20140430
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 10, 2015
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA **IN THE SUPREMECOURT**

SUPREME COURT CASE NUMBER 2014 0430

In the Matter of Darl John Hehn	)	
----------	)	
Ronald W. McBeth, Richland County State's Attorney,	)	
Petitioner and Appellee,	)	
	)	**APPELLANT'S BRIEF**
v.	)	
Darl John Hehn,	)	
Respondent and Appellant.	)	

APPEAL FROM ANNUAL REVIEW AND ORDER DENYING RESPONDENT'S/APPELLANT'S APPLICATION REQUESTING DISCHARGE FILED OF RECORD ON NOVEMBER 7, 2014

Made by the Honorable Daniel D. Narum,
Judge of the District Court, Richland County, North Dakota
District Court Case File No.: 39-06-R-00006

Jonathan L. Green
(ND Bar ID #06853)
Attorney for Respondent/Appellant

GREEN LAW FIRM, P.C.
522 Dakota Avenue, Suite 1
Wahpeton, North Dakota 58075
(701)672-1218

March 10, 2015

This page intentionally left blank

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

¶1 Darl Hehn is appealing from a final order of the District Court, Richland County, North Dakota, denying discharge from civil commitment that was filed of record on November 11, 2014. *See* Findings of Fact, Conclusions of Law, and Order Denying Discharge, App., p. 10. The North Dakota Supreme Court has jurisdiction to review the decision of the lower court pursuant to N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. §25-03.3-19.

STATEMENT OF THE ISSUES

¶2 I. Whether the State Hospital's withholding of sex offender treatment as punishment for Darl Hehn's misconduct, while civilly committed, is a violation of his statutory right to treatment, his right to substantive due process under the Fourteenth Amendment, and his right to be free from cruel and unusual punishment under the Eighth Amendment.

¶3 II. Whether District Court's failure to order the State Hospital to provide witnesses and other evidence, and failure to make individual findings prior to requiring Darl to remain handcuffed during the annual discharge hearing, was a violation of his procedural due process rights under the Fourteenth Amendment.

STATEMENT OF THE CASE

¶4 In 2006, the District Court, Richland County, Southeast Judicial District, John T. Paulson, J., committed Darl John Hehn to the North Dakota State Hospital as a sexually dangerous individual. *See* Findings of Fact and Order for Commitment, App., p. 17. Darl appealed, and the North Dakota Supreme Court, Kapsner, J., 2008 ND 36, 745 N.W.2d 631, affirmed. *See In re Hehn,* App., p. 19. In 2010, Darl petitioned for release, pursuant to N.D.C.C. § 25-03.3-18 (*see* Petition for Release of Respondent, App., p. 24), and the District Court, Paulson, J., denied the petition. *See* Findings of Fact, Conclusions of Law and Order Denying Petition for Discharge, App., p. 26. Darl appealed. The North Dakota

Supreme Court, VandeWalle, C.J., 2011 ND 214, 806 N.W.2d 189, reversed and remanded for additional findings. *See In re Hehn*, App., p. 29. On remand, the District Court made additional findings and again denied the petition (*see* Amended Findings of Fact, Conclusion of Law and Order Denying Petition for Discharge, App., p. 32). The North Dakota Supreme Court, 2012 ND 191, 821 N.W.2d 385, summarily affirmed. *See In re Hehn*, App., p. 35. Darl filed a second petition for discharge and subsequently filed a letter with the District Court requesting an annual review while the second petition was pending. *See* Request for 2010 Annual Review, App., p. 36. The District Court, Daniel D. Narum, J., denied the second petition (*see* Findings of Fact, Conclusions of Law, and Order for Discharge, App., p. 37), treated the letter as a third petition, and denied an immediate evidentiary hearing on the third petition. *See* Order on Right to Hearing, App., p. 42. Darl appealed. The North Dakota Supreme Court, Maring, J., 2013 ND 191, 838 N.W.2d 469, affirmed the denial of the second petition. *See In re Hehn*, App., p. 44. Subsequently, after an evidentiary hearing on Darl's third petition for discharge, the District Court, Narum, J., denied the petition, finding that Darl had engaged in sexually predatory conduct, has a congenital or acquired condition of Borderline Personality Disorder with Anti-social Features, was likely to engage in future sexually predatory acts, and had serious difficulty controlling his behavior. *See* Findings of Fact, Conclusions of Law, and Order Denying Discharge, App., p. 10. The District Court found that Darl's personality disorder made it difficult for him to control his behavior, that treatment of the underlying diagnosis was necessary before Darl could make any meaningful progress toward completing treatment, and that if the State Hospital continues to ignore or fails to treat Darl's personality disorder, eventually "we get to a point where the State Hospital is

violating Mr. Hehn's due process rights to have any meaningful opportunity to be released from this confinement" (Vol. III, Tr. at 4, L. 4-8). Darl appeals.

STATEMENT OF FACTS

¶5 In 1997, Darl John Hehn pleaded guilty to two counts of gross sexual imposition and one count of terrorizing his former girlfriend, who was 17 years old at a time. In 2003, he was released from prison on supervised probation, but in 2004 his probation was revoked when he agreed to plead guilty to violating conditions of probation based on unsubstantiated reports of allegedly walking or driving behind teenage girls, sending an email asking a girl, who was at or just under 18 years old, to marry him, and giving a sexually inappropriate letter to a 20-year-old girl working at a shopping mall. Darl was sentenced to two years in prison and was scheduled for release in 2006, when the petition for civil commitment was filed. In 2006, Darl was civilly committed as a sexually dangerous individual. Subsequently, Darl's two petitions for discharge from the State Hospital were denied by the District Court, and the denials were affirmed by the North Dakota Supreme Court in 2012 and 2013. Finally, Darl's third petition for discharge was denied by the District Court, from which Darl appeals.

STANDARD OF REVIEW

¶6 Civil commitments of sexually dangerous individuals are reviewed under a modified clearly erroneous standard. *In re Thill*, 2014 ND 89, ¶ 4, 845 N.W.2d 330. A district court's order denying a petition for discharge from civil commitment will be affirmed unless the order was induced by an erroneous view of the law or the reviewing court is firmly convinced that the order is not supported by clear and convincing evidence. *Id*. The reviewing court gives great deference to the district court's credibility

determinations of expert witnesses and the weight given their testimony at a hearing on a petition for discharge of a sexually dangerous individual from civil commitment. *Id*. Constitutional claims are reviewed under the de novo standard. *Isaacson v. Isaacson*, 2010 ND 18, ¶ 9, 777 N.W.2d 886 (asserting a claim for deprivation of due process rights). A district court has broad discretion regarding the scope of discovery in a civil proceeding, and the court's decision regarding discovery will not be reversed by a reviewing court absent an abuse of discretion. *In re G.L.D.*, 2014 ND 194, ¶ 13, 855 N.W.2d 99. A district court's decision whether to use physical restraints during court proceedings is also reviewed for an abuse of discretion. *In re Hoff*, 2013 ND 68, ¶ 6, 830 N.W.2d 608. District court abuses its discretion by acting in an arbitrary, unreasonable, or unconscionable manner, or by misinterpreting or misapplying the law, or by issuing a decision that is not the product of a rational mental process leading to a reasoned determination. *Id*.

LAW AND ARGUMENT

¶ 7 I. The State Hospital's withholding of sex offender treatment as punishment for Darl's misconduct, while civilly committed, is a violation of his statutory right to treatment, his right to substantive due process under the Fourteenth Amendment, and his right to be free from cruel and unusual punishment under the Eighth Amendment.

¶8 Pursuant to N.D.C.C. § 25-03.3-13, governing commitment proceedings, a sex offender who is determined to be a sexually dangerous individual and subject to civil commitment to the State Hospital is entitled to treatment:

> 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 executive director may not be required to create a less restrictive treatment facility or treatment program specifically for the respondent or committed individual. Unless the respondent has

> been committed to the legal and physical custody of the department of corrections and rehabilitation, the respondent may not be placed at and the treatment program for the respondent may not be provided at the state penitentiary or an affiliated penal facility.

On petition for discharge from civil commitment, the State has the burden of proving by clear and convincing evidence that the committed sex offender remains a sexually dangerous individual. N.D.C.C. § 25-03.3-18(4). The statutory definition of a sexually dangerous individual includes three prongs: "an 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 that [3] 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." N.D.C.C. § 25-03-01(8). This three-pronged statutory definition is construed in conjunction with Fourteenth Amendment substantive due process requirements and *Kansas v. Crane*, 534 U.S. 407, 412-14, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) to require a fourth prong mandating that the State prove the committed individual has serious difficulty controlling his behavior. *In re G.L.D.*, 2011 ND 52, ¶ 4, 795 N.W.2d 346.

¶9 Therefore, to address substantive due process concerns, the statutory definition of a sexually dangerous individual requires a connection between his disorder and dangerousness, including evidence showing that he has serious difficulty controlling his behavior, which suffices to distinguish a dangerous sexual individual from the dangerous but typical recidivist in an ordinary criminal case. *Id.*; N.D.C.C. § 25-03-01(8). Under the statute governing civil commitment of sexually dangerous individuals, due process requires that the duration and conditions of confinement bear some reasonable relation to the purpose for which the individual has been committed. *In re G.R.H.*, 2006 ND 56, ¶ 24,

711 N.W.2d 587. To that end, N.D.C.C. § 25-03.3-13 requires sexually dangerous individuals to be treated in the least restrictive manner necessary to treat the individual and to protect society. *In re G.R.H.*, 2006 ND 56, ¶ 24, 711 N.W.2d 587. Ultimately, in a proceeding on a petition for discharge of a sex offender from involuntary civil commitment, the fervor of a rightly outraged public to prevent sexually predatory crimes cannot be allowed to overcome the necessary safeguards to individual liberty guaranteed by due process. *In re J.M.*, 2006 ND 96, ¶ 18, 713 N.W.2d 518.

¶ 10 Although the commitment of a sexually dangerous individual involves a civil proceeding, the deprivation of liberty resulting from commitment is in many ways worse than the deprivation of liberty ensuing from a conviction in a criminal proceeding because the period of commitment is indefinite. *In re Hoff*, 2013 ND 68, ¶ 10, 830 N.W.2d 608. Ultimately, judicial inquiry is required to assure that a statutory scheme intended to be civil in nature is not so punitive in purpose or effect as to be transformed into a criminal penalty. *In re G.R.H.*, 2011 ND 21, ¶ 14, 793 N.W.2d 460. Generally, the reason that laws governing the civil commitment of sexually dangerous individuals are not determined to be punitive is their purpose of providing treatment to the civilly committed sex offenders. *Kansas v. Hendricks*, 521 U.S. 346, 367, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *Allen v. Illinois*, 478 U.S. 364, 369, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986).

¶11 Darl Hehn has been civilly committed since 2006, yet the State Hospital has denied him treatment for the majority of that time in contravention to the statutorily mandated treatment in the least restrictive manner, pursuant to N.D.C.C. § 25-03.3-13, and in violation of his right to substantive due process and freedom from cruel and unusual punishment. According to the State's expert witness, Dr. Krance, a licensed forensic

psychologist for the State Hospital, for much of Darl's annual review that was completed in January 2014, he was on detention status awaiting trial on charges he had incurred, so he was "not participating in treatment groups," which was "part of the program's policy." (Tr. at 18, L. 5-10). According to Dr. Krance, after Darl's annual evaluation, he was moved to Secure Two unit, which was a less restrictive treatment unit (Tr. at 18, L. 3-4), where he stayed from early June but was demoted by the end of July back to Secure One (Tr. at 20, L. 4-5). The Secure One unit is a "pretreatment phase," (Tr. at 19, L. 10-12), and according to Dr. Krance, sex offenders "incurring too many resident behavior write-ups . . . are moved down to a pretreatment stage until they are able to exhibit certain types of behaviors or after a certain number of days" (Tr. at 19, L. 17-21). Thus, for the entire year of 2014, Darl was in actual sex offender treatment only from early June to the end of July, as he was "demoted down to the Skills I on Secure One due to having behavior write-ups" (Tr. at 20, L. 4-11).

¶12 This lack of treatment due to behavior write-ups bears directly on Dr. Krance's opinion that Darl remains a sexually dangerous individual, under the third statutory prong, as "there is still a likelihood that Mr. Hehn may engage in sexually predatory conduct in the future" based on "the continued difficulties he's had over this review period; his non-compliance with treatment, even recently being taken back to Secure 1. Those are some concerns that he hasn't completed intensive enough treatment at this point" (Tr. at 21, L. 16-20). Dr. Krance also opined that Darl had difficulty controlling his behavior, under the fourth prong that was a requirement of substantive due process.

> DR. KRANCE: Some of my concerns in terms of Mr. Hehn's--any serious difficulty Mr. Hehn has exhibited is definitely the concern about his **not having completed any treatment** at this point that would decrease his risk. He has engaged in problematic behaviors over this review period, destruction of property,

> physical aggression. There has been numerous behavior write-ups with verbal aggression. I believe Mr. Hehn himself acknowledges the use of profanity. Threats to staff. There's also been concerns about his interactions with other residents at the facility as well. All of these in combination, you know, since we are just not necessarily focusing on sexually behavior difficulties, but difficulties with behavior in general, are all concerns for me as to indicating that Mr. Hehn still has serious difficulty controlling his behavior.
>
> (Tr. at 24, L. 6-20) (emphasis added).

Thus, Dr. Krance admitted that Darl essentially has not received any treatment during the past 12-month period between annual reviews, because of his guilty plea to criminal charges for Menacing and Criminal Mischief and his behavioral write-ups by State Hospital staff that resulted in his demotion from the only treatment he received from early June to late July (Tr. at 24, L. 24-25; Tr. at 25, L. 1-2). Darl's criminal charges were for allegedly swinging a belt and buckle over his head and threatening to hit State Hospital staff members and allegedly holding a shovel and threatening staff members (Tr. at 25, L. 10-16). Dr. Krance stated that if Darl had this kind of "difficulty managing his behavior in a restricted treatment environment, it's unlikely that it would be any different in a less restrictive environment as well" (Tr. at 25, L. 21-24). Dr. Krance stated that Darl had 27 behavior write-ups during the one-year annual review period for 2014, only "some" of which had been appealed and were upheld (Tr. at 36, L. 6-8). However, Darl indicated that the write-ups exaggerated the incidents and that he pleaded guilty, and got a lot of other write-ups, because he was trying to get sent back to prison where conditions were so much better than at the State Hospital (Tr. at 132, L. 5-10).

¶13 Thus, Dr. Krance's annual review relied on behavioral write-ups during the past 12 months, in addition to prior reports by Dr. Belanger, who was part of the initial commitment evaluation and was subsequently has been incarcerated for a child

pornography conviction, (Tr. at 52, L. 24-25; Tr. at 53, L. 12-24), and a report by the State Hospital's evaluator, Dr. Sullivan, who was charged with driving under the influence (DUI) on one occasion on her way to a hearing and was reported by staff as showing up to work drunk (Tr. at 54, L. 7-8, 22-23). However, all three independent experts who actually evaluated Darl, namely, Dr. Volk, Dr. Riedel, and Dr. Benson, opined that Darl did not have a sexual disorder, such as Hebephilia, but rather had only Borderline Personality Disorder (Vol. II Tr. at 32, L. 16; Tr. at 56, L. 17-22; Tr. 86, L. 13-15). Dr. Krance stated that Dr. Sullivan had diagnosed Darl with Hebephilia and Borderline Personality Disorder with Antisocial Features (Tr. at 55, L. 17-20). When questioned about the Antisocial Features, Dr. Krance indicated that some of the concerns in Darl's case "are difficulty with following the law, following the rules. That's kind of what we look at in terms of when they're in the treatment facility" (Tr. at 62, L. 23-25; Tr. at 63, L. 1-2).

¶14 However, Dr. Krance stated that she did not know if Darl "signed for the Resident Handbook when he first came in. I know there's been changes to that and the program has changed, so I can't speak to whether or not he has a copy of that" (Tr. at 63, L. 12-16). Dr. Krance admitted that "yes, it would be important" for someone to know the rules if he is expected not to violate those rules (Tr. at 63, L. 23-25; Tr. at 64, L. 1). Dr. Krance admitted that there was treatment for individuals with Borderline Personality Disorder, namely, dialectical behavior therapy (DBT) in which therapists in the State Hospital have training, but that Darl does not receive any of such treatment as he is in the pre-treatment group (Tr. at 69, L. 10-23; Tr. at 70, L. 1-4). When questioned about the "uptick" in write-ups regarding Darl's behavior before the hearing on his petition for discharge (Tr. at 80, L. 10-11), Dr. Krance opined that she was concerned "that in a controlled treatment

environment he's unable to maintain and manage his stressors with interventions" and she would not "see that as any different out in the community" (Tr. at 81, L. 9-12).

¶15 However, Darl testified that when he was sentenced for 29 days in jail "a lot of the rules and policy for the Core [maximum security] and the South Unit have actually changed because of my sentencing" (Tr. at 113, L. 11-14). Darl further testified that he did not get a copy of the new rules or new policy, and that the State Hospital changes the handbook every three months, "but the majority of the rules are not in there" (Tr. at 113, L. 21-25; Tr. at 114, L. 3-5). Darl gave an example of a major write-up that occurred when he had a rubber ruler and an arts-and-crafts magazine, even though security said he could have those items in the first place (Tr. at 114, L. 8-13). Darl also testified that to move from a more restrictive unit to a lesser restrictive unit, a checklist was to be completed over a period of two weeks; but the State Hospital can then say the person has to stay for 30 days, or two months, even though the "paper says you do two weeks" (Tr. at 117, L. 1-5).

¶16 Thus, despite Dr. Krance's admission that structure "would be an important" for anybody with Borderline Personality Disorder and "for anybody with Antisocial Features especially as well" (Tr. at 87, L. 5-9), the state Hospital presents anything but a structured environment. Dr. Krance stated that program structure itself changed (Tr. at 87, L. 19-20). Thus, the State Hospital does not present a structured or controlled treatment environment for Darl, but rather presents a realm of ever-changing unwritten rules and policies, essentially a house with trap doors, smoke, and mirrors that individuals with personality disorders must navigate in order to even receive treatment, or be condemned to an indefinite period of pre-treatment repeating the same worksheets, just as Darl has repeated the same worksheets seven times until he has them memorized (Tr. at 89, L. 6-7). After

being written up for having a rubber ruler and magazine that security said he could have, he was demoted back to a unit where only pretreatment was available, merely doing the same worksheets over and over:

> DARL: They have a set of four different worksheets. After you do worksheet number one, you're given worksheet number two, all the way up to worksheet number four. When you turn in worksheet number four, you start out doing worksheet number one again.
>
> (Tr. at 113, L. 1-5).

Furthermore, Darl testified that in Secure Two unit where he actually did receive treatment for a brief two-month period:

> DARL: It's all repeated work. . . . You have your autobiography, your sex line, all of your AOH's . . . . My AOH I have done over seven times, my autobiography at least 10, my sex line probably about 20. We also do a lot of things we call thinking reports, risk check-ins, and belief reports that I have seriously done over a hundred of them. . . . As me to do an assignment I can do one right now they're so memorized. No. I'm burnt out doing the same – doing the same things over and over and over.
>
> . . .
>
> I don't see—really any of the treatment I've done or I've seen other people get, I really don't see it as sex offender treatment.
>
> (Tr. at 137, L. 5-20; Tr. at 138, L. 15-17).

¶17 Similarly, in 2011, when Darl had completed all the work for Stage 2 of treatment and simply needed to take a polygraph to advance further in treatment, the staff denied him the polygraph (Tr. at 99, L. 20-25) as he was demoted to a more restrictive treatment unit due to his behavior as documented by write-ups (Tr. at 100, L. 23-25; Tr. at 101, L. 1-9). Once again, Darl was denied treatment as punishment for his behaviors, which becomes a "vicious circle" of never getting treatment "because he has Borderline Personality Disorder so he acts out; and when he acts out, he's placed in a punishment unit and in the

punishment unit he gets no treatment; and when he gets no treatment he doesn't improve" and will remain in civil commitment indefinitely (Vol. II, Tr. at 38, L. 22-25; Tr. at 39, L. 1-3).

¶18 The North Dakota Supreme Court has recognized that due process requires that commitment to an institution because of mental retardation or other developmental disabilities "must be accompanied by minimally adequate treatment" that is designed to give the individual a "realistic opportunity" to be cured or to improve his mental or physical condition. *Assoc. for Retarded Citizens of N.D. v. Olson*, 561 F.Supp. 470, 471-72 (D.N.D. 1981). Similarly, if progression in treatment is the only avenue to discharge for Mr. Hehn, then the continued denial of treatment for his underlying disorder is a violation of his substantive due process rights. After all, the idea behind the continued civil commitment of a sexually dangerous individual is not supposed to be criminal punishment, but rather incapacitation of his ability to cause harm to others, while also receiving treatment to eventually leave the care and custody of the State. However, without an opportunity for treatment, the Respondent will be permanently committed, and the appeal process in N.D.C.C. § 25-03.3 has been swallowed in its own four prongs. Each annual review of Darl will involve a diagnosis of his underlying condition, and the previous crimes paired with current write-ups, allegedly establishing his serious difficulty controlling his behavior, will show a likelihood to re-offend. Thus, the yearly appeal will be four rubber stamps, requiring only a new psychiatric finding which will not change without treatment. As Dr. Reidel stated, Darl is "getting worse and not better [and] his situation at the North Dakota State Hospital is contributing to this. . . . [Darl's] feeling he's pushed into a corner and he's having less and less ability to deal with his behavior" (Vol.

II, Tr. at 70, L. 20-25). Just as if a diabetic is tested daily with no insulin or other treatment, the underlying condition will not cure itself. In fact, the blood sugar level will only worsen. The diabetes must be managed for any progress, and a mental/personality disorder is no different from such a physical condition. Without treatment or even the hope of obtaining any treatment that would allow him to pursue a path toward discharge, Darl's substantive due process rights have been violated. The State Hospital has refused to provide treatment to Darl and, instead, has given him pre-treatment tasks similar to Sisyphus, who was condemned to an eternity of rolling a boulder uphill and then watching it roll back down again. The State Hospital has no treatment plan in place for the Respondent, and then shuffles him from unit to unit, constantly placing him in situations that aggravate his underlying personality disorder, for which he not surprisingly receives write-ups that indicate he cannot control his behavior. Although Dr. Krance stated that Darl would not likely be able to control his behavior if he cannot control himself in the structured environment of the State Hospital, there is nothing structured about the State Hospital or Darl's treatment except a mindless trail of worksheets that he has completed endlessly until they are committed to memory. There is no structured treatment plan in place for Darl. There is not even any structured environment, as he is constantly moved from unit to unit and placed with sexually dangerous individuals who make unwelcome sexual advances to the Darl, which he testified was the reason for a majority of his write-ups, as he gets upset, raises his voice, and makes a threat to set a boundary (Tr. at 142, L. 14-25). There is also a lack of structure with respect to the State Hospital's policies and rules, because they are not written, not provided to Darl, and change all the time without notice. Then these ever-changing rules are used as the basis for write-ups that eventually

ensure Darl will never be discharged because they underlie his continued failure to satisfy the due process prong of the discharge test that requires Darl to be able to control his behavior and the statutory prong regarding recidivism. In such an environment of permanent exercises in futility, anyone who was civilly committed to the State Hospital would end up being diagnosed with a mental disorder even if he did not initially have one. Basically, if a person is treated like an animal, the person will likely behave like an animal.

¶19 The State Hospital staff's behavioral write-ups of Darl result in a *Catch 22* no-win situation, punishing him by denying him treatment, which in turn prevents him from learning to control his behavior, which results in more write-ups, perpetual denial of treatment, and inability to ever qualify for discharge, despite Dr. Reidel's independent expert testimony that Darl's diagnosis would be amenable to treatment (Vol. II, Tr. at 70, L. 7-8). Thus, the State Hospital's deprivation of treatment contravenes not only the statutory right to be treated in the least restrictive manner necessary to treat the individual and to protect society (N.D.C.C. § 25-03.3-13; see also *In re G.R.H.*, 2006 ND 56, ¶ 24, 711 N.W.2d 587, but also his substantive due process rights and is not harmless. According to Dr. Krance, at the annual reviews, the State Hospital looks at the prior 12-month review period, by obtaining "all of the treatment documentation, ward documentation pertaining to that individual, any behavior write-ups that they have received" and also reviews the background information including the risk assessment instruments, actuarial instruments, psychopathy checklists, to see if they have been completed (Tr. at 10; L. 6-13). Thus, the results from instruments have already been reported at the time of Darl's initial commitment evaluation (Tr. at 21, L. 24-25), and were reviewed but not re-scored by Dr. Krance (Tr. at 22, L. 13-14). So basically the only new

information for Darl during the annual review consisted of his behavior write-ups, because he has not had any treatment. If not for the write-ups that result in denial of treatment, Darl would be able to prove that he is not likely to engage in further acts of sexually predatory conduct and does not have serious difficulty controlling his behavior, as distinguished from the following cases in which the sexually dangerous individuals had diagnoses and/or behavior far more egregious than being written up for behavior that contravened rules of which he had no notice or behavior that he engaged in merely to obtain a sentence to prison so that he would have more freedom (see e.g., *In re Thrill*, 2014 ND 89, ¶¶ 12-13, 16, 845 N.W.2d 330, long and extensive history of convictions for sex offenses and was diagnosed with pedophilia and sexual sadism; *In re Mangelsen*, 2014 ND 31, ¶¶ 15-16, 843 N.W.2d 8, sexual behavior with another inmate while he was imprisoned and revocation of supervised probation two times for non-compliance with conditions, including touching a female under her clothing at a public library; *In re J.G.*, 2013 ND 26, ¶ 14, 827 N.W.2d 341, although his last sexual charge occurred when he was only 12 years old, two psychologists identified dynamic risk factors for likelihood of his reoffense, including his sexual preoccupation and deviant sexual preference; *In re Rubey*, 2012 ND 165, ¶ 8, 818 N.W.2d 731, diagnosed with pedophilia, failed to progress in treatment, and then quit the program; *In re Wolff*, 2011 ND 76, ¶ 11, 796 N.W.2d 644, hostile towards women whom he considered to be mere sexual objects for his own use, and admitted that he was afraid he might reoffend once he was released; *In re G.L.D.*, 2011 ND 52, ¶ 10, 795 N.W.2d 346, charged for four sexual offenses involving physical violence to induce compliance and diagnosed with a high degree of psychopathy, paraphilia, and antisocial personality disorder; *In re J.T.N.*, 2011 ND 231, ¶ 10, 807 N.W.2d 570, had no extended

period of time since approximately age 11, other than during confinement, in which he had not been engaged in sexually inappropriate conduct, possessed cellular telephone containing pictures of naked woman, and exposed himself to employee of State Hospital; *In re A.M.*, 2010 ND 163, ¶ 21, 787 N.W.2d 752, groped and kissed a social worker against her will, admitted he might have raped and murdered her had the incident taken place outside the State Hospital, and he continued to report fantasies of rape and violence; *In re Midget*, 2010 ND 98, ¶ 14, 783 N.W.2d 27, engaged in inappropriate touching of female staff members and failed to complete treatment for pedophilia and antisocial personality disorders; *In re Vantreece*, 2009 ND 152, ¶¶ 13-15, 771 N.W.2d 585, diagnosed with sexual sadism, reported raping and killing 12-20 women in Vietnam during the war, he stalked female employees of Veteran's Administration (VA) while receiving treatment for post-traumatic stress disorder (PTSD); *In re O.H.W.*, 2009 ND 194, ¶ 18, 775 N.W.2d 73, psychological testing results suggested that he was a psychopath, and he continued to act violently and aggressively towards peers and staff at state hospital; *In re T.O.*, 2009 ND 209, ¶ 11, 776 N.W.2d 47, violated treatment program rules by acting out sexually and engaged in telephone sex and masturbation in public; *In re A.M.*, 2009 ND 104, ¶ 20, 766 N.W.2d 437, obsessed with a female staff member at the State Hospital, and continued to fantasize about forcing a female to have sex with him and about being violent towards females; *In re G.R.H.*, 2008 ND 222, ¶¶ 8-10, 758 N.W.2d 719, admitted to engaging in sexual acts with 12 female adolescents, 9 of which were committed after his release from prison for his conviction of sexual offense with an adolescent, and he broke treatment rules by engaging in sexual conduct with visitors and placing $4,000 worth of sex-line calls; *In*

re E.W.F., 2008 ND 130, ¶ 15, 751 N.W.2d 686, suffered from two sexual disorders, and continued to engage in appropriate sexual behavior while in treatment).

¶20 Additionally, the State Hospital's application of N.D.C.C. § 25-03.3, governing civil commitment of sexually dangerous individuals, has rendered Darl's civil commitment punitive, by completely denying him treatment under conditions of confinement so penal as to constitute cruel and unusual punishment in violation of the Eighth Amendment. First of all, the civil commitment program at the State Hospital is under the control of the Department of Human Services but is operated by the Department of Corrections. In addition, when Darl was sentenced to 29 days in the county jail for his guilty plea to menacing and criminal mischief, "the judge ordered him to serve 29 additional days, plus gave him credit for all the time he served in the Core [maximum security] at the State Hospital" (Tr. at 52, L. 4-7). Thus, Darl sat several months in the Core before his trial, then spent 29 days in jail, both of which he was given credit for, but then when he returned to the State Hospital after serving his time, he was placed in detention status again for crimes that he had already served his time (Tr. at 115, L. 14-25; Tr. at 116, L. 1-2).

¶21 When Darl was confined to the Core for nine months while his criminal charges were pending, he described the conditions of his confinement:

> DARL: The most restrictive is what we call the Core, or sometimes also the bubble or ICU. That is where you're locked in pretty much all day. You don't get no activity of any kind, one hour of television. You get writing paper, cardboard spoon, rubber pencil to use. You only get to use your pencil for one hour a day, two sheets of writing paper per day. You get to have two books to read and you can only have the contents that fit in the size of [a] shoe box and you can only have those items for one hour a day.
>
> (Tr. at 109, L. 20-25; Tr. at 110, L. 1-3).

Darl had no opportunity to participate in treatment while in the Core, despite several requests and grievances asking for treatment (Tr. at 110, L. 12-14). Darl stated that he and others in the Core had requested to go to jail rather than remain in the Core, and that many people had "chosen to break the law to go to jail to go back to prison because it's much better treatment than the hospital is, and that was my original plan, but they refuse to house in the jail while we wait trial" (Tr. at 112, L. 5-11).

¶22 In addition, while Darl was at the next level of confinement in Secure One South unit:

> DARL: Your bedroom door was locked at 7 o'clock in the morning. It was not unlocked until 5 o'clock in the afternoon. The phones were only turned on three times a day, half an hour each time, and when you got seven residents and you got to split that half an hour every time, you only get a couple minutes to talk to your family. And then you got all those people at night time when the TV's turned on that's your only escape you have. That's all you have. You have seven people crammed all around a little 13-inch television and then you got to sit there and argue, well, what are we watching tonight? You don't got no board games; you don't got no puzzles; you ain't got a damn thing.
>
> (Tr. at 118, L. 1-12).

In addition, Darl stated that "[prison] was so much better in all senses" than the State Hospital:

> DARL: I can visit my family longer. Everything's better. I have more freedom. I have more, you know, outside time. I can use the weight room. I can do arts and crafts. I have music. You got dignity and respect, you know, even a sex offender in prison was treated better than [at the State Hospital]. . . . I could work and make money. I could literally work all day. Nighttime I can go outside, walk the yard, jog, exercise, you know. I can order the music. Everything was better. I didn't have the prison guards weren't coming up pushing my buttons trying to antagonize me, seeing how far I can be pushed before I snap and react, you know. . . . In prison if you get a write-up you don't get punished right away. You actually have a hearing, like we're having right now. They have like a little court thing. I can call my witnesses. They'll listen to my side of it. There [in the State Hospital], if I get a write-up today, I am punished today. . . . Before my appeal goes through you are punished. . . . Even if you win your appeal and the write-up is dismissed whoopee. You've done your punishment. It don't matter.

(Tr. at 162, L. 12-25; Tr. at 163, L. 1-16).

The State Hospital's application of N.D.C.C. § 25-03.3 has rendered Darl's civil commitment, from which there is no possibility of discharge due to the denial of treatment, so punitive as to constitute cruel and unusual punishment in violation of the Eighth Amendment.

¶23 II. Whether district court's failure to order the State Hospital to provide witnesses and other evidence, and failure to make individual findings prior to requiring Darl to remain handcuffed during the hearing on petition for discharge, was a violation of his procedural due process rights under the Fourteenth Amendment.

¶24 Procedural due process requires fundamental fairness, minimally necessitating notice and a meaningful opportunity for a hearing appropriate to the nature of the case. *In re G.R.H.*, 2006 ND 56, ¶ 24, 711 N.W.2d 587. In addition, due process requires that the duration and conditions of confinement must bear a reasonable relation to the purpose for which persons are committed. *Id*. To that end, N.D.C.C. § 25-03.3-13 requires a sexually dangerous individual to be treated in the least restrictive manner necessary to treat that individual and to protect society. *Id*. The framework for analyzing procedural due process claims requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976).

¶25 Generally, a civil litigant's right to confront and cross-examine witnesses is secured by due process concepts. *Matter of Adoption of J.S.P.L.*, 532 N.W.2d 653, 660 (N.D.

1995). A party to any procedure is entitled to know what evidence is relied upon and has a general right to cross-examine witnesses or to present rebutting evidence, unless the party waives such right. *Muraskin v. Muraskin*, 336 N.W.2d 332, 335 n. 2 (N.D. 1983). Additionally, on petition for discharge from civil commitment, a sexually dangerous individual has a right to obtain confidential records provided to the state's attorney and individually identifiable health information. N.D.C.C. §§ 25-03.3-05(2), 25-03.3-06; *see also In re G.L.D.*, 2014 ND 194, ¶¶ 14-15, 855 N.W.2d 99 (finding that the sexually dangerous individual petitioning for discharge from civil commitment was impermissibly denied discovery of any confidential records provided to the state's attorney and any other incident reports, chart notes, and medical records in the control of the state hospital, as those documents might have probative value to determining whether he remained a sexually dangerous individual, including his ability to control his behavior, as the state evaluator noted conflicts with other residents and staff at the state hospital in which the individual was written up for his behavior).

¶26 Darl's subpoenas for documents were all denied by the District Court, including requests for Darl's treatment plan and write-ups by staff members, even though such documents could be "helpful to either substantiate or negate his ability to control his behavior" (*In re G.L.D.*, 2014 ND 194, ¶ 15, 855 N.W.2d 99). Furthermore, Darl's request to call witnesses from the State Hospital, including residents and staff, was denied by the District Court (Tr. at 175, L. 4-5), upon an objection by the Assistant Attorney General that calling such witnesses would turn the discharge proceedings into "little mini-trials" about every one of the write-ups that Darl got for his behavior issues that resulted in demotions and denial of treatment (Tr. at 173, L. 23). As Darl's counsel stated, such denial of

witnesses violated Darl's right to procedural due process by depriving him of the right to cross-examine witnesses regarding one of the main reasons for his continued denial of treatment, namely, his behavioral write-ups by the staff (Tr. at 176, L. 12-23). Interestingly, the Assistant Attorney General objected that "if it is going to be an indictment of the State Hospital, then I need to know that so I can call all these people to defend themselves and not just be stuck with Mr. Hehn's side of that story" (Tr. at 134, L. 23-25; Tr. at 135, L. 1). So the Assistant Attorney General wanted to call the staff members as witnesses to defend themselves, but objected to Darl's request for witnesses to defend himself.

¶27 In addition, denial of treatment for Darl is based on write-ups by staff members with unknown qualifications. Dr. Krance stated she did not know what background or training they had. "It may just be high school education or maybe some may have college, some may not. I'm not positive though of what the requirements are" (T. at 39, L. 6-8). Also, when questioned whether she attempted to check the veracity of the write-ups, Dr. Krance stated: "That's not my responsibility to do" (Tr. at 39, L. 22), "it's not my responsibility to determine if [the incident] did or did not occur" (Tr. at 40, L. 19-20). Therefore, it was crucially important for Darl to be able to call as witnesses the staff members who completed the write-ups and any residents who may have witnessed the alleged incidents, as the denial of such ability to cross-examine witnesses and verify the write-ups was critical to the determination that he would likely engage in further acts of sexually predatory conduct and had serious difficulty controlling his behavior. Dr. Krance expressly indicated that she relied Darl's behavior write-ups as "one piece" to form her opinion as to whether he remained a sexually dangerous individual, and that "participation

in treatment, their progression in the treatment program would be another piece as well" (Tr. at 41, L. 21-25). However, all that Dr. Krance really had was the write-ups, because Darl was never given any treatment, and instead was stuck in pre-treatment because of his write-ups.

¶28 Finally, a trial court is required to make an individualized determination on the record that use of physical restraints in an involuntary commitment proceeding is necessary, and the restraints should not exceed the level required by each particular situation. *In re Hoff*, 2013 ND 68, ¶ 9, 830 N.W.2d 608. Under *Hoff*, the trial court's failure to independently make an individualized determination on the record that physical restraints were necessary during the petition for discharge hearing for a sex offender was an abuse of discretion that was not harmless error, after counsel for the sex offender requested removal of his restraints. *Id*. at ¶ 19. The sex offender argued that refusal to allow removal of his physical restraints during the hearing would violate his due process rights by denying him the opportunity to assist his attorney in his own defense. *Id*. at ¶ 5. The underlying fundamental legal principles were that the sex offender was entitled to his liberty unless the State proved by clear and convincing evidence that he was or remained a sexually dangerous individual, the physical restraints might interfere with his ability to communicate with counsel, and he was entitled to a dignified judicial process that included respectful treatment reflecting the gravity of any deprivation of liberty. *Id*. at ¶ 11. Thus, in order to make individualized findings, the court was required to analyze the sex offender's record, temperament, and desperateness of his situation, the security in the courtroom and the courthouse, his physical condition, and whether there were any less prejudicial but adequate means of providing security. *Id*. at ¶ 12.

¶29 At the discharge hearing, Darl's counsel requested that Darl's handcuffs be removed from his wrists for the following reasons. (Tr. 2, L. 5-6).

> MR. GREEN: I don't think [the cuffs] are necessary. . . . [Darl's] a civilian that happens to be locked up in the State hospital. I don't think he's a flight risk as he sits here, and I do have some documentation . . . that [Darl's] planning on using and going to need to thumb through as we go through these proceedings. It's going to make it very difficult to do with these cuffs on his hands.
>
> (Tr. at 1, L. 21-25; Tr. at 2, L. 1-4).
>
> THE COURT: All right. Mr. Hehn, . . . I'll tell you exactly what I said in chambers when Mr. Green asked that. I said absolutely that I think that would be uncomfortable for you to sit through these proceedings that way. However, the security for District Court is left in the sound discretion of the Sheriff of Richland County and I'm going to leave the issue of any restraints upon you at this time in their discretion. So, we'll move on with that.
>
> (Tr. at 2, L. 13-20).
>
> MR. GREEN: Can I at least get law enforcement on the record saying that they're not going to take the handcuffs off? Or maybe they'll handcuff him to a chair so that he's got at least one arm free.
>
> THE COURT: I'm going to – no, I'm not going to allow you to take testimony regarding that. You've indicated to me that that's their policy. He's in cuffs and that tells me that you're right that that's their policy.
>
> (Tr. at 2, L. 24-25; Tr. at 3, L. 1-6).
>
> MR. GREEN: I find it astonishing that my client's got to be cuffed when there was a murder trial here just two weeks ago and the guy sat there uncuffed during the entire murder trial.
>
> THE COURT: I would imagine, Mr. Green, there was a jury at that trial. There isn't a jury here today. And, thank you. I've allowed you to make, I think, a sufficient record regarding your objections and I understand your concerns.
>
> (Tr. at 4, L. 2-10).

The District Court's failure to make any individualized findings denied Darl due process.

CONCLUSION

¶30 Darl Hehn's statutory and substantive due process rights have been contravened by denial of treatment, and his right to be free of cruel and unusual punishment has been violated by conditions of his civil confinement that are punitive in effect. Additionally, Darl was deprived of his procedural due process rights by denial of his requests for documents and witnesses, as well as the District Court's failure to make individualized findings before denying his request to appear without handcuffs at the discharge hearing. Such constitutional violations warrant a remedy recommended by independent expert, Dr. Reidel, that Darl have an increased period of time with probation that would allow him to receive treatment, rather than staying in the State Hospital on civil commitment, as he was not likely to recidivate and did not have difficulty controlling his sexual impulses (Tr. at 95, L. 10-15), especially given that the State Hospital does not have a unit that would actually treat his Borderline Personality Disorder (Tr. 96, L. 17-19).

Respectfully submitted this 10th day of March, 2015.

GREEN LAW FIRM, P.C.
522 Dakota Avenue, Suite 1
Wahpeton, ND 58075
(701) 672-1218 (Office)
(701) 672-1219 (Fax)

By: /s/ Jonathan L. Greeen
Jonathan L. Green (ND Bar ID #06853)
Attorney for Respondent/Appellant
jon.green@jongreenlawfirm.com

CERTIFICATE OF COMPLIANCE

¶31 The undersigned, as attorney for the Respondent/Appellant, Darl John Hehn, hereby certifies that Respondent's/Appellant's Brief was prepared with proportional typeface and that the Respondent's/Appellant's Brief does not exceed 8,000 words.

¶32 Dated this 10th day of March, 2015.

GREEN LAW FIRM, P.C.
522 Dakota Avenue, Suite 1
Wahpeton, ND 58075
(701) 672-1218 (Office)
(701) 672-1219 (Fax)

By: /s/ Jonathan L. Greeen
Jonathan L. Green (ND Bar ID #06853)
Attorney for Respondent/Appellant
jon.green@jongreenlawfirm.com

STATE OF NORTH DAKOTA **IN THE SUPREMECOURT**

SUPREME COURT CASE NUMBER 2014 0430

In the Matter of Darl John Hehn	
Ronald W. McBeth, Richland County State's Attorney,	
Petitioner and Appellee,	**CERTIFICATE OF SERVICE UPON JONATHAN BYERS, ATTORENY FOR PETITIONER AND APPELLEE**
v.	
Darl John Hehn,	
Respondent and Appellant.	

¶33 The undersigned attorney represents the Respondent/Appellant, Darl John Hehn, in the above-entitle matter and hereby certifies that on March 12, 2015, I served Appellant's Brief and Appendix electronically upon Jonathan Byers, attorney for Petitioner/Appellee, State of North Dakota, at the following email address: jbyers@nd.gov.

¶34 Dated this 12th day of March, 2015.

GREEN LAW FIRM, P.C.
522 Dakota Avenue, Suite 1
Wahpeton, ND 58075
(701) 672-1218 (Office)
(701) 672-1219 (Fax)

By: /s/ Jonathan L. Greeen
Jonathan L. Green (ND Bar ID #06853)
Attorney for Respondent/Appellant
jon.green@jongreenlawfirm.com