ORAL ARGUMENT - 1/4/95
94-0773
TDMHMR V. HON. GAITHER

LAWYER: May it please the Court. Real briefly as representative for one of the real parties in interest, the Dallas County Criminal District Attorney's office, I am not here to argue the merits of this mandamus issue. Your honors my purpose here is simply to let you know that in our office we are ready to prosecute this case. We do adopt the arguments that are going to be made by MHMR, the relator, and request that this court issue the writ of mandamus that they have asked for.

In this case the juvenile is now charged with capital murder and aggravated robbery. These offenses occurred on Feb. 2, 1994, soon after the juvenile had escaped after having to be returned to Dallas, because he violated some violations on another case he had been convicted of.

The State is ready to prosecute the cases now. The juvenile also has a right to be prosecuted as fairly and quickly as possible. We are in a stalemate. We can't continue because the TC has refused to continue. The longer the case is prolonged...

PHILLIPS: The TC felt that there was a mistrial, a hung jury, why has the TC not set the case for trial again under the TC's reading of what the law ought to be and the burden of proof that is required?

LAWYER: Your honors, I was not in on the trial itself. Ms. Treason and the respondents were, but I was at some of the hearings afterwards. And my understanding is, the trial judge is just frustrated and is not sure exactly which way to go. And I think my last understanding was I am not going to continue this case until the court tells me what to do.

Our position in the DA's office is the longer this case goes on, the juvenile has been in detention for almost a year now, the longer the case goes on, it's worse for both parties, not just the state, but for the juvenile also.

PHILLIPS: So while you adopt the MHMR's mandamus, your main desire is just that something be done as opposed to...who has what burden where?

LAWYER: Well we agree with what MHMR is going to say the burden is. But I just didn't want to eat into her time. But our position is the longer that nothing happens, both parties, chances are the evidence will go stale, witnesses will be unavailable, witnesses may not remember. It's bad for both of us. So we just...in our office want this court to know that we would like a writ to be issued, because we would like to try to certify this juvenile, and transfer him to adult court, because it is a capital murder case and an aggravated robbery case, and we want to get to trial as soon as possible.

* * *

TDMHMR

LAWYER: May it please the Court. I represent the relators, Texas Dept. of Mental Health and Mental Retardation. And as this court is aware, we are requesting a writ to require Judge Gaither of the juvenile court in Dallas to proceed to judgment in a commitment proceeding, where we held a jury trial last May, and we still do not have a judgment, nor do we have an order for new trial in the case.

HECHT: Is it your understanding of why you don't, the same as Mr. Sannels(?)?

LAWYER: More or less. And I believe that it is explicated pretty clearly in the statement of facts from the hearing on my motion for judgment your honor. But the judge essentially believes that the statutory scheme is unconstitutional. And he directed the attorneys for the juvenile real party in interest to file an action for declaratory judgment. It was our position and we indeed argued to Judge Gaither that we didn't believe a declaratory judgment would be appropriate in the context where those issues were already pending. We already had the same parties and the same issues before the court, and that the appropriate thing to do would be to enter judgment and let the CA decide all these important issues. But the judge did make a very clear statement and it does appear on the record, I believe it is Ex. 21, that he was not going to proceed in this case until he received some instructions on what to do from the CA. So I believe that he feels somewhat stymied, and I know that he is looking for some direction as to what is an appropriate action at this point.

CORNYN: And if the writ were to issue, the constitutional question could be appealed in the ordinary course of things?

LAWYER: Precisely your honor. All those issues have been preserved in the court below. And again we tried to argue that to Judge Gaither, that the appropriate way to do it would be to enter judgment and have a motion for new trial, and then argue all these issues on appeal. And I am not going to argue to this court any of those issues because I don't believe they are properly before this court. What we want is the chance to present those issues to the CA in some form of _____ format, which we don't believe that it now is.

PHILLIPS: So what do you think that our...what are you asking that our mandamus writ that we would issue on Judge Gaither would instruct him to do?

LAWYER: I believe that the writ of mandamus should instruct the judge to enter judgment. And the reason I say that your honor is that the judge's refusal to enter judgment was based on the fact that we were in a commitment proceeding under Sec. 5503 of the Family Code. The judge had earlier ruled, and I believe correctly, that the burden of proof in the case was beyond a reasonable doubt to establish that the juvenile met the criteria for commitment. Now the criteria for commitment are laid out in the Person's With Mental Retardation Act., and I have provided the court with copies of the statutes, because the scheme is somewhat complex. But because the burden was beyond a reasonable doubt, the judge...

PHILLIPS: Do you believe the burden obviously was properly on the juvenile?

LAWYER: Yes, because the statute, the Persons With Mental Retardation Act provides that the proponent must prove beyond a reasonable doubt, that is the proponent of commitment, and in this case the application for commitment was filed by the attorney for the juvenile. The statute, the PMRA is also where the requirement beyond a reasonable doubt is laid out.

PHILLIPS: Was issue No. 1 a necessary issue for the juvenile to secure a finding on an order for a judgment to be entered? Necessary for the juvenile? That was not an irrelevant issue or an issue that judgment could be entered on any way, the way the rest of these issues were answered?

LAWYER: No, your honor. In fact the 4 criteria that were submitted to the jury, the way that the PMRA expresses them is in a negative. It says: "No person may be committed to long-term placement in a residential facility for persons with mental retardation, unless 1, 2, 3, 4...."

PHILLIPS: And why isn't this case then like an ordinary civil case, like an automobile accident where if you need to get 10 jurors and you only get 9, it's a hung jury and you start over, or like the ordinary criminal case, if you need 12 jurors, and the state gets 11, they start over. Why under this

particular hybrid(?) situation, that the juvenile get one shot and if he misses it, that's the end - you lose?

LAWYER: Well because the PMRA specifies that if adhering it is not proved beyond a reasonable doubt that the person meets the criteria, the application will be dismissed. This may sound like an extraordinary statement your honor, but let me talk a little bit about the statutory context of §5503. And some of the things that §5503 is not: §5503 is not the section of the Family Code that talks about competence, or fitness to stand trial, that is 5504. Nor is it the section that talks about ability to understand the crime and responsibility for the crime, that's 5505. Nor, and this is extremely important, is it the primary nor even a very appropriate vehicle for talking about delivery of services to people with mental retardation. What §5503 does, and it is a very narrow and very specific statute is it says: "In the event, and I would submit to the court the somewhat unlikely event, that someone is so severally retarded that his mental retardation requires that he be institutionalized. Under those narrow circumstances rather than prosecute him we will send him to an institution for the retarded, and we will stay the prosecution pending the commitment." When he is released by the way, the state has the option of proceeding with the prosecution.

The significance of the very narrow focus of 5503 is, this is a pre-conviction commitment. And the importance of that is that Texas MHMR can not under the constitution, under the case Jackson v. Indiana, cannot lock someone up in a state school for the retarded unless their condition, their mental retardation requires that level of restraint. The restrictions on the agency are extremely clear. And we can't lock him up because of his crime because he hasn't been convicted of any crime. And that's why I say 5503 is very narrow. There are very many circumstances in which MHMR provides services to juveniles accused of crimes. And in fact at one point in these proceedings, this juvenile Larry you will note in Ex. 3, was found to be eligible for services. And if Larry desires mental retardation services or his family does, that is fine with MHMR. That's not Larry's problem. His problem is, that only §5503 will stop the commitment.

HECHT: I am still not sure of your answer to Chief Justice's question, which is as I understand it, why should this be any different from another case where if the party with the burden of proof fails to persuade the requisite number of jurors, they get another chance? If the state doesn't get a unanimous verdict it can try the defendant again? In a civil case if the plaintiff doesn't persuade but 6 jurors that they don't lose, they just have to go over it again if they want to?

LAWYER: Well again, the statute itself says that the application for commitment will be dismissed. And I think your honor what that reflects is a...

PHILLIPS: Do you know of any other statutory scheme where somebody just gets one shot...

LAWYER: Your honor I actually don't. But I also want to say that if this...in this day in age commitment to an institution for the retarded is very unusual. In almost every case where we have a person with mental retardation they receive services in the community. And that's even people that are also mentally ill, or people that are severely disabled. The trend in Texas and in the rest of the country has been that services are provided in the community. Larry's problem is he can't receive services in the community, because the prosecutor will not agree to release him to the community, because they want to prosecute him for the crime. In terms of the burden, the problem with requiring that MHMR prove to 12 jurors that we in fact that he is not appropriate for commitment means that we have to establish in effect beyond a reasonable doubt, that he is not committable. Whereas, the issue only is whether he does not meet the criteria for commitment.

HECHT: I am not suggesting that you have the burden to prove otherwise. I am only questioning whether the case should be dismissed, or the juvenile should get another trial. But in that connection also let me ask you, you indicated earlier the relief should be to instruct the trial court to render

judgment. What if the trial court thinks that there should be a new trial in this case. Do you think mandamus should cut-off that discretion?

LAWYER: I do not believe that a new trial in this case would be appropriate on the issue of...

HECHT: But that's the trial judge's call though.

LAWYER: ...of the jury's verdict because of the statutory requirement which as you put it Justice Phillips specifies sort of a one shot at commitment.

PHILLIPS: I didn't put it that way. I am asking you what in this language says that it's one shot, apart from any other statute that says anybody has the burden of proof to establish something in a civil or criminal case, and if they don't have it they lose. And all of that is read within the context of the Code of Civil Procedure and the Code of Criminal Procedure. I mean the Rules of Civil Procedure, Code of Criminal Procedure, that when the burden is not met, but there is not the requisite number of jurors in either direction, you do it again. And where Judge Hecht asked another question, what about this statute takes away this judge's rights under the Rules of Civil Procedure to grant a new trial even if the requisite number of jurors have in his opinion had answered all the questions?

LAWYER: I think that what this statute is reflecting again is the very heavy statutory presumption against institutionalizing someone with mental retardation.

PHILLIPS: But what in the statute...I mean what words in this statute are different from words in any other statute?

LAWYER: Well I believe it is 593.051, that states: "That if at hearing, the person is not found appropriate for commitment, the application shall be dismissed, and it is mandatory." And what I believe that that reflects your honor is some understanding that even if we had another trial, and we got 12 jurors to agree that this person was committable, it's hard to understand how that could be a finding beyond a reasonable doubt when 11 people have already found that he is not retarded. And I guess...

GAMMAGE: You are using the requirement of the unanimous jury in this situation to get around the necessity of another procedure so that you get 12 one way or the other? You are saying that that language requires that this amounts to an affirmative finding of not suitable for commitment?

LAWYER: Well I think that's correct your honor, and I think that's what the statute provides.

GAMMAGE: If you had 11 jurors that said it was suitable for commitment, and one that said that he wasn't, where would you be?

LAWYER: And your honor I would still say that the application had to be dismissed.

GAMMAGE: But under any other circumstances it would be a mistrial and a new trial wouldn't it?

LAWYER: Yes, your honor. That is absolutely correct. And the reason this statute is different is because the whole concept of committing someone to an institution, I want to emphasize this is commitment to a locked-in facility for persons with mental retardation, when there is one person that didn't even believe they were retarded. In other words it is such an extraordinary thing for people in the mental health field to talk about committing someone when there is any question about retardation. Usually that is a foregone conclusion. We know the person is retarded. The issues we are debating are: can we treat

him in a less restrictive alternative; is he dangerous because of retardation? The concept that we would even be talking about committing someone where there is that kind of question, I mean the people in state schools in this day and age are generally very, very profoundly retarded. They are usually wouldn't even be a question as to whether they are retarded or not.

CORNYN: Counsel I am wondering to what extent it's...of course juvenile proceedings are ordinarily tried by the Rules of Civil Procedure, but there is some differences here that jump out: 1) is that it's a requirement of unanimous verdict of 12 as opposed to a 10-2, perhaps even as few as 9 under some circumstances; and the burden of proof being different from a preponderance of the evidence. Are there any other differences in this statutory scheme between the ordinary civil proceeding and this statute?

LAWYER: None that come immediately to mind. Although a commitment proceeding is certainly a very, very specialized proceeding and an unusual proceeding. And of course it is usually the probate courts that specialize in commitment proceedings. But it's a statutory burden of proof which is unusual in a civil case.

CORNYN: And my next question is, even if the juvenile fails to obtain the necessary findings for commitment, does that have any kind of preclusive effect or any impact on a subsequent criminal proceedings on a claim of mental incapacity, or insanity, or...can you...

LAWYER: No, your honor or least the courts have not interpreted it that way. And in fact if at this point he is not found appropriate for commitment, he can still raise the issue of unfitness to stand trial, or mental defect precluding responsibility for his act. All those issues can be raised.

Let me make another comment too about the jury split that I think is important. If we place the burden...if we require a unanimous verdict either way, if we require 12 jurors to find that someone is not committable, we are going to make these proceedings very, very difficult to resolve. And I think that even Judge Gaither recognized that in this proceeding. And in his ruling on the motion for judgment expressed considerable frustration with the fact that he might be holding these trials forever if in fact he was not able to dismiss the proceedings at some point with something less than a unanimous verdict.

I am not positive that Judge Gaither's right, that you have to have a unanimous verdict just because it's a verdict beyond a reasonable doubt. But that issue really wasn't raised in this case because it was 11 to 1. I mean it was very, very far from being a 10 to 2 in favor of commitment. I think that that's another issue that can and should be raised on appeal as to whether a unanimous jury verdict was even required.

GAMMAGE: Isn't it usually the case that when the legislature does not want to require a unanimous jury verdict, the legislature says so? Can you point me in any other situation where the legislature has allowed less than a unanimous jury verdict by default?

LAWYER: Not really your honor. And I agree that it is...

GAMMAGE: Or any other case where the courts have said in the absence of a legislative mandate, that less than a unanimous verdict is required?

LAWYER: Well in a civil proceeding we normally wouldn't expect a unanimous verdict. And there is considerable case law to the effect that commitment is a civil proceeding. It is not a criminal proceeding.

PHILLIPS: If that was a legislative perhaps a constitutional change to allow less than unanimous

verdicts. It may not be a point here. As you say that's an appellate point.

LAWYER: I believe it is your honor.

ENOCH: The parties...it seems to be conceded that it was 11 to 1, the jury agreeing that the juvenile did not meet the burden of proof on the issue. It seems to me some question, is there a signed verdict by the jury?

LAWYER: There is not your honor.

ENOCH: And there is a comment that this 11 to 1 was derived from a discussion off the record, and the jury was then dismissed, is there anything in the record that this court could predicate the judgment on, other than the concession of the parties that well this is what it looked like the jury said?

LAWYER: We do have an order of the court which appears at Ex. 22, which recites what the jury finding was. And to me that problem about the no signed verdict is kind of definitional. You know the jury came back and Judge Gaither immediately said: "Okay, that's it; I am declaring a mistrial," and took the proceedings off the record. So in other words, the reason there is no verdict is because Judge Gaither didn't recognize it as a verdict. If it really were an issue that we didn't have a signed jury form, you know we could go back and get the foreman to sign at this point. He was a Dallas attorney, and I presume that wouldn't even be too much of a problem. But no one here really disagrees with...

ENOCH: Except our rules require that if it's a non-unanimous verdict, all the jurors have to sign the _____?

LAWYER: I presume that is within the realm of possibility also. But no one really disagrees here your honor with what happened. The judge recites it in an order which is part of the record in this case, and the parties all agree that...

ENOCH: I understand. I just wondered if there was something in the record on that. Thank you very much.

LAWYER: I believe it is at Ex. 22.

CORNYN: Another question counsel. Regarding the requirement for unanimous verdict, the jury was instructed that the verdict must be unanimous; is that correct?

LAWYER: Yes, they were.

CORNYN: Is there any statute that requires that?

LAWYER: No. The statute requires that the elements of commitment be proved beyond a reasonable doubt.

CORNYN: Under section 593.049b it says: "The Texas Rules of Civil Procedure prior to the selection of the jury, the court's charge to the jury and all other aspects of the proceedings in trial, unless the rules are inconsistent with this subchapter." Are you aware of any inconsistent provision of any statute that would otherwise trump the Rules of Civil Procedure as regards to the number of jurors who must agree in order to render a verdict?

LAWYER: Not, other than the statutory requirement that the elements be proved beyond a

reasonable doubt. That issue was argued before Judge Gaither. And the point was made I believe by the attorneys for the juvenile that they did not believe that a unanimous jury requirement was appropriate. I am not convinced that it is essential. But I repeat, I don't think that is an issue that is presented by this case, because...

CORNYN: Well I wonder, because if as a matter of law only 10 jurors need to agree in order to render a verdict, wouldn't that have an impact on whether the writ issues in this case or not?

LAWYER: Well it might have an impact as to what the writ would require. I think that it is important for this court to understand that unless some kind of writ issues we are in a sort of a semi-permanent stalemate in this case.

CORNYN: Well this touches on Justice Hecht's question because whether Justice Gaither grants a mistrial, or renders judgment dismissing the case, is ordinarily when we issue a writ of mandamus it requires there be a ministerial act on the part of the trial judge. And I guess what you are asking us to do is to grant a writ of mandamus for alternative relief, either dismissal or do you want to go back to trial again?

LAWYER: I really believe that the writ should require dismissal for this reason your honor...

GONZALEZ: Dismissal of what?

LAWYER: The application for commitment. And that we should return to the prosecution in the original case.

GONZALEZ: Completely cutoff any right to a retrial?

LAWYER: Yes, your honor, I don't believe he is entitled to a retrial under the statute. Nor do I believe at this point we could possibly get a jury that could tell us beyond a reasonable doubt that he is committable. Not after 11 jurors have told us that he is not. There is a very narrow line of cases and probably the best example is the MacGregor case. And in the MacGregor case what happened was it was a trespass suit to try title. And the defendant said: "Well there was an oral contract to buy the land." And the plaintiff said: "Well if there were an oral contract it violated the statute of frauds, and if there was an oral contract it is not what they said it was." It was submitted to the jury on special questions, and the jury found neither one of the oral contracts. And the trial court said: "Well then I can't decide. I can't decide which parties should win." The CA said: "Well of course you can. He is the record owner. Give him access to his land." And that line of cases which are cited in our brief, Texas Board of Optometrists v. Carr, say that when there is a status quo that prevails and the jury's findings fail to make an essential finding to upset that status quo, the court has to issue an order consistent with the status quo.

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REAL PARTY IN INTEREST

LAWYER: I disagree about what happened in the trial court below. And I begin from the proposition that there was no verdict. What happened was, the jury came back and said we can't figure it out. And the judge said well, in that case I am going to discharge you.

PHILLIPS: Is it you true that you advised the judge that you thought only a 10 to 2 verdict was necessary?

LAWYER: At the beginning of the trial we objected to a unanimity requirement upon the

grounds that it did not appear to us to be required by the statute. We also alleged that Larry Manual was not required to prove his own mental retardation beyond a reasonable doubt. Those objections in our minds were locked together. It would be difficult for us to see how Larry Manual could be required to prove beyond a reasonable doubt that he is retarded, but only on a 10 to 2 criteria. So, yes, at the beginning of the trial, though in our view the jury was then misinstructed about it.

GAMMAGE: Isn't that contrary to the situation you are having to argue here? How can you say it's not beyond a reasonable doubt if you can't get unanimity?

LAWYER: Let me see. I am not sure that I grasp your question Justice Gammage. We don't think that the statute requires Larry Manual to prove his own retardation beyond a reasonable doubt. We don't think that is what the statute says.

GAMMAGE: What does it say?

LAWYER: Okay. IN order to, I am going to have to...it's a longer than 10-word story, so we begin from §5503 of the Family Code, that sets up a procedure once a juvenile is in effect charged. What happens is that if someone suggests to the court that there is retardation, then the court orders that tests be done. If the tests come back...

GONZALEZ: They were done in this case, and the tests says he's not retarded?

LAWYER: No, they were not. The tests came back and said he was retarded.

GONZALEZ: Well the earlier tests?

LAWYER: Now the earlier tests are of mixed bag your honor. But in this case following Judge Gaither's order, now the offense supposedly took place in early February. In late February there were already tests begun by Salima(?) Teak(?) at Dallas County MHMR.

GONZALEZ: If we take it back, because this is a package deal, I mean you look at the whole enchilada here. He was tested when the initial offense to which he pled guilty to, and he pled guilty because it was determined he was not retarded, he made the identical claim, and the tests said he is not retarded. Thereafter he was committed to a ranch, then he fled, and then he committed another offense to which he is not charged.

LAWYER: Not quite in that order your honor.

GONZALEZ: Well give me the chronology?

LAWYER: Okay. He was charged in the first offense. He then suggested retardation.

GONZALEZ: He said I am retarded, you can't prosecute me, I am retarded, commit me to a civil institution. And he was tested.

LAWYER: Correct. And he was tested first to decide whether he should be sent to a civil institution. And Judge Gaither judged that he was retarded, that the test scores...all the test scores when understood indicated that he was retarded. He was then sent to an institution, tested again, and Dr. Tombarri(?) concluded, that although the test scores said he was retarded, Dr. Tombarri concluded that he was not retarded, and he was discharged from the institution, whereupon a plea bargain was arranged, in which he said: "I will withdraw the suggestion of mental retardation. I will go to the ranch." And once

he got to the ranch, trouble began in various forms. He left the ranch without authorization. A various offense took place. And he was then charged with aggravated robbery and capital murder. Then another suggestion of mental retardation was made...

GONZALEZ: The identical statement that had been made before?

LAWYER: Yes. Under 5503, Larry again suggested his mental retardation. Judge Gaither ordered that a series of tests be made, the tests were made, the tests said that he was mentally retarded. At which point and now Judge Gammage I will return to your question, at which point the court set the case down for trial. As a result Larry is not the applicant. The court is the applicant. Because how this case got set for trial is that Judge Gaither said: "Under 5503 I have a prima facie finding of mental retardation, now I set it down for trial."

HECHT: So the court has to prove it beyond a burden?

LAWYER: Well that's ridiculous of course. And so as a result, the provision for the allocation of the burden of proof in 593.050 with respect to beyond a reasonable doubt can't possibly have any application at this juncture where there is an interface between the Family Code and the Health and Safety Code. Now it is also true, that on the first day of trial, counsel for Larry, filed an application for a voluntary commitment or in the alternative an involuntary commitment. That is perfectly true. But the case was tried upon the order of Judge Gaither issued under 5503 of the Family Code; and there is no verdict. None at all. As a result...

CORNYN: So did Larry have the burden of proof?

LAWYER: I don't know. I would think that he does.

CORNYN: The state did not want him committed did they? They wanted to prosecute him for capital murder?

LAWYER: Yes. I think that the interface between the Family Code and the Persons With Mental Retardation Act is less than perfect. The Persons With Mental Retardation Act contemplates only voluntary and involuntary commitments. I think all of us when we are using ordinary English know that an involuntary commitment is where somebody else says: "I have to go someplace I don't want to go." Now when I say I want to go to this place, and the state says: "We don't want you there," that's not the kind of thing that we usually mean by an involuntary commitment. So the Persons With Mental Retardation Act has this dichotomy - its either voluntary or involuntary. What it doesn't have is a category for fraudulent voluntary commitments. And what the state believes is going on here is that Larry is trying to circumvent prosecution by classifying himself as mentally retarded.

GONZALEZ: Isn't that obvious?

LAWYER: Isn't it obvious that that's what the state thinks? Yes, sir it is.

GONZALEZ: Isn't it obvious that's what's happening here?

LAWYER: No, I don't think it is because I actually believe since I know him, I think the boy is retarded.

GONZALEZ: You are not a medical health expert?

LAWYER: Absolutely not. But you asked me if it was obvious, and I'm simply responding to that question. No, sir it is not obvious. I don't even think it's true.

SPECTOR: Have you asked the court for another trial?

LAWYER: Well we are ready to go to trial. Have we asked formally...

GONZALEZ: For a similar trial?

LAWYER: No, no, no, no for another chapter 55 jury.

PHILLIPS: What do you think this court should do?

LAWYER: Remember in this court, Ms. Quinn is there everyday. Is it known to Judge Gaither that she is ready to go? Yes. Did Judge Gaither say to her...did she ever make a formal application for a new trial? No. And the reason for that is more or less what Ms. _____ has announced to. Judge Gaither has said: "File a deck(?) action and let's get this thing straightened out." Which Ms. Quinn did. At that point I believe what happened was, that there was a hearing scheduled on the deck(?). Right away, the state said we are not ready.

SPECTOR: Do you anticipate that each time there is a hung jury, that there would be an opportunity for another trial?

LAWYER: Theoretically I suppose so. If the jury hangs up every time, then it would go on infinitely. But that isn't going to happen.

CORNYN: So Larry can avoid criminal prosecution by continuing to refile these commitment actions, and in the event he can't get a unanimous verdict, ...

LAWYER: That was not the question I was answering.

CORNYN: I know. I was kind of asking a little different scenario question.

LAWYER: Do you have to try it until you get a verdict? Yes. Do you get on the same prosecution an infinite number of chances to file and keep filing? Obviously not.

CORNYN: How many does Larry get?

LAWYER: I believe that common sense is one prosecution, one chance.

PHILLIPS: But on this provision, wasn't it your answer to Judge Spector's question as long as he keeps filing involuntary commitment under Judge Gaither's view of the burden of proof, and the _____ gets one juror each time to believe that he is mentally retarded, and meets the other criteria, that this process could go on indefinitely?

LAWYER: That would be true, the same as any criminal trial. But we all know from the history of criminal trials, that that hardly ever happens. Either you lose it...

PHILLIPS: But then the state finally gives up. I mean you know you're saying at some point Larry will give up and go take his chances in an adult murder trial?

LAWYER: No, I wouldn't say that. Being an internal optimist, I think I am going to win the next one because there is a crucial piece of evidence I am going to keep out that I didn't manage to keep out last time.

PHILLIPS: How would somebody give up? I mean if it's Larry's burden and he can get one juror each time, what incentive would he have to give up?

LAWYER: Somebody will lose. Now of course I believe...

PHILLIPS: That's what you're saying. Eventually it will be 12 of them one way or the other?

LAWYER: It has to be, yes. Either that...I believe actually that this burden of proof on Larry is unconstitutional, which is I suspect what Judge Gaither believes as well. And if we ever lose it, if we lose it on that, and the burden's on us and we lose 12 to zip, then you know it is up again.

CORNYN: You haven't changed your position on how many jurors you need in order to render a verdict here? I thought I heard you at the outset you earlier took the position that a unanimous verdict was not required and you just suggested I think that perhaps a unanimous verdict was required?

LAWYER: I don't mean to be suggesting that your honor. Here is what I...

CORNYN: Can you tell me what's your position?

LAWYER: Yes. I think a verdict should _____ first thing.

CORNYN: How many jurors must agree?

LAWYER: Okay. I don't know.

CORNYN: What's your position?

GONZALEZ: Did you take it at trial court, and what position are you taking now?

LAWYER: My position in the trial court was that it was not required that there be 12. My position in the trial court was that the jury should not be thusly instructed. But it was.

CORNYN: Have you changed your position?

LAWYER: No. However I have a different position. Once the jury was instructed that the verdict must be unanimous, if this court wish to create a doctrine of constructed verdicts so that an oral representation could somehow constitute a sufficient verdict under Rule 292, then I would argue that given the way the jury was instructed, that would be error to do that.

SPECTOR: Were there any objections to the charge? I didn't see the charge in the record.

LAWYER: They are in our exhibits. There were objections to the charge, and there were objections to the allocation of the burden of proof in the charge. The charge conference is reproduced in our Ex. booklet.

SPECTOR: I didn't find it.

CORNYN: And you dispute opposing counsel's statement that Ex. 22, I think she said, reflects that this was an 11 to 1 division among the jurors?

LAWYER: Well I dispute that.

CORNYN: You dispute that that's sufficient...

LAWYER: Absolutely.

CORNYN: To meet the requirements of the Rules of Civil Procedure?

LAWYER: Yes, sir.

GONZALEZ: So you can't lose?

LAWYER: I can't lose here, now. I could lose this case.

PHILLIPS; What would you have us...do you think we should just dismiss this petition, or should we do something?

LAWYER: No. Here is what I would like to see you do your honor. I would like to see you deny the writ of mandamus with a comprehensive opinion. I would like to see the elements...

GONZALEZ: Circumvent the appellate court, the court of appeals? I am not sure you want to forget about the CA and the intermediate appellate review.

LAWYER: There is a reason for it; and the reason is, that if for example you were to grant the writ, Larry would immediately be transferred to the adult side and put to trial for capital murder in the adult courts. It seems to me there would be a far greater use of judicial time, a better use of judicial time, while we are appealing by the way, he's getting older, we are appealing all this stuff, and you have a mandamus petition here before you now.

PHILLIPS; If it's your position that there should be another trial...

LAWYER: Yes, sir that is my view.

PHILLIPS; Is it your view that we should order Judge Gaither to proceed to that trial, or that it is up to him in his discretion as a judge in his own sweet time to decide when to set it?

LAWYER: Under the circumstances of this case, although I wouldn't use the words own sweet time, I would say that Judge Gaither should be permitted to exercise his discretion as to when to schedule the case.

CORNYN: Hasn't he already been permitted that time and chosen not to act?

LAWYER: He's been permitted time, true. He has done something. He appointed counsel to bring a deck action; thought that he could get it through the courts reasonably quickly and get it to the court of appeals very quickly so that he wouldn't waste the time of 12 more citizens in trying the case without a construction of the statute. Whereupon, first there was an objection in proceeding, then the case was removed to federal court on the grounds of sovereign immunity.

CORNYN: Presumably then that declaratory judgment action would then go through all the usual appeals and meanwhile this is sort of a standoff?

LAWYER: That could happen. That would not be a good thing. Because my assumption as to how it would go...

ENOCH: We have a trial judge who has refused to either set it for trial or enter a judgment, do we not?

LAWYER: No. He's never refused to set it for trial. He has never been asked to set it for trial. He went forward affirmatively and said: "I don't see any point in trying this again because Ms. Quinn is going to hang it every time."

ENOCH: I was under the impression he has advised this court through the record that he is not planning on taking any action till this court says something?

LAWYER: That's his dearest and fondest hope at this time.

ENOCH: So the flip side of that is, that this court is not really inclined to be advising a trial judge on how to try their case; and consequently could not the court just take that as a position that he is refusing to set it for trial and we just order him to set the case for trial and get it on?

LAWYER: Yes.

PHILLIPS: Has the MHMR asked Judge Gaither to try this case again?

LAWYER: I don't think so.

PHILLIPS: So neither side has formally asked the judge to try the case again?

LAWYER: Correct.

PHILLIPS; And yet we are in a position where we might be issuing a mandamus to tell him he has abused his discretion in not setting a trial where neither side has asked him to set it?

LAWYER: Yes.

CORNYN: But MHMR has requested that the commitment proceeding be dismissed?

LAWYER: Yes.

CORNYN: So they have asked us for some relief, and...we can either say you are entitled to that relief, or you are not entitled to that relief?

LAWYER: You could do that. Yes, your honor. But to say that they are entitled to it you have to create the doctrine of constructed verdicts because there is no written verdict. And there was less than unanimity and there is no chance of getting signatures. I mean the idea of bringing back a bunch of jurors months later after they've been dismissed...

CORNYN: Is it contested? Do you contest that it was 11 to 1 verdict?

LAWYER: I contest that that is sufficient to constitute a verdict.

CORNYN: But do you contest factually that 11 jurors decided against commitment, and one decided for commitment?

LAWYER: I do not contest that. I do not contest that at that point...at the point in their deliberations where Judge Gaither ordered a mistrial, I do not contest that. At that point in their deliberations under an instruction beyond a reasonable doubt and unanimity, there was an 11 to 1 configuration.

HECHT: Mr. Quinn let me ask another question just before you sit down. Let me be sure I understand. If the jury was required to be unanimous, clearly wasn't, and it was hung, and so if the jury was hung, then we have to decide whether the statute requires dismissal or whether it permits a retrial?

QUINN: Yes, sir.

HECHT: If a unanimous verdict is not required, then the jury was not hung, but we have to then decide what the effect of the mistrial and the failure to return a verdict was?

QUINN: Yes, sir.

HECHT: If we think that that's fatal, then there would have to be a retrial. If we don't think so, then we should render judgment or direct the trial court to render judgment?

QUINN: Almost. There is I believe inherent in Texas law another deep and important principle that no court should ever issue an extraordinary writ like a mandamus compelling a judgment when the trial below was not informed of its statutes, and violated the constitution of the United States and of Texas.

HECHT: In other words, we should either render judgment, or since we are not in a position at this point to review those whatever else may have happened at the trial to let the trial judge decide whether he wants to grant a new trial or not, or let that go up on appeal?

QUINN: I believe he has already in effect granted a new trial through this mistrial. But in response to your question now and to Judge Phillips' question earlier, what we dearly want is a denial of the mandamus with an opinion. It doesn't have to be advisory. You have the doctrine of alternative grounds upon which you can base your holding. And what we would like to see you do is assist us in structuring the retrial of this case.

* * *

LAWYER: May it please the court. I represented Larry Manual for two years now. It is not obvious to me, nor was it obvious to Dr. Glen Pearson who is in charge of adolescent services as Psychiatrist at Dallas County MHMR. It was not obvious to Dr. _____ Teak who is the chief psychologist for the juvenile department. And it was not obvious to the original Dallas County MHMR department that originally tested Larry two years ago. Nor to the Standardized Psychometric Instruments administered to Larry when he was committed once before to Brenham State School. On the basis of any of those tests it was found that he was retarded.

GONZALEZ: It was obvious to 11 jurors that you failed to convince otherwise.

LAWYER: There were 11 jurors who were not convinced beyond a reasonable doubt. And there were other issues presented...

GONZALEZ: So your client failed to meet the statutory burden of proof?

GAMMAGE: Are you saying all the tests indicated that he is retarded?

LAWYER: I think there was...all the Standardized Psychometric Instruments that were deemed valid by the people who administered them found him to be retarded to the requisite degree. And by the way there is a discrepancy between what the Mental Health and Safety Code requires for mental retardation, and what is a prima facie finding that Ch. 55 requires. Chapter 55 requires more retardation.

GAMMAGE: The trial court has already determined that the prima facie standard has been met?

LAWYER: Yes, sir. And the TC originally determined in the first Ch. 55 hearing that he was qualified for those services. And the reason this is so important is found originally in Chapter 51 of the Family Code, where it talks about the public policy of the State of Texas. The public policy is to treat all of these children with care, protection and wholesome moral and physical development, to protect the community, and finally to remove the taint of criminality and the consequences of criminal behavior and substitute in its stead treatment, training and rehabilitation. That is what the Family Code is trying to do for the juveniles who have been accused of committing delinquent acts.

The Mental Health & Safety Code also has stated policies. And their policy is to enhance and enable people who are mentally retarded to fulfill their potential as citizens. The reason we stay the criminal proceedings when a Chapter 55 hearing issues, and when a child is found to be mentally retarded, is to provide for that child the rehabilitation he needs and to remove the taint of criminality. And it is true, he will still face, if he is to be committed at some point in time, he would still face the motion for discretionary transfer that is currently pending. But he has a right to those services. The Mental Health & Safety Code says that the Texas DMH & Safety shall provide a continuum services to juveniles committed to its care by the courts.

GAMMAGE: Where does the reasonable doubt standard come in?

LAWYER; The reasonable doubt standard is in Ch. 593.050e: the party that files the application has the burden to prove beyond a reasonable doubt that long-term placement of the proposed resident in a residential care facility is appropriate.

HECHT: I suppose you would take the position that if that party is the state, then that is a correct assignment of the verdict?

LAWYER: I think when this was written it contemplated that the applicant was going to be the state. In fact there is an attorney general opinion that says in almost all of these cases: "The superintendent of the facility or the state is the applicant."

CORNYN: But why would the state want to have him committed? They said here today they want to try him as an adult for capital murder?

LAWYER: Historically the state has looked at these cases and have been the one, in fact Judge Gaither as a district attorney, was the one who filed a commitment proceeding on a juvenile. They want these children...typically the state has wanted to protect the community, so they want to get the child off the streets, and they want to rehabilitate the child. The juvenile department doesn't have the resources to

rehabilitate someone who might be retarded. So the alternative is to have a commitment proceeding. And you thereby kill two birds with one stone. You protect the community, and you rehabilitate the child. The state has typically been the one to seek the commitment of juveniles.

HECHT: So I will be very clear, you do think that if the state is the party filing the application, it should have the burden of proof beyond a reasonable doubt?

LAWYER: I do not know how...I mean that goes to issues of protecting the individual. And obviously you are talking under those circumstances about a child or an adult who does not want to be committed, who is fighting his own commitment, and it is an indefinite commitment. Under those circumstances I don't know if it would not be appropriate. I don't know that it is required by the constitution. And some states have it differently. They have a lower standard on the state. And in fact the Mental Illness Code I believe it specifies that the burden is on the state.

HECHT: But if the party is not the state, then you think that the statute is infirm to assign that high burden to a juvenile?

LAWYER: I do. And we have here a child who is saying, you know, I am banging at the door trying to get the rehabilitation that the state has by its policy and by its statutes promised me. And the thing that is supposed to protect me from involuntary commitment is here twisted and ironically keeping me out.

GAMMAGE: What are the consequences...this young man were given a retardation commitment and went through sufficient therapy and rehabilitation that he was deemed suitable to depart the institutional care and go out into the community; would he still be subject to criminal prosecution?

LAWYER: Yes, sir. Typically...

GAMMAGE: In other words it doesn't have the same effect as an insanity finding would have, that if you are insane at the time the offense is committed and you are insane now, we are going to put in, you are innocent by reason of insanity virtually, and once you are deemed rehabilitated there you are released, and there is no further consequences. Here there are further consequences; his retardation does not forgive his accountability for the crime?

LAWYER: Well my understanding is a juvenile who only has a petition alleging juvenile delinquency pending against him, if that child is committed and stays incarcerated past his 18th birthday, the petition lapses, and they never prosecute. But we don't have that here. We have a motion for discretionary transfer which Judge Gaither believes does not lapse, and I believe the state agrees. And so they would be then going forward on their motion for discretionary transfer to have him certified to stand trial as an adult. And of course, assuming that they are right, he would then still have to stand trial as an adult on these charges.

GAMMAGE: Whenever that commitment ended he would still be subject to being tried as an adult?

LAWYER: Two years from now, 10 years now, 40 years from now.

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REBUTTAL

LAWYER: Let me just address first this last issue that was being discussed in terms of your question Justice Gammage about what happens if the person leaves and goes into the community. I think

that the answer to that was somewhat misstated. What the Family Code provides is that if a person is discharged before their 18th birthday, then the prosecution can resume. In a commitment to the Dept. MHMR where MHMR believes that in fact the person is retarded, and does require services, they would not normally be discharged if they were moved into the community. The normal procedure there is called a furlough, and the person is furloughed into the community into a different kind of placement, normally not invoking the criminal procedures again.

GAMMAGE: But the conclusion of the requirement for institutional care would not make him automatically subject to prosecution on this discretionary transfer? In other words when he no longer requires institutionalization, a commitment, if he is furloughed from that commitment, it is non-custodial care. When he is no longer required to be in custody for that treatment, that would not put him back or make him once again subject to the criminal prosecution?

LAWYER: Well your honor I so far agree with you that I have in fact advised MHMR to notify the juvenile court when they do furlough someone into the community. But technically the statute says that they can't be prosecuted again unless they are discharged. And MHMR would only normally discharge if they determine that in fact the person wasn't' retarded.

On the issue of who was the applicant in this case, as Mr. Quinn stated to you, there was...the statute is very specific. It says the...

GAMMAGE: I really need to follow up on that question. I am confused as to why MHMR would furlough someone who had capital murder charges pending against him when he couldn't be prosecuted unless he was discharged as opposed to furlough? Why would they furlough someone under those circumstances if they felt that they were prepared and adequately rehabilitated to go out into the community on a furlough situation even, considering the circumstances and the pending criminal charges, why wouldn't they discharge them, or if they didn't feel that they were prepared to go out into the community, keep them under commitment?

LAWYER: I think your honor all they are doing is treating these folks just like anyone else, which they must, because they haven't been convicted of anything. Normally when a person is mentally retarded and he comes under the care of the department, he stays under the department's care regardless of where he goes, and he is not discharged...

GAMMAGE: I understand normally. But criminal charges pending are not the normal procedure?

LAWYER: I repeat your honor, that I have advised MHMR to notify the juvenile court if they make a decision to move someone into the community. And it may just be a problem with the terminology of the statute. But technically what it says: "that unless the person is discharged," and we discharged Larry Manuel for example at one point, we discharged him from the Brenham State School when it was determined that he was not retarded. But what the statute actually says is: "That he cannot be prosecuted unless he is discharged."

CORNYN: Was there an application for commitment filed in this case?

LAWYER: Yes, your honor.

CORNYN: And who was the party who filed the application?

LAWYER: Larry Manuel. His attorney's filed it. And it appears in our records at Ex. 20.