record. ***Mr. Ted Tolleson, called me some***

obscene names and he actually spit on me why didn't they lock Mr. Tolleson, up in LAMB COUNTY SHERIFF DEPARTMENT like me. Plaintiff May, avers that he has been incarcerated for more than 6 months and was insisting on a jury trial. As you must be fully aware of by now, this treatment facility has been run like a private prison for most of its existence, rather than the way it was intended to be operated.

The prison mentality of those who have been running the facility has created an oppressive atmosphere for the residents here, making it very difficult for us to focus on the actual therapy we are here for. ***"Affidavit of Marsha McLane, this has taken the form of due process hearing for each of the SVPs that chose not to [consent] to the amendment of their order of commitment."*** On September 15, 2015, TCCO learned that the court found against the State following five due process hearings involving SVPs Danner, Jenkins, Heinemann, May and Ford. In light of this decision, TCCO had to determine the steps to take with these five SVPs who were not under the program but rather would be left under an old court order that is no longer consistent with the law. TCCO is considered whether these five SVPs would be able to remain in any of the facilities under contract with the TCCO rather than moving the five SVPs to the Littlefield facility. BEFORE ME, the undersigned authority, on this day personally appeared Marsha McLane; and after being first duly sworn according to law, upon her oath, deposed and said:

The plaintiff understands that some of the defendants will claim they have [no] knowledge of these violations and the abuse of authority. Because the law of Texas says that upon notification, you are made aware and should become a party to the suit. Plaintiff alleging that his privacy was intruded upon on 10/20/2017. ***"Texas Penal Code Title 4, Inchoate offenses Chapter 16, Criminal Instruments, Interception of Wire or Oral Communication, and Installation of Tracking Device § 16.02 Unlawful Interception, Use Or Disclosure of Wire, Oral or Electronic Communications."*** Some of these individuals have been removed from their positions since the last 19 months. Case manager Luke Oaks, Clinical Director Edward Towns, Operational Specialist Tiffany Maybank's, Case manager Paratha, and there was another Case manager that's has been removed from his duties. These violations or guaranteed by Constitutional rights of the due process and Equal protection being impeded upon by the staff of TCCC and CCRS Wellpath in other agencies of the State. Applying policies and rules to a resident that had not or hasn't been approved by the Texas Civil Commitment Office. Such as the stealing of my property, they have randomly confiscation of my personal property order by operational specialist Tiffany Maybank's TCCO head of operations. I have had these items stolen from me 1 element T.V. 1 pair of crutches 1 pair of headphone 1 evodigital 4.3-inch touch screen T.V. out 16 GB internals memory, off commissary 3 bags of corn chip and two chili no beans. Since I been back here I've been discriminating against by the staff members and I been retaliated against and constantly harass. Officer Andres Flores, Mike Tornes, and Earnest Cantu, who doesn't work here anymore, assaulted me Jane Salazar Captain Supervisor Mark Fisher, night supervisor Security Director Christopher Woods, and Facility Administrator Brian Thomas on November 3, 2017.

Some of these individuals have been release from their duties and since than I been persistently, disturb on the daily basis am harass. ***“For the foregoing violations of law.”*** Racial discrimination, for targeting me for the purpose of punishment in a tactical way than other ethical groups. The regulation is intended cannot restrict your rights any more than is required to meet the goal. ***Procunier v. Martinez***, 416 U.S. 396 (1974). In 2010 the ACLU brought a First Amendment challenge to this type of policy at the El Paso County Jail in Arizona and the jail quickly agreed to change the rule. ***“TCCO cost recovery delinquency notification, commissary package restriction.”*** [Notice to Residents that Refuse to Participate In Treatment Consequences for Refusing to Participate In Treatment.]

JOB OPPORTUNITIES

The demand for paralegals is increasing. Both federal and state governments have many departments which employ paralegals. ***The Career: The paralegal, legal assistant, lawyer’s assistant, and investigator are all terms which have come to describe an individual who is prepared to step into a position of substantial responsibility within the legal community.*** The annual earnings employing the largest number of paralegals in the top five industries were as follows earns: ***“Federal government \$64,650 Finance and insurance \$50,570 Local government, excluding education and hospitals \$48,920 Legal services \$47,450 State government, excluding education and hospitals \$46,810.”*** How do you stop a publisher, from making a living and how do you stop an inmate from reading the material, how is this not punitive, by nature. ***See Supporting Evidence;*** Texas Civil Commitment Center Client Communication Form and Management & Training Corporation response? And see Texas Civil Commitment Office Cost Recovery Delinquency Notification Form on July 31, 2018 signed by Case Manager Kirsten Johnson on May 22, 2019? ***Comments: If a partial phone restriction is selected you may contact your attorney, Government Officials, Representatives, and other calls as approved by the Case Manager with the assistance of a Case Manager.***

CONFLICTING POLICIES

(1). Not be allowed to purchase meals from local, outside food establishments. (2). Be limited on the amount and type of items they can purchase from the commissary each month. Residents refusing treatment shall be allowed to purchase up to \$50 dollars each month if current with cost recovery and within authorized storage capacity provided, (3) be permitted use of telephone in accordance with Tied 1 guidelines. (4) Be permitted regular correspondence, legal and religious material in accordance with Tier 1 guidelines. (5) Be limited to special visits beyond regular visitation allowed to all residents as approved by the Facility Administrator and/ or Security Director. (6) Be subject to any additional restrictions approved and posted by the Facility Administrator and/ or Security Director. Includes the making, performance, modification, and termination of contracts, and the ***[enjoyment of all benefits,]*** and privileges, term, and conditions of the contractual relationship. Every resident deserve to live as comfortable, as possible we all are sex offender ***“We all share same proud title citizens.” Injustice anywhere is a threat to***

justice everywhere.” Protections against impairment, the rights that are protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Defendant’s conduct interferes with and invaded Plaintiff’s Interest. A defendant conduct was Negligent Conduct, Intentional Conduct, and conduct that is abnormal and out of place in its surroundings. Failure to follow up on prisoners with known or suspected mental health disorders. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; you can’t continue to house sane, individuals with insane individuals it’s against the law. *A “severe” mental illness is one “that has caused significant disruption in an inmate’s everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself.* Tillery v. Owens, 719 F. Supp. 1256, 1286 (W.D. Pa. 1989), *aff’d* 907 F. 2d 418 (3d Cir. 1990).

I, Alonzo May, do solemnly swear that I filed a written affidavit on or about 12/5/2016 on three officers employed by Correct Care Recovery Solutions (CCRS) for threatening to inflict harm on me. Those officers were Security officer Ms. Evelyn Lamer, Security Director Mr. Christopher Woods, and back than the Investigator officers Mr. Leslie Dinwiddie. And Operational Specialist Mr. Michael Searcy, that works for the Texas Civil Commitment Office (TCCO). Was in fact caught with my mail that I sent out to the LAMB COUNTY SHERIFF DEPARTMENT. I sent my mail through official mail pathways and fully expected it to reach its intended location, yet it was intercepted by a yet unknown person and handed over to a TCCO staff member for reasons not yet explained to me. The Sheriff Department is a Government Official that’s license through the Government why did Mr. Searcy even have my mail?

On September 21, 2017 around 3:45 or 3:50 I was walking with another inmates Mr. Erick Lawson, when he spoke to Mr. Michael Searcy, on the recreation yard and Mr. Searcy ask me what was I doing out on the rec yard than he said no I am serious I will fix that just view the cameras, I was on my way to the restroom. On October 15, 2018 I was in solitary confinement when the temperature reach a 123 degrees in the cell I was staying in I almost died that one night of many nights back there in there illegal solitary confinement, how is that not punishment, and this is supposed to be an treatment facility to translation us back into society where we were supposed to be in the first place. While convicted prisoners are protected only against **“cruel and unusual” punishment**, pretrial detainees cannot be subjected to any conditions that constitute punishment, *“[f]or under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”* Bell v. Wolfish, 441 U.S. 520, 535, 545 (1979) (noting that pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that... are enjoyed by convicted prisoners. *Post-conviction but pre-sentence detainees have a status analogous to pretrial detainees and,*

therefore, are similarly protected by the Due Process Clause. “As explained above, the Supreme Court has ruled that pretrial detainees enjoy greater protection against excessive force by prison staff than do convicted prison Kingsley v. Hendrickson, 135 S. Ct 2466 (2015). In accordance to your previously policy as stated by it doesn’t say anything about outside charges pending is one of the criteria for SMU policy. Others violations Johnson v. Avery, to get a responsive filing in the mail box by the deadline from the court 14 days. I am accusing CCRS, Texas, LLC staff of Knowing and intentionally, with Flagrant Disregard of Denying I and others similarly situated TCCC residents’ access to Courts. ***“I was being illegally held in solitary confinement on pending charges awaiting a decision from the court.”*** I just need to know why was I even back here without an ***“infraction”*** just because am discriminated against because am non-complaint. I was confine for about 22 to 24 hours a day and the sad thing about this is that TDCJ has done away with its solitary confinement may be the courts can decide this illegal ***“practice,”*** and what’s the purpose of this treatment facility of even having solitary confinement and the excessive escorting, when the real purpose supposed to be treatment to transition out of here.

“I have been punishing three different times for the same infraction that itself is excessive.” I did 30 days for that infraction than they let me out for about four days than they said that the investigator said he had enough evidence to pursuant with criminal charges to the Code of Criminal Procedure, Art 28.01. Mr. Ted Tolleson instigated that there situation when he started chanting those ***“racial slurs,”*** and then he ejected his saliva into my mouth just view the tape and the audio my cause of action was self-defense, on June 28, 2018. Resulting from TCCC and TCCO and CCRS Abuse of Office and Obstruction of the Administration of Justice by all Defendants’ conflicting policies. Who, while acting under color of office has egregiously violated Plaintiff’s Civil Rights with impunity. By imposing unconstitutional provisions upon Plaintiff, without any due consideration for his statutorily vested liberty interest.

Judge Seiler appeared before the Commission with counsel on April 8, 2015 and gave testimony. After considering the evidence before it, the Commissary entered the following Findings and Conclusions. I am appearing in your court because the 154th Judicial District Court of Lamb County, Texas is refusing to hear my complaint against CCRS and TCCC Well path Management & Training Corporation and TCCO. ***“Pursuant to Section 24.007 of the Texas Government Code the 154th Court does has jurisdiction over the subject matter of this case.*** When I defended myself from a hate crime against Mr. Tolleson, they didn’t send me to the 435th Judicial District Court of Conroe, Montgomery County, Texas they sent me to Lamb County, Texas. I have been a resident of Lamb County, Texas for the past three in half years. ***“Since being illegally seized from my home in Grand Prairie, Texas;” [I do not intend to work “in cahoots” with TCCO by “selling out” and falling in line for “piecemeal,” freedom and privileges.]*** Because it is illegal to justify putting sane individuals with insane individuals. ***“The Sovereign mind set is your demand for your liberty.”***

ARE YOUR BENEFITS EXEMPT FROM CLAIMS OF CREDITOR?

Help me to understand the State has already received State and Federal funding for housing us inmates. The IRS already knows that ***“VA pension payments are exempt from claims of creditors.” With certain exceptions, the payments are not assignable and not subject to attachment, levy, or seizure except as to claims of the United States Government [and not of the State Government, I can’t call an 1800-827-1000 to report these criminal actives.***

We have served out our criminal sentences without new offenses, only to be further punished and incarcerated with a charade of ***“treatment.”*** Our contacts with family and friends are severely limited and restricted. We are prevented from employment and made indigent and taxes 33.3% of family assistance and gifts by the duress of failure. In addition we are denied meaningful and effective health care and access to courts by the limitations and restrictions Texas Civil Commitment Office imposes on our life, liberty, and properties, along with Management & Training Corporation. If the effects of a civil sanction feel like punishment, it is therefore punishment! The court went on to say, no kind of **oppression** can be named, against which the framers of the constitution **intended to guard**, which may not be effected. ***“Why hasn’t the State of Texas been able to successfully treat and release anyone on its civil commitment scheme? How can this not be punitive in nature, and not “FEEL LIKE PUNISHMENT?”***

The idea that we should take all possible steps to prevent the next victim of a sex crime is a very daunting, if not scary, proposition in a legal context. As “we the people” we should be willing to question the constitutionality of our government’s banishment of American Citizens and how it effects the liberties guaranteed by the Federal Constitution under the provisions therein. We the People need to being an examination of the approaches being brokered by our Legislators to reduce sexual violence as well as their political imperatives that are seemingly benign yet invidiously promote wrongful government actions regardless of the fairness of the procedures used to implement them. **FAMILIES ARE BEING TORN APART! JUSTICE IS TO BE DENIED TO NO ONE THIS INCLUDES SEX OFFENDERS?**

You know we have a problem when you have more people leaving here dead than alive, why is this not punitive for GOD sake ***“Ray Charles, and Ronnie Millsap, and Stevie Wonder, can see through that and they or legally blind!*** This is no more than a smoke screen. I have wrote the Texas Rangers and numerous of others agencies a number of times from 2016 until this day 2019 the Police Department and the Sheriff Department to no prevail, from these superior power for they influence, on this situation on our outcry at the Texas Civil Commitment Center. ***Question where do our complaints stop at the Attorney General Office these or the people that’s covering these crimes up?*** “Marsha McLane, and others agencies who support this or urge this kind of illegally activity publicly by promoting by argument at these legislative meeting should be lock up as well. ***“We lock up rappers we also lock up actors and actress and we lock up owner of association like football baseball basketball. We lock up Millionaire and Billionaire what make Marsha McLane exempt she’s not and where is the Senator John Whit mire the***

architect who design this lay out plan your creator, I guess it gotten hot in the kitchen and he turn it over to Charles Perry?

CONSTITUTION OF THE STATE OF TEXAS 1876-/TEXAS STATE CONSTITUTION

ARTICLE I BILL OF RIGHTS -/SEC. 19. DEPRIVATION OF LIFE, LIBERTY, etc.;

DUE COURSE OF LAW

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

UNITED STATES CODE SERVICE

Second Session of the 114th Congress (Public Laws 114-1 to 114-314)

1981. Equal rights under the law (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains penalties, taxes, licenses, and exactions of every kind, and to no other.

B “Make and enforce contract” defined. For purposes of this section, the term “**make and enforce contracts**” includes making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, term, and conditions of the contractual relationship.

C Protection against impairment. The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

§ 1982. Property rights of citizens All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

TDCJ PUNITIVE IN NATURE,

Loss of privileges *“not to exceed [45] days per disciplinary case.”* At no time shall the loss of property or restriction of each privilege exceed a total of [90] days from the date of the most recent conviction as the result of cumulative disciplinary convictions. Privileges that may be restricted. If the effects of a civil sanction feel like punishment, it is therefore punishment! *No kind of oppression can be named, against which the framers of the constitution intended to guard, which may not be effected.*

TEXAS CIVIL COMMITMENT CENTER/TDCJ

If an inmate loses any privileges he's sanctioned from 0 to 90 days for the restriction than the inmate is "***restricted again for 6 months***" Commissary and Package Restriction and Partial Phone Restriction. And failure to make payment as set forth in your cost recovery is a violation of the Texas Civil Commitment rules and you may lose your privileges. I am in a secure facility and I am an indigent inmate the only thing that I am responsible for is the services for this global positioning satellite tracking device they told me that the State is responsible for everything else including housing, according to contractual contract.

WE HAVE RECEIVED YOUR CORRESPONDENCE WITH THE FOLLOWING ISSUES:

If items are refused / returned by your facility, you must get a letter stating they will accept the items before we will attempt to reship. "***We are not responsible for items held or confiscated by your facility Administrator.***" Management & Training Corporation and Texas Civil Commitment Center Well path and Texas Civil Commitment Office? "***Insufficient payment. Please include \$1225.50 for your order.***" Money doesn't grow on trees, this isn't free I am an indigent, inmate and my elderly mother wanted to get me that for my birthday, she's on a fixed income herself she can't afford these items. "***So why or these agencies or extorting my family members this is against the law to extort, and elderly person?***"

A deprivation of a basic human need (such as food, clothing, shelter, exercise, medical care, or reasonable safety) Helling v. McKinney, 509 U.S. 25, 31-32 (1993).

OTHER VIOLATION TO ADD

Improper use of restraints. Excessive use of force against ill prisoners. Lack of training of custody staff in mental health issues. Protection from Assault, Farmer v. Brennan, 511 U.S. 825, 833 (1994). Excessive heat. Excessive cold. Inadequate ventilation. Sleeping on the floor, Gillis v. Litscher, 468 F. 3d 488, 494 (7th Cir. 2006) (in combination with other conditions, forcing prisoners in special behavioral management program to sleep on concrete floor may amount to claim of deliberate indifference:

THE RESIDENTS HERE AT THE TEXAS CIVIL COMMITMENT CENTER, ARE MEN WITHOUT A GOVERNMENT AND COUNTRY! THE DAYS OF YORE REVOLUTION-FREEDOM FROM ENGLAND'S CIVIL INJUSTICE!

Racial discrimination and segregation by prison authorities are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Washington v. Lee 263 F. Supp. 327 (M.D. Ala. 1966).

UNSWORN DECLARATION

I, Alonzo May, declare under penalty of perjury that the foregoing instrument is true and correct.

Executed on this the 1 day of AUG 2019.

Respectfully Submitted

Alonzo May

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument:

CLERK SCOTT S. HARRIS UNITED STATES SUPREME COURT

Been forwarded to

NINTH CIRCUIT, 11 ST WASHINGTON D.C. 20543-0001

Postage pre-paid.

Executed on 1 day of AUG 2019.

Alonzo May

Alonzo May

2600 South Sunset Avenue

Littlefield, Texas 79339

DEC 14 2015

BARBARA GLADDEN ADAMICK
District Clerk
MONTGOMERY COUNTY, TEXAS
By [Signature] Deputy

NO. 12-12-13065-CV

IN RE:

§

IN THE DISTRICT COURT OF

THE COMMITMENT OF

§

MONTGOMERY COUNTY, TEXAS

ALONZO MAY

§

435th JUDICIAL DISTRICT

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW****After the December 08, 2015 trial, the trial court makes the following:****FINDINGS OF FACT**

1. On July 24, 2013 the trial court signed a Final Judgment as the result of a Montgomery County jury's verdict that Alonzo May was a sexually violent predator. Whereupon the trial court signed an Order of Commitment that Alonzo May was indefinitely committed for *outpatient* treatment and supervision.
2. Evidence submitted to the jury showed that Alonzo May had been convicted of several sex crimes, served out the punishments imposed, and released from criminal confinement.
3. On June 17, 2015 SB 746 amended Chapter 841 of the Texas Health and Safety Code, ending funding for *outpatient* treatment and requiring those in Alonzo May's circumstance to attend a "due process" hearing in advance of being committed to "tiered *inpatient* treatment".
4. Although called "due process" the only possible result that would provide any treatment was tiered *inpatient* treatment.
5. Alonzo May did not waive a hearing. At the conclusion of the September 09, 2015 hearing, the trial court denied the State's petition to transfer Alonzo May from *outpatient* to tiered *inpatient* treatment. The State then moved for reconsideration. After discovery by Alonzo May, the December 08, 2015 hearing was conducted.

SCANNED

6. Although not having been convicted of new sex crimes or for that matter any crimes, committed persons such as Alonzo May were to begin tiered *inpatient* treatment in total confinement for an indeterminate period, historically much longer than a definite prison sentence.
7. The place of confinement, the Bill Clayton Detention Center or private prison at Littlefield, Texas has two chain link fences topped by concertina wire around its perimeter and all the characteristics of a Texas Department of Criminal Justice prison facility.
8. The confinement to which Alonzo May would be subjected if ordered into tiered *inpatient* treatment is substantively and substantially more oppressive than that required by the July 24, 2013 Order of Commitment.
9. There was no credible evidence presented that tiered *inpatient* treatment would provide better benefits to Alonzo May than *outpatient* treatment required by the July 24, 2013 Order of Commitment.

Based upon the foregoing Findings of Fact, the trial court reaches the following:

CONCLUSIONS OF LAW

- A. Texas Health and Safety Code Chapter 841 as amended by the 2015 Senate Bill 746 fails to meet Constitutional muster in that the requisite involuntary commitment of Alonzo May pursuant thereto is, retroactive, punitive and a denial of Alonzo May's due process rights under the both Texas and U.S. Constitutions.
- B. Therefore, Alonzo May shall be released from civil commitment forthwith.

Signed this 14th day of December, 2015



P.K. Reiter, Judge Presiding

RECEIVED AND FILED
FOR RECORD
At 9:53 a.m.
DEC 14 2015

BARBARA GLADEN ADAMICK
CLERK OF DISTRICT COURT
MONTGOMERY COUNTY, TEXAS

§
MONTGOMERY COUNTY, TEXAS
§
435th JUDICIAL DISTRICT

NO. 12-12-13065-CV

IN RE:
THE COMMITMENT OF
ALONZO MAY

JUDGMENT


BE IT REMEMBERED that on December 8, 2015, this cause came on for reconsideration on motion of the State of Texas for the Court to reconsider a ruling on September 08, 2015 in which the Court denied the State's motion to place Alonzo May into the tiered sex offender treatment program. The parties announced "Ready" and proceeded to trial. The trial court considered the pleadings, evidence and argument of counsel. Based thereon, it is accordingly:

ORDERED, ADJUDGED AND DECREED that Alonzo May be, and is hereby released from civil commitment imposed upon him by Judgment and Order of Commitment signed July 24, 2013. The Texas Civil Commitment Office is directed to:

- 1) immediately remove each and every tracking device from Alonzo May's person.
- 2) immediately release Alonzo May from its custody.
- 3) return to Alonzo May all property belonging to Alonzo May, at Alonzo May's expense.

All costs are charged to the State of Texas pursuant to Texas Health and Safety Code § 841.146(c). All relief not granted herein is denied.

SIGNED December 14, 2015.



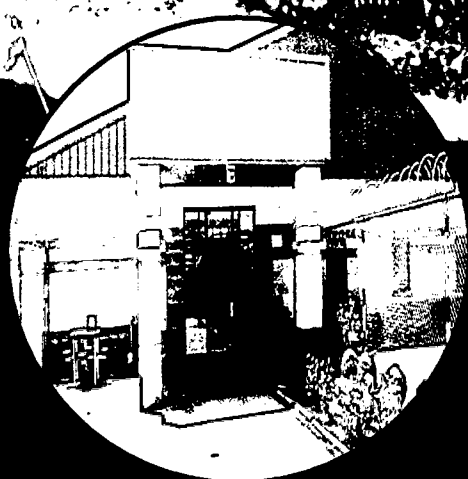
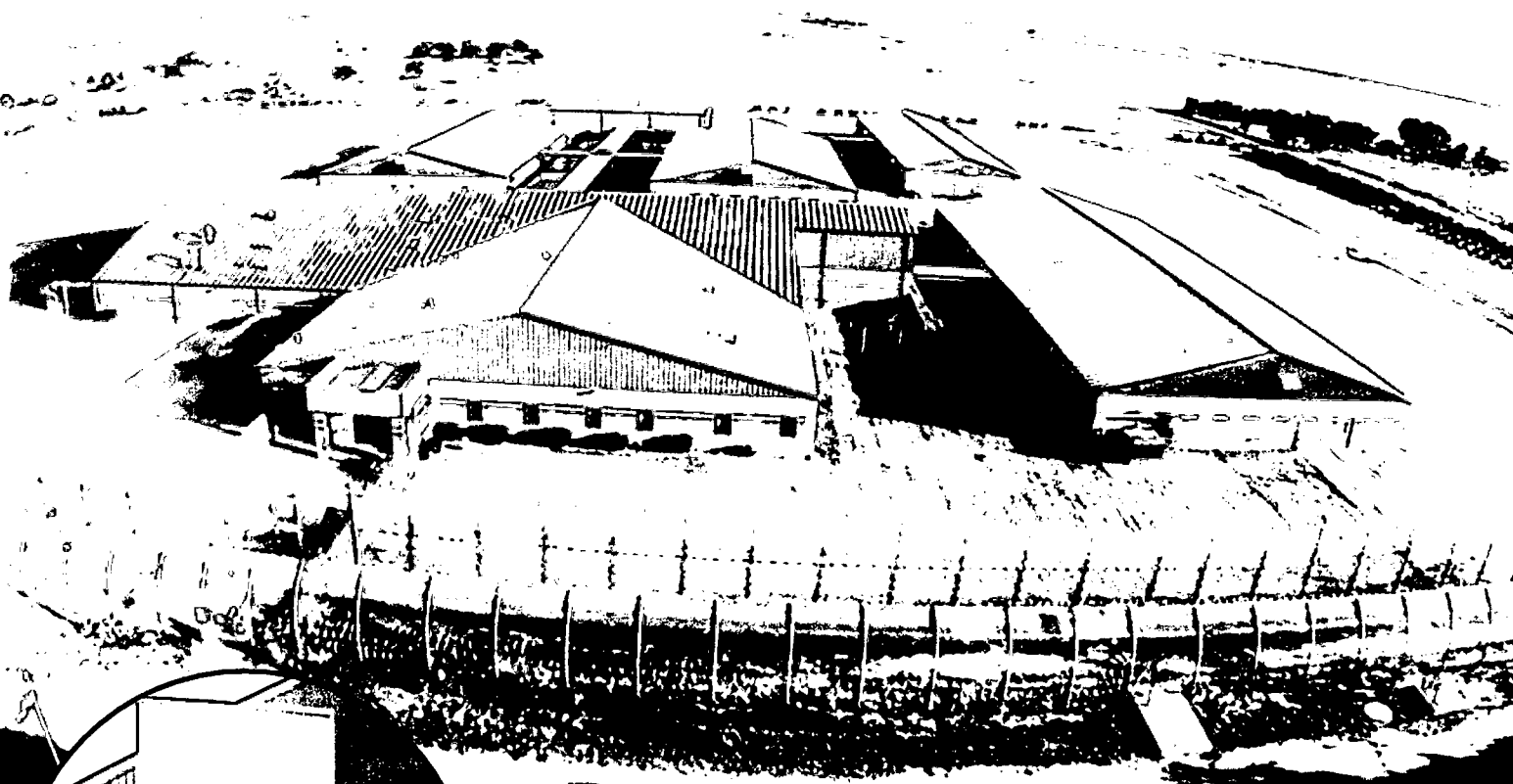
P.K. Reiter, Presiding Judge

Minute

Date: 12-14-15



CORRECT CARE
RECOVERY SOLUTIONS



TEXAS CIVIL COMMITMENT CENTER

RESIDENT HANDBOOK

2600 South Sunset Avenue
Littlefield, Texas 79339

Phone: 806.485.8100 / Fax: 806.485.8116

Exhibit - B

WELCOME
September 2015



Exhibit - C

500 S.W.3d 515::In re Commitment of May::July 12, 2016[Group:"500 S.W.3d 515"]LNI:5KB9-JHM1-F04K-B4NX-00000-00

IN RE COMMITMENT OF ALONZO MAY

COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT

500 SW3d 515500 S.W.3d 515; 2016 Tex App LEXIS 80582016 Tex. App. LEXIS 8058

NO. 09-15-00513-CV

July 12, 2016, Submitted

July 28, 2016, Opinion Delivered

Editorial Information: Subsequent History

Petition for review denied by In re Commitment of May, 2017 Tex. LEXIS 237 (Tex., Mar. 3, 2017)Appeal dismissed by In re May, 2017 Tex. App. LEXIS 6710 (Tex. App. Beaumont, July 20, 2017)

Editorial Information: Prior History

On Appeal from the 435th District Court, Montgomery County, Texas. Trial Cause No. 12-12-13065-CV.In re Commitment of May, 2014 Tex. App. LEXIS 13273 (Tex. App. Beaumont, Dec. 11, 2014)

Disposition:

REVERSED AND REMANDED.

Counsel For Appellant: Ken Paxton, Attorney General of Texas; Bill Davis, Assistant Solicitor General; Celamaine Cunniff, Assistant Attorney General, Austin.

For Appellee: Bob Mabry, Bob Mabry Attorney at Law PLLC, Conroe.

Judges: Before McKeithen, C.J., Kreger and Johnson, JJ.CASE SUMMARYChanges in the civil commitment statute that required a person committed as a sexually violent predator to move from outpatient treatment to inpatient treatment and were more oppressive than the conditions required by the original commitment, were not punitive and not unconstitutionally retroactive.OVERVIEW: HOLDINGS: [1]-Even assuming that changes in the civil commitment statute required a person committed as a sexually violent predator (SVP) to move from outpatient treatment to inpatient treatment and were more oppressive than the conditions required by the patient's original order of commitment, the statute was not punitive; [2]-The tiered supervision and treatment program implemented under the 2015 amendment to the SVP statute included the possible transition to less restrictive housing and eventually to release, Tex. Health & Safety Code Ann. § 841.0831 (Supp. 2015); [3]-The trial court abused its discretion by ordering the patient's release from civil commitment in the absence of a fact-finder's

determination that his behavioral abnormality had changed as required by Tex. Health & Safety Code Ann. §§ 841.102, 841.121, 841.124 (Supp. 2015). OUTCOME: Judgment reversed. LexisNexis Headnotes

Governments > Legislation > Effect & Operation > Retrospective Operation

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Application Principles The statute authorizing the civil commitment of sexually violent predators, as amended in 2015, is neither unconstitutionally retroactive nor punitive. The Legislature has created a new state agency, the Texas Civil Commitment Office (TCCO), with the responsibility for treatment and supervision of sexually violent predators. Tex. Health & Safety Code Ann. § 841.007 (Supp. 2015). The Legislature requires the TCCO to develop a tiered program of supervision and treatment that provides a seamless transition from a total confinement facility to less restrictive housing and supervision and eventual release from civil commitment, based on the person's behavior and progress in treatment. Tex. Health & Safety Code Ann. § 841.0831 (Supp. 2015). Under the statute as amended, the TCCO transfers a committed person to less restrictive housing and supervision if the transfer is in the best interests of the person and conditions can be imposed that adequately protect the community, and a committed person may petition the court for a transfer to less restrictive housing and supervision. Tex. Health & Safety Code Ann. § 841.0834 (Supp. 2015).

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > Presumptions An analysis of the constitutionality of a statute begins with a presumption of validity.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation The legislative findings for the sexually violent predator statute state that public safety and long-term treatment-not punishment-are the primary statutory goals of Chapter 841 of the Health and Safety Code. Tex. Health & Safety Code Ann. § 841.001 (2010). A court may reject the Legislature's manifest intent to create a civil statute only upon the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the intention to deem it civil. Factors that may be considered in determining the punitive effect of a statute include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. The primary objectives of criminal punishment, retribution, and deterrence are not implicated by a civil commitment statute that does not fix liability for prior criminal conduct. As amended in 2015, a person may no longer be deemed to be a repeat violent sexual offender after being found to be not guilty by reason of insanity. Tex. Health & Safety Code Ann. § 841.003 (Supp. 2015). Nevertheless, the commitment determination is made based upon a mental abnormality rather than one's criminal intent, and because the commitment is for sex offender treatment, the deterrent effect is incidental. Generally, a statute that applies to behavior that is already a crime is more likely to be considered to be punitive. Because the sexually violent predator statute (SVP) does not categorically apply only to convicted individuals, this factor does not weigh in favor of finding that Chapter 841 of the Health and Safety Code is punitive. Under the recent

amendments, the Legislature deleted the language referencing persons adjudged not guilty by reason of insanity. Tex. Health & Safety Code Ann. § 841.003(b). Although registration triggered by a conviction is indicative of a punitive intent, it is not especially crucial in ferreting out the true character of the sanction in question. Simply because the SVP statute now applies to those persons who have been convicted of more than one sexually violent offense, and no longer includes a person who is adjudged not guilty by reason of insanity, this factor alone is not sufficient to render the statute criminally punitive. The State's legitimate interest in providing sex offender treatment to a person whose emotional or mental disorder makes the person unable to control sexually violent behavior, along with the State's compelling need to protect the public from harm, are the overriding concerns of Chapter 841 of the Texas Health and Safety Code. Tex. Health & Safety Code Ann. § 841.001. The sexually violent predator statute is rationally connected to the goals of long-term supervision and treatment. These goals have not been supplanted or diminished under the 2015 amendments to Chapter 841 of the Texas Health & Safety Code. The 2015 amendments to Chapter 841 of the Texas Health & Safety Code continue to require a determination that a person currently has a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. Tex. Health & Safety Code Ann. § 841.003(a)(2). The person's inability to control behavior must be 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. The amendments enacted in SB 746 also limit the circumstances under which a person may be held criminally responsible for non-compliance with an order of civil commitment. Tex. Health & Safety Code Ann. § 841.085 (Supp. 2015). Therefore, the criminal penalties attached to a violation of a commitment requirement do not make the commitment scheme punitive. Taken together, the factors considered in determining whether the civil statute governing sexually violent predators, as amended in 2015, is punitive point to a conclusion that a commitment proceeding under Chapter 841 of the Texas Health and Safety Code, as amended in 2015, is a civil matter.

Governments > Legislation > Effect & Operation > Retrospective Operation

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Application Principles Tex. Const. art. I, § 16, prohibits bills of attainder, ex post facto laws, or any law impairing the obligations of contracts. Retroactivity challenges are, by definition, as-applied constitutional challenges. The 2015 amendments to the sexually violent predator statute permit movement to less restrictive housing based on the person's behavior or progress in treatment. Tex. Health & Safety Code Ann. § 841.0834.

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Application Principles

Governments > Legislation > Effect & Operation > Retrospective Operation The sexually violent predator civil commitment statute is remedial and not punitive, and Chapter 841 of the Texas Health & Safety Code does not violate the constitutional prohibition against retroactive laws as applied to a person who committed his sexual offenses before the statute's enactment.

Governments > Legislation > Effect & Operation > Retrospective Operation

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Application Principles In determining whether a statute violates the Texas Constitution's prohibition against retroactive laws, no bright-line test for unconstitutional retroactivity is possible. Rather, to determine whether a statute is unconstitutionally retroactive, courts must consider three factors in light of the prohibition's dual objectives: (1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment. The Legislature has determined 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 because the pre-existing treatment modalities for sexually violent predators were inadequate to address the risk of repeated predatory behavior that sexually violent predators pose to humanity. Tex. Health & Safety Code Ann. § 841.001. The public interest served by Chapter 841 includes: (1) the parens patriae power to provide care to its citizens who are unable because of emotional disorders to care for themselves; and (2) the police power to protect the community from the dangerous tendencies of some who lack volitional control over certain types of dangerous behaviors.

Governments > Legislation > Effect & Operation > Retrospective Operation

Constitutional Law > Separation of Powers The necessity and appropriateness of legislation are generally not matters the judiciary is able to assess. Changes in the law that merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive.

Governments > Legislation > Effect & Operation > Retrospective Operation

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Application Principles Chapter 841 of the Texas Health and Safety Code, as amended in 2015, governing sexually violent predators, does not violate the constitutional prohibition against retroactive laws. The enacting language of SB 746, governing sexually violent predators, requires notice and a hearing before the trial court modifies any civil commitment requirement to conform to the statutory amendments.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial In an initial sexually violent predator civil commitment proceeding, if a jury trial is requested a jury must determine if a person is a sexually violent predator; that is, whether the person suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Tex. Health & Safety Code Ann. §§ 841.061, 841.062 (2010), 841.002(2), 841.003(a) (Supp. 2015). The trial court imposes the requirements contained in the civil commitment order. Tex. Health & Safety Code Ann. § 841.082 (Supp. 2015). The jury does not determine the terms and requirements of the civil commitment order. The statute provides for notice and a hearing before the trial court modifies any civil commitment to conform it to the statutory amendments, and the jury would not be called upon to decide the conditions of a committed person's sex offender treatment in the first instance. Therefore, it is not a violation of due process to submit modifications to the judge rather than a jury. An appellate court reviews questions of

law de novo. The appellate court reviews the trial court's legal conclusions drawn from the facts to determine their correctness. Several procedural mechanisms exist to release a person from an order of civil commitment, but each requires a factual finding that the person's behavioral abnormality has changed to the extent that he is no longer likely to engage in a predatory act of sexual violence. Tex. Health & Safety Code Ann. §§ 841.102, 841.121, 841.124 (Supp. 2015). Opinion

Opinion by: LEANNE JOHNSON Opinion

{500 S.W.3d 517} The State of Texas appealed an order releasing Alonzo May from civil commitment as a sexually violent predator. We reverse the trial court and remand the case to the trial court for entry of an order of commitment that places May into a tiered program of supervision and treatment. We conclude that the statute authorizing the civil commitment of sexually violent predators, as amended in 2015, is neither unconstitutionally retroactive nor punitive, nor has there been a denial of May's due process rights. We further conclude that the trial court's findings of fact do not support the trial court's decision to release May from civil commitment under any applicable legal theory.

Background

In 2013, a jury unanimously found beyond a reasonable doubt that Alonzo May is a sexually violent predator. Consistent with the jury verdict, the trial court signed a final judgment wherein it "ORDERED, ADJUDGED AND DECREED that ALONZO MAY is a sexually violent predator . . . and is civilly committed as such in accordance with Texas Health & Safety Code § 841.081 for outpatient treatment and supervision . . ." See generally Act of May 30, 2003, 78th Leg., R.S., ch. 347, § 23, 2003 Tex. Gen. Laws 1505, 1516 {500 S.W.3d 518} (amended 2015, current version at Tex. Health & Safety Code Ann. § 841.081 (West Supp. 2015)). A separate order of commitment required May to reside in supervised housing at a Texas Residential facility under contract with the Office of Violent Sex Offender Management (OVSOM), ordered May to strictly comply with the commitment requirements of Section 841.082 of the Texas Health and Safety Code, and scheduled a biennial review for July 24, 2015. See Act of May 23, 2011, 82nd Leg., R.S., ch. 1201, § 8, 2011 Tex. Sess. Law. Serv. 3195, 3200 (amended 2015, current version at Tex. Health & Safety Code § 841.082 (West Supp. 2015)). The judgment and the order of civil commitment were affirmed on appeal. See *In re Commitment of May*, No. 09-13-00513-CV, 2014 Tex. App. LEXIS 13273, at *6 (Tex. App.-Beaumont Dec. 11, 2014, pet. denied) (mem. op.).

Effective June 17, 2015, Senate Bill 746 amended Chapter 841 of the Texas Health and Safety Code in several respects. See Act of May 21, 2015, 84th Leg., R.S., ch. 845, 2015 Tex. Sess. Law Serv. 2701, 2701-12. The Legislature created a new state agency, the Texas Civil Commitment Office (TCCO), with the responsibility for treatment and supervision of sexually violent predators.¹ Id. § 3 (current version at Tex. Health & Safety Code Ann. § 841.007 (West Supp. 2015)). The Legislature required the TCCO to develop a tiered program of supervision and treatment that provides a seamless transition from a total confinement facility to less restrictive housing and supervision and eventual release from civil commitment, based on the person's behavior and progress in treatment. Id. § 16 (current version at Tex. Health & Safety Code Ann. § 841.0831 (West Supp. 2015)). Under the statute as amended, the TCCO

transfers a committed person to less restrictive housing and supervision if the transfer is in the best interests of the person and conditions can be imposed that adequately protect the community, and a committed person may petition the court for a transfer to less restrictive housing and supervision. Id. (current version at Tex. Health & Safety Code § 841.0834 (West Supp. 2015)). The enacting language of SB 746 provides:

If a civil commitment requirement imposed under Chapter 841, Health and Safety Code, before the effective date of this Act differs from any of the civil commitment requirements listed in Section 841.082, Health and Safety Code, as amended by this Act, the applicable court with jurisdiction over the committed person shall, after notice and hearing, modify the requirement imposed as applicable to conform to that section. Id. § 40(b).

In July 2015, the TCCO notified May of the changes in the law. The State filed an opposed motion to place May in the tiered treatment program. After a hearing, the trial court ordered that May could not be placed in the tiered treatment program, finding:

1. ALONZO MAY was adjudicated a sexually violent predator ("SVP") by Agreed Final Judgment and civilly committed on July 24, 2013 by Agreed Order of Commitment.

{500 S.W.3d 519} 2. At the last Biennial Review for ALONZO MAY, Relator ALONZO MAY's behavioral abnormality, which causes him to engage in predatory acts of sexual violence, was still present.

3. The witness testimony and the evidence presented demonstrate that ALONZO MAY's behavior and progress in treatment will not benefit from placement in the Tiered Treatment Program.

4. The witness testimony and the evidence presented demonstrate that placement in the Tiered Treatment Program will not be in the best interest of ALONZO MAY and conditions can be imposed that adequately protect the community.

The State filed a motion for reconsideration. May filed a response raising several challenges to the 2015 amendments to Chapter 841 and to TCCO's implementation of the tiered treatment program.

On November 9, 2015, the elected judge in the 435th District Court signed a biennial review order that found "there is no evidence to suggest that sex offender treatment of ALONZO MAY has resulted in his behavioral abnormality having changed to the extent that ALONZO MAY is no longer likely to engage in a predatory act of sexual violence[.]"²

After a hearing, on December 14, 2015, a visiting judge sitting in the 435th District Court ordered May's release from the civil commitment imposed on him by the judgment and order of civil commitment. Findings of fact and conclusions of law signed in connection with the judgment included findings that:

1. On July 24, 2013 the trial court signed a Final Judgment as the result of a Montgomery County jury's verdict that Alonzo May was a sexually violent predator. Whereupon the trial court signed an Order of Commitment that Alonzo May was indefinitely committed for outpatient treatment and supervision.

2. Evidence submitted to the jury showed that Alonzo May had been convicted of several sex crimes, served out the punishments imposed, and released from criminal confinement.

3. On June 17, 2015 SB 746 amended Chapter 841 of the Texas Health and Safety Code, ending funding for outpatient treatment and requiring those in Alonzo May's circumstance to attend a "due process" hearing in advance of being committed to "tiered inpatient treatment".

4. Although called "due process" the only possible result that would provide any treatment was tiered inpatient treatment.

5. Alonzo May did not waive a hearing. At the conclusion of the September 09, 2015 hearing, the trial court denied the State's petition to transfer Alonzo May from outpatient to tiered inpatient treatment. The State then moved for reconsideration. After discovery by Alonzo May, the December 08, 2015 hearing was conducted.

6. Although not having been convicted of new sex crimes or for that matter any crimes, committed persons such as Alonzo May were to begin tiered inpatient treatment in total confinement for an indeterminate period, historically much longer than a definite prison sentence.

{500 S.W.3d 520} 7. The place of confinement, the Bill Clayton Detention Center or private prison at Littlefield, Texas has two chain link fences topped by concertina wire around its perimeter and all the characteristics of a Texas Department of Criminal Justice prison facility.

8. The confinement to which Alonzo May would be subjected if ordered into tiered inpatient treatment is substantively and substantially more oppressive than that required by the July 24, 2013 Order of Commitment.

9. There was no credible evidence presented that tiered inpatient treatment would provide better benefits to Alonzo May than outpatient treatment required by the July 24, 2013 Order of Commitment.

The trial court also included two conclusions of law: (1) "Texas Health and Safety Code Chapter 841 as amended by the 2015 Senate Bill 746 fails to meet Constitutional muster in that the requisite involuntary commitment of Alonzo May pursuant thereto is, retroactive, punitive and a denial of Alonzo May's due process rights under the both Texas and U.S. Constitutions[;]" and (2) "Therefore, Alonzo May shall be released from civil commitment forthwith." The State appealed the trial court's final judgment.

In two issues, the State: (1) challenges the trial court's finding that "Chapter 841 as amended by the 2015 Senate Bill 746 fails to meet [c]onstitutional muster in that the requisite involuntary commitment of Alonzo May pursuant thereto is" either (A) "retroactive" or (B) "punitive and a denial of . . . May's due process rights under the . . . Texas and U.S. Constitutions[;]" and (2) argues the trial court's findings of fact do not support releasing May from civil commitment under any legal theory.

Constitutionality of the Statute

May has been judicially determined to be a sexually violent predator, and no court or jury has determined that May's behavioral abnormality has changed to the extent that he is no longer likely to engage in a predatory act of sexual violence. Although May has a condition that makes him a menace to the health and safety of others, the trial court ordered May released from civil commitment because the trial court concluded that retaining May in civil commitment under the tiered program would violate May's rights under the Texas and U.S. Constitutions.

We have previously upheld the constitutionality of Chapter 841 of the Texas Health and Safety Code as it was originally enacted. *Beasley v. Molett*, 95 S.W.3d 590, 596-97 (Tex. App.-Beaumont 2002, pet. denied). Additionally, in 2005, the Texas Supreme Court reversed a lower court's holding that Chapter 841 is unconstitutionally punitive and held that Chapter 841 is a civil statute. See *In re Commitment of Fisher*, 164 S.W.3d 637, 656 (Tex. 2005). The findings of fact and conclusions of law that have been signed in May's case indicate that the trial court ruled that, as amended in 2015, Chapter 841 of the Texas Health and Safety Code is unconstitutionally retroactive, punitive, and denies due process because: (1) what previously was outpatient treatment when the Texas Supreme Court decided *Fisher* became inpatient treatment in the tiered program created in 2015; and (2) at the time of the hearing on the State's motion to modify May's commitment order, the TCCO's sole treatment facility was located in a former juvenile detention center.

a. Punitive Effect of Statute

"An analysis of the constitutionality of a statute begins with a presumption of validity." *Id.* at 645. The legislative {500 S.W.3d 521} findings for the SVP statute state that public safety and long-term treatment-not punishment-are the primary statutory goals of Chapter 841 of the Health and Safety Code. See Tex. Health & Safety Code Ann. § 841.001 (West 2010). A court may reject the Legislature's manifest intent to create a civil statute only upon the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the intention to deem it civil. *Id.* at 647 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)). Factors that may be considered in determining the punitive effect of a statute include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). We address these factors in light of the Texas Supreme Court's decision in *Fisher* and consider the effect, if any, the subsequent amendments to the statute had on the previous analyses in *Fisher* and the application of other binding precedent.

1. Affirmative disability or restraint. In *Fisher*, the Texas Supreme Court acknowledged that the SVP statute imposes affirmative disabilities on civilly committed persons, such as requiring the person to reside at a particular location, to remain within the State of Texas, and wear satellite monitoring equipment. 164 S.W.3d at 648. The Texas Supreme Court noted that the Texas civil commitment statute

imposed affirmative disabilities and restraints that were "certainly no greater than the inpatient commitment held to be civil in *Hendricks*[,] and the Court held that this factor alone does not compel a conclusion that the statute is punitive. *Id.* (citing *Hendricks*, 521 U.S. at 363). As originally enacted, Chapter 841 authorized the trial court to impose on a civilly committed person requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community; the statute was amended in 2003 to allow a trial court to modify requirements for civilly committed persons, and in 2005 and 2011, to require the trial court to order a civilly committed person to reside in a Texas residential facility under contract with the TCCO's predecessor agencies, the Council on Sex Offender Treatment and OVSOM. See *In re Commitment of Cortez*, 405 S.W.3d 929, 935-36 (Tex. App.-Beaumont 2013, no pet.).

This Court has previously considered and rejected a committed person's argument that the SVP statute was unconstitutional as applied to him because he had not received outpatient treatment, was required to wear a leg monitor, and required to live at a camera-monitored transitional facility, enclosed by a fence topped with barbed wire, where he was required to remain unless given permission to leave. See *In re Commitment of Dodson*, 434 S.W.3d 742, 745 (Tex. App.-Beaumont 2014, pet. denied). We held the statute was not unconstitutionally punitive. *Id.* at 747. We rejected Dodson's argument that the commitment was punitive because it was indefinite, noting that the SVP statute provides a biennial review of status as well as the right to file an unauthorized petition for release. *Id.* at 746.

In the case now before us, the trial court found the tiered inpatient treatment would {500 S.W.3d 522} be more oppressive than May's former outpatient treatment. Nevertheless, outpatient treatment as it existed in 2012 when May was first civilly committed required May to wear a GPS leg monitor and live in a transitional facility enclosed by barbed wire. See *id.* The trial court found that the place of confinement has chain link fencing with concertina wire and characteristics of a prison facility, and that the inpatient treatment is substantively and substantially more oppressive than that required by the July 24, 2013 Order of Commitment. Even assuming such facts to be true, those findings would not compel or support a conclusion that the statute is punitive. See *Fisher*, 164 S.W.3d at 648, 653; *Dodson*, 434 S.W.3d at 747.

2. Historically not regarded as punishment. Historically, civil commitment of sexually violent predators has not been viewed as punishment. *Fisher*, 164 S.W.3d at 648 (citing *Hendricks*, 521 U.S. at 363). In this case, the trial court found that the tiered inpatient treatment confinement period was "historically much longer than a definite prison sentence[,] but we rejected the same argument based on indefinite commitment in *Dodson*. 434 S.W.3d at 746-47. Like *Dodson*, May can obtain his release from the restrictions placed on him if his behavioral abnormality changes to the extent he is no longer likely to engage in a predatory act of sexual violence. See *id.* Furthermore, the tiered supervision and treatment program implemented under the 2015 amendment to the SVP statute includes the possible transition to less restrictive housing and eventually to release from civil commitment entirely, based upon the person's behavior and progress in treatment. See Tex. Health & Safety Code Ann. § 841.0831 (West Supp. 2015). This factor weighs against finding a punitive effect.

3. Finding of scienter. In *Fisher*, the Texas Supreme Court held that Chapter 841 of the Texas Health and Safety Code lacks the scienter requirement typically found in criminal statutes. 164 S.W.3d at 649. Similarly, in *Beasley* this Court held that commitment under the SVP statute involves no finding of scienter. 95 S.W.3d at 607. Additionally, we previously rejected an argument that the SVP statute allows a jury to retrospectively determine whether a crime was sexually motivated in an appeal by a person who was civilly committed after his release from prison for committing burglary with intent to commit rape. See *In re Commitment of Miller*, 262 S.W.3d 877, 884-86 (Tex. App.-Beaumont 2008, pet. denied). This factor weighs against finding a punitive effect.

4. Traditional aims of punishment. In *Hendricks*, the Supreme Court recognized that the primary objectives of criminal punishment, retribution and deterrence were not implicated by a civil commitment statute that does not fix liability for prior criminal conduct. 521 U.S. at 361-62. As amended in 2015, a person may no longer be deemed to be a repeat violent sexual offender after being found to be not guilty by reason of insanity. See Tex. Health & Safety Code Ann. § 841.003 (West Supp. 2015). Nevertheless, the commitment determination is made based upon a mental abnormality rather than one's criminal intent, and because the commitment is for sex offender treatment, the deterrent effect is incidental. *Fisher*, 164 S.W.3d at 649-50. We conclude this factor also does not compel a conclusion that the statute is punitive.

5. Criminality of behavior. Generally, "a statute that applies to behavior that is already a crime is more likely to be considered to be punitive." *Id.* at 650. *Fisher* noted that because the SVP statute did not categorically apply only to convicted individuals, {500 S.W.3d 523} this factor did not weigh in favor of finding that Chapter 841 of the Health and Safety Code is punitive. *Id.* at 650-51 ("In this case, the Act defines 'repeat sexually violent offender' to include both individuals convicted of sexually violent offenses and those adjudged not guilty by reason of insanity. [citation omitted] Because the Act does not categorically apply only to convicted individuals, this factor does not weigh in favor of finding that the Act is punitive.") Under the recent amendments, the Legislature deleted the language referencing persons adjudged not guilty by reason of insanity. See Tex. Health & Safety Code Ann. § 841.003(b). In its discussion on this factor, *Fisher* cited to a criminal case concerning a sex offender registration statute. 164 S.W.3d at 650 (citing *Rodriguez v. State*, 93 S.W.3d 60, 74 (Tex. Crim. App. 2002)). In *Rodriguez*, the Court of Criminal Appeals noted that although registration triggered by a conviction is "indicative of a punitive intent, it is not especially crucial in ferreting out the true character of the sanction in question." 93 S.W.3d at 74. Simply because the SVP statute now applies to those persons who have been convicted of more than one sexually violent offense, and no longer includes a person who is adjudged not guilty by reason of insanity, this factor alone is not sufficient to render the statute criminally punitive. See *id.*

6. Alternative purpose. *Fisher* held the State's legitimate interest in providing sex offender treatment to a person whose emotional or mental disorder makes the person unable to control sexually violent behavior, along with the State's compelling need to protect the public from harm, are the overriding concerns of Chapter 841 of the Texas Health and Safety Code. 164 S.W.3d at 651; see Tex. Health & Safety Code Ann. § 841.001. *Fisher* determined that the SVP statute is rationally connected to the goals of long-term supervision and treatment. 164 S.W.3d at 651. We conclude that these goals have not been

supplanted or diminished under the 2015 amendments to Chapter 841 of the Texas Health & Safety Code. This factor weighs against finding a punitive effect.

7. Excessiveness. Fisher reasoned that the Texas SVP statute was notably different from the Kansas statute at issue in *Hendricks* because the Texas statute made the violation of a civil commitment order a third degree felony. 164 S.W.3d at 652-53. The 2015 amendments to Chapter 841 continue to require a determination that a person currently has a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. Tex. Health & Safety Code Ann. § 841.003(a)(2). The person's inability to control behavior "must be 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, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). The amendments enacted in SB 746 also limit the circumstances under which a person may be held criminally responsible for non-compliance with an order of civil commitment. Tex. Health & Safety Code § 841.085 (West Supp. 2015). Therefore, we conclude that the criminal penalties attached to a violation of a commitment requirement do not make the commitment scheme punitive.

The trial court found that the tiered treatment program was substantively more oppressive than the outpatient treatment ordered in May's initial civil commitment, but the 2013 civil commitment order required May to live in supervised housing at an OVSOM-contracted Texas residential facility, submit to tracking under a global positioning satellite, and participate in sex {500 S.W.3d 524} offender treatment. Furthermore, the statute upheld in *Hendricks* provided that civilly committed sexually violent predators would be housed in a prison unit segregated from the general prison population. 521 U.S. at 368.3 Therefore, use of a former prison to house sexually violent predators, or requiring inpatient treatment in a facility with such characteristics would not weigh heavily in favor of a finding that it is punitive.

May has wholly failed to provide "the clearest proof" that the statute's effects are punitive. Rather, as in *Fisher*, taken together, the factors considered in determining whether this civil statute, as amended, is punitive point to a conclusion that a commitment proceeding under Chapter 841 of the Texas Health and Safety Code, as amended in 2015, is a civil matter.

b. Retroactivity

In response to the State's motion to reconsider the trial court's order denying the State's motion to place May into the tiered treatment program, May argued that the civil commitment judgment ordering outpatient treatment was a contract between May and the State giving him a vested right to outpatient treatment, and granting the motion would violate Article I, Section 16 of the Texas Constitution, which prohibits bills of attainder, ex post facto laws, or any law impairing the obligations of contracts. "[R]etroactivity challenges are, by definition, as-applied constitutional challenges." *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 710 (Tex. 2014).

May argued at the hearing before the trial court that the 2015 amendments to the SVP statute altered the 2013 judgment that ordered him to submit to outpatient treatment because he will be required to reside in a prison indefinitely. The 2015 amendments to the SVP statute permit movement to less

restrictive housing based on the person's behavior or progress in treatment. See Tex. Health & Safety Code Ann. § 841.0834. Furthermore, from our review of the record, it is evident that the 2013 judgment and order of civil commitment permitted the treating agency to house May in the facility in question and provide sex offender treatment to him until it is judicially determined that his behavioral abnormality has changed to the extent that May is no longer likely to engage in a predatory act of sexual violence.

When the trial court committed May for outpatient treatment and supervision in 2013, it ordered May to "reside in supervised housing at a Texas residential facility under contract with [OVSOM] or at another [location] or facility approved by [OVSOM,]" and ordered May to "exactly participate in and comply with a specific course of treatment provided by [OVSOM.]" Janet Latham, a TCCO grant specialist who helped design the tiered program, testified that since 2005, all of the civilly committed persons have resided in halfway houses. Before September 1, 2015, the Texas population of civilly committed sexually violent predators were housed in six facilities. Latham testified that the new facility in Littlefield had security and locked doors that restricted the residents' movements, but the residents move throughout the facility to attend treatment, work, and recreation during the day. May had not yet been evaluated for placement in the tiered program and it had not been determined what tier he would be in, but according to Latham, persons who {500 S.W.3d 525} transitioned into the tiered program would not have to start over and would not be placed in tier one. The Texas Commitment Center in Littlefield was designed to be as inclusive as possible so that everything that the residents need or may be entitled to receive is available at Littlefield. Amy Goldstein, the clinical director at the Texas Civil Commitment Center in Littlefield, testified that the tiered program included sex offender treatment personalized for the resident based on offending patterns and behaviors, therapeutic study hall, dorm meetings, substance abuse education, anger management, life skills, and cognitive behavioral treatment. The tiered program is designed for a person to progress through each of four tiers in twelve to eighteen months. According to Goldstein, a person's sexual offense history does not impact the tier in which the person is placed, but the respective tier in which the person is placed relates to the sex offender treatment the person has previously completed.

We have previously held that the SVP statute is remedial and not punitive, and Chapter 841 does not violate the constitutional prohibition against retroactive laws as applied to a person who committed his sexual offenses before the statute's enactment. In re Commitment of Mailhot, No. 09-13-00270-CV, 2015 Tex. App. LEXIS 332, at **5-6 (Tex. App.-Beaumont Jan. 15, 2015, pet. denied) (mem. op.); Dodson, 434 S.W.3d at 747-48. May's retroactivity challenge to the statute differs in one respect to the challenges presented in Mailhot and Dodson because May has not challenged his commitment but has challenged the modification of the sex offender treatment program from an "outpatient" to an "inpatient" modality. Nevertheless, May's case bears some similarity to Cortez. 405 S.W.3d at 934. In a due process challenge that arose when the Legislature changed the treating agency and created OVSOM, Cortez argued the trial court deprived him of a liberty interest by changing the treatment provider, and he argued that he had a vested interest in the outpatient commitment requirements contained in his original commitment order. Id. at 934-35. Noting that Section 841.082 of the Texas Health and Safety Code required that the trial court order a civilly committed person to reside in a Texas

residential facility under contract with OVSOM and allowed the trial court to modify the commitment order at any time after notice and a hearing, we reasoned that Cortez lost his right to control the location of his residence when he was committed, and we held that the trial court could order Cortez to reside in an OVSOM-approved facility notwithstanding the original order committing Cortez to "outpatient" sex offender treatment. *Id.* at 934-36.

In determining whether a statute violates the Texas Constitution's prohibition against retroactive laws, "[n]o bright-line test for unconstitutional retroactivity is possible." *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145 (Tex. 2010). Rather, to determine whether a statute is unconstitutionally retroactive, courts must consider three factors in light of the prohibition's dual objectives: (1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment. *Id.* The Legislature has determined 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 because the pre-existing treatment modalities for sexually violent predators were inadequate to address the risk of repeated predatory behavior that sexually violent predators pose to humanity. See {500 S.W.3d 526} Tex. Health & Safety Code Ann. § 841.001. The public interest served by Chapter 841 includes: "(1) the *parens patriae* power to provide care to its citizens who are unable because of emotional disorders to care for themselves; and (2) the police power to protect the community from the dangerous tendencies of some who lack volitional control over certain types of dangerous behaviors." *In re Commitment of Rushing*, No. 09-11-00268-CV, 2012 Tex. App. LEXIS 8140, at **5-6 (Tex. App.-Beaumont Sept. 27, 2012, no pet.) (mem. op.).

May argued at the hearing that he had a right to outpatient care and that such right was impaired by the 2015 amendments to Chapter 841. As we previously reasoned in *Cortez*, May lost his right to control the location of his residence when he was committed. 405 S.W.3d at 934-36. May argues the use of an outpatient modality under the previous version of the statute demonstrates that inpatient sex offender treatment is unnecessary, "[b]ut the necessity and appropriateness of legislation are generally not matters the judiciary is able to assess." *Robinson*, 335 S.W.3d at 146. Changes in the law that merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive. *Id.* When May was civilly committed in 2013, the Legislature provided that settled expectations included having the treating agency determine where May would reside and the sex offender treatment he would receive. The State's need to operate a sex offender treatment program for sexually violent offenders who have discharged their criminal sentences justifies requiring a person to receive sex offender treatment at the general location where he resides, as determined by the TCCO, which by statute now includes a tiered program with "inpatient" as opposed to "outpatient" treatment. We conclude that Chapter 841, as amended in 2015, does not violate the constitutional prohibition against retroactive laws.

Due Process

The enacting language of SB 746 requires notice and a hearing before the trial court modifies any civil commitment requirement to conform to the statutory amendments. See 2015 Tex. Sess. Law Serv. at

2711. May contends his due process challenge is not to the constitutionality of inpatient treatment in itself, but to modifying the existing order without re-initiating the process for an initial civil commitment. In an initial civil commitment proceeding, if a jury trial is requested a jury must determine if a person is a sexually violent predator; that is, whether the person suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. See Tex. Health & Safety Code Ann. §§ 841.061 (West Supp. 2015), 841.062 (West 2010); see also id. §§ 841.002(2), 841.003(a) (West Supp. 2015). The trial court imposes the requirements contained in the civil commitment order. See id. § 841.082 (West Supp. 2015). The jury does not determine the terms and requirements of the civil commitment order. See id. The statute provides for notice and a hearing before the trial court modifies any civil commitment to conform it to the statutory amendments, and the jury would not be called upon to decide the conditions of May's sex offender treatment in the first instance. Therefore, we conclude that it is not a violation of due process to submit modifications to the judge rather than a jury.

May also suggests that due process requires that before the trial court modifies a civil commitment order a person must be provided the right to counsel, the right for time to prepare discovery and defenses, {500 S.W.3d 527} and a right to appeal. We need not determine whether due process requires these protections because May was represented by counsel in the hearing on the State's motion to reconsider and the trial court granted May additional discovery before the hearing.⁴

Review of the Trial Court's Conclusions of Law

An appellate court reviews questions of law de novo. *City of Austin v. Whittington*, 384 S.W.3d 766, 788 (Tex. 2012). We review the trial court's legal conclusions drawn from the facts to determine their correctness. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The trial court concluded that the civil commitment of May under the amended SVP statute was retroactive, punitive and a denial of May's due process rights. The trial court's conclusion that May is entitled to release from civil commitment depended on the validity of the trial court's conclusions regarding the constitutionality of Chapter 841 of the Health and Safety Code. We have concluded that the trial court's conclusions regarding the constitutionality of the statute were incorrect.

Several procedural mechanisms exist to release a person from an order of civil commitment, but each requires a factual finding that the person's behavioral abnormality has changed to the extent that he is no longer likely to engage in a predatory act of sexual violence. See Tex. Health & Safety Code Ann. §§ 841.102, 841.121, 841.124 (West Supp. 2015). In the biennial review of May's commitment, the trial court found that a behavioral abnormality was still present which causes May to be likely to engage in predatory acts of sexual violence. The trial court made no contrary finding at any subsequent hearing, and that finding has not been challenged in this appeal. Therefore, the trial court also abused its discretion by ordering May's release from the judgment and order of civil commitment in the absence of a proper fact-finder's determination that May's behavioral abnormality has changed to the extent that he is no longer likely to engage in a predatory act of sexual violence. See id.

Conclusion

We reverse the trial court's order of September 9, 2015, which denied the State's motion to place May in the tiered treatment program, and we reverse the trial court's judgment signed December 14, 2015, which ordered May's release from civil commitment. We remand the case to the trial court for entry of an order modifying the civil commitment order, and committing May to the tiered sex offender treatment program provided by the Texas Civil Commitment Office. See Tex. Health & Safety Code Ann. § 841.082(a)(3).

REVERSED AND REMANDED.

LEANNE JOHNSON

Justice

Submitted on July 12, 2016

Opinion Delivered July 28, 2016Footnotes

1

See Tex. Gov't Code Ann. § 420A.002 (West Supp. 2015). Throughout this opinion we refer to the Texas Civil Commitment Office by its acronym, "TCCO." We refer to its predecessor agency, the Office of Violent Sex Offender Management, as "OVSOM." In some places in this opinion, we refer to Chapter 841 of the Texas Health and Safety Code as "the SVP statute."

2

The elected judge conducted the biennial review, while a visiting judge conducted the hearings and made the rulings that are at issue in this appeal.

3

The statute in *Hendricks* also provided for "'secure'" confinement and "'incarceration against one's will.'" *Kansas v. Hendricks*, 521 U.S. 346, 379, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

4

Furthermore, even assuming without deciding that May was entitled to such rights in this civil proceeding, the appropriate relief for such a violation logically would be a new hearing in which due process was provided, not release from civil commitment as ordered by the trial court. See, e.g., *McIntire v. State*, 698 S.W.2d 652, 662 (Tex. Crim. App. 1985) (appropriate relief for a due process denial of a hearing on a motion for new trial alleging jury misconduct was a remand to determine if a new trial hearing was feasible three years after jury trial).500 S.W.3d 509::*Brown v. RK Hall Constr., Ltd.*::July 5, 2016