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Supreme Court of Texas.
In re The Commitment of Michael Bohannon.
No. 10-0605.

November 8, 2011.

Appearances:

Catherine Palmore of the Special Prosecution Unit, for Petitioner.

Kenneth Nash of the State Counsel for Offenders, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Court is ready to hear argument in 10-0605 In re The Commitment of Michael Bohannon.

MARSHAL: May it please the Court, Miss Palmore will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF CATHERINE PALMORE ON BEHALF OF THE PETITIONER

ATTORNEY CATHERINE PALMORE: May it please the Court, the Ninth Court of Appeals erred in this case because it did not follow the proper standard of review. Had the Ninth Court of Appeals properly applied the abusive discretion review in reviewing the trial court's decision, it should have affirmed the trial court's decision to exclude Dr. Shursen's testimony in the case below. The proper standard of review in these types of cases for exclusion of expert testimony is abusive discretion. If there is no abusive discretion, the decision of the trial court should not be disturbed. A trial court abuses its discretion when it acts without reference to guiding principles of law and that did not occur in this case. Moreover, a reviewing court must uphold a trial court's evidentiary ruling if there's any legitimate purpose for that ruling in the record. Rather than looking for a legitimate purpose to support the trial court's ruling in this case, the appellate court seemed to have gone out of its way to find that the trial court abused its discretion. For instance, there's a discussion in the appellate court's decision-- and I'm going to reference both Dodson and in Bohannon because they both were ruled on at the same time and Bohannon references the Dodson opinion quite a bit and in those opinions, the court talks about how Dr. Shursen is qualified to talk about the risk of recidivism of the defendant in that case; but the problem is, that's not what Dr. Shursen was designated to testify about. She was designated to testify about whether he had a behavioral abnormality that made it likely for him to engage in a predatory act of sexual violence. What the court did

was ignore that designation. That's going outside, that's not finding a legitimate purpose to uphold the trial court's ruling.

JUSTICE DEBRA H. LEHRMANN: Are you arguing that a medical degree would always be required?

ATTORNEY CATHERINE PALMORE: Or a psychology degree. Some sort of psychological or psychiatric training to do these types of evaluations.

JUSTICE DEBRA H. LEHRMANN: Isn't that really a matter of weight rather than admissibility if a foundation is laid that indicates that there is reliability with regards to the qualifications and the knowledge that that expert possesses?

ATTORNEY CATHERINE PALMORE: Well, in the *Beasley v. Molett* case, which is a seminal Ninth Court of Appeals decision in these types of civil commitment cases, the Ninth Court of Appeals in reviewing the statute, reviewing the Texas Constitution found that the statute, the Legislature intended for there to be competent medical testimony to support a commitment. So using that, when you have that kind of ruling on the books already saying that we have to have competent medical testimony to support this kind of ruling, then that should apply to both sides. It should apply not only to the State, but to the defense as well.

JUSTICE DEBRA H. LEHRMANN: And you're saying medical and/or?

ATTORNEY CATHERINE PALMORE: And psychological.

JUSTICE DEBRA H. LEHRMANN: Psychological.

ATTORNEY CATHERINE PALMORE: Right. Because -and it makes sense- because these are inquiries about mental health issues. These inquiries about civil commitment, whether somebody has a behavioral abnormality that makes them likely to engage in a predatory act of sexual violence is an inquiry about that person's mental health and so it makes sense that it should be somebody who has expertise and training and education in the mental health arena like a psychologist or a psychiatrist and *Beasley v. Molett* found that the State had to prove its case with competent medical testimony and it should apply to both the defendant and the state, that that standard should apply for both sides. But even if that's not, even if this Court disagrees with that, if you look at the specific qualifications of Dr. Shursen, Dr. Shursen doesn't have the training necessary to conduct psychological evaluations. She has training on psychological testing, actuarials, but these evaluations go way beyond just that kind of psychological testing. It goes to a psychological evaluation. And then --

JUSTICE NATHAN L. HECHT: I was unclear about the record. Did the trial court appoint her as a consulting expert or something?

ATTORNEY CATHERINE PALMORE: I think in -- I noticed that the Ninth stated that, I think under the statute, technically, that's the formality. The court appoints it, but he didn't actually appoint her. They retained their own experts and the court has to approve of the retain because he has to approve of the expenditure.

JUSTICE NATHAN L. HECHT: Well, this is at the request of the defense. This was not an independent appointment by the trial court?

ATTORNEY CATHERINE PALMORE: No. This was retained by the State Counsel for Offenders on behalf of Mr. Bohannon. And Dr. Shursen had the or the State Counsel for Offenders and Mr. Bohannon in this case had the burden to prove that Dr. Shursen met the qualifications to testify in this case and that's axiomatic in expert testimony that the offering party has to be the one to meet the burden to prove that that person is qualified--

JUSTICE DON R. WILLET: What are we to make of 841.061, which talks about how medical or psychiatric

expert testimony is not required for civil commitment of a sexually violent predator? What do we do with that?

ATTORNEY CATHERINE PALMORE: Well, and that's --that Section 841.1461 actually doesn't say that medical or psychiatric testimony is not required. What it says, is that proof of unsound mind is not required in these cases. And that's something that we've known since, well since this and since Fisher, when you guys decided Fisher. We don't have to prove that the person who suffers from a behavioral abnormality is also a person of unsound mind. You don't have to prove that. When you have a behavioral abnormality, that does not mean that you are for purposes of the law a person of unsound mind. So the state does not have to offer testimony about that kind of incapacity in these types of cases. And I think that's what 841.1461 is referencing. It doesn't say anything about that we have to have, that we don't have to have psychiatric or psychological testimony, we do under *Beasley v. Molett* we have to have that kind of testimony. But again Dr. Shursen -- they had the burden to prove that Dr. Shursen had that kind of training, that she had the training requisite to offer an opinion in this case. And the trial court, as a gatekeeper, have the duty to decide if they met that burden. In fact, this Court in *Gammill v. Jack Williams Chevrolet* stated that, trial courts must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion. And Dr. --

JUSTICE NATHAN L. HECHT: So if the trial court then admitted this testimony, you'd be okay with that?

ATTORNEY CATHERINE PALMORE: Had they admitted the testimony?

JUSTICE NATHAN L. HECHT: If the trial court had admitted it, you'd be okay with that.

ATTORNEY CATHERINE PALMORE: No, I think the trial court was proper in--

JUSTICE NATHAN L. HECHT: But if the trial-- you say it's discretionary.

ATTORNEY CATHERINE PALMORE: Right.

JUSTICE NATHAN L. HECHT: So if the trial court had admitted it, that would be all right?

ATTORNEY CATHERINE PALMORE: Well, I would have to live with that. Yes, Your Honor. But I think that under an abuse of discretion standard, his decision should be given deference because he was the one sitting on the bench evaluating the testimony and knows these cases. He hears these every month. He hears them --

JUSTICE NATHAN L. HECHT: But, one court it comes in, - and one court it stays out.

ATTORNEY CATHERINE PALMORE: I'm sorry?

JUSTICE NATHAN L. HECHT: So one court it comes in, another court it stays out?

ATTORNEY CATHERINE PALMORE: Well, I think, I think there's got to be a standard. And I think that's what the case law that we follow when we talk about expert evaluations, the rules of evidence and the case law that we follow helps to provide that standard and that's what Judge Sieler, that's what the trial court in this case followed was the rules, the guiding rules and principles that were in effect at the time his decision was made and the *Dodson* opinion and the *Bohannon* opinion obviously were not part of the body of law when he made his decision in this case. And this Court has said that, if you are offering an expert you have to prove, the trial court has to ensure that that person actually has expertise in the actual area about which they're offering an opinion and she was there to offer an opinion about behavioral abnormality. We know that because of her designation in the clerk's record. We know that because of the testimony that she gave on offer of proof was about whether or not Mr. Bohannon had a behavioral abnormality that made him likely to engage in a predatory act of sexual violence.

CHIEF JUSTICE WALLACE B. JEFFERSON: These experts' opinions, there's a lot of discussion in [inaudible] and Robinson and other cases about the peer review, you looking at the literature, make a determination of whether the expert is qualified and there are other cases on our docket, petitions that are filled here in which an expert, I don't think it was this one, said, I don't even see in the literature this phrase behavioral abnormality as a recognized mental health disease or condition. And so my testimony is based not so much on the literature, but on my experience dealing with patients that have mental illnesses. Now if you're, if we adopt your position and get highly technical on the admissibility of expert testimony, why would the admission of any testimony on, on a condition that is not recognized in the literature be permitted? In other words, you know where is the basis for the commitment to begin with?

ATTORNEY CATHERINE PALMORE: Well, there's no diagnosis say for insanity or competency, but those are legal terms that were created by the Legislature to create a standard by which people have to comply in order to, you have to be competent to stand trial. If you're insane, you there are certain, you're pardoned in a sense from criminal activity that you engaged in so we have these kinds of legal terms that are really psychological concepts, but they're given a legal term. There is no term insanity in the DSM. There's no term competency in the DSM. There's no term behavioral abnormality in the DSM, but they're all the same idea in that they require a psychological evaluation. They require psychological expertise, psychological training, education, to say this is what I see in this person and I'm taking, I'm making a bridge from the psychological clinical knowledge that I have to the legal term that's been given to me from the Texas Legislature. So the ideas that support behavioral abnormality, is there something, is there a condition, is there something wrong with this person that makes him likely to engage in a predatory act of sexual violence? That's what these people are trained to do, that's what these people are trained, these professionals, these experts are trained to evaluate and then offer an opinion on that specific topic.

CHIEF JUSTICE WALLACE B. JEFFERSON: But why wouldn't someone who's trained as a sex offender treatment provider and licensed by the State in that capacity not qualify?

ATTORNEY CATHERINE PALMORE: Well, because the if you look at the Preamble, the very first section of the statute, listed under the Legislative Findings, it says that, we are dealing by the very nature of being under this statute, we're dealing with a subgroup of very dangerous people who are not amenable to traditional treatment modalities. So why would we have somebody who is a part of that traditional treatment world assessing somebody who the legislature has deemed to be outside of that traditional treatment modality? This person doesn't have the training necessary to treat that kind of person. So she doesn't have the training necessary to evaluate that type of person, and if you look at the evidence that they submitted in their Daubert hearing, none of it rises to the level that would give her the type of qualification necessary to offer an opinion in this case. Her CV was admitted, which shows that she has a degree in geology, which is not relevant, a master's in counseling, which is not relevant, a Ph.D. in Family Sciences, which is not relevant. She admitted her trial to her education transcripts, the majority of courses and her master's degree, she took 18 courses, 11 of those courses had the word treatment in the title and none of them, there's only one that talks about assessment in the title of the course and that's Assessment in the Treatment Arena.

JUSTICE EVA M. GUZMAN: Is she a licensed though in the sex, in the treatment of sex offenders?

ATTORNEY CATHERINE PALMORE: She is, she's a licensed sex offender treatment provider.

JUSTICE EVA M. GUZMAN: And because 841 and 702 don't specify, why couldn't the Court look at her experience treating, actually treating sex offenders?

ATTORNEY CATHERINE PALMORE: Well, because again, sex offender, the types of sex offenders that she's treating or if you look at the purpose of the statute is to, we've set apart this type of sex offender as highly dangerous, someone who's not amenable to that type of treatment, that kind of treatment that she has training to give.

JUSTICE EVA M. GUZMAN: So from all of that treatment would she not be able to identify those, that although they entered the treatment simply would not respond to the treatment because they are in a separate category. Wouldn't that, after all those years of doing that qualify you to be able to make that decision?

ATTORNEY CATHERINE PALMORE: Possibly, but she doesn't, but that's not the question that's she's being offered to establish in this case. She's being offered to give an opinion as to whether he has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. And that's not just well, he probably won't respond to this kind of treatment or he will respond to this kind of treatment. That that's not a question that's before the jury. It's not a question that she was even asked to evaluate based on her, we know that based on her designation and her testimony that she gave on offer of proof.

JUSTICE DON R. WILLETT: Well, Chapter -- I'm sorry. Well, Chapter 841, it doesn't enumerate specific qualifications that they have to have.

ATTORNEY CATHERINE PALMORE: Right.

JUSTICE DON R. WILLETT: So why shouldn't we assume that lawmakers were just satisfied with the sort of general guidance given in Rule 702, which talks very generically about knowledge, skill, experience, it mentions education, but also just training and experience. Why can't we assume that lawmakers were happy for that to inform questions of admissibility and not give the requirement of specific--

ATTORNEY CATHERINE PALMORE: I think, and I think that the word that's used in Chapter 841 is consistently expert, expert, expert. So I think looking to 702 is wise. But I think under a 702 evaluation, even under that kind of evaluation, Dr. Shursen isn't qualified because she is not, you have, to under 702, your testimony has to assist the trier of fact. Dr. Shursen's experience in treatment with people who are amenable to the traditional treatment modality is not going to have any bearing on the jury's decision on whether this person has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.

JUSTICE DEBRA H. LEHRMANN: Didn't the record indicate that she had over 1,000 hours of clinical training in the areas of assessment and treatment of sex offenders? And that she described that she had provided behavioral therapy treatment to juvenile and adult sex offenders as a licensed sex offender treatment provider since 2000?

ATTORNEY CATHERINE PALMORE: Yes.

JUSTICE DEBRA H. LEHRMANN: So what's that?

ATTORNEY CATHERINE PALMORE: But under, you have to look at the, it's 1,000 hours of assessment and treatment of sex offenders. And then under her license, professional counselor license, it also requires hours of counseling experience. So we're dealing with different beasts. I mean we're talking about psychological evaluation on whether somebody has -- I see I'm out of time. May I finish answering the question?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may finish.

ATTORNEY CATHERINE PALMORE: I'm sorry. So if you, if you look at that, you have to look at, I think assessment, the word assessment is misleading in that sense because she was given 1,000 hours of additional training in assessment and treatment and it was all while she was getting her LSOTP license and it was under the guidance and tutelage of a licensed sex offender treatment provider, not a psychologist, not a psychiatrist not somebody who has this expertise in evaluating these very dangerous types that the statute is meant to address.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is now ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Nash will present argument for the Respondent.

ORAL ARGUMENT OF KENNETH NASH ON BEHALF OF THE RESPONDENT

ATTORNEY KENNETH NASH: Mr. Chief Justice and may it please the Court, as I perceive it, the issue confronting this Court is did the Court of Appeals err in reversing the trial judge's order excluding Dr. Shursen's expert witness testimony proposed by the Respondents. The Court of Appeals, as the respondent maintains correctly, found that her testimony was relevant to an issue, the relevancy, of course would be did Michael Bohannon suffer from a behavioral abnormality that would predispose him to commit a future sexually violent predatory act? And two, was it based on a reliable foundation? Now--

JUSTICE DEBRA H. LEHRMANN: Can I ask you, what is your response to the argument that the expert has to have medical or psychological expertise?

ATTORNEY KENNETH NASH: My response, Your Honor, is Section 841.1461 in which the legislature, which sets the parameters of this statutory cause of action, specifically excluded the requirement that these opinions be based upon or be rendered by psychologists or psychiatrists or superannuated forensic experts.

JUSTICE DALE WAINWRIGHT: What is the standard for experts to testify in this context? Must they comply with, in your opinion, Robinson/Havner's requirement in Texas for expert testimony to be relevant and reliable?

ATTORNEY KENNETH NASH: Your Honor, the touchstone, in my opinion, or the Respondent's position is Rule 702 and if the Court pays close attention to Rule 702, it speaks in the disjunctive, education, training, expertise, or those other matters that would qualify the person to be an expert.

JUSTICE DALE WAINWRIGHT: Is %Robinson/Havner the standard or is it a lower standard in your opinion? Robinson Habner discuss 702, that's what those cases were about.

ATTORNEY KENNETH NASH: In my reading of Robinson, Robinson is more a reliability case. The court is past the question of whether or not the expert is qualified, but is the expert, the opinion that the expert will give to the trier of fact, will it be reliable in either assisting the trier fact in its fact determination or in understanding the evidence? The--

JUSTICE NATHAN L. HECHT: The court of appeals seemed to think that the expert should have medical training to opine on whether the Defendant has a condition of a particular type. Do you agree with that?

ATTORNEY KENNETH NASH: If I understand your question, Your Honor, the, this whole analysis was jumpstarted by the case of Beasley v. Molett. Beasley v. Molett was handed down by the Beaumont Court of Appeals and that was apparently the rule of decision for some years; well actually not for some years, but handed down on December 19, 2002. The very next term of the Legislature, the Legislature passed Section 841.1461, which the Respondent maintains was a sub silentio repudiation of the requirement that these cases not be, these persons not be involuntarily committed except on the proof of medical or psychiatric testimony. In, the response to what counsel for the State is maintaining, these are matters of weight for the jury.

JUSTICE NATHAN L. HECHT: Let me direct you specifically. The court of appeals said, this is a multifarious inquiry by which it seemed to mean there are two parts to it, the condition and the recidivism and it seemed to say you need medical testimony for the condition not for the recidivism. Do you agree with the first part?

ATTORNEY KENNETH NASH: Your Honor, I don't agree with the premise of the court's question because as

this, as the, as the Legislature has specifically enunciated, these are not necessarily cases of persons of unsound mind. Therefore, that removes it from the purview of the Texas constitutional requirement of Article 1, Section 15(a), which maintains or requires that these cases or persons cannot be involuntarily committed except on proof of qualified medical or psychiatric testimony.

JUSTICE NATHAN L. HECHT: So your position is that with respect to the whole idea of behavioral abnormality whatever that comprises, medical expert testimony is not required.

ATTORNEY KENNETH NASH: It's not required and therefore, the trial judge got it wrong because and we can only take him at what he says, and in his findings of fact, he specifically set forth in his findings of fact Dr. Shursen is not a psychologist. Dr. Shursen is not a psychiatrist. Dr. Shursen does not have forensic training. The Legislature doesn't require it and until the Legislature changes its mind and decides that the, that Section 841.1461 should be tightened, that is a matter for the Legislature. The -- this Court has, and this Court has established its Broders case, which explains Rule 702. And in doing so explains the, how expert witness must not necessarily have all those qualifiers, but it reads them the disjunctive.

JUSTICE DEBRA H. LEHRMANN: Let me ask you, if we decide that expert testimony is required to testify about behavioral abnormalities, can your case stand on the court of appeals' opinion about recidivism being a subinquiry or are those inseparable? What's your, what's your response to that?

ATTORNEY KENNETH NASH: Your Honor, I -- in all due respect, if the Court were to decide, as you're suggesting, would be to engage in the same type of conduct that the trial judge engaged in, which is to make a major incursion into a legislative matter.

JUSTICE DEBRA H. LEHRMANN: But that's not the point of my question. My question is, if we do get there, then looking at this issue about whether or not the issue of recidivism is a sub-inquiry, is it or are those two issues so intertwined that you can't really separate them out?

ATTORNEY KENNETH NASH: Well, of course, I rise to the defense of the court of appeals' decision because I believe the court of appeals got it right. I can only revert back to Section 841.1461 as the threshold requirement that essentially exempts the Texas constitutional requirement that these cases be proven on qualified medical or psychiatric testimony.

JUSTICE DALE WAINWRIGHT: I'm sorry, did you say the statute exempts compliance with the Constitution?

ATTORNEY KENNETH NASH: Because the Legislature makes somewhat of a--

JUSTICE DALE WAINWRIGHT: Is that your argument?

ATTORNEY KENNETH NASH: --makes somewhat of a prefatory finding that these cases do not necessarily deal with persons of unsound mind as are contemplated by Article 1 Section 15(a) for the persons who are being committed for lunacy or what have you. That the Legislature acknowledged that behavioral abnormality, a legislative construct does not necessarily fit these diagnoses of behavioral abnormality in the traditional mental health diagnostic code.

JUSTICE DALE WAINWRIGHT: So are you saying that the behavioral abnormality that's talked about in Chapter 841 is not the unsound mind concept that's in the Constitution? They're different? Is that your argument?

ATTORNEY KENNETH NASH: That is my argument, Your Honor.

JUSTICE DALE WAINWRIGHT: So it's not really an exemption; it's that they're different because a statute

can't exempt compliance with the Constitution. Right? It can be different, but it can't exempt compliance if the Constitution applies.

ATTORNEY KENNETH NASH: Well, Your Honor, of course, I beg to differ because if the problem is that Dr. Shursen is not a psychiatrist or not a psychologist though she has postgraduate degrees, that is a matter for the jury to determine in according the weight to assign her testimony. It becomes a battle of the experts and if the jury chooses to accord more weight to it, to the State's experts who come to court with, are credentialed as forensic experts and forensic psychologists and Dr. Shursen is a licensed sex offender treatment provider who, by the way, has seen hundreds of these individuals on a daily basis and would testify in a practical sense what the State's experts could only testify in the abstract, that is a matter for the jury determine.

JUSTICE EVA M. GUZMAN: What type of training is required to interpret, evaluate and give meaning to the test data? I understand she's conducted tests, but what type of training is required to make it meaningful in the context of the inquiry here?

ATTORNEY KENNETH NASH: Well, apparently the professional societies for which she is a member have set certain standards that they caution against persons who would use these actuarial risk tests and who would make these kind of assessments that they meet some type of the rigors for their particular membership.

JUSTICE EVA M. GUZMAN: Some sort of forensic training in order to give actual meaning or reliable meaning to interpret a test data. Is that right?

ATTORNEY KENNETH NASH: Well, I don't think it's necessarily forensic.

JUSTICE EVA M. GUZMAN: What is it?

ATTORNEY KENNETH NASH: Well, I think it becomes a matter of what the jury then wants to determine as to whether or not this person who has met the minimal qualifications under Rule 702 as compared to the other expert witnesses that they have heard from, balancing that testimony and according the weight proper to that particular expert who does not necessarily enjoy the designation or the licensure of the title of forensic.

JUSTICE EVA M. GUZMAN: I guess I'm really trying to focus your attention on interpreting this test data in other context when I was on the trial bench interpreting the Rorschach Test and other tests that were administered, not just anyone. A counselor, for example, could not come in, look at that data, evaluate it and give it meaning in a sense that's relevant to the inquiries at issue. So what is it here that qualifies her to do that?

ATTORNEY KENNETH NASH: Knowledge, skill, experience, training, disjunctive or education. It may be a very low-threshold requirement that the legislature has established in these cases. And one --

JUSTICE DALE WAINWRIGHT: Why do you say that?

ATTORNEY KENNETH NASH: Well, and it's one that we have found ourselves on the other side arguing that the standards had been relaxed so much. I bring out, let me bring out the case that's cited by the trial judge in his findings of fact when he specifically relied upon the Nenno case decided by the court across the hall. And I found it curious that when the rule makers codified the rules of evidence, they actually relaxed traditional barriers to the admission of expert witness testimony and opinion testimony. And curiously, the Nenno case, which, of course, is not a controlling decision, would have actually augured in favor of the admission of Dr. Shursen's testimony.

JUSTICE DALE WAINWRIGHT: So why do you -- you believe Texas Rule of Evidence 702 is an easier standard than the Frye Standard for admission of expert testimony?

ATTORNEY KENNETH NASH: Than the Frye Standard? Well, of course, the Frye--

JUSTICE DALE WAINWRIGHT: You said, the standard was relaxed.

ATTORNEY KENNETH NASH: Well, the -- Frye v. United States is actually a novel scientific evidence case.

JUSTICE DALE WAINWRIGHT: So what was the Texas standard relaxed from?

ATTORNEY KENNETH NASH: Your Honor, I'm not sure, in all candor.

JUSTICE DALE WAINWRIGHT: If the statute is just silent on the qualifications for experts just as expert, how can we conclude that the Legislature didn't adopt our pre-existing, this Court's preexisting precedent on the standards for qualifications and reliability of their testimony that an expert must have to testify in a court of law?

ATTORNEY KENNETH NASH: Well, I would assume that the Legislature was cognizant of this Court's case *Broders v. Heise* in which the Court actually explains Rule 702. And for that reason in its amendment to Chapter 841 realized that perhaps the standards that the trial judge was imposing upon the litigants were too rigorous for the admission of these types of cases because the Legislature specifically stated these persons are not necessarily persons of unsound mind in the traditional realm of psychiatry and psychology and should not have necessarily or should not necessarily enjoy the enhanced qualifications of being forensically trained and forensically certified. I always hearken back and I will hearken back to Rule 702, which, again, it reasoned the disjunctive and for that reason, Dr. Shursen met at least one of those qualifications, knowledge, skill, experience. She was heavy on experience.

JUSTICE DAVID M. MEDINA: Could she be - could this doctor be extremely qualified and the trial judge makes the decision that her testimony or this doctor's testimony doesn't advance the trial because there's a weakness in some of her studies? There's some citation to the record here that's in the Petitioner's brief where she seems to be guessing at some statistics and when she's asked by the judge where she is getting this information the doctor replies, she's kind of pulled it out of the air. That in itself would lead me to believe that she's probably not qualified to help the trier of fact.

ATTORNEY KENNETH NASH: Actually, Your Honor, I believe that would touch on to more of the reliability of her opinion, which is not a determination of her qualifications. Remember, she was excluded on her qualifications.

JUSTICE DAVID M. MEDINA: They can handle that on voir dire.

ATTORNEY KENNETH NASH: And then it is for a matter for the jury then to assess how much weight to give her testimony and her ultimate opinion. Essentially, it is our Respondent's position that the trial judge substituted the weight determination for what should have been the trier of facts' decision.

JUSTICE PHIL JOHNSON: Counsel, let me interrupt you just momentarily. We're getting close on your time. Do you agree with the opposing counsel's representation that the doctor, the expert witness was appointed by the trial court, but selected by defense counsel?

ATTORNEY KENNETH NASH: She was initially consulted by State Counsel for Offenders on behalf of the --

JUSTICE PHIL JOHNSON: And they selected who they -- and does the record reflect, go into all of this? Or is this just going to be background information?

ATTORNEY KENNETH NASH: You kind of have to read in between the lines in the clerk's record, and --

JUSTICE PHIL JOHNSON: Okay well help me with it then. In a hypothetical case, the defense counsel would select an expert they wanted to consult and then go to the court and ask that that expert be appointed, is that the way it works as a practical matter? Or does the court select an expert and say here's your expert?

ATTORNEY KENNETH NASH: No, Your Honor. The original contact or the original selection of the expert and it's, of course, a matter of referring a file to the expert can you help us out?

JUSTICE PHIL JOHNSON: And that decision is the defense counsel's decision not the trial court's decision about who the defense counsel can send the file to?

ATTORNEY KENNETH NASH: That is correct, Your Honor. And then the matter of ultimately bringing on board that expert is a matter of payment.

JUSTICE PHIL JOHNSON: That's what the appointment is.

ATTORNEY KENNETH NASH: That's what the appointment is.

JUSTICE PHIL JOHNSON: Simply to get them paid.

ATTORNEY KENNETH NASH: And that is the problem that -- in the court of appeals in making the harmless error analysis was that the respondent was hamstrung at the point that the hearing was held after jury selection at a time when Dr. Shursen was struck, was stricken and the trial judge denied a continuance for him to seek the services of someone more suitable to the trial judge's personal predilections of what is a qualified expert.

JUSTICE PHIL JOHNSON: Any reason why defense counsel could not have asked for that type of hearing pre-trial?

ATTORNEY KENNETH NASH: The motion had been filed, according to my recollection, in advance. The state's motion had been filed and the whole matter, the whole Daubert hearing although I beg to differ, it's really not a Daubert hearing because Daubert's more of a reliability determination. For some reason and I don't know, Your Honor, why it was post-jury selection, pre--

JUSTICE PHIL JOHNSON: My question was the state filed their motion, was there any reason defense counsel, and that's a pretty important motion, you have to I suspect most lawyers would think if they're going to take your expert out. Was there any reason defense counsel could not have asked for a hearing in advance of trial instead of, and then objected if they did not get that until during trial when they could not get anyone else.

ATTORNEY KENNETH NASH: Well, of course, the answer to your question begs it never hurts to ask to make that request that the hearing be held before jury selection and sufficient time to postpone the trial of the case for retaining someone more suitable to the trial court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Nash. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF CATHERINE PALMORE ON BEHALF OF PETITIONER

JUSTICE DON R. WILLETT: Mr. Nash says that, the adoption in '03 of 841.1461 is a sub silentio repudiation of the Beasley requirement of specific kind of heightened medical expertise. What do you say?

ATTORNEY CATHERINE PALMORE: I think that that provision is entirely too vague to reach that conclu-

sion. And I would point out that there's only one case that this provision is discussed and that's In re Commitment of Rhymes, which is also a Texas Beaumont Court of Appeals case no petition was file. And in that case the petitioner in that case was the defendant in the trial below. And they argued a completely different argument about the meaning of 1461 and that was that it was unconstitutional as an interpretation of the Texas Constitution. So it's a completely different argument than what they're saying today is that it repudiates Beasley v. Mollitt. That's not what this provision, this provision means that we don't have to provide testimony about the person's unsound mind. The State does not have to provide that in order to meet its burden in this case. I'd also like to address Justice Wainwright's question about the Robinson factors. This Court has acknowledged that some types of science, some types of expert testimony are not amenable to that type of Robinson analysis and so you're using analytical gap analysis in those types of cases and in Gammill v. Jack Williams Chevrolet, this Court talked about that. The Court of Criminal Appeals has also talked about soft sciences versus hard science and has consistently held that psychology and the social sciences are a soft science and then they apply the analytical gap analysis or the Nenno standard, which I know is not binding on this Court. But the Ninth Court of Appeals, which is binding on the trial court, has consistently applied analytical gap analysis and/or the Nenno Standard. There's one case where the In re Gallaher, the Ninth Court of Appeals applied the Nenno standard as opposed to the analytical gap analysis. So I think in these cases, this type of psychological evaluation, you can't talk, it doesn't lend itself to analysis about rates of error or whether or not you can repeat the result. I mean those types of questions, the Robinson type of questions are not appropriate for psychological testimony. By its very nature, it requires education and training, but it's not susceptible to scientific replication or statistical rate of error analysis. So the Robinson standards and the Robinson vectors would be misapplied in a case involving psychology or the social sciences. I'd also like to address the question that Justice Johnson asked about the selection of experts. I can tell you I usually try these cases rather than argue the appeals and what happens is they meet with their expert. They file a designation expert. She was filed, she was designated as an independently retained expert in this case. And then the court, it's really not there's no formality, there's no even process for the court to approve of it. It's just sort of implied that the court approves of it so they can pay the expert. So the court did not appoint this expert in this case. And also Justice Hecht asked about, you asked about whether or not you can separate or maybe it was, I think it was you, about whether or not you can separate this question of behavioral abnormality from the risk of recidivism and you can't. It is a one phrase, it is a phrase that cannot be separated. Behavioral abnormality, that makes him likely to engage in a predatory act of sexual violence. If you just do basic sentence diagramming, that makes him likely to engage in a predatory act of sexual violence, refers back to behavioral abnormality. It's a description of the condition that this person suffers from.

JUSTICE DALE WAINWRIGHT: But 841.003(a)(1) states recidivism as a separate factor, a repeat sexually violent offender.

ATTORNEY CATHERINE PALMORE: Right, but that is established, the rest of the statute then says that, repeat sexually violent offender is established through the number of convictions not the person's risk of recidivism, which would be a psychological inquiry and that's as it regards this condition that this person suffers from. It's not a separate inquiry and also Justice Guzman asked about the training for actuarials. Again, just based on my knowledge in doing these cases, these actuarial training usually occur in courses and conferences and they get a handbook. It's their training and their background in their fields like psychology that renders that test meaningful because they can interpret it with that training and background that they have.

JUSTICE DALE WAINWRIGHT: Counsel, I'm just curious, the State's on both sides of this case. Is the Special Prosecution Unit and the State Counsel for Offenders, are they both part of the Department of Criminal Justice?

ATTORNEY CATHERINE PALMORE: And I see I'm out of time. May I respond?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may.

ATTORNEY CATHERINE PALMORE: No, they're not both part of the Texas Criminal. Department of Criminal Justice.

JUSTICE DALE WAINWRIGHT: What's the structure?

ATTORNEY CATHERINE PALMORE: I'm sorry?

JUSTICE DALE WAINWRIGHT: What's the structure then?

ATTORNEY CATHERINE PALMORE: The structure and this is I should probably know this a little bit better than I do, but the Special Prosecution Unit is its own entity. It's under the State of Texas. It's its own entity, but we are, the Walker County has been given I guess the money from the State and they distribute our benefits whereas the State Counsel for Offenders is under the Texas Department of Criminal Justice umbrella. The Special Prosecution is not under that same umbrella. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions. Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshal will now adjourn the Court.

MARSHAL: All rise.

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