

Mr. Gregory Ian Runge
Attorney at Law
1983 E. Capitol Ave.
Bismarck, North Dakota 58501
(701) 222-1808
Attorney for Respondent/Appellant

QUESTION PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND FACTS SPECIFICALLY AND STATE SEPARATELY ITS CONCLUSIONS OF LAW WHEN IT ENTERED ITS ORDER FOR COMMITMENT, DATED AUGUST 5, 2010.

II.

WHETHER THE COURT ERRED IN ITS ORDER BY STATING IT CONSIDERED THE TESTIMONY OF DR. EDWARD L. KELLY.

III.

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT/APPELLANT ENGAGED SEXUALLY PREDATORY CONDUCT, HAD A CONGENITAL OR ACQUIRED CONDITION MANIFESTED BY A SEXUAL, PERSONALITY OR OTHER DISORDER OR DYSFUNCTION THAT MAKES THE RESPONDENT LIKELY TO ENGAGE IN FURTHER ACTS OF SEXUALLY PREDATORY CONDUCT WHICH WOULD CONSTITUTE A DANGER TO THE PHYSICAL OR MENTAL HEALTH OF OTHERS AND HAS SERIOUS DIFFICULTY IN CONTROLLING HIS BEHAVIOR.

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
II.	STATEMENT OF THE FACTS	12
III.	JURISDICTION	21
IV.	SCOPE OF REVIEW	23
V.	ARGUMENT	28
A.	Sexually Predatory Conduct	29
B.	A Congenital or acquired Condition that is Manifested by a Sexual Disorder, a Personality Disorder, or other Mental Disorder or Dysfunction	32
C.	Further Acts of Predatory Conduct	35
D.	Serious Difficulty Controlling Behavior	39
E.	Conclusion	41

TABLE OF AUTHORITIES

Case Law

<i>Kansas V. Crane</i> , 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)	14, 40
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	25
<i>In Re D.V.A.</i> , 2004 ND 57,676 N.W.2d 776	24
<i>In Re Korner</i> , 325 N.W.2d 217, 220 (N.D. 1982)	25
<i>Santosky v. Kramer</i> , 455 U.S. 745, 754-757 (1982).	246
<i>Zundel v. Zundel</i> , 278 N.W.2d 123, 130 (N.D. 1979).	25

N.D. Constitution and Statutes

N.D. Const. Art. VI §6	22
N.D. Const. Art. VI §8	22
N.D.Cent Code §25-03.3	22
N.D.Cent Code §25-03.3-02	22
N.D.Cent Code §25-03.3-19	22
N.D.Cent Code §25-03.3-29	22
N.D.Cent Code §27-05-06(1)	22
N.D.Cent Code §29-01-12	22
N.D.Cent Code §29-28-06	22

Rules

N.D.R.App. 4(b)	22
N.D.R.Civ. 52(a)	27

1

I. STATEMENT OF THE CASE

2 This is an appeal of a South Central Judicial District Court's Order for
Commitment of Sexually Dangerous Individual held on and filed August 5, 2010,
from an Involuntary Commitment Hearing, the Honorable Bruce B. Haskell,
presiding, taken under Section 25-03.3-19 of the North Dakota Century Code. This
appeal is also brought under Rule 4 of the North Dakota Rules of Appellate
Procedure. Notice of Appeal was served to opposing counsel on September 3,
2010 and filed on September 9, 2010.

3 On February 17, 2010, the petitioner filed a Petition for the Commitment of
a Sexually Dangerous Individual, along with the affidavit of petitioner affidavit and
Notice of Rights. Register of Actions [ROA] 1-3. Appendix [App.] 2-7.

4 Also on February 17, 2010, the undersigned was appointed as respondent's
counsel on and a Preliminary Hearing was scheduled for March 16, 2010. ROA 4-7,
App. 8-10. The Preliminary Hearing was held and the court found probable cause
to believe that the respondent was a sexually dangerous individual and that he was
to be transferred to the North Dakota State Hospital for an evaluation. ROA 9, App.
14. A commitment hearing was scheduled for May 5, 2010. ROA 10, App. 16.

5 On March 31, 2010, the respondent requested the district court to appoint
him an independent qualified expert examiner. ROA 10-14, App. 17-27. On March
31, 2010, the district court granted respondent's order. ROA 14, App. 28-30.

6 The petitioner filed his expert's evaluation on April 29, 2010.

7 On May 3, 2010, the respondent requested a continuance because his expert
examiner could not complete the written findings and file his report. ROA 15, App.

39. The continuance was granted and the commitment was rescheduled for July 19, 2010. ROA 42, App. 18. Then, on May 7, 2010, the petitioner also put is a Request to Reset Hearing, which was granted, because his expert witness was not available for the July 19, 2010 hearing. ROA 43, App19. The commitment hearing was now rescheduled for August 5, 2010. ROA 21, App. 45.

8 The respondent's Independent SDI Evaluation was filed on July 16, 2010. ROA 22, App. 46.

9 On August 5, 2010, an Involuntary Commitment Hearing was held. Transcript [Tr.] 1-28. The respondent introduced no exhibits. The petitioner introduced three exhibits. ROA 23-25, App. 56-69.

10 On August 5, 2010, the district court filed its Order for Commitment of Sexually Dangerous Individual. ROA 26, App. 70.

11 On September 3, 2010, the respondent served his Notice of Appeal and Request for Transcript. ROA 27-29. The Clerk of the District for McLean County filed the Notice of Filing the Notice of Appeal. ROA 30, App. 74. Finally, on October 22, 2010, the Transcript of Sexually Dangerous Offender Commitment Hearing was served by the court reporter on all parties.

12 **II. STATEMENT OF THE FACTS**

13 On August 5, 2010, a hearing was held In the Matter of Larry Gene Rubey. Tr. 1-28. Dr. Robert Lisota was the only witness to testify. Tr. 3-24.

14 On direct examination, after establishing his qualifications, Dr. Listota testified as to whether Larry met the three elements required, that is, whether Larry is a:

"Sexually dangerous individual" . . . who is shown to have [1] engaged

in sexually predatory conduct and [2] who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction [3] that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. It is a rebuttable presumption that sexually predatory conduct creates a danger to the physical or mental health or safety of the victim of the conduct.

N.D.Cent.Code 25-03.3-01(8). Dr. Lisota also testified as to whether Larry met a fourth element, that is, whether Larry has serious difficulty controlling his behavior as required by the United States Supreme Court. under ***Kansas v. Crane***, 534 U.S. 407, 122S.Ct. 867, 151L.Ed2d 856 (2002).

15 As to the first element, engaging in sexually predatory conduct, Dr. Lisota testified that Larry had met the first element when the doctor reviewed the criminal judgments that were submitted to the court. Tr. 8. Those were prior sexual acts with children. Tr. 9

16 Regarding the second element, whether Larry has a congenital or acquired condition, The doctor stated that Larry has a sexual diagnosis of pedophilia. Tr. 8. The doctor defined the term pedophilia, in this case as:

In practice it means the respondent has engaged in — has experienced over at least six months, and in this case obviously much longer, recurrent intense sexual arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child, generally ages and younger. The person has acted on these sexual urges in this case and the person is at least 16 years of age and five years older than the victims.

Tr. 8. The doctor relied on Larry's four judgments in state court, a GSI conviction in 1988 and one in 1999. Tr. 9-10. The doctor also relied on other uncharged criminal offenses that would qualify. Tr. 8-13.

17 Addressing the third element, the doctor expressed an opinion that Larry would likely engage in further predatory conduct. Tr. 14. Dr. Listota based his opinion upon his risk assessment tools, i.e., the Static-99R and the MnSOST-R. Tr. 15.

18 Referencing the fourth element, Dr. Lisota indicated that Larry would not be able to control his behavior outside is an unsupervised setting. Tr. 16. The doctor based his opinion “on the information available to me and the particularly the historical evidence from his files, that he remains likely to engage.” Id.

19 At the close of the hearing, the court made the following conclusions:

Based on the evidence that's been presented, I do believe that the State has established that the respondent is a sexually dangerous offender, specifically there is evidence that he has engaged in sexually predatory conduct, specifically a gross sexual imposition conviction in May of 1988, a gross sexual imposition conviction in June of 1999, corruption or solicitation of a minor conviction in June of – June 17th of 1999. There has been some uncharged sexual contact. I'm not considering anything that there was inadequate foundation for, but Dr. Lisota did testify that in his review of the reports, the respondent did admit to sexually predatory conduct, so that prong has been established. The State has established that the respondent does have a congenital or acquired condition that is manifested by a sexual disorder, personality disorder, or other mental disorder, specifically a diagnosis – or several diagnoses of pedophilia. Also, there's some diagnosis of mental disorders that Dr. Lisota said are not relevant to any of these prongs, however the pedophilia diagnosis in and of itself is a congenital sexual disorder. The evidence also establishes that the respondent is an individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others, specifically Dr. Lisota testified that pedophilia itself in this case makes the respondent likely to engage in sexually predatory conduct. There is also the factor that he has been non-compliant with sex offender treatment and never has actually engaged or involved in any treatment at any level. The risk assessment instruments indicate a likelihood of re-offending. Further, the evidence establishes that the respondent would have serious difficulty controlling his behavior, specifically the pedophilia diagnosis contributes to that. The fact that he is likely to engage in sexually predatory conduct and the fact that he has, at the very least, failed to participate or complete any

program of treatment. For those reasons, the Court believes that the State has established that the respondent is a sexually dangerous individual requiring treatment in the care and custody of the superintendent. Tr. 26-27.

20 In its order, the court wrote:

This matter came on for the commitment hearing on August 5, 2010. Respondent was represented by Greg Runge and the Petition was filed by McLean County State's Attorney Ladd Erickson. Prior to the hearing the Court was provided with copies of the evaluations conducted by Dr. Robert Lisota and Dr. Edward L. Kelly, the respondent's independent evaluator. Testimony was provided to the Court by both Dr. Lisota and Dr. Kelly.

Both Dr. Lisota and Dr. Kelly based their opinions on Larry Rubey's history of sexually predatory conduct and found him to a sexually dangerous individual.

The Court finds by clear and convincing evidence [Larry] is a sexually dangerous individual. As a sexually dangerous individual [Larry] shall be committed to the care, custody and control of the executive director as defined by N.D.C.C. 25-03.3.

ROA 26, App. 70.

21 **III. JURISDICTION.**

22 The district court had jurisdiction under N.D. Const. Art. VI, §8, and N.D.C.C. §27-05-06(1) and N.D.C.C. 25-03.3-02. The appeal from the district court was filed under N.D.R.App.P.4(b). This Court has jurisdiction under N.D. Const, Art. VI, §6, N.D.C.C. §29-01-12, N.D.C.C. §29-28-06 and N.D.C.C. §25-03.3-19.

23 **IV. SCOPE OF REVIEW**

NORTH DAKOTA SUPREME COURT'S SCOPE OF REVIEW OF THIS APPEAL IS LIMITED AND THE STANDARD IS GOVERNED BY N.D.C.C. 25-03.3-29 AND RULE 52(A) OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

24 Pursuant to 25-03.3-19, this Court is "limited to a review of the procedures,

findings, and conclusions of the lower court." **N.D.Cent.Code § 25-03.3-19 (2009)**,
The standard of review for appeals from commitments of sexually dangerous individuals is a modified clearly erroneous standard. *In Re D.V.A.*, 2004 ND 57, ¶7, 676 N.W.2d 776. "We affirm the trial court's order of committal unless it is induced by an erroneous view of the law or we are firmly convinced the Court's decision is not supported by clear and convincing evidence." *Id.*

25 The "clear and convincing evidence" standard is more than just a standard imposed by the North Dakota statute. That standard is, in fact, mandated by the due process clauses of the Fourth and Fourteenth Amendments to the United States Constitution. *Addington v. Texas*, 441 U.S. 418 (1979). North Dakota has defined "clear and convincing evidence" as "evidence leading to a firm belief or conviction that the allegations are true." *In Re Korner*, 325 N.W.2d 217, 220 (N.D. 1982) citing *Zundel v. Zundel*, 278 N.W.2d 123, 130 (N.D. 1979).

26 To satisfy due process, the "clear and convincing evidence" standard is a subjective sliding standard which considers (1) the importance of the private interests affected by the proceedings; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest use of the challenged procedure. *Santosky v. Kramer*, 455 U.S. 745, 754-757 (1982). The Court has said that the minimum standard of proof tolerated by the due process requirements reflects not only the weight of the public and private interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. *Santosky, supra*. In fact, in *Santosky*, the Court said the

"clear and convincing evidence standard" is supposed to convey to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due process. **Santosky, supra**, 455 U.S. at 768, 770.

27 Pursuant to Rule 52(a) of the North Dakota Rules of Civil Procedure,

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, including findings in juvenile matters, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

N.D.R.Civ.P. 52(a) (2004).

28

V. ARGUMENT

29

A. Sexually Predatory Conduct

30

The court ruled that:

I do believe that the State has established that the respondent is a sexually dangerous offender, specifically there is evidence that he has engaged in sexually predatory conduct, specifically a gross sexual imposition conviction in May of 1988, a gross sexual imposition conviction in June of 1999, corruption or solicitation of a minor conviction in June of – June 17th of 1999. There has been some uncharged sexual contact. I'm not considering anything that there was inadequate foundation for, but Dr. Lisota did testify that in his review of the reports, the respondent did admit to sexually predatory conduct, so that prong has been established.

Tr. 26.

31 Since this first element is proved by his history of convictions, as they meet the statutory definition, Larry concedes this point.

32 **B. A Congenital or Acquired Condition that is Manifested by a Sexual Disorder, a Personality Disorder, or other Mental Disorder or Dysfunction.**

33 The court next held that:

The State has established that the respondent does have a congenital or acquired condition that is manifested by a sexual disorder, personality disorder, or other mental disorder, specifically a diagnosis – or several diagnoses of pedophilia. Also, there's some diagnosis of mental disorders that Dr. Lisota said are not relevant to any of these prongs, however the pedophilia diagnosis in and of itself is a congenital sexual disorder.

Tr. 26-27.

34 Again, Larry concedes this point, as well. Dr. Lisota reviewed the files in Larry's case. He observed that the Larry had engaged in, over at least six months, recurrent intense sexual arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child, generally ages 13 and younger. That Larry had acted on these sexual urges in this case and the person is at least 16 years of age and five years older than the victims. Tr. 8.

35 **C. Further Acts of Sexually, Predatory Conduct**

36 As to the third element, the court ruled:

The evidence also establishes that the respondent is an individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others, specifically Dr. Lisota testified that pedophilia itself in this case makes the respondent likely to engage in sexually predatory conduct. There is also the factor that he has been non-compliant with sex offender treatment and never has actually engaged or involved in any treatment at any level. The risk assessment instruments indicate a likelihood of re-offending.

Tr. 27.

37 Larry states that there was no clear and convincing evidence nor did the court make specific findings as to how there was a nexus or connection between the diagnosis of pedophilia and the predictability that Larry was likely to engage in future predatory conduct.

38 Dr. Lisota merely stated that “I believe, based on the information available to me and particularly the historical evidence from his files, that he remains likely to engage.” Tr. 16. Again, the doctor merely concluded that pedophilia was an indicator by itself that Larry was likely to engage in further predatory acts. Tr. 13.

39 **D. Serious Difficulty Controlling Behavior**

40 There was no clear and convincing evidence that Larry had difficulty in controlling his behavior. In fact, neither the court’s oral decision, nor the written addressed this issue. The court never ruled on whether Larry had difficulty in controlling his behavior. Under ***Kansas v. Crane***, 534 U.S. 407, 122S.Ct. 867, 151L.Ed2d 856 (2002), the court must find whether Larry has difficulty in controlling his behavior.

41 **E. Conclusion**

42 For the reasons stated above, Larry respectfully requests this court reverse the lower court’s Order for Commitment of Sexually Dangerous Individual.

43 Respectfully submitted this 1st day of December, 2010.

Gregory Ian Runge
Mr. Gregory Ian Runge
1983 E. Capitol Ave.
Bismarck, North Dakota 58501

(701) 222-1808

Attorney for Respondent/Appellant

CERTIFICATE OF SERVICE

I certify that I am the attorney representing Larry to this action. I made service of the Respondent's/Appellant's **BRIEF FOR THE APPELLANT and APPENDIX TO APPELLANT'S BRIEF** by electronic transmission (e-mail) true copies to Mr. Ladd R. Erickson, McLean County State's Attorney, at 712 5th Ave., Washburn, North Dakota 58577 at lrerickson@nd.gov <lrerickson@nd.gov> on this 1st day of December, 2010, in accordance with Rule 5(f) of the North Dakota Rules of Civil Procedure and Supreme Court Order 14.

Gregory Ian Runge

Mr. Gregory Ian Runge
Attorney at Law
1983 E. Capitol Ave.
Bismarck, North Dakota 58501
(701) 222-1808
Attorney for Respondent/Appellant