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OPINION COMMITTEE



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FILE # ML-48109-16  
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November 18, 2016

RD-0142-KP

To: The Honorable Ken Paxton  
Attorney General, State of Texas  
Opinion Committee  
P.O. Box 12548  
Austin, TX 78711-2548

Re: Proper interpretation of "disabled" as that term is used in Tex. Elections Code § 82.002

Dear General Paxton:

We are seeking an opinion to assist and instruct the Texas Secretary of State, Lamb County Clerk (as Early Voting Clerk), and the Lamb County Early Voting Ballot Board in the proper interpretation and application of Texas Elections Code § 82.002.

#### Background

In August 2015, the Texas Civil Commitment Office ("TCCO") moved all of Texas's Sexually Violent Predators ("SVPs") from halfway houses all over the state to a former prison facility located in Littlefield, Lamb County, Texas—now referred to as the Texas Civil Commitment Center ("TCCC"). The facility is not "come and go," as were the halfway houses; but *neither* is TCCC a jail, "secure correctional facility," "correctional facility," or "penal institution," as those terms are defined in the Penal and Elections Codes.<sup>1</sup> The TCCC is operated by Correct Care Recovery Solutions, a private corporation based in Deerfield Beach, Florida. Its staff are not correctional officers or public servants, or "security officers," as those terms are defined by the Penal Code.<sup>2</sup>

<sup>1</sup> A "secure correctional facility" means (1) a municipal or county jail; or (2) a confinement facility operated by or under a contract with any division of the Texas Department of Criminal Justice ("TDCJ"). Tex. Penal Code § 1.07(45). A "correctional facility" means a place designated by law for the confinement of a person arrested for, charged with, or convicted of a criminal offense; and includes county jails, confinement facilities operated by TDCJ or under contract with TDCJ, and community corrections facilities operated by community supervision and corrections departments. Tex. Penal Code § 1.07(14). A "penal institution" means a place designated by law for confinement of persons arrested for, charged with, or convicted of an offense. Tex. Penal Code § 1.07(37). And see Tex. Elections Code § 82.004(a).

<sup>2</sup> "Security officer" means a commissioned security officer as defined by § 1702.002, Occupations Code, or a noncommissioned security officer registered under § 1702.221, Occupations Code. Tex. Penal Code § 22.01(e)(3). "Public servant" means a person who serves as an officer, employee, or agent of the government. Tex. Penal Code § 1.07(41).

As you may be aware, before an SVP may be committed to this (or any facility) for treatment as prescribed by Chapter 841 of the Texas Health and Safety Code, a finding must be made that the individual “(1) is a repeat sexually violent offender; and (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.”<sup>3</sup> A “behavioral abnormality” is defined as “a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.”<sup>4</sup>

If a judge or jury determines, after a trial, that a person is a SVP, the judge presiding over the trial is required to commit the person for “treatment and supervision to be coordinated by” TCCO.<sup>5</sup> Treatment and supervision begins “on the person's release from a secure correctional facility” and continues until the behavioral abnormality has changed “to the extent that the person is no longer likely to engage in a predatory act of sexual violence.”<sup>6</sup> Provisions in the Health and Safety Code dealing with SVPs do not mandate the type of treatment environment TCCO must provide for SVPs; it simply requires the SVPs to “reside where instructed” by TCCO, and submit to positional tracking at all times.<sup>7</sup>

Currently, the state of the law is that depending on their status, certain SVPs do meet the requirements to be considered “qualified voters”—so long as they are over the age of 18, are citizens of the United States and residents of the state of Texas, have not been deemed totally or partially mentally incapacitated, are registered voters, and have fully discharged their felony prison sentences.<sup>8</sup> The legislature has set out that in only four circumstances<sup>9</sup>, a qualified voter can also be a person qualified to participate in early voting by mail if the voter:

1. Expects to be absent from their county of residence on election day and during early voting,
2. Is disabled,
3. Is age 65 or older on election day, or
4. Is confined in jail.

The Texas Elections Code defines a “disabled” voter—someone who is qualified to apply for and receive a ballot by mail—as someone who “has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or injuring the voter's health.”<sup>10</sup> SVPs, by definition, are persons whom have been deemed to possess “behavioral abnormalities.” But nothing about their individual diagnoses automatically deems them unable to physically appear at a polling place. By all accounts, SVPs are perfectly capable of leaving TCCC accompanied by staff

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<sup>3</sup>Tex. Health & Safety Code § 841.003(a).

<sup>4</sup>Tex. Health & Safety Code § 841.002(2).

<sup>5</sup>Tex. Health & Safety Code § 841.081(a).

<sup>6</sup>*Id.*

<sup>7</sup>Tex. Health & Safety Code § 841.082(a)(1), (4).

<sup>8</sup>Tex. Elections Code § 11.002(a).

<sup>9</sup>Tex. Elections Code §§ 82.001, 82.002, 82.003, 82.004.

<sup>10</sup>Tex. Elections Code § 82.002(a).

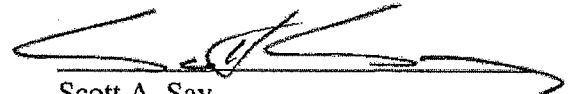
members (who accompany them for security purposes), and while wearing their ankle monitors. Nothing about their behavioral abnormality appears to, in and of itself, require personal assistance to complete tasks such as those required to be able to vote in a polling place.

Earlier this year, the TCCO began communicating with the Office of the Texas Secretary of State, in order to obtain an opinion from that office as to whether the SVPs who live at TCCC are indeed "disabled" as that term is defined by the Elections Code, and therefore able to apply for and obtain early voting ballots by mail. It is apparently the current opinion of the Office of the Secretary of State that "it may indeed be appropriate" for SVPs to claim "disability" as the reason they should be allowed to submit an application for a ballot by mail. The Secretary of State has previously communicated it has "examined the wording of Tex. Election Code Section 82.002, [ . . . ] and believe[s] it can reasonably be argued that a person who has been [ . . . ] found to be suffering from a 'behavioral abnormality,' to the point where the individual has been civilly committed and is unable to leave the commitment facility without being accompanied, is disabled for purposes of voting by mail."

**Requested Opinion**

Our office now respectfully requests an Attorney General Opinion as to whether sexually violent predators are, by the nature of their diagnosed "behavioral abnormalities" and current residential circumstances in Lamb County, "disabled" under the Texas Elections Code.

Sincerely,

  
Scott A. Say,  
Lamb County Attorney