

**IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA**

<b>In the Interest of Danny Nelson</b>	)	
	)	
<b>Lonnie Olson, State’s Attorney, Petitioner and Appellee,</b>	)	<b>Supreme Court No.: 20160113</b>
	)	<b>District Court No.: 36-2014-MH-00023</b>
	)	
<b>v.</b>	)	
	)	
<b>Danny Robert Nelson, Respondent and Appellant.</b>	)	
	)	

**APPEAL FROM THE DISTRICT COURT ORDERING CIVIL COMMITMENT  
DATED MARCH 8, 2016, HELD BEFORE THE HONORABLE DONOVAN  
FOUGHTY IN RAMSEY COUNTY, NORTH DAKOTA**

**SUPPLEMENTAL BRIEF OF THE APPELLANT**

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**SUPPLEMENTAL BRIEF**

[¶1] Mr. Nelson is not a sexually dangerous individual that warrants civil commitment to the North Dakota State Hospital (herein after State Hospital). N.D. Cent. Code § 25-03-3 contains a three (3) prong test, which the State must satisfy in order to commit someone to the State Hospital as a sexual dangerous individual. The three (3) prongs are: (1) the individual has engaged in sexually predatory conduct; (2) the individual has a congenital or acquired condition that is manifested by a sexual disorder, or other mental disorder or dysfunction; and (3) the disorder makes the individual likely to engage in further acts of sexually predatory conduct. Interest of D.W., 2016 ND 156, ¶ 7; see also Interest of Corman, 2014 ND 88, ¶ 8, 845 N.W.2d 335. The State failed to satisfy this test. This led the Judge to make a modified clearly erroneous error.

[¶2] The Judge failed to specifically state the facts on which he relied in order to determine whether Mr. Nelson has a mental disorder and how he is likely to engage in further acts of sexually predatory conduct. In order to commit Mr. Nelson to the State Hospital, “[t]he District Court must specifically state the facts on which it relied to determine an individual has serious difficulty controlling his behavior.” Interest of Johnson, 2015 ND 71, 861 N.W.2d 484. The Judge failed to do this in his decision, which resulted in the illicit commitment of Mr. Nelson as a sexually dangerous individual.

[¶3] At the Commitment Hearing, the State called Dr. Krance as an expert witness to testify as to Mr. Nelson’s mental health and recommended him for commitment to the State Hospital as a sexually dangerous individual. After evaluating Mr. Nelson’s medical history

and conducting her evaluation, Dr. Krance incorrectly diagnosed Mr. Nelson with Hebephilia.

[¶4] Hebephilia is a term used to describe an adult's sexual attraction to pubescent aged adolescents (roughly ages 11 to 14). Hebephilia: What is Hebephilia?, <https://www.psychologytoday.com/basics/hebephilia> (last visited May 9, 2017). It is a categorical classification term used to refer to a specific sexual attraction and is used the same way someone would use homosexual, heterosexual or bisexual. The term was first used in 1955 to distinguish pedophiles from sex offenders whose victims were adolescents. Hammer, E. F.; Glueck, B. C. (1957). "Psychodynamic patterns in sex offenders: A four-factor theory". *The Psychiatric Quarterly*. 31 (2): 325–345. In the 1960s the term was then used by sexologist Kurt Freund to distinguish between age preferences of homosexual and heterosexual men during their mental health assessments. Since then, the term has been used to describe the sexual preference category of an adult male's sexual attraction to pubescent aged adolescents.

[¶5] While testifying, Dr. Krance stated that Hebephilia is included in her diagnosis, which was then relied upon by the Judge in his decision to commit Mr. Nelson. TH 39-40. After evaluating Mr. Nelson, Dr. Krance included Hebephilia in her diagnosis in order to maintain that Mr. Nelson has a sexual or mental disorder or dysfunction and is likely to engage in further acts of sexually predatory conduct. This resulted in Mr. Nelson being diagnosed with "Paraphilia Not Otherwise Specified, with Fetish and Hebephilia." TH 40. Hebephilia is a classification, not a sexual or mental disorder or dysfunction and therefore should not have been included in Dr. Krance's diagnosis.

[¶6] During her testimony, Dr. Krance further acknowledged that Hebephilia is not included in the Diagnostic and Statistical Manual of Mental Disorders (herein after DSM-5). Id. In the United States the DSM-5 serves as the universal authority for psychiatric diagnoses and treatment recommendations. The American Association of Psychiatry and Law (herein after APPL) voted 31 to 2 against the inclusion of Hebephilia in the DSM-5. Hebephilia: What is Hebephilia?, <https://www.psychologytoday.com/basics/hebephilia> (last visited May 9, 2017). Dr. Krance acknowledged under oath that the DSM-5 is there for her to reference various diagnosis in order for her to develop an accurate diagnosis and treatment plan for Mr. Nelson while also stating, “[Hebephilia is] not included in the DSM-5.” TH 40-1. Further, after being asked by Mr. Dusek if Hebephilia is an accepted mental disorder, Dr. Krance responded by saying, “It’s not its own paraphilic disorder . . .” TH 40. Dr. Krance acknowledged during the hearing that Hebephilia is not a diagnosis, independently or in the DSM-5, while still keeping it in her official diagnosis to the Court.

[¶7] In order for a scientific method or diagnosis to be relied upon in legal proceedings, it must be valid under an evidentiary test commonly referred to as the “Frye Test.” Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The test maintains that the scientific principals in which the diagnosis is based must be “sufficiently established to have gained general acceptance in the particular field in which it belongs.” Id. Hebephilia fails the Frye Test for a mental disorder because it is only accepted by a small radical group of psychologists. APPL is the leading organization of psychiatrists dedicated to ensuring excellence in practice, teaching and research in forensic psychiatry. The APPL has determined that Hebephilia should not be included in the DSM-5. The DSM-5 was written and then published by the American Psychiatric Association (herein after APA). The AAPL and

APA are two of the most recognized organizations of psychologists representing the common beliefs of practitioners throughout the nation. These highly recognized groups, and many others, have chosen not to recognize Hebephilia as a diagnosis and therefore it cannot pass the Frye Test. After failing the Frye Test, the Judge should not have been able to rely upon Dr. Krance's false diagnosis in Court. This misreliance was used to maintain that Mr. Nelson has a mental disorder and is likely to engage in further acts of sexually predatory conduct, which constitutes a modified clearly erroneous decision.

[¶8] Mr. Nelson's records were also independently evaluated by psychologist Dr. Robert G. Riedel. Dr. Riedel reviewed Dr. Krance's reports and diagnosis. At the Treatment Hearing, Dr. Riedel testified that it is not possible for Dr. Krance to diagnose Mr. Nelson with Hebephilia because it does not exist as a diagnosis. TH 92. Dr. Riedel explained that

Hebephilia is an attraction to pubescent females or pubescent males, your same sex orientated and the research shows that if you take a group of normal males and you put them on the PPG, the penile plethysmograph and you show them pubescent females most of them will show a response. So it is a normal response. Now "normal" means; typical or occurring [more] often than not, to use fancy legal terms. The fact is that you can't make it a mental illness if almost everybody suffers from it.

Id.

Dr. Riedel maintains that because it is a classification in preference of sexual attraction, it cannot be a mental illness or dysfunction. Id. The Judge made a modified clearly erroneous decision by relying on Dr. Krance's diagnosis even though Dr. Krance herself and Dr. Riedel both stated that Hebephilia is not a diagnosis.

[¶9] Additionally, judges around the nation oppose the use of Hebephilia as a diagnosis in order to civilly commit people as sexually dangerous individuals. In Ralph, the Court explored the classification of Hebephilia at length. A petition seeking civil commitment

was filed after the offender was diagnosed with Other Specified Paraphilic Disorder (OSPD) Hebephilia. Matter of State of N.Y. v. Ralph P., 53 Misc. 3d 496(), 497 (Sup. Ct. New York Cty. 2016). A Frye Hearing was held and the Supreme Court reviewed the commitment and maintained that

Defining hebephiliac as a distinct disorder, however, would not only be contrary to the DSM proposal or the ICD-10. It is highly problematic from a practical perspective. Hebephilia is a preferential (or equal) arousal to underdeveloped body types. . . . Making distinctions between children close to physical maturity and children who are physically mature, as Dr. Thornton testified, is particularly problematic. In this Court's view, such distinctions can simply not be made with the accuracy required by due-process in forensic settings given the current state of practice.

Id. at 548.

This resulted in the Court holding that Hebephilia is not a diagnosis that is generally accepted by the relevant scientific community. Id. at 554. Ralph is similar to our present case in that the offender is being invalidly diagnosed with Hebephilia. Experts in both cases elaborated on how Hebephilia is a classification rather than a diagnosis. Judges around this nation have agreed that Hebephilia is not a diagnosis accepted by the relevant scientific community and the Supreme Court of North Dakota should come to the same conclusion.

## **CONCLUSION**

[¶ 10] The State's expert, Dr. Krance, has acknowledged that Hebephilia is not a mental disorder, an independent psychologist that evaluated Mr. Nelson's case explained in detail why Hebephilia cannot be a diagnosis and judges throughout the nation are holding that Hebephilia does not pass the Frye Test in order for Hebephilia to be used as a diagnosis in legal proceedings. Prominent psychology groups, research and judicial experts have agreed that Hebephilia is not a diagnosis; nor does it determine that Mr. Nelson is likely to engage



in further acts of sexually predatory conduct. Therefore, Hebephilia cannot be used as a basis for the civil commitment of Mr. Nelson as a sexually dangerous individual. At the Commitment Hearing, the Judge relied on the false diagnosis by Dr. Krance, which was a modified clearly erroneous error resulting in the commitment of Mr. Nelson as a sexually dangerous individual.

Respectively submitted on May 10, 2017.

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	)	

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**CERTIFICATE OF SERVICE**

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I, **David D. Dusek**, do hereby certify that on May 10, 2017, I served the following document:

Supplemental Brief of the Appellant

in PDF format upon the following:

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All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

by United States Mail upon the following:

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Dated this 10<sup>th</sup> day of May, 2017.

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