

**NO. 09-0236, 09-0243
(Consolidated)**

**IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS**

THE STATE OF TEXAS

Petitioner

VS.

K.E.W.

Respondent

On Petition for Review from the First Court of Appeals at Houston, Texas
Cause Nos. 01-08-00371-CV, 01-08-00372-CV (Consolidated)

PETITIONER'S REPLY ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Cases	Trial No. 3318 (01-08-00371-CV) involved the temporary involuntary commitment of KEW; Trial No. 3318A (01-08-00372-CV) involved the involuntary administration of psychoactive medications to KEW; both cases were brought under Texas Health & Safety Code Ch. 574.
Trial Court	Probate Court of Galveston County, Texas Honorable Gladys Burwell, Presiding
Trial Court Disposition	Trial Court No. 3318: trial to the bench resulted in an order of temporary commitment. Trial Court No. 3318A: trial to the bench resulted in an order for the administration of psychoactive medications. Both judgments were issued April 23, 2008.
Parties in the Court of Appeals	K.E.W. Appellant State of Texas Appellee
Court of Appeals	First Court of Appeals; Justice Tim Taft authored the opinion, joined by Justice Elsa Alcala. Justice Evelyn Keyes authored a dissenting opinion.
Citation	K.E.W. v. State of Texas, 276 S.W.3d 686 (Tex.App.-Houston [1 st Dist.] 2008)
Court of Appeals decision	Judgments reversed and rendered.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Petitioner State of Texas presents this Reply to the Response Brief on the Merits filed by K.E.W. as follows.

REPLY ISSUE I

THE COURT OF APPEALS ERRONEOUSLY SUBSTITUTED ITS OWN ASSESSMENT OF THE CREDIBILITY OF THE WITNESS BY CHOOSING TO BELIEVE THE PROTESTATIONS OF A SCHIZOPHRENIC INDIVIDUAL TASKED BY ALIENS TO CREATE A NEW SOCIETY; IN DOING SO THE COURT OF APPEALS INVADED THE SOLE PROVINCE OF THE TRIAL JUDGE WHEN IT CONCLUDED THERE WAS NO EVIDENCE KE.W. WAS A DANGER TO OTHERS.

- a. **The Court of Appeals improperly substituted its own assessment of the credibility of the witness for that of the trial court.**

Perhaps the most surprising aspect of this case has been the willingness to give total credence to the assurances of K.E.W. that he would never do anything to

hurt the women he had been tasked by the aliens to impregnate. The Court of Appeals certainly found this assurance persuasive and cited it as a reason for its reversal of the trial court. *K.E.W. v. State of Texas*, 276 S.W.3d 686, 697 (Tex.App.- Houston [1st Dist.] 2008, pet. filed). The respondent likewise assures this Court that there was no admitted intention by K.E.W. he would impregnate the women against their will.¹

While this may be of comfort to some, by giving credence to those assurances the Court of Appeals substituted its own assessment of the evidence for that of the trial judge, and invaded the sole province of the trier of fact.

To conduct a legal sufficiency review, the Court considers only the evidence and inferences tending to support the fact finding, and disregards all contrary evidence and inferences. See *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996); *In The Interest of H.C.*, 924 S.W.2d 661, 664 (Tex.App.—San Antonio 1997, no writ.). If there is more than a scintilla of evidence to support a finding, the evidence is legally sufficient and other challenges go to the weight to be accorded the evidence. *Matter of RSC*, 921 SW2d 506, 511 (Tex.App.-Ft. Worth 1996, no writ).

In a factual sufficiency review, the Court will sustain a factual sufficiency challenge only if, after viewing all the evidence, it concludes the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam);

¹ Respondent's Brief on the Merits pg. 14.

Hollander v. Capon, 853 S.W. 2d 723, 726 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

In non-jury cases, the trial judge is the fact finder and the sole judge of the credibility of witnesses and the weight given their testimony. *In re AR*, 236 SW3d 460, 471 (Tex.App.-Dallas 2007, no writ). That is because ‘the trial court is in the best position to observe the demeanor and personalities of the witnesses and can ‘feel’ the forces powers and influences that cannot be discerned by merely reading the record”. *In Re. K.R.P.* 80 S.W.3d 669,675, (Tex.App.-Houston [1st Dist.] 2002, rev. den’d). Ignoring its own opinion in *K.R.P.*, the Court of Appeals substituted its own assessment of the evidence, giving credence to K.E.W.s’ assertion that he would never have sex with, and impregnate, the women identified to him by the aliens against their will.

But as pointed out in the Petitioners Brief on the Merits, his intended target was not sure, she hid in the back of the building while her male co workers intervened and K.E.W. was taken away by the police.²

b. Under the categorization supplied by the respondent, K.E.W. was an immediate threat of serious harm to others.

Respondent’s counsel has done an excellent job in trying to find some order in the body of cases that comprise the jurisprudence of the State of Texas law of mental health commitments. But in doing so Respondent has laid bare the error committed by the Court of Appeals in the instant case.

² RR 23/17-23;26/19-29;27/14 to 28/3; 28/6-24

The respondent pointed out the spectrum of case ranges from acts which are “Per Se Overt Acts of Dangerousness” to those of “No Substantial Dangerous Conduct” where there is a total absence of absence of identifiable dangerous acts.³

The respondent urges that the State cannot identify an overt act to justify the order of commitment. But it is the State’s contention that K.E.W.’s trip to the MHMR in search for one of the women identified to him by the aliens for impregnation as the first step in creating a new race is an overt act sufficient to show K.E.W. likely posed a risk of serious harm to his intended target, satisfying the requirements of *Tex. Health & Safety Code §574.034(b) & (d)*.

Respondent places the case of *In the State of Texas for the Best Interest and Protection of D.C.* 2005 WL 3725079 (Tex.App. Tyler 2006, no pet.) in the category of “Per Se Overt Acts of Dangerousness”. D.C., diagnosed with schizoaffective disorder, had threatened to shoot the Governor, and had called the Governor’s Office and threatened to kill him. D.C. denied he would ever kill except to defend himself or his property. The Tyler court was not so ready to accept the blithe assurances D.C. offered that he wouldn’t harm anyone except in defense of himself or his property; the order of commitment was affirmed.

K.E.W. may not have been as boisterous as D.C., but he did one thing D.C. did not do; K.E.W. actually showed up at the MHMR looking for his intended alien soul mate; there is no mention of D.C. showing up anywhere but his house.

³ Respondent’s Brief on the Merits PP 8-15.

The only explanation that comes to mind that explains the differing results reached by the Tyler Court in *D.C.* and the First Court of Appeals in Houston is that the Houston First Court has ...

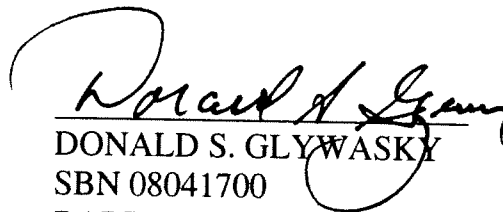
raised the standard so high that a commitment order cannot survive a legal or factual sufficiency challenge in this Court. The result is the routine overturning of the involuntary commitments of mentally ill patients who presented immediate threats to their own health and welfare and the safety of the community and the generation of a direct conflict with our sister court, the Fourteenth Court of Appeals, demonstrating the arbitrary and capricious application of the statute.

K.E.W. v. State of Texas supra at 701. (Keyes, J. dissenting.)

CONCLUSION

The state of the law regarding mental health commitments in the State of Texas is hopelessly muddled. The Petitioners prays this Court to grant the Petition for Review, vacate the opinion of the Court of Appeals and remand the case to the Court of Appeals for further proceedings.

Respectfully submitted,



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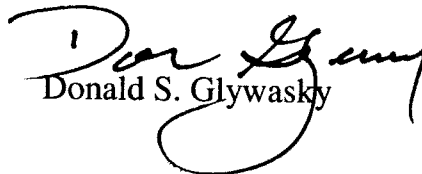
CERTIFICATE OF SERVICE

In accordance with TRAP Rule 9.5, I certify a true and correct copy of the foregoing Petitioners Brief on the Merits has been sent certified mail, return receipt requested, to opposing counsel at the following address:

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On this the 9 day of Dec, 2009.


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