ORIGINAL 20040319

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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| State of North Dakota, | ) | Supreme Court No. 20040319 |
| | ) | Rolette County No. 04-R-00019 |
| Petitioner/Appellee, | ) | |
| -vs- | ) | |
| | ) | |
| L.D.M., | ) | |
| | ) | |
| Respondent/Appellant. | ) | |



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# BRIEF OF APPELLEE

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## TABLE OF CONTENTS

# TABLE OF CASES AND STATUTES

## CASES



## STATUTES

## STATEMENT OF THE ISSUES

I. RESPONDENT HAS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT HIS ALLEGATION THAT STATE'S EXPERTS DID NOT ACT INDEPENDENTLY.

II. RESPONDENT'S ALLEGATION THAT THE STATE MUST PRODUCE TWO INDEPENDENT EXPERTS AND CANNOT RELY ON RESPONDENT'S EXPERT MISINTERPRETS THE PLAIN LANGUAGE OF THE STATUTE.

## STATEMENT OF THE CASE

On March 16, 2004, the Rolette County State's Attorney filed a Petition for Commitment of a Sexually Dangerous Person in which the State sought to have L.D.M. involuntarily committed as a sexually dangerous person under North Dakota Century Code §25-03.3. A probable cause hearing was held on March 29, 2004, and L.D.M. orally waived his right to the probable cause hearing and consented to extensions for the purpose of evaluations. (Tr- 1 at 8-9.)[1] A Commitment hearing was held on November 4, 2004 after which the District Court ruled as follows:

FINDINGS OF FACT

1. That L.D.M. by history has been convicted of two sexual offenses and has been incarcerated for ten years at the North Dakota State Penitentiary. That while in custody he has engaged in sexually harassing conduct and inappropriate conduct that led to discipline.
2. That one or more of the sexual offenses occurred while he was consuming alcohol.
3. The three expert examiners diagnosed L.D.M. as having anti-social personality disorder. Dr. Belanger and Dr. Etherington describe the diagnosis as anti-social personality with borderline features. Dr. Gulkin describes it as anti-social personality with narsistic with passive aggressive. It is a personality disorder that

[1] Two transcripts have been prepared; a transcript of the March 29, 2004 proceedings which includes pages 1-17, and separate transcript of the November 4, 2004 proceedings which includes pages 1-179. The March 29, 2004 transcript will be cited as "Tr-1," and the November 4, 2004 transcript will be cited as "Tr-2."

impairs L.D.M.'s ability to perceive and relate to the people around him. His behavior is self-centered and that he does not respond to any internal or external restraints that would prevent criminal conduct. His personality is instable and impulsive.

4. This behavior pattern is pervasive and enduring. The disorder does not respond to medications. Any treatment is long term therapy.
5. L.D.M. has also been diagnosed as being chemically dependent at the State Penitentiary, but has refused treatment.
6. The examiners administered tests to determine actuarially the likelihood of L.D.M. re-offending. On three of the tests he scored in the range of 49 to 78 percent probability of re-offending. The examiners stated that he needed to only score high in one.
7. The primary factor to mitigate the diagnosis is sexual offender treatment. Although it has been recommended to L.D.M., he has refused to undergo and complete the program. According to his testimony he does not perceive that he has a sexual problem or the ability to relate with other people.
8. There were no other factors that could be considered to mitigate the diagnosis.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I. That L.D.M. is an individual who has engaged in sexually predatory conduct.

II. That L.D.M. has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitutes a danger to the physical or mental health or safety of others.

Based on the foregoing Conclusions of Law, IT IS ORDERED: That L.D.M. is committed to the care, custody, and control of the executive director of the department of human services and shall be transported to the North Dakota State Hospital. (Resp. App. at 10.)

After reviewing the evidence and hearing testimony at the Preliminary Hearing, the Court ordered that L.D.M. be "...committed to the care, custody and control of the executive director of the department of human services and shall be transported to the North Dakota State Hospital." (Resp. App. at 10.) L.D.M. filed a Notice of Appeal on November 23, 2004.

## STATEMENT OF THE FACTS

L.D.M. was convicted by a jury in Rolette County, North Dakota of Gross Sexual Imposition in September, 1993 and sentenced to serve 10 years at the North Dakota State Penitentiary. (Resp. App. at 4, 6.) Prior to L.D.M.'s release, the State filed a Petition for Commitment of a Sexually Dangerous Person pursuant to North Dakota Century Code Chapter 25-03 in which the State alleged that L.D.M. was a sexually dangerous individual and sought to have L.D.M. civilly committed. (Resp. App. at 2.)

A Preliminary Hearing was held on March 29, 2004, and L.D.M. orally "waived his right to the probable cause hearing and consented to extensions that may be necessary during the course of the evaluations." (Resp. App. at 9.)

L.D.M. was evaluated at the North Dakota State Hospital by Dr. Joseph Belanger, a licensed psychologist employed by the North Dakota State Hospital (Tr- 2. at 2, 7.) L.D.M. was also evaluated by Dr. Rosalie Etherington, a licensed psychologist who is also employed by the North Dakota State Hospital (Tr- 2. at 65-66, and 68.) In addition, L.D.M. exercised his right to an independent evaluation under N.D.C.C. §25-03.3-12, and Dr. Robert Gulkin, a clinical psychologist conducted a third evaluation. (Tr- 2. at 107, 109 and Pet. App. at 2.)

A commitment hearing was held November 4, 2004, and all three of the above psychologists testified. Dr. Belanger reviewed L.D.M.'s file and interviewed L.D.M. on three separate occasions. (Tr- 2. at 8-9.) Dr. Belanger

diagnosed L.D.M. as having an "antisocial personality disorder with additional borderline features" and alcohol abuse. (Tr- 2. at 10, 25.) Dr. Belanger outlined three instruments he used to aid in determining whether L.D.M. was likely to engage in further acts of sexually predatory conduct – the RRASOR, the STATIC 99, and the MnSOST-R. (Tr- 2. at 42-43.) Based on these three tests, the evaluation and L.D.M.'s past history, Dr. Belanger determined that there is reason to believe that L.D.M. is likely to engage in further acts of sexually predatory conduct. (Tr- 2. at 49.) Dr. Belanger also testified that L.D.M. has "...the kind of psychopathic features that the risk for violence is high, and this is corroborated by the physical evidence on the victims I cited earlier." (Tr- 2. at 49.)

Dr. Etherington also reviewed L.D.M.'s file and interviewed L.D.M. at the North Dakota State Hospital. (Tr- 2. at 68-69.) Dr. Etherington testified regarding L.D.M.'s borderline personality disorder and described L.D.M.'s continuing pattern of sexual assaults against "...women in the community, against the women in the penitentiary, and even against women at the State Hospital." (Tr- 2. at 74-78.) She said that L.D.M. had been ordered into sexual offender treatment as an adolescent but did not complete it. (Tr- 2. at 72.) She also testified that the "...penitentiary staff recommended he complete treatment. He refused it." (Id.) In assessing L.D.M.'s likelihood to engage in further acts of sexually predatory conduct, Dr. Etherington used the same assessment methodology as did Dr. Belanger: the MnSOST-R, the STATIC 99, and the RRASOR. (Tr- 2. at 83.) Dr. Etherington said that, based

on her evaluation, she believed L.D.M. "... is at high risk for future sexually predatory conduct and does meet criteria under Chapter 25." (Tr- 2 at 91.)

She further testified that her opinion was "... that yes in fact he (L.D.M.) does meet the statutory definition under the law in that he has an acquired or congenital condition that makes him likely to engage in further acts of sexually predatory conduct. (Tr- 2. at 91, 92.)

Dr. Gulkin, who conducted the independent evaluation of L.D.M. at his request pursuant to NDCC §25-03.3-12, testified that he believed L.D.M. did meet the statutory requirements as a "...sexually dangerous individual and someone who is likely to engage in future acts of sexually predatory behavior." (Tr- 2 at 135, 136 and Pet. App. at 14.)

## ARGUMENT

### I. RESPONDENT HAS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT HIS ALLEGATION THAT STATE'S EXPERTS DID NOT ACT INDEPENDENTLY.

L.D.M. alleges that the evaluations done by Dr. Etherington and Dr. Belanger upon which the court relied in determining whether L.D.M. met the criteria as a sexually dangerous individual were not "independent" as required by the statute. (L.D.M. Br. at 6-9). L.D.M. makes this allegation based on the fact that Dr. Etherington and Dr. Belanger work for the same employer and based on a misrepresentation of Dr Etherington's testimony as well as a misrepresentation of the statutory language. (Id.) L.D.M.'s allegation is nothing more than speculation and is not supported by any evidence.

L.D.M. claims that because Dr. Etherington and Dr. Belanger (1) are employed by the same employer (the North Dakota State Hospital), and (2) teach at the same school (Jamestown College), they cannot be considered "independent experts." (L.D.M. Br. at 7-9.) L.D.M. provides no evidence to support this statement. Rather, he alleges that they "...are naturally going to confer and consult with each other on cases or regarding patients they are seeing." (L.D.M. Br. at 7.) L.D.M.'s speculation that this is what they do is not "evidence," and does not prove that Dr. Etherington and Dr. Belanger did not, in fact, complete their evaluations independently. Without more, L.D.M.'s allegations should be dismissed as lacking merit.

L.D.M. attempts to support his claim of lack of independence based on a distortion of Dr. Etherington's testimony concerning how the evaluations are completed. (L.D.M. Br. at 7.) L.D.M. claims that Dr. Etherington stated that she and Dr. Belanger "come together and "correct" their differences before they complete their final report." (Id.) By this, L.D.M. suggests that Dr. Etherington and Dr. Belanger confer to make their reports uniform, even if they had arrived at different results. In fact, Dr. Etherington's testimony identifies that she and Dr. Belanger do their evaluations independently:

Q. And do you do these independently or do you do them with Doctor Belanger?

A. We do them independently. However we do in the end come together and confer if we have any differences. We identify if there are differences did either of us make an error, and we review them with Doctor Dorum, who gives us consultation and supervision for R-A-I's and sexual dangerousness assessment.

Q. And if there are differences, do you note those differences in your report or do you wipe them out when you—

A. No. This is actually before we complete the whole process and so it is really a part of the process. We do independent scoring, we come together, we identify if there are possible errors and if so we correct those errors before we actually make the final report and the final scoring. (Tr-2 at 96-97.)

Dr. Etherington was not stating that they collaborated on doing the evaluations. Rather, their conferring was only to determine if errors had been made in the actuarial tests. As can be seen by the further testimony concerning the actuarial tests, if the correct data is used in the actuarial tests, the scoring would be the same by any one who uses the tests. If there are differences in the scoring, then one of them has made an error, and the error is caught and corrected. Then, each expert completes a final report based on the actuarial test results and clinical judgment. (See In the Interest of M.B.K., 2002 ND 25, ¶ 18, 639 N.W.2d 473 (noting that the experts can, in determining if a respondent meets the criteria for civil commitment, "...use the fullness of their education, experience and resources available to them in order to determine if an individual poses a threat to society").

A correct reading of Dr. Etherington's testimony in context does not support L.D.M.'s claim that she and Dr. Belanger collaborate in producing their evaluations. Rather, as she stated, they do the evaluations of the respondent independently.

## II. RESPONDENT'S ALLEGATION THAT THE STATE MUST PRODUCE TWO INDEPENDENT EXPERTS AND CANNOT RELY ON RESPONDENT'S EXPERT MISINTERPRETS THE PLAIN LANGUAGE OF THE STATUTE.

L.D.M. also claims that the statute requires the State must "produce" two

independent experts and the expert produced by the respondent, even if that expert's conclusions are that the respondent meets the criteria, cannot be used by the court to satisfy the statutory requirement for two independent experts. (L.D.M. Br. at 5-6.) For this reason, L.D.M. claims that Dr. Gulkin's testimony supporting the findings of the State's experts cannot be considered in the court's determination that two independent experts have found that the respondent meets the criteria for civil commitment. L.D.M. claims that this interpretation, along with L.D.M.'s claim that the State has produced only one expert, because he alleges Dr. Etherington and Dr. Belanger did not act independently, means that the State has failed to meet its burden to produce two experts. (Id.) L.D.M.'s interpretation of the statutory provision does not reflect the plain language of the statute.

In interpreting a statute, "the primary objective of statutory construction is to ascertain the Legislature's intent." In re Estate of Thompson, 1998 ND 226, ¶ 7, 586 N.W.2d 847. In ascertaining legislative intent, the courts first look at the words used in the statute, giving them their ordinary, plain, and commonly understood meaning. Id. This is consistent with N.D.C.C. §1-02-02, which provides "(w)ords used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained."

Further, if the language of a statute is clear and unambiguous, "the legislative intent is presumed clear from the face of the statute." Thompson, 1998 ND 226, ¶ 8, 586 N.W.2d 847 (citation omitted). "(T)he letter of the

statute cannot be disregarded under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute." Lawrence v. North Dakota Workers Compensation Bureau, 2000 ND 60, ¶ 19, 608 NW2d 254, (citing County of Stutsman v. State Hist. Soc., 371 N.W.2d 321, 325 (N.D. 1985)). Only if statutory language is ambiguous does the court resort to extrinsic aids to construe the statute. Thompson, 1998 ND 226, ¶ 7, 586 N.W.2d 847.

In this case, the plain language of the statute provides its clear meaning: "**An individual may not be committed unless evidence is admitted establishing that at least two experts have concluded the individual has a congenital or acquired condition that is manifested by a sexual disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct.**" N.D.C.C. §25-03.3-13 (emphasis added). This section does not, as alleged by L.D.M., require that the State must produce two experts who both find that the respondent meets the criteria for a sexually dangerous individual. (See L.D.M. Br. at 6.) It only requires that at least two experts have reached such a conclusion. Thus, L.D.M. is incorrect when he states that the evaluation by Dr. Gulkin on behalf of L.D.M., which also concluded that L.D.M. met the criteria as a sexually dangerous individual, cannot be one of the two independent experts.

If the language is considered ambiguous, then a review of the legislative history is appropriate. In that regard, the original civil commitment statute was drafted by and introduced on behalf of the Attorney General. The Senate Judiciary Committee adopted the amendment that provided the requirement

that at least two experts must conclude that the respondent meets the criteria for commitment. See Minutes of Senate Judiciary Committee on HB 1047, 55th Legislative Assembly (N.D. March 10, 1987). [2] There is nothing in the discussion accompanying the adoption of this amendment that indicates it is the "State's" burden to produce two experts. Rather, to the extent it addresses the amendment, it suggests the contrary, as the following exchange indicates. "Sen. Traynor: If you have two experts, one says yes and the other says no, can you go out and get another expert?" "Yes, judge needs two experts that concur in this statement in order to commit at that. If that level 1 is not met, the judge could not commit." (Id., 5.)

The Supreme Court's statement quoted by L.D.M. does not change the plain meaning of the statute. (L.D.M. Br. at 6 (quoting In re M.B.K., 2002 ND 25, ¶ 11, 639 N.W.2d 473).) The court did not make a "finding" or "hold" the statute was to be interpreted to require the State produce the two independent experts as its witnesses. In context, the Supreme Court was merely identifying that the State has the burden of proof that two experts have concluded the respondent met the criteria. (Id.) It does not identify how or from where the two experts are produced.

Finally, the Supreme Court has previously reviewed the reports of Dr. Etherington and Dr. Belanger and noted that they do produce their evaluations independently. See In the interest of D.V.A., 2004 ND 57, ¶ 5, 676 N.W.2d 776 (noting that Dr. Etherington testified that she and Dr. Belanger conducted the scoring on the inventories independently). In fact,

[2] A copy of the legislative history is attached for the Court's convenience.

relying on the expert testimony of the North Dakota State Hospital's two experts, the Supreme Court has upheld the civil commitment of three separate respondents. See In the Interest of D.V.A., 2004 ND 57, 676 N.W.2d 776; In re M.B.K., 2002 ND 25, 639 N.W.2d 473; In the Interest of M.D., 1999 ND 160, 598 N.W.2d 799.

For these reasons, the reports of the State Hospital experts, even if considered not to be independent, and the report of Dr. Gulkin provide the two independent experts that are required to meet the criteria of the statute.

## CONCLUSION

The State presented evidence and testimony in support of the petition and showed by clear and convincing evidence that the respondent is a sexually dangerous individual. Two experts testified on behalf of the State, and both concluded that L.D.M. has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes him likely to engage in further acts of sexually predatory conduct. (N.D.C.C. §25-03.3-13.) The respondent's independent expert reached the same conclusion.

The State has met its burden of proof, and the District Court's Order for civil commitment pursuant to N.D.C.C. §25-03.3 must be affirmed.

Dated this 8 day of August, 2005.

Respectfully submitted,

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**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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| State of North Dakota,<br><br>Petitioner/Appellee,<br>vs.<br><br>**L.D.M.,**<br><br>Respondent/Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Supreme Court No. 20040319<br>Rolette County No. 04-R-00019<br><br>**AFFIDAVIT OF SERVICE**<br><br>**BY MAIL** |

STATE OF NORTH DAKOTA

COUNTY OF ROLETTE

**Dawn Halone,** being first duly sworn on oath, deposes and says that she is a citizen of the United States and is over the age of twenty-one years of age, and on August 8, 2005 said affiant deposited in a sealed envelope a true copy of the following:

Brief of Appellee
Appendix

In the above entitled action, in the United States Post Office in Rolla, North Dakota, postage prepaid, directed to:

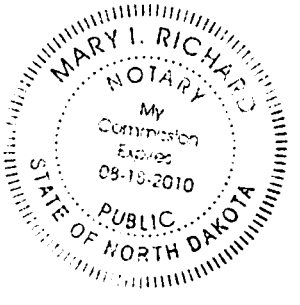
William Hartl
Attorney at Law
PO Box 319
Rugby, ND 58368

Dawn Halone
Dawn Halone

Subscribed and sworn to before me this 8th day of August, 2005.

Mary I. Richard
Notary Public
Rolette County, ND

My commission expires:



first. Also need the expertise for this kind of treatment. What about other states and how they have provided for this, state facility or private and ways of saving money in contracting out.

Heidi Heitkamp, Attorney General appeared in support with written testimony.

Laurie Loveland of Attorney General's Office appeared in support with written testimony.

Questions on what therapy will consist of & how long. Also mental health treatment. Concerns with castration and then still commit sexual offense without a penis. Questions on releasing the offender back into society without some kind of detector or someone to watch them.

Alex Schweitzer, Superintendant of State Hospital, appeared in support with handouts and graph, stating there is no cure but on going progress with treatment.

Sen. Watne asked if there was any study or inquiry within cities around the state. Answer being yes.

Sen. W. Stenehjem commented on this involving people with motivation, what about those that aren't motivated.

Questions on personnel for this treatment plan and their expertise or caliber and what paid.

Mary Tello of the ND Mental Health Association appeared in support with written testimony.

Deanna, parent, appeared in support with written testimony.

Linda Isaakson appeared to hand out testimony for Bonnie Palacek in support.

Edwin Dyer III, Attorney in Bismarck, appeared in opposition with written testimony. Could submit some amendments.

Carol Two Eagle Walker appeared in opposition with written testimony.

March 19, 1997 Tape # 1 Side B 24.2 - 24.8

Sen. Andrist: what's the use of passing the bill if there is no appropriations. Response: That is what we need to visit about, what is the appropriation if any.

March 25, 1997 Tape # 1 Side A 0.0 - 30.0 Side B 0.0 26.0
# 2 Side A 0.0 - 19.4

Sen. W. Stenehjem stated that he visited with Laurie Loveland and have drafted some amendments and explained them. Also noting that the Governor does not intend to provide an appropriation for treatment program for anyone who may be committed under the provisions of this bill. And that's a problem as I see it with enacting the bill or not enacting the bill. However, he appears to be of the opinion that he can use existing resources, either through

the emergency commission or through existing budget of the Dept. of Human Services to enter into a contract if somebody who is committed under the provisions of this bill to send them out of state to treatment programs that might exist. That is problem number 1. I don't see that the appropriations committee is moving to add any money anywhere to provide for an in-state treatment program.

1) To provide that the Director of the Dept. of Human Services rather than the states attorney selects the experts who are doing the evaluation. 2) Another one that is a little more controversial requires not one but two experts to concur in a decision that an individual needs to be committed under the provisions of this bill 3) Requires treatment in the least restrictive a treatment program possible and I think that's probably a constitutional magnitude anyway and maybe implied, but this would state it specifically 4) Makes it clear that the commitment will not be to the State Penitentiary and that's in line with what Ms. Loveland told us in her testimony that sending people under the provisions of this bill to the state penitentiary would be worse than doing nothing. 5) Savings Clause provision stating that the detention and commitment must conform to constitutional requirements as kind of a savings clause. The other concern had to do with an individual who gets committed, if under the bill as its introduced, if there is any treatment for anybody, that person has to pay for the treatment, that's 80 to 100,000 dollars a year. We will impoverish anybody who is committed under this. I's not sure if that's better than just simply allowing the court the authority to look at the resources the person has and give them a bill that fits.

Sen. Traynor concerns in the case of assessing the respondent, if he is expected to pay for treatment, would he have any choice of the selection of site of treatment. No

Final Amendment if the effective date of July 1998.

Sen. Traynor: regarding the amendments, one doesn't preclude the other, do they? No.

Sen. Watne concerns with civil mental commitment procedure, why can't this individual go under those rules to.

Jean Mullen of the Attorney Generals Office stated they've tried it, it doesn't work. The nature of illness is different.

Concerns of the committee with indigent and right to an expert in evaluations and if the amendment passed, there would be 3 experts. Also if we sent them elsewhere and they come back every year, we would have to pay for this. Can we really rehabilitate these people? Can't we fit this all together in one program example the state pen if we already have the expertise here.

It was noted that if they are at the pen serving time, they are there for punishment and can refuse treatment. This way one serves time and be free when their sentence is up, with this, one serves time and serves until they do treatment.

Sen. Berg asked if there was any evidence that there is a difference in the success rate from the prison vs the civil commitment setting for these offenders? Response being: They are still fairly new and doesn't have any statistics.

Sen. Watne concerns with parole officers doing the initial assessment, then going onto another level and with pedophiles, their behavior, and if able to really treat them.

Sen. Traynor wondered how many people were committed to the State Pen now for sex offenses. 125 If we pass the bill, the treatment must be available and the treatment program means any hospital, what's to prevent the 125 from saying you have to let out of the penitentiary, were going to the hospital. Civil rights, if the program is there, haven't they got a right to elect that program? No I wonder if we shouldn't be prepared to defend that. Response: 2 components to the bill, one is that you have to have a particular mental disorder and that mental disorder is going to make you sex offend again. The other is that some of these people probably after serving their sentences would be considered treatable in the community. This is only treatment for people who that they find is a threat, a dangerousness, mental disorder.

Sen. Andrist: Is there any potential for castration? Response: doesn't feel it would work, mental illness would still be there.

Further discussion on effective date and why delayed.

Sen. Watne made a Motion to adopt the first amendment, second by Sen. Andrist. 7-0-0. Replacing state's attorney with executive director.

Sen. Watne made a Motion to adopt the second amendment, second by Sen. Berg. 7-0-0. To clarify that the treatment program for committed individuals who are not also serving criminal sentences may not be at the State Penitentiary.

Sen. Berg made a Motion to adopt the 3rd set of amendments, second by Sen. C. Nelson. 7-0-0. To give the court discretion in awarding the amount of the cost s of treatment and care to repaid and to make ability to pay a consideration to be considered by the court in that decision.

Sen. Watne made a Motion to adopt set # 4 amendments, second by Sen. Traynor. To require the least restrictive treatment be provided to committed individuals.

Sen. Watne made a Motion to adopt set # 5, second by Sen. Traynor. 7-0-0. To require the concurrence of two experts to commit an individual.

Sen. Watne: Does this help you uphold it constitutionally even more? Response: It takes away 1 argument the offender or opponents could make.

Sen. W. Stenehjem noted that under current constitutionally he's entitled to the least restrictive setting anyway and the second section of the bill, last sentence should help when they come in and say I want a program just for me.

Sen. Andrist: Do we risk getting into a situation where now the court has decided that he will be committed, then he gets to argue to which facility he wants to go to.

Sen. Watne: Doesn't say anything about the cost,

Roll call vote taken. 5-2-0.

Ms Loveland was present to the present the savings clause and feels that we don't really need it.

Sen. Berg: how do you define "likely"? page 2 of the bill, sexually dangerous person means an individual person who has shown to have engaged in sexual predatory conduct and who has the disorder line which makes that individual likely to engage in further sexual predatory conduct. That's based on the definition by the task force as to what other states have found by psychologists and psychiatrists.

Sen. Watne made a Motion to adopt the amendment, second by Sen. Traynor. To require the concurrence of two experts to commit an individual.

Sen. Traynor: Is that a definition, is the definition a work of art, accepted definition in this area? Doesn't know, the definitions in some of the other states statute have been major issues in their litigation but the problem there is that they have used terminology that practicing psychologists and psychiatrists don't use. So that's why this definition comes from terms that are used in diagnostic and statistical manual, which is the current manual used by psychiatrists and psychologists. We have worked with them to make sure that these are medical terms that they understand and would apply in their practice.

Sen. Traynor: If you have two experts, one says yes and the other says no, can you go out and get another expert? Yes, judge needs two experts that concur in this statement in order to commit at that. If that level 1 is not met, the judge could not commit.

Roll call vote taken. 7-0-0

Sen. Watne made a Motion for Do Pass as Amended, second by Sen. Traynor.

Concerns of the committee of where is this going with no money, the governors office. We need to protect our kids and the hurdle is high under this bill. The attorney general knows that and feels we just need to take care of our kids. Also we may be protecting very few of our kids, so in a sense it might just be satisfying our instinct to want to feel good. The problem is far far greater than this bill.

Sen. Andrist to Laurie Loveland: we've spoken about the likely hood that this will tested, I presume that means one of the first few people that might be committed under this will protest it? We've expected it, always with the first person to come in and challenge it.

Sen. W. Stenehjem: We here in the legislature in general, talk about going to court. It is fair to say that if anybody is committed under this, it will go

as far as it can go. It will go to the Supreme Court and probably beyond. It's almost certain, the attorney for the respondant will be obligated to make those arguments. (there will be an attorney for the respondent as what has happened in every other state, its required by law)

Sen. Mutzenberger: feels this bill has become about as good as it can get with the amendments, its a really good bill, but it has no money in it for treatment, has no program in it for any after-care and its simply on that basis that I have in the past not supported for mandatory sentencing bills. In part because there is no money in them and more people will go to prison and I see this is going to happen here to. I don't mean that I don't want to protect our kids either, this is a very good bill which is not workable because were not willing to fund it. I have to vote no.

It just seems to me that we are not really interested in making these people well. If we were, we'd put the money here, we are interested in protecting our society and I wish this could come at it in some other way, but under the disguise of were sending people away to make them well, because we are not going to do that.

Response by W. Stenehjem: They are going to treatment, they are not going to the penitentiary. Although we don't have the facility in this budget. They are not going anywhere except for treatment.

Sen. Andrist: his argument is accurate though, we'd never spend this kind of money on so few people just to make them well. Also concerned with sending six people to this and somewhere down the road they say its unconstitutional, then what? What happens to those six people?

W. Stenehjem: Hard to say, sometimes the courts will fashion their remedy and they might specify them just for the individuals who brought the claim.

Sen. Andrist: Who makes the decision on whether were going to contract the first case or first two cases or plan a facility? The governors going to have to make that decision through the Dept. of Human Services and the availability.

Sen. Traynor commented: This is a crime prevention measure, its not a criminal procedure as Laurie pointed out, its a civil procedure but it removes those people from society where a crime is highly likely. A very vicious crime and I think the people of ND will approve the legislature for doing that.

Sen. Watne: Looking at when the crime does eventually happen that the cost is probably going to be a life time or at least 25 years in prison at $30,000 plus the treatment in the facilities there. I think your just borrowing from pater to pay paul.

Sen. C. Nelson: Was there an indication during the interim that there was going to be funding? Response by Sen. W. Stenehjem: I served on that interim committee and left from that interim committee with the impression that funding was going to be there.

Further concerns with not having sufficient solid information at least on the Kansas case. Sen. Stenehjem feels that this is some information that we will have in the next 2 years and I'm sure there will be some problems when it comes time to place these individuals, but will have the information by 1999.

Sen. Berg: If were talking about fiscal costs, I think that we can also think of this as being just a transference of these costs. If we look at the cost of treatment for the victims of these crimes who are hospitalized for a varying period of time, it doesn't take long to add up a 100 grand for the treatment of children who have been abused. This isn't a new added cost, it could be a transference of the cost to another part of the pot.

Roll call vote taken. 6-1-0 Sen. W. Stenehjem will carry the bill.

REPORT OF STANDING COMMITTEE (410)
March 27, 1997 11:35 a.m.

Module No: SR-55-1023
Carrier: W. Stenehjem
Insert LC: 70094.0501 Title: .0600

## REPORT OF STANDING COMMITTEE

HB 1047, as reengrossed: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Reengrossed HB 1047 was placed on the Sixth order on the calendar.

Page 6, line 23, replace "state's attorney" with "executive director"

Page 7, line 9, after the period insert "An individual may not be committed unless evidence is admitted establishing that at least two experts have concluded the individual has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct."

Page 7, line 14, replace "at" with "in", remove "treatment", and after "or" insert "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."

Page 7, remove line 15

Page 7, line 16, remove "the facility or in the program in which the respondent is placed."

Page 7, line 19, replace "care," with "legal and physical" and remove ", and control of the director"

Page 10, line 13, after the first "for" insert "all or part of the"

Page 10, line 14, after the period insert "In establishing the amount of reimbursement ordered under this section, the court shall consider the ability of the respondent or committed individual to pay."

Renumber accordingly