

**Supreme Court No. 20150217  
District Court No. 51-2012-MH-14**

**NORTH DAKOTA SUPREME COURT**

**In the Interest of Jeremy Tim Johnson**

**Rozanna C. Larson, County State's Attorney,**

(Petitioner and Appellee)

**v.**

**Jeremy Tim Johnson.**

(Respondent and Appellant)

Appeal from Order Denying Motion to Release Following  
Annual Review issued June 5, 2015  
By the Honorable Gary H. Lee of the Ward County District Court

**REPLY BRIEF OF THE APPELLANT**

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ISSUE PRESENTED FOR REVIEW

- I. **[¶ 1] 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 by Failing to Illustrate how Mr. Johnson has Serious Difficulty Controlling his Behavior.**

## ARGUMENT

### **I. [¶ 2] 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 Because the District Court failed to Establish how Mr. Johnson has Serious Difficulty Controlling his Behavior.**

[¶ 3] 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 such a determination was required to distinguish a sexually dangerous individual from the ordinary recidivist convicted in a typical criminal case. *Id.* As with each element under NDCC 25-03.3-01(08), the State must prove an individual’s “serious difficulty” by clear and convincing evidence.

[¶ 4] The district court’s second order, of June 5, 2015, again fails to discern clear and convincing evidence of how Mr. Johnson has serious difficulty controlling his behavior. There is no clear illustration of the findings of fact that led to the conclusion that Mr. Johnson has serious difficulty controlling his behavior. Instead, the district court simply focuses on Mr. Johnson’s offending history and his progress, or lack thereof, in treatment at the NDSH. Simply reciting one’s past offending behavior does not constitute clear and convincing evidence of serious difficulty in controlling one’s

behavior. In re Johnson, 2015 ND 71, ¶9, 861 N.W.2d 484. If it did amount to such evidence, no individual would ever be released from the NDSH under NDCC 25-03.3-18 because they were committed to the NDSH for their offending in the first place. If the State could simply rely on an offender's past behavior, it would amount to an end-around the entire the statute. This, clearly, is not the legislative intent behind NDCC 25-03.3.

[¶ 5] Furthermore, in the *Brief of Appellee*, the State also focuses on Mr. Johnson's past offenses and his alleged lack of progress in treatment. The State fails to cite any specific findings of fact from the district court's June 5, 2015, order that illustrate a serious difficulty. The State mentions that "[t]he district court noted that Johnson, having been adjudicated a sexually dangerous individual in need of treatment, failed to make an meaningful progress in treatment, and refuses to recognize that he is in need of treatment" (*Brief of Appellee*, p. 11). The State itself highlights the district court's failure to make specific findings of fact regarding whether Mr. Johnson has serious difficulty in controlling his behavior, as ordered to do by this Court.

[¶ 6] The State cited In re M.D., 2012 ND 261, 825 N.W.2d 838 and In re G.L.D., 2011 ND 52, 794 N.W.2d 346 as comparable cases. However, in M.D., the court illustrated multiple findings of fact used in determining that he had serious difficulty controlling his behavior, such as: (1) M.D.'s statements in treatment that he would take advantage of an under-aged black male if he knew he would not be caught; (2) M.D. stated he would use illicit drugs if they were offered to him; (3) M.D. stated he would provide oral sex to someone who approached his door and wanted it; (4) M.D. admitted substance abuse would be problematic for him as it regarding his offending; and (5) Dr. Lisota's testimony that M.D. admitted he was addicted to "[s]ex, drugs, alcohol and

pornography.” Id. at ¶10. This is not comparable to the present matter as the district court twice failed to make any specific findings of fact regarding Mr. Johnson’s ability to control his behavior. Moreover, in G.L.D., the district court also noted specific findings that led to determining G.L.D. had serious difficulty controlling his behavior, most notably the fact that G.L.D. was currently facing menacing and simple assault charges for assaulting the hospital staff. 2011 ND 52 at ¶7. Again, not comparable to the case at hand.

[¶ 7] This Court previously ordered the district court to make specific findings of fact on whether Mr. Johnson has serious difficulty controlling his behavior. In re Johnson, 2015 ND 71, 861 N.W.2d 484. The district court has again declined to make these findings. The mandate rule, by which the trial court is bound on remand, requires the trial court to follow an appellate court’s pronouncements on legal issues and to carry an appellate court’s mandate into effect according to the court’s terms. Law v. Wittet, 2015 ND 16, ¶5, 858 N.W.2d 636. The district court has failed to carry this Court’s mandate into effect according to its terms by failing to make specific findings of fact on Mr. Johnson’s serious difficulty in controlling his behavior.

#### CONCLUSION

[¶ 8] Based on the argument set forth as well as the evidence at hand, it is apparent that the State failed to meet its burden and the district court failed to illustrate with specific findings of fact on whether Johnson has serious difficulty controlling his behavior. Mr. Johnson respectfully requests this Court reverse the decision of the district court and grant Jeremy his immediate release.

Respectfully submitted this 10<sup>th</sup> day of November, 2015.

\_\_\_\_\_/s/\_\_\_\_\_  
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IN THE SUPREME COURT OF NORTH DAKOTA

ON APPEAL OF ORDER FOR CIVIL COMMITMENT, THE HONORABLE GARY H. LEE, DISTRICT JUDGE PRESIDING, NORTH CENTRAL JUDICIAL DISTRICT,  
FILED JULY 27, 2015

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State of North Dakota,	)	CASE NO: 20150217
Petitioner/Appellee,	)	
	)	
Vs.	)	CERTIFICATE OF SERVICE BY
	)	ELECTRONIC MAIL
	)	
Jeremy Tim Johnson,	)	
	)	
Respondent/Appellant.	)	

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STATE OF NORTH DAKOTA )  
 )SS  
COUNTY OF GRAND FORKS )

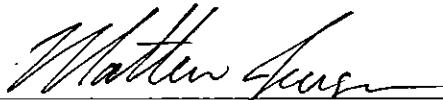
The undersigned, being of legal age, being first duly sworn deposes and says that on the 10<sup>th</sup> day of November, 2015, he served a true and correct copy, with the non-substantive corrections, of the following documents:

REPLY BRIEF OF THE APPELLANT

Electronically via email to:

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Mathew V. Jensen (#08278)