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# IN SUPREME COURT

# STATE OF NORTH DAKOTA

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| In the Matter of L.D.M. | ) | |
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| LISA B. GIBBENS, | ) | Supreme Court No. 20110110 |
| Rolette County, State's Attorney, | ) | District Court No. 40-04-R-19 |
| | ) | |
| Petitioner/Appellee, | ) | |
| | ) | |
| -vs- | ) | |
| | ) | |
| L.D.M., | ) | |
| | ) | |
| Respondent/Appellant. | ) | |



APPEAL FROM ADDENDUM TO FINDINGS OF FACT
OF THE ROLETTE COUNTY DISTRICT COURT, ROLLA, ND,
HON. LAURIE A. FONTAINE, PRESIDING,
DENYING APPELLANT DISCHARGE FROM CIVIL COMMITMENT.

## BRIEF OF APPELLEE

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(701) 477-3169
*Attorney for Appellee*

corrected brief

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## STATEMENT OF ISSUES

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   *District Court held: in the affirmative.*

2. **Whether requiring L.D.M. to admit his guilt as part of sex offender treatment violates the Fifth Amendment's self incrimination clause.**

   *District Court held: in the negative.*

3. **Whether the court can order the executive director of the Department of Human Services to adopt a particular treatment plan.**

   *District Court held: in the negative.*

## STATEMENT OF THE CASE

This is an appeal from an order denying discharge from appellant's commitment as a sexually dangerous individual. Appellant, L.D.M., was initially committed as a sexually dangerous individual by order dated November 5, 2004. [Dock. No. 27]. In December, 2008, L.D.M. requested a discharge hearing pursuant to N.D.C.C. §25-03.3-18. [Dock. No. 91]. Hearing was initially scheduled for April, 2009, but had to be rescheduled several times (so that L.D.M. could obtain a court-appointed attorney, so that he could obtain an independent evaluation, and also due to illnesses of a witness and L.D.M.'s counsel). [Tr. pp. 1-2]. Hearing was held on March 23, 2010, before the Honorable Laurie A. Fontaine, District Judge. Discharge was denied by order dated April 20, 2010. [Appendix of Appellant, p. 4]. L.D.M. appealed that order, and this Court issued its decision on February 8, 2011, reversing and remanding the matter for more specific findings. On March 23, 2011, the trial court issued an Addendum to Findings of Fact Issued April 20, 2010, and again denied discharge. L.D.M. is now appealing that ruling.

## STATEMENT OF FACTS

L.D.M. is 36 years of age. [Tr. p. 13]. Since the age of 19, he has been continuously held either in the state prison or the state hospital, and between the ages of 15 to 19, he spent about half the time in detention placements. [Tr. p. 12; Dock.

No. 110[1], p. 5]. He has been using alcohol since he was 12 or younger. [Dock. No. 110, p. 6]. His criminal history extends back to the age of 12. [*Id.*, p. 8]. At age 14, he was charged with theft, three burglaries and criminal transform (1989). [*Id.*]. In July, 1990, he pled guilty to aggravated sexual assault, arising out of a rape which occurred on June 25, 1989. The offense involved breaking into the apartment of a woman in the early morning hours, while she was asleep, and raping her. The victim had bruising on the wrist, arm thorax, and both legs, and vaginal lacerations, indicating a very violent rape. L.D.M. had apparently been consuming alcohol at the time of this offense. [Dock. No. 110, p. 8]. In early 1990, he committed three offenses against one of his female teachers. The first incident involved touching her buttocks (February, 1990). The next month, he hid in the bathroom until school was over and touched her again. In April of 1990, he hid in the gymnasium and grabbed the same teacher with both hands while she was shutting off the lights–when she told him to get away, he said "I can't help it, it feels good." He threatened to slash the teacher's tires, and a few days later, her tires were slashed. He was convicted of three counts of criminal mischief and sexual assault, and sent to the State Industrial School for evaluation. During his placement there, he pled guilty to the 1989 rape. [Tr. p. 10; Dock. No. 110, p. 9-10].

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[1] Docket Entry No. 110 is the Report of Independent Evaluator Dr. Stacey Benson, admitted at trial as Respondent's Exhibit No. 1.

L.D.M. was discharged from the State Industrial School in June of 1991. In September, 1991, he was convicted of three counts of criminal trespass arising out of three incidents occurring in the early morning hours of August 17, 1991. Each incident involved breaking into a home where a woman was asleep inside. In one of the homes, he was found standing over the bed of a 17-year old girl. He had been consuming alcohol at the time of these offenses. [Tr. p. 11-12; Dock. No. 110, p. 10; Dock. No. 102[2], p. 1]. Following these crimes, L.D.M. was adjudicated for sex offender and chemical dependancy treatment. He was sent to South Dakota for sex offender treatment, but he was terminated from treatment due to denial and noncompliance. [Dock. No. 110, p. 10; Tr. p. 13].

On his 18th birthday (February 6, 1992), L.D.M. was placed in Dickinson Correctional Facility. [Dock. No. 110, p. 10]. Following his release, he was convicted of gross sexual imposition for an assault which occurred on February 21, 1993, shortly after he turned 19. He broke into the victim's home through a locked door at 6 am, and then forced his way into her bedroom through a locked door. A 25-year old woman (a distant acquaintance of his) was sleeping in the bedroom. L.D.M. got into the bed. When she told him to leave, he forced her onto the floor, ripped off her clothes, choked her, and raped her. The victim was kicking and fighting and

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Docket Entry No. 102 is the SDI Annual Re-Evaluation prepared by Dr. Lynne Sullivan, admitted at trial as State's Exhibit No. 2.

telling him to leave. She reported that he choked her until she thought she was going to die or pass out, and that he verbally threatened her life. She had bruises and scrapes on her body. [Tr. pp. 130-131; Dock. No. 110, p. 11]. L.D.M. maintains his innocence, even though he admits entering the house and bedroom and putting the victim on the floor to have sex. He claims he went to the house to get together with the victim's sister, but when he saw it was the victim in the bed, he still got into the bed and started sexual contact. He claims the sex was consensual because the victim never said no. [Dock. No. 110, p. 11]. While out on bond awaiting trial for this offense, bond was revoked following an early morning incident in which an intoxicated L.D.M. was beating on the door of a single woman. [Dock. No. 110, p. 12]. Following his conviction for gross sexual imposition (a Class B felony), L.D.M. was sentenced to 10 years at the North Dakota State Prison (NDSP), where he remained until his commitment in 2004. [*Id.*].

During his incarceration, L.D.M. refused to undergo sex offender treatment or chemical dependency treatment. [Register of Actions, No. 27]. He had numerous disciplinary problems in prison, including multiple assaults and threats of violence against staff members, assaults on other inmates, and property destruction. One assault against a staff member in 1996 resulted in a February, 1997, conviction for felony assault with an 18-month sentence to run consecutive to the sentence he was then serving. [Dock. No. 110, pp 12-14]. His disciplinary incidents in prison included

sexually inappropriate behavior such as harassment and stalking-type activities toward female staff, including:

- Telling a female staff member "Fuck you, you don't know, you shouldn't even be here. This is a man's fucking job. This is bullshit. Fuck you all." (02/06/1996).

- Telling an officer "you take it in the ass," and "you're a pussy." (04/16/1996).

- Asking a female officer, "Do you get paid to suck cock?" (10/12/1996).

- When a female staff was in the process of letting another inmate through the gates by the shower room, coming out and telling the inmate, twice, "Leonard, break her in half." (05/31/1997)

- Telling a staff member, "Bend over you little fuckin' Mexican." (09/10/1997).

- Stating that he would start to kill staff members if they didn't stop messing with him, and stating several times that he wanted to kill staff because he had nothing to lose (09/10/1997).

- Telling staff, "I'm going to take this fucking chair and put it over your head." (02/28/1998).

- Assaulting another inmate (7 stitches) (06/26/1998).

- Assaulting another inmate who refused to sell him his T.V. (02/11/1999).

- Keeping *Gallery* magazines (a nude female magazine) in his cell (02/04/2000).

- Sexually assaulting a female officer (05/03/2000).

- Calling an officer "a big fuckin' bitch," and telling staff that when he gets out he's going to fuck her and her grandmother (07/01/2000).

- Writing a disturbing letter to a female officer, accusing her of having sex with another inmate and being a "dirty woman." (10/24/2000).

- Class A write up for sexual harassment, stalking behavior, including asking a female officer for a pair of her panties (07/2001).

- Found guilty of sexual harassment of the female staff officer whose buttocks he grabbed (10/2001).

- Asking a female officer where her ring was, telling her she looked good, and glaring at her (12/11/2002).

[Dock. No. 110, p. 12-14, Dock. No. 102, p. 1].

In the May 3, 2000, sexual assault, L.D.M. came up behind a female officer and placed his hands on her upper left thigh and lower left buttocks. He brushed the area with his hands again and told her, "I have to admit it felt good." About an hour later, he came into her office, closed the door, and told her she was beautiful, that he couldn't stop thinking about her, that he hadn't been with a woman for seven years, and he just wanted to smell her. He asked her for a pair of her panties. When she wrote him up for this behavior, he wrote her a letter saying that the sexual contact was just "natural" arising out of their long prior relationship. He then accused her of having sex with another inmate and being a "dirty woman." When his appeal of this write up was turned down, he was sent a letter on November 16, 2001, which stated:

> You were trying to exert control over a female staff member. When she didn't follow your wishes, you tried to get her in trouble. . . by accusing her of acts that could be grounds for her to lose her job. You were trying to hurt her for not allowing you to control her. [L.D.M.], you even tried to control me. . . you wrote me and other staff vile and threatening letters to goad us into coming to talk to you. Your recent behavior with. . . is a classic example of stalking and you have also displayed grooming behavior with both. . . and a female officer. . . For your sake and the sake of your future, get into treatment now. Your appeal is denied.

[*Id.*, p. 15].

Throughout his incarceration from 1996-2004, L.D.M. had additional sexually inappropriate behavior and a significant history of stalking behavior is referred to in his record. Examples include this notation:

> "Since [L.D.M.] has been in the East Cell House from the A.S. Unit, his behavior has been getting more predatory toward female officers. He will stand close to the officer and imitate their body motions and when I mean close, I am referring to elbow touching to inches away. He will also be on the third tier where he lives, calling your name in a taunting fashion or in a just plain monotone at a volume where the whole cell house can hear him. He has in the past followed me around during recreation. At times he was no less than 2 steps behind me. I deal with this behavior on a daily basis and I know that other female officers have also. When asked not to do a behavior, he laughs it off and will tell you that he is only joking. He has not gone as far as inappropriate touches with me yet but I am sure that he will try it someday."

[Dock. No. 110, p. 14].

At the time of his initial commitment in 2004, L.D.M. was diagnosed by two experts with alcohol abuse and antisocial personality disorder with borderline features. A third expert diagnosed him with antisocial personality disorder with narcissistic and passive aggressive features. [Dock. No. 27]. When he arrived at

NDSH in 2004, he was offered sex offender treatment but did not actively participate. [Tr. p. 13]. Subsequently, he did advance to stage two sex offender treatment on July 31, 2007. At this point, however, he refused to participate in group treatment. He was then transferred to a secure ward (Secure II) for threatening another resident. Later that month, he failed a polygraph as to whether he had other victims. He continued to threaten staff and residents and was transferred to the most secure ward (Secure I) in October, 2007. While there, he broke a locker door off its hinges and tried to smash windows with it. He caused substantial damage to the unit, including broken windows and broken security doors, and a staff member was injured by glass shards. He was convicted of Criminal Mischief and Disorderly Conduct for this incident and sentenced to 14 months in prison. After serving that sentence at NDSP, he returned to NDSH on September 29, 2008. [Dock. No. 110, p. 16]. Upon his return, his behavior was disruptive and uncooperative; he behaved in an "entitled" manner, he was uncooperative and dismissive with male staff and repeatedly sought out attention from female staff. [Tr. pp. 23-25]. Although he continued to pursue female staff members, he claimed that he should not get into trouble for his behavior with female staff because he was not doing anything wrong with them. [Tr. pp. 25-27].

In April of 2009, L.D.M. received a write-up for disrespect of staff, failure to follow directives, and property destruction. He had requested that a particular female

staff member come to speak to him. When she did so, he wrote a note to her, talking about how much he cared for her, how she smelled so good he just couldn't control himself, that he wanted to put his face between her legs and that he wanted a pair of her panties. [Tr. pp. 29, 31]. He went on the intercom several times asking that staff member to come see him or communicate with him. [Tr. pp. 31-32]. He continued to engage in stalking-type and other inappropriate behavior with female staff members, until he was moved to a unit for particularly disruptive residents. He continued to request to talk to certain female staff members about his write-up for sexual overtures and then started throwing his dinner tray and kicking dishes around; he later removed a cabinet door and started smashing the windows in the area, managing to break the shatter-resistant glass, and smashed a video camera that was mounted on the wall. [Tr. pp. 33-34]. This was very similar to the October, 2007, incident. [Tr. p. 34]. This incident resulted in another felony conviction for criminal mischief with a sentence of four years' imprisonment to be followed by four years of probation. [Tr. p. 34]. He returned to NDSP in July, 2009, and remains there at present.

Dr. Lynne Sullivan, a licensed forensic psychologist for the North Dakota State Hospital, completed L.D.M.'s annual review in February, 2009. She did not speak to L.D.M. for this evaluation because he declined to speak with her. Dr. Sullivan previously did an annual review of L.D.M. in 2008, at which time she did interview

him. [Tr. pp. 3, 8-9]. Dr. Sullivan concluded that L.D.M. continues to suffer from alcohol abuse and antisocial personality disorder with borderline features. [Dock. No. 102, p. 6]. In addition, on the psychopathy checklist, Sullivan scored L.D.M. a 36, which is higher than his scoring at the time of the initial commitment. A score of 30 or higher indicates that an individual can be designated as a psychopath, which is associated with an increased risk of general violence. [Tr. pp. 19-20]. L.D.M.'s high level of psychopathy is essentially a worsened form of antisocial personality disorder. [Tr. p. 76].

Dr. Sullivan used multiple risk assessment tests to evaluate L.D.M.'s risk of re-offending sexually. Using the Static-99 test as revised, L.D.M. scores a 6, which places him at high risk. [Tr. p. 16]. Using the Minnesota SOST test, L.D.M. scores a +12, which is also high risk. [Dock. No. 102, p. 2]. L.D.M. scored a 36 in the psychopathy checklist, which means that he can be designated as a psychopath. [Tr. P. 19]. Dr. Sullivan concluded that L.D.M.'s test results indicate that he is "unusually detached, cold, grandiose, manipulative, willing to lie, and lacking in empathy and remorse. These traits make it highly likely that he will act in ways that harm others with little or no regard for their feelings or welfare." [Dock. No. 102, p. 3; Tr. P. 19-20].

In addition to the sexual assaults which resulted in convictions, Dr. Sullivan testified that L.D.M. has demonstrated a pattern of stalking-type behavior, going back

to adolescence, which pattern is to ask for attention and to spend time with females and then becoming quite angry when they decline his attention, and to stalk women that have declined his interest. [Tr. p. 10]. He has repeated the same pattern of behavior while in the state prison and state hospital. [Tr. pp. 10-11]. Dr. Sullivan testified that his behavior was typical of someone with antisocial personality disorder. [Tr. p. 25].

Dr. Sullivan testified that L.D.M. continues to manifest antisocial personality disorder: he continues to violate rules; he is deceitful, especially concerning his sexual offense history; he is irritable and aggressive; he lacks remorse for his sexual offenses; he is quite entitled, self-centered and egocentric; he fails to listen to authority figures or obey orders; he feels strongly that he is being persecuted by others; and he has a very distorted perception of the world. [Tr. p. 37]. He continues to demonstrate borderline personality disorder by his severe emotional instability, and by becoming strongly attached to others and then becoming very angry and potentially aggressive toward such persons when his attachment is rejected. [Tr. p. 37-38]. Dr. Sullivan concluded that L.D.M. continues to be likely to engage in further acts of sexually predatory conduct as a result of his antisocial personality disorder with borderline features. [Tr. pp. 69-70]. She believes there is a nexus between his personality disorder and his likelihood of sexual re-offense, as evidenced by the fact that his sexually predatory conduct is characterized by opportunistic offending,

impulsivity, deceitfulness, aggression, and lack of remorse for his victims, and she believes that his disorder makes him more likely to re-offend. [Tr. pp. 38-39; Dock. No. 102, p. 6]. His disorder predisposes him to act impulsively and to disregard the wishes, rights, and safety of others in order to achieve his own ends. [Dock. No. 102, p. 6]. Dr. Sullivan therefore believes that L.D.M meets all the criterial for a sexually dangerous individual. [Tr. p. 45]. She believes L.D.M. poses a very serious and high risk to the community if released. [Tr. p. 44].

Specific risk factors for L.D.M. include his lack of positive social influences or relationship stability in his life; his hostility and repeated aggression toward women, including repeated stalking and inappropriate touching of female staff against their consent; his lack of concern for others and lack of remorse; his impulsivity, including seeking out female staff even though he knows it will lead to consequences and engaging in significant property destruction simply because he's upset; his tendency to solve problems through inappropriate means; his negative emotionality and becoming very angry over trivial matters; his belief that others are out to get him; and his demonstrated sexual preoccupation. [Tr. pp. 39-41]. Although L.D.M. has been in controlled environments for most of his adult life, away from free access to alcohol, some of his offenses were committed under the influence of alcohol, and Sullivan testified that alcohol remains a risk factor in that if he were out in the

community and started drinking, that may increase the risk of sexual re-offending. [Tr. p. 36].

Dr. Sullivan testified that L.D.M. continues to demonstrate the same behavior that he demonstrated in the community while sexually offending. Since the best predictor of future behavior is past behavior, the fact that he demonstrates the same type of past behavior while in the most controlled environment tells her that, if released to a less restrictive environment, he would have serious difficulty controlling his behavior. He has also demonstrated serious difficulty controlling his behavior with respect to anger and property destruction. Since he has not received sexual offense treatment, he would not be likely to recognize and intervene upon problematic sexual behaviors and would not be able to effectively manage that risk. Since his sexual offenses in the community occurred while under supervision, even if he were released under some form of supervision, he would be likely to sexually re-offend in the future even with supervision. [Tr. pp. 43-44]. Because his cooperation with supervision is exceedingly poor, Dr. Sullivan believes he would quite likely not comply with supervision if he were released to a less controlled environment. [Tr. p. 41]. Dr. Sullivan strongly believes that a community placement option would not be appropriate for L.D.M. [Tr. p. 72].

The stalking-type behaviors that L.D.M. has committed while in prison and the state hospital indicate an uncontrollable sexual desire, and an inability to control his

behavior. [Tr. p. 68]. Dr. Sullivan concluded for several reasons that L.D.M. would likely have serious difficulty controlling his behavior if released to the community. First, he has continued to seek inappropriate attention from female staff while in the most controlled environments possible, which type of behavior drove some of his prior sex offenses. Moreover, the rage that he experiences when rejected is likely in some cases to result in rape in an uncontrolled environment, similar to the property destruction incidents which occurred in the state hospital when his ego was injured. In addition, L.D.M. does not perceive himself as posing any sexual risk, meaning that he is unable to recognize and manages risky situations-- she believes this perception by L.D.M. that he does not present a sexual risk will be extraordinarily resistant to change. Finally, L.D.M.'s very high degree of psychopathy exacerbates these other issues and makes it further likely that he will have serious difficulty controlling his behavior if released in to the community at this time. [Dock. No. 102, p. 8]. L.D.M. scored extremely high on the emotional and interpersonal aspect of psychopathy–relating to a lack of empathy and remorse, a failure to take responsibility, manipulation and grandiosity. This means that there are fewer inhibitions which might stop future offenses against people. [Tr. pp. 78-79].

Dr. Sullivan testified that antisocial personality disorder tends to be long-standing and reasonably inflexible–it can become so rigid as to be almost untreatable. [Tr. p. 36]. Psychopathy is the most virulent form of antisocial personality disorder

which is very difficult to treat. Although psychopathy does not in and of itself directly lead to a risk of sexual re-offending, given that L.D.M. has already committed sexual offenses, his high degree of psychopathy creates a strong probability that he would commit sexual offenses in the future. [Tr. p. 45]. Dr. Sullivan believes that L.D.M. is toward the end of the spectrum of being non-amenable to treatment. [Tr. p. 59]. Dr. Sullivan testified that it would be impossible to treat L.D.M. separately for antisocial personality disorder because the antisocial personality disorder is so intertwined with the sexually offending behaviors. [Tr. pp. 76-77].

L.D.M. requested an independent evaluation, which was performed by Dr. Stacy Benson, who operates Benson Psychological Services. Her primary work is to provide risk assessments for sexual offenders. [Tr. pp. 84-85]. She reviewed L.D.M.'s historical and ward files at the state hospital, and she met with him twice at the prison, for a total of about 4½ hours. [Tr. p. 89]. Dr. Benson diagnosed L.D.M. with antisocial personality disorder with borderline and narcissistic features. [Tr. p. 97]. In her risk assessment testing, Dr. Benson obtained somewhat different individual scores than Dr. Sullivan, but they both placed L.D.M in the same high risk category on all items they used. [Tr. pp. 102, 108]. Dr. Benson testified that L.D.M. also scored high on the SORAG, a sex offender risk appraisal guide, and she assigned him a high rating on the psychopathy checklist. [Tr. pp. 114-115].

Dr. Benson agrees with Dr. Sullivan's conclusion that L.D.M.'s antisocial personality disorder manifests in his sexual offending in that he is an opportunistic offender, acting impulsively, with deceit, aggression and lack of remorse for his victims. [Tr. pp. 133-134]. She also agrees that L.D.M. is likely to engage in further acts of sexually predatory conduct. [Tr. p. 134]. She agrees that there is a nexus between the antisocial personality disorder and his likelihood of future sexually predatory conduct, and further agrees that he has serious difficulty controlling his behavior. [Tr. p. 135]. Dr. Benson concludes that L.D.M.'s long criminal history, the fact that he has very little time free in the community before he is arrested again, and the fact that he has continued to engage in both sexual and violent behavior while in prison and the state hospital all "clearly show serious difficulty controlling his behavior." [Dock. No. 110, p. 24]. There have not been any changes since the last proceeding which might lower L.D.M.'s risk level. [Tr. p. 135]. Dr. Benson concluded that L.D.M. meets all the requirements to qualify as a sexually dangerous individual, including a difficulty controlling his behavior to the extent of meeting the requirements of the law for commitment as a sexually dangerous individual. [Tr. pp. 138-139].

Dr. Benson testified that treatment for antisocial personality disorder attempts to change someone's behavior–there is no known effective treatment to change the condition itself. [Tr. p. 98]. However, it would be very difficult to modify L.D.M.'s

behaviors unless he wants to change. [Tr. pp. 99-100, 125]. Dr. Benson does believe that L.D.M.'s antisocial personality disorder could be treated apart from sex offender treatment, but she does not believe it could be done in a less restrictive setting. [Tr. p. 125]. She does not believe that there is any less restrictive or alternative treatment which would be appropriate for L.D.M. and she believes he needs to remain in the state hospital at this time. [Tr. p. 139].

## ARGUMENT

### I. THE EVIDENCE CLEARLY AND CONVINCINGLY DEMONSTRATES THAT L.D.M. REMAINS A SEXUALLY DANGEROUS INDIVIDUAL SUBJECT TO CONTINUED CIVIL COMMITMENT.

L.D.M. initiated this civil commitment discharge proceeding pursuant to the Commitment of Sexually Dangerous Individuals Act, N.D.C.C. §25-03.3-01, et seq. Under the Act, a committed individual is entitled annually to petition the court for discharge. N.D.C.C. §25-03.3-18(1). In a discharge proceeding, the State bears the burden of proving by clear and convincing evidence that the committed individual

remains a sexually dangerous individual. N.D.C.C. §25-03.3-18(4). The term "sexually dangerous individual" is defined in N.D.C.C. §25-03.3-01(8):

> "Sexually dangerous individual" means an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the 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.

The statutory definition contains three elements: (1) having engaged in sexually predatory conduct; (2) a sexual disorder, personality disorder, or other mental disorder or dysfunction; and (3) making the person likely to engage in further sexually predatory conduct. In addition, due process concerns impose a corollary to the third element, requiring the State to demonstrate that the individual has serious difficulty controlling his behavior. *In re Voisine*, 2010 ND 17, ¶9, 777 N.W.2d 908. In *Kansas v. Crane*, 534 U.S. 407 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), the Court held that lack of control for civil commitment purposes requires proof of a serious difficulty in controlling behavior. This difficulty must be sufficient to distinguish a dangerous sexual offender whose serious mental illness, abnormality or disorder subjects him to civil commitment from a dangerous but typical recidivist convicted in an ordinary civil case. 534 U.S. at 412.

The trial court's initial order in this case was reversed and remanded for more specific findings. On remand, the court issued an Addendum which supplemented the initial order with additional findings [Appendix of Appellant, p. 4]. The additional findings (Findings, par. I-II) detail L.D.M.'s criminal convictions which establish that he has engaged in sexually predatory conduct. The court also finds that L.D.M. suffers from a mental disorder: Antisocial Personality Disorder, with elevated levels of psychopathy and Borderline features [Findings, II, III, IV]. The findings further show actuarial risk assessments, demonstrating that L.D.M. poses a substantial (moderate to high) risk of repeating his sexually predatory conduct, as well as a medical opinion that L.D.M.'s elevated levels of psychopathy creates an elevated risk of repeating those offenses. [*Id.*, p. 5-6, Findings III-IV]. The Court also finds, based on Dr. Sullivan's testimony, a nexus between L.D.M.'s mental disorder and his sexual offending [Finding IV]. The additional findings further set forth several behavioral incidents since his incarceration, as well as supporting expert opinions, establishing that L.D.M. would presently have serious difficulty controlling his behavior if released into the community [Findings V-VII]. The Addendum, containing detailed findings with specific references to the evidence relied upon by the court, unchallenged by L.D.M., satisfy the standards of *In re Midgett*, 2009 ND 106, ¶¶ 8, 9, 766 N.W.2d 717, and *Matter of T.O.*, 2011 ND 9, ¶ 4, 793 N.W.2d 204.

Civil commitments of sexually dangerous individuals are reviewed under a modified clearly erroneous standard of review. A district court order denying a petition for discharge will be affirmed unless it is induced by an erroneous view of the law or the court is firmly convinced it is not supported by clear and convincing evidence. *In re Midgett*, 2010 ND 98, ¶6, 783 N.W.2d 27. The district court below, utilizing the correct standard of law, found by clear and convincing evidence that L.D.M. remains a sexually dangerous individual subject to continued civil commitment. That finding is supported by abundant evidence and must be affirmed.

The North Dakota courts have construed the definition of sexually dangerous individual to require a nexus, or causal connection, between the disorder and dangerousness, including evidence that the person has serious difficulty controlling his behavior. In other words, the mental disorder must be linked to the inability to control behavior. *In re Hanenberg*, 2010 ND 8, ¶8, 777 N.W.2d 62; *In re Rush*, 2009 ND 102, ¶9, 766 N.W.2d 720. This distinguishes a dangerous sexual offender from the dangerous but typical recidivist, and therefore satisfies due process requirements for civil commitment. *In re G.R.H.*, 2006 ND 56, ¶18, 711 N.W.2d 587.

The 2004 Order for Civil Commitment found that L.D.M. was an individual who has engaged in sexually predatory conduct, therefore meeting the first element of the statutory definition of a sexually dangerous individual. That finding, of course, remains equally true today. All sexually predatory conduct may be considered in

determining whether a person qualifies as a sexually dangerous individual, whether or not it results in a charge or conviction. *Hanenberg*, 2010 ND 8, ¶9; *In re O.H.W.*, 2009 ND 194, ¶7, 775 N.W.2d 73; *In re A.M.*, 2009 ND 104, ¶10, 766 N.W.2d 437. A single prior conviction for gross sexual imposition is sufficient to satisfy this first element. *In re Barrera*, 2008 ND 25, ¶¶6, 744 N.W.2d 744. L.D.M. has convictions for aggravated sexual assault and gross sexual imposition, both of them involving violent rapes, which clearly qualifies as sexually predatory conduct as defined in N.D.C.C. §25-03.3-01(9). In addition, he has been convicted of another sexual assault, and three counts of criminal trespass, which involved uninvited lurking in or near the bedrooms of women in the middle of the night. A criminal trespass of this nature qualifies as sexually predatory conduct. *In re P.F.*, 2006 ND 82, ¶21, 712 N.W.2d 610. The first element is clearly satisfied.

In the 2004 proceeding, the second element of a sexually dangerous individual (i.e., a condition manifested by a sexual disorder, personality disorder or other mental disorder) was satisfied by the opinions of three experts. Two experts, Dr. Balenger and Dr. Etherington, diagnosed L.D.M. with antisocial personality disorder with borderline features, and a third expert, Dr. Gulkin, diagnosed him with antisocial personality disorder with narcissistic and passive aggressive features. [Dock., No. 27]. His diagnosis has not changed. Dr. Sullivan diagnosed L.D.M. with antisocial personality disorder with borderline features and Dr. Benson diagnosed him with

antisocial personality disorder with borderline and narcissistic features. He also has a diagnosis of alcohol dependence. Antisocial personality disorder is a qualifying personality disorder under the statute. *In re G.R.H.*, 2006 ND 56, ¶7. It is clear that L.D.M.'s continuing diagnosis of antisocial personality disorder is sufficient to satisfy the second element. *In re Barrera*, 2008 ND 25, ¶¶6, 7.

With regard to the third element, an individual is likely to engage in further acts of sexually predatory conduct when his propensity toward sexual violence is of such a degree as to pose a threat to others. *In re O.H.W.*, 2009 ND 194, ¶7. The evidence clearly and overwhelmingly demonstrates that L.D.M.'s propensity toward sexual violence poses a threat to others. Dr. Sullivan and Dr. Benson both presented explicit opinions that L.D.M. is likely to engage in further acts of sexually predatory conduct. They both administered risk assessment tests which showed that L.D.M. poses a high risk of re-offending sexually. Moreover, the fact that L.D.M. has not completed sex offender treatment, and that he continues to have disciplinary problems, including violent behavior and inappropriate sexual behavior while in a controlled environment, further demonstrate that L.D.M. remains a sexually dangerous individual.

Both experts expressly opined that there was a nexus between the personality disorder and the likelihood of re-offense and that L.D.M. has serious difficulty controlling his behavior. A sex offender's serious difficulty controlling his behavior

may be established by expert testimony that the individual is not able to control his behavior, though such an expert opinion is not required. *In re Vantreece*, 2009 ND 152, ¶11, 771 N.W.2d 585. Serious difficulty controlling behavior may also be evidenced by an inability to control one's behavior even in the highly structured environment of the state hospital. *In re T.O.*, 2009 ND 209, ¶11, 776 N.W.2d 47.

In addition to his antisocial personality disorder, L.D.M. scores very high on the psychopathy checklist. Dr. Sullivan testified that this means that L.D.M. has a particularly virulent form of antisocial personality disorder, and that it is associated with an increased risk of violence. Although psychopathy does not in and of itself directly lead to a risk of sexual re-offending, Dr. Sullivan testified that, given that L.D.M. has already committed sexual offenses, his high degree of psychopathy creates a good probability that he would commit sexual offenses in the future. She concluded that he was highly likely to act in ways that harm others with little or no regard for their feelings or welfare. His disorder makes him act impulsively and to disregard the wishes, rights, and safety of others in order to achieve his own ends. The nexus between his disorder and his likelihood of further sexually predatory conduct is evidenced by the fact that his sexually predatory conduct is characterized by opportunistic offending, impulsivity, deceitfulness, aggression, and lack of remorse for his victims. Dr. Benson agrees that L.D.M.'s antisocial personality disorder manifests in his sexual offending in that he is an opportunistic offender, acting

impulsively, with deceit, aggression and lack of remorse for his victims. She agrees that he is likely to engage in further sexually predatory conduct, and that there is a nexus between his disorder and his dangerousness. Clearly, L.D.M. poses a very serious and high risk to the community if released.

L.D.M. argues that he has not been charged with any "sexually predatory" conduct, as defined by the statute, since his commitment. Nevertheless, even in this controlled environment, he has engaged in violent conduct, he has been charged and convicted of two incidents of violent property destruction, and he has engaged in sexually inappropriate conduct (including stalking, sexual touching and asking multiple female staff members for their panties). He has continued to engage in such conduct knowing it will result in discipline. An individual's actions and misconduct while in the state hospital may serve to establish that he remains a sexually dangerous individual and that he has serious difficulty controlling his behavior–it is not necessary to prove that such conduct includes further acts of sexually predatory conduct as defined in the statute. *In re R.A.S.*, 2009 ND 101, ¶¶19, 20, 766 N.W.2d 712. Although the first element of a sexually dangerous individual (having engaged in sexually predatory conduct) must be based on sexually predatory conduct which meets the statutory definition of such, all conduct of a sexually predatory nature may be considered under the second element, and all relevant conduct may be considered under the third element, whether or not it meets the statutory definition of sexually

predatory conduct. *Voisine*, 2010 ND 17, ¶¶13, 14. The behavior which establishes an individual's serious difficulty controlling his behavior need not be conduct of a sexual nature. *In re Wolff*, 2011 ND 76, ¶7, 796 N.W.2d 644.

*T.O.*, 2009 ND 209, ¶9, upheld a finding that a committed individual remained a sexually dangerous individual based on his risk assessment scores, his failure to complete treatment, his violation of treatment rules, and his failure to control his sexual impulses. The court recognized that a failure to complete sex offender treatment increases an offender's risk of re-offending. 2009 ND 209, ¶10. In *Barrera*, the court held that the third element was satisfied by moderate to high risk assessment scores, by an opinion that the person's antisocial personality disorder rendered him more likely to disregard the rights of others to achieve his own ends, by the person's extensive criminal history and prior sexual offense, and by his failure to complete sex offender or alcohol abuse treatment. 2008 ND 25, ¶13. In *O.H.W.*, the court held that a denial of discharge was sufficiently supported by evidence that the person scored high on risk assessment tests, by an expert opinion that the test results suggested the person was a psychopath, making it highly likely he would act in ways that would harm others with little or no regard for their feelings or welfare, possibly including in a sexually offensive manner, and by evidence that the person failed to advance in sex offender treatment and continued to act in a violent and aggressive manner towards peers and staff at the state hospital. 2009 ND 194, ¶18. In *Wolff*, 2011 ND

76, ¶¶9-12, the court upheld a denial of discharge based upon the individual's risk assessment and psychopathy scores, his history of behavioral incidents during his commitment, and his failure to make progress in sex offender treatment. The evidence in the present case is at least as compelling as in the cited cases.

L.D.M. argues that it is not sufficient for an expert to opine that he has serious difficult controlling his behavior *at this time* and that there is insufficient evidence that he would have serious difficulty controlling his behavior in the future. Dr. Benson, when asked if L.D.M. has shown that he has difficulty controlling his behavior at this time, answered "yes." She also testified that L.D.M.'s condition makes him "likely to engage in further acts of predatory conduct" and that he has such difficulty controlling his behavior, as to meet the requirements of *Kansas v. Crane*. [Tr., p. 139]. The cases do not even require an explicit expert opinion on this point–they certainly do not purport to require an explicit opinion that a present serious difficulty controlling behavior will extend into the future. Dr. Benson clearly expressed her opinion that L.D.M. has a sufficiently serious difficulty controlling his behavior to satisfy the case law requirements. Moreover, Dr. Sullivan did expressly opine, both in her written report and in her testimony, that L.D.M. *would have* serious difficulty controlling his behavior if released to the community or other less restrictive environment. [Tr. pp. 43-44; Dock. No. 102, p. 8]. The evidence clearly and convincingly establishes that L.D.M. remains a sexually dangerous individual.

## II. THE FIFTH AMENDMENT DOES NOT PROTECT L.D.M.'S REFUSAL TO PARTICIPATE IN SEX OFFENDER TREATMENT BECAUSE HE WOULD HAVE TO ADMIT HIS GUILT.

L.D.M. argues that his rights under the Fifth Amendment to the United States Constitution are violated by the requirements of the sex offender treatment program because a civilly committed individual cannot advance through treatment without admitting his responsibility for the sex offense for which he has been convicted. This Court applies a *de novo* standard of review to claims of a constitutional violation. *State v. Aguero*, 2010 ND 210, ¶16 791 N.W.2d 1. L.D.M. relies on *McMorrow v. Little*, 103 F.3d 704 (8th Cir. 1997), where a prison inmate (suing under 42 U.S.C. §1983) claimed that his rights were violated because prison benefits were withheld when he refused to admit his crime. The court did not determine whether or not such a withholding of benefits would violate the constitution. Instead, the court held that, even if the inmate's rights had been violated, the defendants would be entitled to qualified immunity. 103 F.3d at 708.

L.D.M. is under civil commitment and has fully served his time for the offense in question. The Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

L.D.M. advances no argument that he is at risk of further criminal prosecution for the offense or that he still has any constitutionally protected privilege against self-

incrimination for that offense. The Fifth Amendment privilege cannot be invoked "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." *State v. Gruchalla*, 467 N.W.2d 451, 454 (N.D. 1991), *quoting Pillsbury v. Conboy*, 459 U.S. 248, 273, 103 S.Ct 608, 622, 74 L.Ed.2d 430 (1983). L.D.M.'s handwritten argument cites the case of *Lile v. McKune*, 24 F.Supp.2d 1152 (D.Kan. 1998) for the proposition [Appendix, p. 14]:

> . . .that if a defendant changes his mind and says he is guilty after appeal exhaustion, he still can be charged with a crime if he does so.

In *Lile v. McKune*, the court found the requiring disclosure of "all *uncharged* sexual offenses" [emphasis added] violated the self incrimination privilege. However, the court expressly declined to decide whether an admission of responsibility for a convicted offense (while a habeas corpus petition remained pending) is protected by the privilege. The decision was affirmed on appeal, and then reversed by the Supreme Court. *Lile v. McKune*, 24 F.Supp.2d 1152 (D.Kan 1998), *aff'd*, 224 F.3d 1175 (10th Cir. 2000), *rev'd*, 536 U.S. 24 (2002). The Supreme Court, in reversing, held that the state would require the admission of responsibility for uncharged sexual offenses as a condition of participation in the sex offender treatment program. Moreover, unlike the offender in *Lile*, L.D.M. makes no claim that any post-conviction proceedings are pending, nor does he claim that he testified at this jury trial. He has therefore not presented a threat of prosecution sufficient to invoke the Fifth Amendment.

The district court in *Lile* suggested the possibility of the threat of a perjury prosecution if the defendant had testified at his trial. Here, however, there is no indication that L.D.M. testified prior to his 1993 conviction. North Dakota has a three-year statute of limitations for perjury. N.D.C.C. §12.1-11-01 (perjury a Class C felony); §29-04-02 ("a prosecution for any felony other than murder must be commenced within three years after its commission). L.D.M.'s present admission of guilt for his 1993 conviction would not possibly be the basis for, or in aid of, a perjury prosecution.

Even in cases where an individual has been required, as part of sex offender treatment, to disclose past criminal behavior of which officials were previously unaware, the North Dakota Supreme Court has held that the Fifth Amendment rights of the individual are not violated by the commitment law. *In re G.R.H.*, 2011 ND 21, ¶¶12-18, 793 N.W.2d 460; *In re Maedche*, 2010 ND 171, ¶¶19-23, 788 N.W.2d 331. Rather, the court has held, the commitment of sexually dangerous persons is a civil rather than criminal procedure. Moreover, the commitment law is not impermissibly punitive in nature so as to be treated as if it were a criminal law to which privilege against self-incrimination applies. Therefore, compelled admissions in sex offender treatment, and the use of such admissions in determining whether continued civil commitment is warranted, does not violate the individual's Fifth Amendment rights.

The federal case law, including the *McMorrow* decision upon which L.D.M. relies, recognizes that an individual may be denied benefits based on his failure to make statements necessary to his rehabilitation, so long as the benefits are being withheld due to a refusal to make the admission as part of rehabilitation and not due to his invocation of the privilege against self-incrimination [103 F.3d at 708]:

> Under *Murphy* [*Minnesota v. Murphy*, 465 U.S. 420 (1984)], prison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege. See *Asherman*, 957 F.2d at 980-83 [*Asherman v. Meachum*, 957 F.2d 978, 982-83 (2d Cir. 1992) (en banc)].

In *Doe v. Sauer*, 186 F.3d 903, 906 (8th Cir. 1999), the court stated:

> Doe has refused to admit he committed the offense for which he was convicted, and as observed by the Second Circuit, "[a]n inmate who is unwilling to admit to particular criminal activity is unlikely to benefit from a rehabilitative process aimed at helping those guilty of that activity." *Johnson v. Baker*, 108 F.3d 10, 12 (2nd Cir. 1997) (holding a policy requiring an inmate to admit to sexual offenses before admission to sex offender treatment program did not violate the inmate's right against self-incrimination).

See also, *Lile v. McKune*, 536 U.S. at 36-42, 50-51. L.D.M. has not demonstrated any constitutional violation. L.D.M. does not in fact invoke the Fifth Amendment privilege at all. The right he asserts (a right to "continue to profess his innocence") is not protected. The Fifth Amendment protects a right to be free from compelled testimony against himself in a criminal proceeding. L.D.M.'s objection is that he

refuses to accept responsibility for his 1993 conviction for gross sexual imposition, not that he's afraid of being prosecuted for making such an admission. [Tr. 144]. There is no Fifth Amendment violation herein.

## III. L.D.M. IS NOT ENTITLED TO HAVE THE COURT ORDER A TREATMENT CHANGE.

L.D.M. asks the court to order the state hospital to provide him with separate treatment for his antisocial personality disorder and/or anger management treatment instead of sex offender treatment. He claims that he has a statutory right to the least restrictive appropriate treatment and that he should therefore be provided with separate treatment for his antisocial personality disorder. NDCC §25-03.3-13 provides, in relevant part:

> If the respondent is found to be a sexually dangerous individual, the court shall commit the respondent to the care, custody, and control of the executive director. The executive director shall place the respondent in an appropriate facility or program at which treatment is available. The appropriate treatment facility or program must be the least restrictive available treatment facility or program necessary to achieve the purposes of this chapter.

The interpretation of this statute presents a question of law "fully reviewable" by this Court. *In re G.R.H.*, 2006 ND 56, ¶15, 711 N.W.2d 587. The court looks first to the statute's plain meaning to ascertain legislative intent. *Id.*

Under the statute, the court determines whether to commit an individual, but once a person is committed, his treatment is determined by the executive director of the Department of Human Services. The court may not order the executive director to create a less restrictive treatment program for an individual. N.D.C.C. §25-03.3-13. Following commitment, treatment decisions are to be made by the executive director and not by the court. *In re G.R.H.* 2006 ND 56, ¶22:

> [¶ 22] The plain language of N.D.C.C. § 25-03.3-13 authorizes the court to commit a sexually dangerous individual to the care, custody, and control of the executive director of the Department of Human Services and authorizes the executive director to place a sexually dangerous individual in an appropriate facility or program for treatment, which must be the least restrictive available treatment facility or program necessary to achieve the purposes of N.D.C.C. ch. 25-03.3. Those statutory provisions require the executive director, not the court, to make that decision. We conclude the district court correctly interpreted the plain language of N.D.C.C. § 25-03.3-13 to authorize the executive director to decide the least restrictive available treatment for a sexually dangerous individual.

The courts are not authorized to determine the appropriate treatment to be provided to a committed individual. L.D.M.'s attempt to distinguish G.R.H. is without merit. Although he claims in one breath that his case is different from G.R.H. in that he is not asking the court to determine alternatives to sex offender treatment, in the next breath he asks the court to order the executive director to provide him with antisocial personality disorder treatment instead of sex offender treatment. He is

clearly asking the court to determine and order an alternative to sex offender treatment.[3]

In *Whelan v. A.O.*, 2011 ND 26, ¶6, 793 N.W.2d 471, 474, this Court reaffirmed its prior decisions to the effect that the executive director, not the court, has the authority to decide the least restrictive available treatment facility or program under N.D.C.C. §25-03.3-13, and that this statute does not violate due process or double jeopardy. The Court noted, however, that those decisions were made in the context of an initial commitment hearing and the A.O. hearing was (like this case) deciding the issue in the context of a hearing on whether A.O. should be discharged from treatment. The trial court in *A.O.* viewed the discharge hearing as an appropriate case to conduct a limited review of whether the executive director's decision violated the statute by not providing the most appropriate and least restrictive program available. *Id.*

On review, this Court did not address the question of whether the trial court had the authority to conduct such judicial review and, if so, what scope of review would be appropriate. Because A.O. did not present evidence establishing another

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L.D.M. also purports to rely upon the statutory list of patient rights contained in NDCC §25-03.1-40. Persons committed under the Commitment of Sexually Dangerous Individuals Act are entitled to the benefit of these statutory rights, but only subject to the terms of the individual's treatment plan. NDCC §25-03.3-23(1). Section 25-03.1-40 therefore does not provide a basis for ordering the executive director to change an individual's treatment plan.

treatment program or facility which would be more appropriate and less restrictive, the trial court's decision to continue the commitment was upheld. *Id.*, ¶8. Unlike the trial court in *A.O.*, the trial court below held that it lacked the authority to direct the mental health providers how to best treat L.D.M. [Finding No. V, App. p. 9]. The court expressed its opinion that "some portions of treatment" should be allowed to go forward without an admission of guilt, but it also found that L.D.M.'s dangerousness would be mitigated by participating in a course of intensive sex offender treatment. [Addendum Finding VII, App. p. 7].

Courts are ill-equipped to act as medical review boards for mental health treatment plans. The trial court properly held that it did not have the authority to second guess the professional judgment of the mental health providers in this case. L.D.M.'s reliance upon a right to the least restrictive treatment option is misplaced. L.D.M. is not requesting to be transferred to a less restrictive program or facility–he is requesting that the court order the state hospital to provide him with a particular type of treatment. That is, he is requesting a different form of treatment in an equally restrictive setting. He has made no showing at all that any particular treatment program at the state hospital is a less restrictive option and he has not made a credible showing that treatment of his antisocial personality disorder alone is more appropriate for him than sex offender treatment. Dr. Sullivan testified that, in his professional judgment, separate antisocial disorder treatment is not possible for L.D.M. because

his disorder is too intertwined with his sexual offending behaviors. Dr. Benson testified that, although it may be possible to provide L.D.M with separate antisocial personality disorder treatment, she does not believe it could be done in a less restrictive setting. She did not testify that she believed that antisocial disorder treatment was more appropriate for L.D.M. than sex offender treatment, but rather she testified that she did not believe that there was any less restrictive alternative treatment appropriate for L.D.M. Moreover, she acknowledged that the antisocial personality disorder itself is not subject to change through treatment–treatment is geared only at changing behavior, which would be very difficult unless L.D.M. actually wants to change. He has made no effort to demonstrate a sincere desire to change and has expressed no recognition of a need to change. The evidence does not establish that the requested treatment is either less restrictive or more appropriate for L.D.M.

It may be possible for a committed individual to "challenge his continued commitment under due process if a case can be made that the statutory requirements are being violated." *In re P.F.*, 2008 ND 37, ¶24, 744 N.W.2d 724. P.F. petitioned for discharge from confinement and requested that the court order that he receive chemical dependancy treatment before beginning sex offender treatment. The court held that he was required to show that the hospital's "presumptively valid" treatment

decision was not based on professional judgment. *Id.*, *Bailey v. Gardebring*, 940 F.2d 1150, 1154 (8th Cir. 1991). The court in *P.F.* rejected his claim:

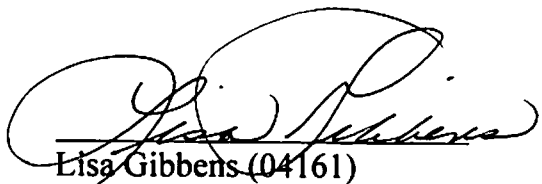
> His argument that chemical dependancy treatment must come first in order for his treatment to be the least restrictive, even if challenged under due process, would fail for lack of support.

The same is true here. As noted above, Dr. Sullivan testified that separate treatment for the antisocial personality disorder is not possible. Although Dr. Benson disagreed on this one point, she also testified that antisocial personality disorder cannot be changed through treatment. At most, treatment can attempt to change the antisocial behavior, and then only if he wants to change his behavior. There is no evidence that L.D.M. wants to change his behavior or sees any need to do so. His personality disorder is so severe that it is at the end of the spectrum of being amenable to treatment. The State Hospital has reasonably exercised its professional judgment in determining that his treatment must be addressed in the sex offender program. L.D.M.'s request that the court order the executive director to provide him an alternative to sex offender treatment is outside the court's authority and is in any case unsupported by the evidence.

## CONCLUSION

For the foregoing reasons, the ruling below, which denies L.D.M.'s petition for discharge from civil commitment, must be affirmed.

Dated this 12th day of August, 2011.



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