

# ORIGINAL

Supreme Court Number 20070380 20070380  
District Court Number 01-K-00471

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

State of North Dakota,

MAR 13 2008

Plaintiff/Appellee,

STATE OF NORTH DAKOTA

vs.

Mario Hernandez,

Defendant/Appellant.

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APPEAL FROM ORDER REVOKING PROBATION  
DISTRICT COURT OF GRAND FORKS COUNTY

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BRIEF OF APPELLANT

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Mario Hernandez  
P.O. Box 5521  
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Was the evidence insufficient with respect to the issue of Hernandez having a congenital or acquired condition which makes it difficult, if not impossible, for him to control dangerous sexually predatory behavior.	10
Does revoking probation and incarcerating so as to give the probationer sex offender treatment subject it to Fourteenth Amendment due process and equal treatment analysis.	17
Did Hernandez willfully violate his probation condition.	21
Did Hernandez fail to complete treatment.	21

STATEMENT OF THE CASE

Mario Hernandez was convicted of statutory rape in violation of N.D.C.C. 12.1-20-03(1)d). Judgment was entered on April 30, 2002 pursuant to a guilty plea. He was sentenced to 15 years with eight years suspended for 15 years, with 15 years of supervised probation, and was given credit for time served since November 16, 2000. He was scheduled to be released from prison July 30, 2007.

On June 27, 2007, a petition to Revoke Probation was issued to revoke probation for not completing sex offender treatment while incarcerated, because he was terminated from treatment for "noncompliance due to failure to take responsibility for his crime and for blaming his victim and the victim's family." A copy of this petition is at App.6 (Appendix page 6); R.A.#105 (Register of Actions number 105).

He was violated for violating Condition #12 of his probation conditions. A copy of his probation conditions, Appendix A, is at App.8; R.A.#50.

Hernandez had a revocation hearing on November 13, 2007. R.A.#116-120.

Order for revocation of probation was filed on November 27, 2007. He was resentenced to 15 years with five years suspended for five years, with credit for time served from July 24, 2007 plus credit for time served of seven years. A copy of the Order For REvocation Of Probation is at App.11; R.A.#123.

The District Court made the finding of fact that he "was terminated from treatment for noncompliance due to failure to take responsibility for his crime and for blaming his victim and the victim's family. App.12.

Notice of appeal was filed December 28, 2007. A copy of the NOtice of Appeal is at App.13; R.A.#124.

A copy of the transcript of the November 13, 2007 revocation hearing is on file with this Court.

#### STATEMENT OF THE FACTS

The only witness for the State at the revocation hearing was Loralyn Waltz, a probation officer. Tr.7, L.18-25. (Transcript Page 7, Lines 18-25).

Hernandez entered a 'qualified' not guilty plea to the revocation charge, pleading that he did not "successfully complete the program as prescribed". Tr.6, L.11-13. The emphasis is on the "as prescribed".

Waltz testified that she "staffed this petition" with Barb Breland, a DOCR supervisor of the Sex Offender Program, and with Sandy Bender, a counselor and supervisor for the Sex Offender Program at the state penitentiary. Tr.8, L.5-14.

She testified that Hernandez was terminated on or about October 5, 2004. Tr.9, L.1. He completed the first two parts of the treatment program. Tr.9, L.7-19. These first two parts are an education class and a video program.

Tr.9, L.12-19.

Waltz testified that Hernandez was assessed at a risk level prior to his prison release date. Tr.12, L.7-10.

She testified that the tools used to assess his risk level was that State Penitentiary and treatment staff make a Sex Offender Prerelease Staffing wherein they look at offender information, his sexual offending information, his criminal history, victim information, treatment information, and they then utilize assessments. Tr.12, L.11-22.

This risk level or assessment is a clinical recommendation. Tr.12, L.21-22. This clinical assessment was completed on December 13, 2006.

Hernandez was assessed at a high risk level. Tr.13, L.2. The scores on the MnSOST and the MnSOST-R were 52 and 10. Tr.13, L.3-6.

A copy of Sandy Bender's memo kicking Hernandez out of treatment on October 5, 2004 was entered in to evidence as exhibit 1. T.14, L.22-23. A copy of this memo is at App.14.

A copy of the Sex Offender Prerelease Staffing was entered in to evidence as exhibit 2. Tr.15, L.20-22; R.A.119. This was the risk level assessment used to determine his risk level. It is dated December 13, 2006.

Exhibit 1, App.14, says that Hernandez was kicked out of treatment because "You continue to minimize your crime and sexual misbehavior, you admit some part of your

crime but attribute to victim and her family by stating they lied to you about her age, you deny that your sexually offending actions have affected your victim, even after being confronted on these behaviors you continue to objectify women, and children." App.14.

The Sex Offender Prerelease Staffing is a clinical assessment. Tr.15-16, L.25 and 1-3. Sandy Bender participated in that clinical assessment. Tr.16, L.4-6. The Clinical Prerelease indicated their assessment was more likely than not to reoffend sexually. Tr.16, L.9-12. His risk level would go down if he were to complete sex offender treatment. Tr.16, L.13-16.

Waltz testified that Sandy Bender had other things to say about Hernandez which is not in the Prerelease Staffing, that he has no boundaries as far as his victims, he manipulated by actually marrying his victim in his first crime, and he molested his own children which is incestual, and she said that the MnSOST screening tool does not react toward incest, and if it did, the MnSOST score would actually be higher <sup>than</sup> ~~that~~ what it is, and his prior record is in the Prerelease Staffing. Tr.16-17, L.17-25 and 1-10.

Waltz testified the high risk assessment is basically based on the MnSOST and the MnSOST-R, and any assessment of the penitentiary staff. Tr.23, L.12-16.

Hernandez testified. Tr.28, L.4-9.

Hernandez testified he did do the victim impact statement. Tr.P29, L.22-25. The treatment staff was not satisfied

with what I wrote in it because I wrote the truth and she, Sandy Bender, didn't want to hear it, she wanted me to write like other guys that did different things, my case was different, real different from theirs, and I can not write something that I did not do or something that is going to affect me in the long run, I did not want to lie about anything just to complete that statement, so that night I got in the mail that I was thrown out of the program. Tr.30, L.1-25.

Hernandez testified that Sandy Bender gets people who want to do the treatment but she gets them to write what she wants them to write. Tr.35, L.18-21.

Hernandez testified that he did not want to lie about what happened because he would only be lying to himself, to everybody else and to God, and if I did not do something but she wanted me to write it down, why should I. Tr.35-36, L.22-25 and 1-3.

Hernandez testified that the lie he would not do was that even though he was living with the minor, he did not know she was a minor. Tr.41, L.19-25. He testified that the mother of the girl, and the uncle of the girl, and the grandfather all knew the girl and I were living together, but they said nothing to me, in fact, he had a birthday party for the girl, thinking she was 19 years old. Tr.42, L.1-24.

He testified that what the treatment department wanted him to admit to was that he knew the girl was underage,

and because he did not say it, that<sup>is</sup> when the problem came up and he was kicked out of treatment. Tr.43, L.14-22.

He further testified that when he was arrested and the authorities told him she was a minor, that he responded that "if she's a minor, I'm guilty", but I can not lie that I told them the truth I was living under a lie. Tr.43-44, L.22-25 and 1-2.

The memo from Sandy Bender, kicking Hernandez out of treatment on October 6, 2004, Exhibit 1 of the State's exhibits, was read by the Court. Tr.14-15, L.22-25 and 1-2. The transcript does not say that the Court took the time to read the State's Exhibit 2, the Sex Offender Prerelease Staffing. Tr.15, L.20-25.

Loralyn Waltz, State's witness, testified that Hernandez was eligible to reapply to treatment six months after his termination from it. Tr.11, L.12-16. She testified that Sandy BENDER said that Hernandez did not reapply. Tr.11, L.17-21. The Court<sup>interrupted and</sup> clarified that Hernandez could reapply six months after termination. Tr.11-12, L.23-25 and 1.

It was made clear what the requirement was to reapply. Tr.12, L.4-6. Exhibit 1, the October 6, 2004 memo from Sandy Bender says that Hernandez "may reapply in 6 months and after you have completed a Victim IMPact Statement to the satisfaction of the Sex Offender Treatment Staff." The Court did read this memo when it was entered in to evidence. Tr.14-15, L.22-25 and 1.

Waltz testified that people may have to wait a considerable

period of time before they get in to treatment or can get back in to treatment. Tr.18, L.9-13. She testified that if Hernandez was revoked and sent back to prison that he would be put on a waiting list to get back in to treatment. Tr.19, L.5-25.

Waltz testified that the requirement to get back in to treatment was for Hernandez to complete the victim impact statement to the satisfaction of the treatment staff. Tr.20, L.6-11.

She testified that Hernandez did not resubmit the victim impact statement to get back in to treatment. Tr.20, L.14-20.

Hernandez testified that he did reapply twice to get back in to treatment. Tr.31, L.1-2. He reapplied once before the six months were up, and once after. Tr.31, L.3-15. Plus he asked to get back in verbally to Sandy Bender. Tr.31, L.15-19. And Sandy Bender responded When I'm ready to call you back, I'll call you back. Tr.31, and Tr.33, L.12-17. L.18-20, And Hernandez asked her if he could have it in writing, and Bender responded, no, you can't have this in writing, just wait 'till I call you back. Tr.31, L.22-24. Plus Hernandez sent kites to the treatment staff, but he never received an answer. Tr.32, L.8-25.

Hernandez testified that some people were still on the <sup>waiting</sup> waiting list to get back in to treatment when he left in July from the Jamestown prison to his revocation hearing in 2007, they were kicked out in 2004 when he was kicked

out of treatment. Tr.33, L.18-25, and Tr.34, L.1-9.

Immediately after testimony, the Court found that Hernandez violated the condition of probation as alleged in the petition to revoke and that he failed to complete the Sex Offender Treatment Program while incarcerated. Tr.44, L.6-16.

Peter Welte, prosecutor, in his closing argument, said Hernandez was 63 years old. Tr.44, L.20-21.

Welte said Hernandez has been assessed at high risk. Tr.45, L.8.

Welte asked that Hernandez be sent back to prison so as to "give him the benefit of the doubt that he does indeed want to receive sex offender treatment, which is what he is saying." Tr.46, L.14-16. And Welte threatened that if he does not complete treatment, that, with MnSOST and the sex offender civil commitment laws, if it doesn't work, because I'm sure he'll be facing a civil commitment then. Tr.46, L.17-22. This was the end of Welte's closing argument.

Dave Ogren's closing statement, defense attorney, argued that it is subjective when people can get back in to treatment, it could literally be years. Tr.47, L.3-7.

Ogren also said Hernandez was kicked out of treatment because of the way he filled out the victim impact statement and so he was terminated from treatment. Tr.47, L.8-13.

The Court's sentencing statement was then made.

The Court recognized that Hernandez has remained consistent from the time his charges were brought, that is, he admits to having sex with a female under the age of 15, but that he did not know she was under the age of 15. Tr.49-50, L.17-25 and 1.

The Court then castigates and condemns Hernandez and says or implies he deserves punishment and needs treatment because he did not make good decisions. Tr.50, L.2-7. (As a point of correction, the girl was age 14, not 13.) Tr.50, L.4.

The Court also judges Hernandez because he did not accept responsibility for this. Tr.50, L.9-10.

The Court, contrary to the 'facts', converts crimes or charges in to rape or sex offenses, knowing full well that often times charges are made, but, when there is no proof because they were false charges, the state oftentimes reduces the charge so as to induce the defendant to plead guilty so that the defendant can 'get out of jail' and get on with his life, that is, defendants oftentimes plea to charges they are not guilty of because the system drives them to it. Tr.50, L.16-21.

The Court says that he doubts Hernandez will successfully complete treatment unless he accepts that as an adult it is his job to check the age of anyone he is going to have intercourse with. Tr.51, L.19-23.

The Court tells Hernandez he can appeal. Tr.52, L.1-4.

## STANDARD OF REVIEW

The standard of review of a probation revocation is an abuse of discretion, reviewing the trial court's factual determination that the defendant violated the terms of his probation, and the trial court's discretionary determination that the violation warrants revocation. State v. Saavedra, 406 N.W.2d 667, 669 (N.D. 1987). The clearly erroneous standard is applied to review findings of fact. Id.; State v. Causer, 2004 ND 75, ¶31, 678 N.W.2d 552, 561. And the decision to revoke is reviewed under the abuse of discretion standard. State v. Saavedra, id.; State v. Causer, id., ¶32, page 562; State v. Wardner, 2006 ND 256, ¶26, 725 N.W.2d 215, 225.

## ARGUMENT

- I. NO FINDING OF A CONGENITAL OR ACQUIRED CONDITION WHICH CAUSES HERNANDEZ TO NOT BE ABLE TO CONTROL HIS SEXUALLY DANGEROUS PREDATORY BEHAVIOR AND THUS TO BE DANGEROUS WAS MADE. AND PROBATION REVOCATION FOR TREATMENT PURPOSES SUBJECTS IT TO FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL TREATMENT ANALYSIS.

Probation revocation is a two part analysis: Whether the probation condition was in fact violated, and, two, if violated, should the probationer be put in prison or should other steps be taken to protect society and improve chances of rehabilitation. Gagnon v. Scarpelli, 411 U.S. 778, 784, 93 S.Ct. 1756, 1760-1761 (1973); and see State

v. Toepke, 485 N.W.2d 792, 794 (N.D. 1992) and State v. Saavedra, id.

This second determination depends upon both facts and discretion, it involves making a prediction as to the ability of the individual to live in society without committing antisocial acts, without committing another crime. Morrissey v. Brewer, 408 U.S. 471, 479-480, 92 S.Ct. 2593, 2599-2600 (1972); State v. Osborne, 732 N.W.2d 249, 253 (Minn. 2007).

"Revocation ... is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent never to revoke, the whole thrust of ~~the~~<sup>the</sup> probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail." Gagnon v. Scarpelli, id., page 785, 1761.

The purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed; there must be a balancing of the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety. State v. Austin, 295 N.W.2d 246, 250-251 (Minn. 1980); State v. Osborne, id.

The word treatment, as used in the context of this case, means: "A broad term covering all the steps taken to effect a cure of an injury or disease; the word including

examination and diagnosis as well as application of remedies." Black's Law Dictionary, Fourth Edition, defining treatment.

Hernandez's probation was revoked so that he could have sex treatment in prison, not 'on the street'. He was revoked because it is claimed that he did not complete sex treatment while in prison on his first sentence.

Before one needs treatment, one must first be sick and diagnosed as being sick.

In this case, one must be diagnosed as having a congenital or acquired condition which causes one to be not able to control one's ability to not commit sex offenses. See N.D.C.C. 25-03.3-01(8).

In order for one to need treatment and to be incarcerated, it must be diagnosed that the person has a mental condition which causes him to have a serious difficulty in controlling his dangerous sexually predatory behavior. See In re P.F., 2006 ND 82, ¶28, 712 N.W.2d 610, 617 (Concurring opinion); In re G.R.H., 2006 ND 56, ¶13 and 18, 711 N.W.2d 587, 592; In re Anderson, 2007 ND 50, ¶22, 730 N.W.2d 570, 575-576; Kansas v. crane, 534 U.S. 407, 413, 122 S.Ct. 867, 870 (2002).

This serious difficulty in controlling one's behavior must be such that the mental abnormality or personality disorder rises to the level of making it difficult, if not impossible, for the person to control his dangerous behavior. Kansas v. Crane, *id.*, page 411, 870; Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 2080 (1997).

A diagnosis of a congenital or acquired condition, such as a paraphilia or antisocial personality disorder, does not, of itself, show future dangerousness, rather in addition, the diagnosis must be such that it causes a serious difficulty, if not impossibility, in controlling one's urges or sexually predatory behavior. Kansas v. Crane, id., page 411-412, 870; In re G.R.H., id, ¶18, page 594-595; In re J.M., 2006 ND 96, ¶10, 713 N.W.2d 518, 522 (A diagnosis of a disorder does not, per se, show future dangerousness. The evidence must clearly show that the disorder causes a serious difficulty in controlling sexually predatory behavior.).

This difficulty, if not impossibility standard to not be able to control is necessary so as to distinguish a 'mentally ill' person from the normal criminal recidivist who makes up much of a prison population, so that the incarceration/commitment (or probation revocation) does not move away from rehabilitation but becomes a "mechanism for retribution or general deterrence", quoting from Kansas v. Crane, id., page 412, 870. Here in Hernandez's case, a proper diagnosis is needed so as to prevent the State from 'brainwashing' him or to oppress him or 'bully' him in to conforming his words from the truth in to what they want to hear, or because the State feels treatment would do him some good.

Even if it is shown that the person would benefit from treatment, one can not be incarcerated unless one

fits the criteria of being a sexually dangerous person, that is, one must require treatment. Cf. In re R.S., 2006 ND 253, ¶15, 725 N.W.2d 193, 198.

There is a presumption against treatment or that one requires treatment. In re R.S., id. The burden of proof is on the State to show that revocation and incarceration is needed; and there is a presumption that one is competent, that one can control one's behavior and that one has control over his behavior, unless and until the State proves the contrary. Cf. In re I.K., 2003 ND 101, ¶15, 663 N.W.2d 197, 201.

A finding of dangerousness, standing alone, is not sufficient reason upon which to incarcerate, rather, there must also be a mental illness or mental abnormality, (a congenital or acquired condition which causes one to be dangerous). Kansas v. Hendricks, id., page 357-358, 2080.

And a clinical diagnosis is insufficient to show the congenital or acquired condition which causes one to not be able to control his urges. Clinical diagnosis means: "A diagnosis from a study of symptoms only." Black's Law Dictionary, Eighth Edition, defining diagnosis.

The diagnosis of the congenital or acquired condition and of dangerousness can not be based merely on one's conduct and past history of conduct, can not be based on statistics or actuarial statistics, but must be based on an examination of <sup>the</sup>te mind and soul of the person as it must be of a congenital or acquired condition and because it must be

the condition which causes the dangerousness, which causes one to lack control of one's sexually predatory behavior.<sup>1</sup>

Merely looking at one's history of conduct only shows that one has a history of conduct, which is what every convict has or criminal recidivist has. It does not, of itself, show that the conduct was caused by a congenital or acquired condition. A symptom does not, of itself, prove the cause of the symptom.

For example, just because one has an upset stomach and vomited does not necessarily mean that one has the flu, for one could have an upset stomach due to some other cause, such as food poisoning or some other disease or disorder.

Likewise, one's past history of criminal conduct simply means one chose to do wrong, and does not necessarily mean

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1. It must be the congenital or acquired condition which causes the lack of ability to control because "The Devil made me do it" is not an excuse in law. That is, if one chose to do the sex crime, he had control, or if one was 'impelled' to do it but one knew he was doing wrong and did it anyway, then he did not lack the ability to control because the DEvil made me do it is not an excuse. The lack of ability to control, the serious difficulty, must be caused by the congenital or acquired condition, not those situations which can be attributed to one's lusts, or which can be attributed to the Devil made me do it reasoning.

that one did wrong because one could not control oneself due to a congenital or acquired condition. The diagnosis of the illness and the dangerousness must be based on more than just the symptoms.

The dangerousness must result from something more than that dangerousness which every or perhaps almost everybody convicted of a crime would show if he were subjected to a statistical analysis or actuarial analysis, a MnSOST type test, labeled or mislabeled as or substituted for a psychiatric examination to show dangerousness.<sup>2</sup>

A clinical test or actuarial test only puts the person in the same class as every convict, as every dangerous recidivist, which due process of law forbids to be done as a reason to incarcerate or commit or revoke.

In fact, it is presumed a probationer is dangerous because that is the reason he is on probation, to see if he will rehabilitate and to give him a chance to rehabilitate.

In truth, Hernandez was revoked simply because he was a probationer, simply because some MnSOST type tests, some actuarial analysis was done, which determined he was dangerous, likely to reoffend, something every probationer has a likelihood of doing, and was already known to be true by the court when Hernandez was sentenced to probation. Failing treatment is only another actuarial assumed likelihood of reoffending. It does not mean Hernandez himself will

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2. Even probation officers in Grand Forks County are now administering some of the MnSOST type tests.

sexually reoffend, that he has a congenital or acquired condition which causes him to reoffend, to have a serious difficulty of controlling sexually predatory behavior.

Commitment proceedings, whether denominated civil or criminal, are subject to both the Equal Protection Clause and to the due process Clause of the Fourteenth Amendment. Specht v. Patterson, 386 U.S. 605, 608, 87 S.Ct. 1209, 1211 (1967).

A person held under a criminal statute as a criminal, but held under a statute designed for treatment and rehabilitation purposes, a Sex Crimes Act (or probation act), is denied equal treatment if he is denied the same rights the person would have if he had been civilly committed for treatment and rehabilitation purposes; a person committed under a criminal (or probation) statute must be given equal treatment or the same rights as a person committed under civil commitment statutes. Humphrey v. Cady, 405 U.S. 504, 508-511, 92 S.Ct. 1048, 1051-1053 (1973).

A person in penal custody held for mental illness after his sentence was completed is denied equal protection if he is not given the same rights and protections as that afforded to those civilly committed. Baxstrom v. Herald, 383 U.S. 107, 110, 86 S.Ct. 760, 762 (1966).

The Supreme Court has held that the equal protection clause requires the application of identical standards to civil and criminal commitment decision. Francois v. Henderson. 850 F.2d 231, 236 (5th Cir. 1988) (Citing Jackson

v. Indiana, 406 U.S. 715, 92 S.Ct. 1845 (1972); Humphrey v. Cady, id.; and Baxstrom v. Herold, id.).

The Petition To Revoke Probation, App.7, says that it is based on the treatment report dated December 13, 2006. This is State's Exhibit 2, R.A.119, which is the 8-page Sex Offender Prerelease Staffing, dated December 13, 2006. On page 7, it says that it is the clinical recommendation regarding pursuit for civil commitment, and it did recommend such. This report was completed within six months of Hernandez's release date from prison in July, 2007. However, the State's Attorney chose to seek probation revocation instead of civil commitment.

The fact that this is a probation proceeding does not mean the equal protection of the law is lost or does not apply because the State sought commitment and treatment under the probation statute rather than relying on the civil commitment statute. Humphrey v. Cady, 405 U.S. 504, 510-512, 92 S.Ct. 1045, 1052-1053 (1972). Incarceration is not justified on the ground that this is a probation revocation proceeding because this is still a commitment for treatment purposes, comparable to civil commitment.

Where the State has created or is using functionally distinct institutions, (such as probation and civil commitment), classification of patients for involuntary commitment to one of these institutions may not be wholly arbitrary. Baxstrom v. Herald, id., page 114-115, 764.

Having chosen to incarcerate Hernandez on the basis

he needs treatment, the State has determined that it no longer has an interest in punishing him, but rather in attempting to rehabilitate him. Ohlinger v. Watson, 652 F.2d 775, 777 (9th Cir. 1980). Of course, as noted at the beginning of this brief, probation is rehabilitative, not punitive in purpose.

Thus the fact this is a criminal or probation revocation proceeding does not detract from one's right to equal rights under the law.

Of the facts which the revocation Court considered, heard and read, one fact not considered, because it was not presented, was that Hernandez was diagnosed with having a congenital or acquired condition and that such condition causes him to have serious difficulty, if not impossibility, in controlling sexually predatory behavior. There is nothing in the transcript on this.<sup>3</sup>

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3. The District Court did read State's Exhibit 1, App.4, at the revocation hearing before she made her decision. The Court did not read State's Exhibit 2, R.A.#119. The Court made her decision based on the verbal testimony, Exhibit 1, plus she said she had read or reviewed the file, the presentence report, and transcripts of other hearings. Tr.49, L.18-20.

State's Exhibit 2, R.A.#119, the SEx Offender Prerelease Staffing, at page 6, did say that Hernandez was diagnosed with a paraphilia of hebephilia. No mention was made that

Hernandez is entitled to equal rights in this revocation proceeding as he would have if he had been civilly committed.

Plus, the evidence is insufficient to incarcerate or commit him because no diagnosis was made that he has a congenital or acquired condition which causes him to not be able to control, or which makes it difficult, if not impossible, for him to control dangerous sexually predatory behavior.

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footnote 3 continued. it caused him to not be able to control dangerous sexually predatory behavior. The Prerelease Staffing report did not say whether it was a diagnosis made by a psychiatrist based on a person examination of the mind and soul, or if it was made by the treatment staff, the mental health staff. The report was labeled a clinical assessment only. Plus, it was made pursuant to N.D.C.C 25-03.3-03.1(1), which says the assessment is based on only actuarial and clinical evaluations only, including prison behavior and whether the inmate participated in sex offender treatment while in prison.

Hernandez did not put this State's Exhibit 2 in his Appendix because it was not considered and relied on by the Court in making her decision.

II. HERNANDEZ DID NOT WILLFULLY VIOLATE HIS PROBATION  
CONDITION. AND HE DID NOT FAIL TO COMPLETE TREATMENT.

Hernandez was kicked out of treatment when he was asked to do a report wherein he was asked to describe how the relationship with the girl started, what led up to commit the crime, and he said he did not know she was underage. The treatment department then kicked him out for saying this, for not admitting guilt. See App.14.

This was wrong.

The treatment department made no finding as to why Hernandez said he did not know. The probation revocation Court likewise was not introduced with any evidence as to why he did not know or have reason to know.

The District Court, at Tr.49-50, L.17-25 and 1-11, and Tr.51, L.19-23, simply arbitrarily concluded that Hernandez should have known.

This is insufficient to show that he was willful or that he intentionally or inexcusably violated his probation condition of completing treatment.

While the calendar age of the girl obviously can not be ignored, that it is strong or 'conclusive' evidence to cause one to raise one's eyebrows, to make one think Hernandez is not speaking the truth, it still is not and can not be sufficient to show he is not speaking the truth.

What if the girl looked and acted older than her age. What if she acted more mature. What if she dressed and her hair was styled in a mature fashion, not like a young

girl. What if her facial features and body looked mature, not girlish. What if she did not attend school. What if she had had another adult boyfriend before meeting Hernandez. What if she had an I.D. saying she was age 18. What if her family represented her as being older than she was. What if Hernandez threw her a birthday party for her 19th birthday because he was led to think that, and her family came to it.

Hernandez presents this to show that calendar age alone is not sufficient to prove he knew or should have known she was underage. (In this case, all these facts occurred. But since these facts are not on this record, Hernandez poses the issue as a question to show that calendar age alone is insufficient to show he knew or should have known her age. These facts are in Hernandez's post-conviction file, which is a part of the over-all record of this case. See the post-conviction application at R.A.#93.)

Hernandez spoke the truth to the treatment staff, but they kicked him out anyway. They had no evidence to show he was not speaking the truth. Of course, as discussed above, calendar age alone is insufficient to prove he was not speaking the truth.

Hernandez did not willfully, intentionally or inexcusably violate his probation condition, did not willfully fail to complete treatment.

To find that a probation condition was violated, it must be shown that the condition was intentionally or

inexcusably violated, that it was willful. State v. Osborne, 732 N.W.2d 249, 253 (Minn. 2007).

Willfulness must be found, for the Court can not decide or condemn in an arbitrary, unreasonable or capricious manner. State v. Stavig, 2006 ND 63, ¶6, 711 N.W.2d 183, 185.

The fact that Hernandez did not know the age of the girl is a fact, is the truth. One can not be kicked out of treatment for speaking the truth.

And simply because he said he did not know her age does not mean he has not accepted responsibility, for his testimony at the revocation hearing shows he has accepted responsibility. He testified that he will not lie just to please Sandy Bender; and he testified that when he was arrested and the authorities told him she was a minor, that he responded that "if she's a minor, I'm guilty", but I can not lie that I told them the truth I was living under a lie. See pages 5-6 above, of this brief.

When he is saying he did not know she was underage, he is simply saying he has no guilt. That is, he is saying that if he had known she was underage, he would not have gotten involved with her, would not have gotten involved in the relationship, would not have committed the offense.

In reality, from a medical/psychological perspective, he is saying he has control, he does not come within the meaning of having a congenital or acquired condition which causes him to not have control of dangerous sexually predatory

behavior.

The purpose of a clinician or psychiatrist, and of a court, is to take the words a person says and translate them in to a psychological/medical term and in to a legal term.

In this case, a lack of guilt, or as App.14 put it, Sandy Bender said he did not have or avoided shameful personalizing of thoughts, feelings, and behaviors, shows the clinician, and the Court, that in reality the person can control himself, is not within the meaning of a person with a congenital or acquired condition which causes one to not have control.

Understand that lack of guilt, as used in this case, means lack of guilt because the facts show he did not know the girl was underage, meaning if he had known, he would not have gotten involved with the girl. Lack of guilt as used here is not used in the sense the person does not perceive that what he did do was not wrong. Hernandez is not and did not and never has said that what he did was not wrong, it is just that he did not know he was doing wrong. And thus he lacks guilt.

A court can determine whether the treatment was adequate or properly done. O'Connor v. Donaldson, 422 U.S. 563, 574 note 10, 95 S.Ct. 2486, 2493 note 10 (1975); and see In re G.R.H., id., ¶60-64, page 604-605 (Dissenting opinion.). In this case, a court can and must determine whether he was rightfully kicked out of treatment.

Hernandez said he did not know the girl was underage. This is truth. There are no facts showing otherwise. Although the calendar age of the girl obviously is important, standing alone, it does not tell the whole story, it does not prove that Hernandez is not speaking the truth. It does not show or mean that he knew or should have known.

Lack of guilt in this case means that Hernandez has control of himself, he would not have gotten involved if he had known.

In other words, Hernandez does not need treatment. And he was wrongfully kicked out of treatment.

Sandy Bender kicked him out, interpreting his lack of guilt to mean he was denying guilt, but having no facts to show that Hernandez was lying or was arbitrarily denying wrongdoing, was saying that what happened was not wrong. Without facts to show that Hernandez spoke untruth, she should have understood him to be saying he would not have committed the offense if he had known she was underage, and thus he has control, and thus he does not need treatment. The District Court likewise interpreted his words without facts showing untruthfulness. (Of course, calendar age alone is insufficient to show untruthfulness. It does not tell the whole story.)

Comment must be here made about use of Hernandez's prior criminal record:

The clinicians interpreted his prior record to say or prove he committed prior sex offenses. The facts in

the record do not say this.

Unproven charges, that is, slander, can not be used to say it. All accusations are automatically slanderous until proven to be true. To accuse a person of having committed a crime is slander. See N.D.C.C. 14-02-03 and 14-02-04 and 14-02-05(4 and 2). And when accused and charged but not proven, it is slander or libel. One has a right to be free from personal insult and defamation. N.D.C.C. 14-02-01. One can not abuse process or government proceedings and say it is not slanderous to make false accusations. Malicious prosecution or malicious use of government proceedings does not convert slander in to truth.

Dismissed or reduced charges do not prove prior sex offenses. And to assume that one 'got by' with a crime is just plain wrong, is slanderous. One has a right to be free of defamation until proven otherwise. It was wrong, it was false, to use the three prior allegations or insinuations of prior sex offenses against Hernandez.

The District Court likewise abused her discretion when she extrapolated the record so as to make it say something it does not say, and when she used slander, an unproven charge, to prove its own truthfulness.

And add to this the fact that Loralyn Waltz, probation officer, had to testify and say that even though it is not in the record or in the Sex Offender Prerelease Staffing report, that Sandy Bender said that Hernandez married his first victim and committed incest <sup>with</sup> ~~with~~ his own child,

should have told the District Court that something was not right with this case, that maybe Hernandez never did require treatment or that he was not rightfully kicked out of treatment, that he was being made in to a victim of retribution or of more punishment. And further, heighten this with the fact that Waltz or Bender put themselves above the MnSOST statistics people and impeached the veracity of their test by saying that it was not accurate because it did not include incest as a statistic to show predatory risk, and the District Court should have really become alarmed that something was wrong with this case. Not only is the evidence insufficient to show that Hernandez wrongfully did not complete treatment, the evidence was both exaggerated or extrapolated and slanderous, and in the same breath the State even impeached their own evidence, really making their evidence insufficient.

The evidence does not show that Hernandez was not speaking the truth when he said he did not know the girl was underage.

The evidence is insufficient to show he was rightfully kicked out of treatment, that he failed to complete treatment.

And the evidence is insufficient to show that he willfully or inexcusably violated his probation condition.

In fact, the facts show that he can control himself, that he does not come within the meaning of having a congenital or acquired condition which causes him to not be able to control himself, that is, he does not require treatment.

And the evidence even points to a perjury and subornation of perjury in this case. And saying the record says it says something it does not say is slanderous, malicious use of process, a malicious prosecution, bad faith.

Hernandez did not violate the terms of his probation condition.

Hernandez's speaking the truth and saying he did not know the girl was underage has to be understood for what it really means. The job function of a clinician and of a judge is to understand what the patient/defendant is saying. The patient/defendant does not have to tailor his thoughts in to a legal or psychological fashion. Rather, that is the psychologist's or clinician's or court's job, to translate what the patient/defendant says in to a diagnosis and in to legal language, in this case, that he does have control of himself.

#### CONCLUSION

Wherefore, Herndandez prays this Supreme Court to overturn his probation revocation conviction for insufficiency of the evidence for the reasons stated in parts I and II of this brief.

Dated this 10th day of March, 2008.

  
Mario Hernandez  
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**CERTIFICATE OF SERVICE BY MAIL**  
 DEPARTMENT OF CORRECTIONS & REHABILITATION  
 PRISONS DIVISION  
 SFN 50247 (Rev. 04-2001)

20070380

STATE OF NORTH DAKOTA )  
 ) SS.  
 COUNTY OF BURLEIGH ) Appeal file #20070380

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 13 Day of March, 2008, M, I mailed the following:

One copy of the Appeal Brief and one copy of the Appendix;  
 Letter addressed to Penny Miller;

**FILED**  
 IN THE OFFICE OF THE  
 CLERK OF SUPREME COURT

by placing it/them in a prepaid enveloped, and addressed as follows:

MAR 14 2008

Peter Welte  
 State's Attorney  
 P.O. Box 5607  
 Grand Forks, N.D. 58206-5607

STATE OF NORTH DAKOTA

and depositing said envelope in the Mail, at the NDSP, P.O. Box 5521, Bismarck, North Dakota 58506-5521.

AFFIANT *[Signature]*  
 P.O. Box 5521  
 Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this 13 day of March, 2008.  
 Notary Public *[Signature]* My Commission Expires On 10-31-08

**PATRICK SCHATZ**  
 Notary Public  
 State Of North Dakota  
 My Commission Expires Oct. 31, 2008