

**Supreme Court No. 20140366  
District Court No. 51-2012-MH-14**

**NORTH DAKOTA SUPREME COURT**

**In the Matter of Jeremy Tim Johnson**

**Christene Reiersen, Assistant Ward County State's Attorney**

**(Petitioner and Appellee)**

**v.**

**Jeremy Tim Johnson**

**(Respondent and Appellant)**

**Appeal from Order for Commitment issued October 3, 2014  
by the Honorable Gary H. Lee of the Ward County District Court**

**BRIEF OF THE APPELLANT**

**Tyler J. Morrow  
Attorney for Appellant  
ND # 06923  
301 N. 3<sup>rd</sup> St, Suite 300  
Grand Forks, ND 58203  
Ph.: (701) 775-0654  
tyler@ralawfirms.com**

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## JURISDICTIONAL STATEMENT

[¶ 1] Jurisdiction in this matter is pursuant to N.D.C.C. § 25-03.3-19. The Ward County District Court issued a decision ordering Jeremy Tim Johnson (“Johnson”) remain civilly committed on October 3, 2014. Johnson timely filed this appeal on October 20, 2014.

ISSUE PRESENTED FOR REVIEW

**I. [¶ 2] Whether the District Court Erred in determining that the State had met its Burden of Proving by Clear and Convincing Evidence that Jeremy Tim Johnson remains a Sexually Dangerous Individual.**

**II. [¶ 3] Whether Johnson remains a Sexually Dangerous Individual Pursuant to N.D.C.C. § 25-03.3 which would warrant further Civil Commitment.**

## STATEMENT OF THE CASE

[¶ 4] Johnson was initially committed to the North Dakota State Hospital (“NDSH”) as a Sexually Dangerous Individual on September 26, 2012. He has remained there to this day.

[¶ 5] Johnson exercised his right to request a discharge hearing under N.D.C.C. § 25-03.3-18. The Ward County District Court determined that the State had established by clear and convincing evidence that Johnson remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8), and denied Johnson’s discharge on October 3, 2014. Johnson appealed that decision on October 20, 2014.

## STATEMENT OF THE FACTS

[¶ 6] A complete history prior to the review hearing can be found from the Opinion issued by this Court in the *Interest of Jeremy Tim Johnson*, 2013 ND 146, 835 N.W.2d 806.

[¶ 7] Johnson petitioned for an annual review hearing pursuant to N.D.C.C. § 25-03.3-18 on whether he remained a sexually dangerous. A hearing was held on two separate days, August 20 and 21, 2014. The State called Dr. Robert Lisota (“Lisota”) to testify that Johnson remained a Sexually Dangerous Individual subject to continued civil commitment at the NDSH. Johnson called Drs. Stacey Benson (“Benson”) and Troy Ertelt (“Ertelt”) who both testified that Johnson no longer met the criteria for civil commitment.

[¶ 8] The Ward County District Court found that the State had proven by Clear and Convincing evidence that Johnson remained a Sexually Dangerous Individual subject to continued civil commitment and issued an Order in that regard on October 3, 2014. Johnson filed his appeal on October 20, 2014.

## ARGUMENT

### **I. [¶ 9] The District Court Erred in determining that the State had met its Burden of Proving by Clear and Convincing Evidence that Jeremy Tim Johnson remains a Sexually Dangerous Individual.**

[¶ 10] The North Dakota Supreme Court has determined that civil commitments of sexually dangerous individuals are reviewed under a “modified clearly erroneous” standard. *In re Midgett*, 2007 ND 198, ¶ 6, 742 N.W.2d 803, 805. The Court will affirm the trial court’s decision unless the “order is induced by an erroneous view of the law, or [it is] firmly convinced the order is not supported by clear and convincing evidence.” *In re Anderson*, 2007 ND 50, ¶ 21, 730 N.W.2d 570. Here the trial court erred in determining that the State had proved by clear and convincing evidence that Johnson remains a Sexually Dangerous Individual when Lisota’s report and testimony were based off of a review of a summary of the records compiled by the NDSH (47:22-25) and not the records themselves (48:2); the first half of Lisota’s report was cut-and-pasted from Dr. Krance’s initial commitment hearing report (49:7-9); the second half of the report is a “template” used by the NDSH where the names and/or scores of the individuals are changed but the rest of the wording remains the same (49:13-25; 50:1) (68:20); Lisota has never interviewed Johnson (53:4); Lisota did not follow American Psychological Association rules in writing his report (59:3-10); Lisota did not review a single transcript of any of Johnson’s criminal proceedings (66:11-14); Lisota testified that Johnson was 2.7x more likely than “I don’t care what it is” to reoffend (72:19); Lisota did not rescore the PCL-R and relied on the score from the initial hearing even though Benson and Ertelt

found drastically different scores (77:16-20); Lisota did not provide the PCL-R as instructed by the author of the instrument (85:10-12) (91:13-14); and Lisota admitted the clear and convincing evidence offered to the Court was someone else's work (93:18-20).

[¶ 11] In *Hehn*, this Court stated, "in addition to the three requirements contained in the plain language of the statute and this Court's definition of 'likely to engage in further acts of sexually predatory conduct,' the United States Supreme Court held that in order to satisfy substantive due process requirements, the individual must be shown to have serious difficulty controlling his behavior." *In re Hehn*, 2008 ND 36, ¶ 19, 745 N.W.2d 631. This Court further stated that such a determination was required to distinguish a sexually dangerous individual from the ordinary recidivist convicted in a typical criminal case. *Id.* The State did not prove by clear and convincing evidence that Johnson poses any more of a threat than the typical criminal recidivist. Instead, the State, and the District Court, relies on a circle argument which, if affirmed, could never be defeated. That argument being that Johnson offended, which leads to a diagnosis, which means he will offend again. As Lisota even points out, the DSM 5 does not agree with the State or the District Court in this regard (120:25 through 121:10) Johnson is incapable of changing the past, and to dwell there affords him no opportunity to ever get out of the NDSH.

[¶ 12] Both the State and the District Court rely heavily on Johnson's progress, or depending on which expert is asked, lack of progress in treatment in determining whether

or not Johnson remains a Sexually Dangerous Individual. In fact, in its Order, the District Court offers the following for a conclusion:

“Until Johnson admits his problem, accepts the need for treatment [to] address his problem, and progresses in that treatment, he remains a high risk offender. He remains a danger to the physical or mental health or safety of others. He remains a sexually dangerous individual.”

(Order ¶ 27). Although Johnson disputes this factual determination, it is not necessary to dispute these facts to show that such a finding goes against both the statute and case law. As the District Court correctly pointed out in the beginning of its Order, “At any hearing pursuant to a petition for discharge, the burden of proof is on the state to show by clear and convincing evidence that the committed individual remains a sexually dangerous individual” (Order ¶ 6), this Court has likewise stated that, “At a discharge hearing, the State has the burden of proving by clear and convincing evidence the petitioner remains a sexually dangerous individual.” In re J.G., 2013 ND 26 ¶9, 827 N.W.2d 341, 343. N.D.C.C. § 25-03.3-13. The plain reading of the District Court Order shows that the Court incorrectly shifted the burden to Johnson. It is Johnson that must “admit...accept....progress,” which completely negates the State’s burden of providing clear and convincing evidence.

[¶ 13] The release of an individual from the NDSH can be done one of two ways. N.D.C.C. § 25-03.3-17 controls when the NDSH believes an individual has advanced far enough in treatment to be released. N.D.C.C. § 25-03.3-18 controls when the Respondent has petitioned for discharge against the wishes of the Petitioner. Being as Johnson had petitioned for discharge against the wishes of the Ward County State’s Attorney’s Office, N.D.C.C. § 25-03.3-18 is the controlling statute during this hearing

and the burden is on the State as noted above. To follow the District Court's and State's position in this matter and affirm the decision would by implication negate N.D.C.C. § 25-03.3-18 and render it meaningless, as the NDSH has already said the individual has not completed enough treatment, otherwise said individual would have been released pursuant to N.D.C.C. § 25-03.3-17. Therefore, at any hearing pursuant to N.D.C.C. § 25-03.3-18, the "lack of treatment" argument may be raised and, if accepted as clear and convincing evidence by this Court, used over and over again by district courts throughout this state, making the hearings themselves superficial and without meaning. The plain language of both the statute and the controlling case law clearly establishes that a present day determination as to dangerousness must be proven by the Petitioner through clear and convincing evidence, which, as previously noted, was not done in this case.

**II. [¶ 14] Johnson does not remain a Sexually Dangerous Individual Pursuant to N.D.C.C. § 25-03.3 which would warrant further Civil Commitment.**

[¶ 15] Johnson concedes that the State has shown by clear and convincing evidence that he has engaged in sexually predatory conduct, as evidenced by previous convictions, and Johnson's understanding that the review of "Prong 1" at a Review Hearing is barred via *Res Judicata* as this Court recently established. *Interest of Graham*, 2013 ND 171, 837 N.W.2d 382

[¶ 16] Johnson further concedes that the State has shown by clear and convincing evidence that he suffers from an actual sexual disorder, a personality disorder, or other mental dysfunction that would subject him to commitment as a sexually dangerous individual. All three Drs. testified as to antisocial personality disorder, but both Benson and Ertelt qualified the diagnosis as “(provisional).” Neither Benson nor Ertelt found a sexual disorder. (Order ¶ 19 and ¶ 20).

[¶ 17] This Court has previously said that the diagnosis of antisocial personality disorder alone is not enough. The Petitioner must prove by clear and convincing evidence there is a nexus between the disorder and the future dangerousness (which the State attempted to provide through use of the “template” by Lisota). *In re Wolf*, 2011 ND 76, 758 N.W.2d 719. All Drs. agreed antisocial personality disorder is a disorder which the United States Supreme Court has previously said could be diagnosed in up to seventy percent of the prison population. This fails to distinguish Johnson from the “dangerous but typical” offender, a requirement under *Crane* made applicable to North Dakota by this Court’s decision in *Hehn*. *In re Hehn*, 2008 ND 36, ¶ 19, 745 N.W.2d 631.

[¶ 18] The State must prove by clear and convincing evidence that the antisocial personality disorder is likely to manifest itself in a serious difficulty in controlling one’s behavior. *In re Wolf*, 2011 ND 76, 758 N.W.2d 719. There must be a nexus between the individual’s disorder and dangerousness and evidence that the individual has serious difficulty in controlling his behavior, showing the difference between a sexually dangerous individual and other dangerous persons. *Id.* The argument the State presents

to the Court regarding this nexus being present is a word-for-word identical match to the argument that was made by Dr. Jennifer Krance in her evaluation of James McLeod which can be found on page 10 of Exhibit H (113:7-12; 115:20-22). Put another way, the evidence offered by the State to meet its burden of proof via clear and convincing evidence is merely a copy-and-paste with a name change. This nexus is being offered after Lisota reviewed a “summary” of the records. At no time did Lisota interview Johnson.

[¶ 19] Ertelt, on the other hand, had both a three hour interview with Johnson and also interviewed Johnson’s parents (154:2-8). Ertelt also reviewed the entirety of the records, and not just a summary (153:25; 154:1). Based upon the interviews and documents reviewed, Ertelt was unable to find a sexual disorder present in Johnson (160:5-19). Although Ertelt found a provisional diagnosis of antisocial personality disorder, Ertelt could not find the “nexus” as required under *Wolf*. (170: 3-5). Ertelt scored the PCL-R, resulting in a score of 20 (178:7). This score was computed prior to seeing Benson’s score (179:1). Based upon such a score, Johnson does not fall into the “psychopathic” range of the instrument (180:9-15). Understanding that the diagnosis, STATIC-99R, and PCL-R all look back in time (180:19-20), Ertelt used an instrument designed for individuals currently institutionalized (184:6-7) which looks at long-term vulnerabilities (183:19-22), or, in other words, addresses where Johnson is at today and Johnson’s future. The exact purpose of a review hearing. Ertelt scored Johnson as a 2.56 (184:13-15), which means if Johnson were to be discharged, he should be on probation plus some

treatment (184:22-24). Importantly, Ertelt arrived at this score independent of Benson's score (185:1-4).

[¶ 20] Like Ertelt, Benson personally interviewed Johnson, as did her assistant for a total of eight hours (262:20-22). Also like Ertelt, Benson reviewed the entirety of the records, and not just a summary (263:5-9). Without reviewing each other's work, both Ertelt and Benson came to the same antisocial personality disorder (provisional) diagnosis (265:5-9). Benson also did not believe there was a nexus between the disorder and the offending (268:6). Like Ertelt, Benson utilized the SRA-FV to determine where Jeremy is as we sit here today (299:20-22), which resulted in a score of 2.56, very close to Ertelt's score of 2.55 without reviewing each other's work prior to scoring the instrument (300:3-16). Benson also scored the PCL-R, which resulted in a score of 21, whereas Ertelt found a score of 20 without reviewing each other's work (302:17-23; 303:9-14). Benson ultimately found that Johnson does not meet criteria as an SDI today (263:19-20).

#### CONCLUSION

[¶ 21] Under N.D.C.C. 25-03.3, at a petition for discharge hearing the State bears the burden of proving Jeremy Johnson *remains* a sexually dangerous individual subject to civil commitment. This requires a present-day determination of sexual dangerous. The "remains" standard requires that only present-day evaluations involving current medical determinations be used to support Johnson's continued commitment. Under N.D.C.C. 25-03.3, the only experts capable of testifying as to a present-day condition are Drs. Ertelt and Benson.





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