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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

OCT 10 2017

STATE OF NORTH DAKOTA

In the Interest of J.J.G. )

Julie Lawyer, )  
Burleigh County State's Attorney, )

Petitioner and Appellee, )

J.J.G., )

Respondent and Appellant, )

Supreme Ct. No. 20170159

District Ct. No. 08-2015-MH-00075

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**BRIEF OF PETITIONER AND APPELLEE**

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**APPEAL FROM ORDER FOR TREATMENT**

Burleigh County District Court  
South Central Judicial District  
The Honorable Judge Sonna M. Anderson, Presiding

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Julie Lawyer  
Assistant Burleigh County State's Attorney  
Courthouse, 514 East Thayer Avenue  
Bismarck, North Dakota 58501  
Phone No: (701) 222-6672  
BAR ID No: 05693  
bc08@nd.gov  
Attorney for Petitioner and Appellee

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## STATEMENT OF THE ISSUES

- [¶1] Whether the District Court erred by ordering the independent evaluator to provide a copy of the report of examination to the petitioner and to allow the independent evaluator to testify at the hearing.

## STATEMENT OF THE CASE

[¶2] On July 13, 2015, a Petition for Commitment of a Sexually Dangerous Individual was filed with the District Court. (Doc ID # 1). A preliminary hearing was held in the matter on July 16, 2015, where probable cause was found and the District Court ordered an evaluation. (Doc ID # 16).

[¶3] J.J.G. requested an independent evaluation which was granted on July 16, 2015 and on July 17, 2015, Dr. Stacey Benson was appointed to conduct an independent evaluation. (Doc ID # 11, 18).

[¶4] A hearing was held on the Petition on December 20, 2016. Post-Hearing Briefs were filed by the Petitioner and Respondent on January 20, 2017. (Doc ID # 49, 51). On March 29, 2017, the Court entered its Order placing J.J.G. in the custody of the Director of the North Dakota Department of Human Services for treatment. (Doc ID # 57). The Respondent timely filed notice of appeal on April 26, 2017. (Doc ID # 58).

## STATEMENT OF THE FACTS

[¶5] A Petition for Commitment of a Sexually Dangerous Person per Chapter 25-03.3 N.D.C.C. was filed regarding the Respondent. (Doc ID #1). On July 16, 2015, Attorney Tyler Morrow filed a certificate of representation and a request for production of documents. (Doc ID #8, 9). Respondent also requested an independent evaluation. (Doc ID #11).

[¶6] On July 16, 2015, the Petitioner filed a response to the request for production of documents and provided the Respondent with a copy of the Petitioner's file excluding a confidential report that the Petitioner notified the Respondent would be available for review at the State's Attorney's office. (Doc ID #14).

[¶7] On September 4, 2015, an SDI Evaluation completed by Dr. Jennifer Krance was filed with the District Court. (Doc ID # 20).

[¶8] On November 3, 2016, the Petitioner filed a Request for Production of Documents wherein the Petitioner requested, among other items, "[a]ny and all reports and tests used by any independent examiner(s) either appointed or hired by the Respondent to conduct an evaluation(s)" and "[a]ny available evidence known to the Respondent that would tend to show the Respondent should remain under an order for commitment." (Doc ID #27).

[¶9] On December 7, 2016, the Respondent filed a report of examination prepared by Dr. Robert Riedel which was served on the Petitioner. (Doc ID # 30, 31). On December 13, 2016, an addendum to the

SDI evaluation completed by Dr. Jennifer Krance was filed with the District Court. Also on December 13, 2016, the Respondent filed a report of examination prepared by Volk Human Services which was served on the Petitioner. (Doc ID #34, 35). Other than the report of examinations prepared by Dr. Riedel and Dr. Greg Volk, Volk Human Services, the Petitioner did not receive a response to its request for production of documents.

[¶10] On December 19, 2016, the State prepared an order for the District Court releasing the report of the independent examiner which was signed on that date, ordering the independent examiner to release copies of her report to the District Court, Petitioner, and Respondent. (Doc ID #47). On December 19, 2016, Dr. Stacey Benson's report of evaluation of was filed with the District Court by the Petitioner. (Doc ID # 46).

[¶11] A hearing on the Petition was held on December 20, 2016. (Transcript of Treatment Hearing "Tr." dated December 20, 2016). The Petitioner called Dr. Stacey Benson and Dr. Jennifer Krance as witnesses. (See generally, Tr.). The Respondent testified and also called Dr. Robert Riedel and Dr. Greg Volk as witnesses. (See generally, Tr.). The District Court found that J.J.G. met the criteria for a sexually dangerous individual and issued an order for his commitment. (Doc ID # 57).

## ARGUMENT

[¶12] Whether the District Court erred by ordering the independent evaluator to provide a copy of the report of examination to the petitioner and to allow the independent evaluator to testify at the hearing.

[¶13] The standard of review that applies to a commitment of a sexually dangerous individual is a “modified clearly erroneous” standard. In re J.T.N., 2011 ND 231, ¶6, 807 N.W.2d 570. This Court will affirm the trial court’s order unless the order was based upon an erroneous view of law or there was not clear and convincing evidence that the respondent is a sexually dangerous individual. Id.

[¶14] The Respondent argues that the District Court erred by ordering the independent examiner to release her report to the District Court and the Petitioner and allowing the Petitioner to call the independent examiner as a witness in the case. The Respondent relies on section 25-03.3-12, N.D.C.C. which states in part, “...the court shall appoint a qualified expert to perform an examination or participate in the commitment proceeding on the respondent’s behalf.” Despite that statute, there is no statute that prohibits the Petitioner from calling any of the Respondent’s experts as witnesses. In fact, section 25-03.3-13, N.D.C.C. states “[a]t the commitment proceeding, any testimony and reports of an expert who conducted an examination are admissible, including risk assessment evaluations.” This statute does not exempt an independent evaluator appointed “on behalf of the respondent” pursuant to N.D.C.C. § 25-03.3-12. That statute does not limit which party



can introduce the testimony or reports and states that "...the state's attorney shall present evidence in support of the petition..." N.D.C.C. § 25-03.3-13.

[¶15] The Respondent is likely to argue that the statutes are in conflict, however, "[t]his Court must 'harmonize statutes to avoid conflicts between them.' " In re Midgett, 2007 ND 198, ¶12, 742 N.W.2d 803. The statute allowing an independent examiner to be appointed to perform an examination or participate in the proceedings on the respondent's behalf does not mean that the examiner must provide a report or testimony favorable to the Respondent. Furthermore, as "any testimony and reports of an expert who conducted an examination are admissible," it does not usurp a party's right in a civil proceeding to call witnesses disclosed (or not disclosed) by the Respondent. N.D.C.C. § 25-03.3-13.

[¶16] The Respondent in this case also ignores the fact that the Petitioner filed a request for production of documents pursuant to Rules 26 and 34, North Dakota Rules of Criminal Procedure wherein the Petitioner requested, among other items, "[a]ny and all reports and tests used by any independent examiner(s) either appointed or hired by the Respondent to conduct an evaluation(s)" and "[a]ny available evidence known to the Respondent that would tend to show the Respondent should remain under an order for commitment." (Doc ID #27). Rule 26 allows for information to be withheld if the party believes the information is privileged, however, the party must expressly make that claim. N.D.R.Civ.P. 26(b)(5)(A). Rule 34 requires

response must be made in writing within 30 days after being served. N.D.R.Civ.P. 34(b)(2)(A).

[¶17] The time for the Respondent to make a written response to the Petitioner's request was December 3, 2016. The Respondent made no response other than to file copies of the evaluations of two of his five evaluators on December 7, 2016 and December 13, 2016. (See Tr. p. 162-63). In fact, counsel argued on the Respondent's behalf that he provided the Petitioner with everything they intended to use at trial and the Petitioner "could have filed a motion to compel." (Tr. p. 8).

[¶18] The Respondent acknowledges through counsel that he did not object to the Petitioner's request for production of documents or raise the confidentiality issue regarding the report because "the reason you don't do that is it's a red flag." (Tr. pp. 7-8). The Respondent believes he does not have to comply with the Rules of Civil Procedure and the onus is on the opposing party to force him to comply. (Tr. p. 8).

[¶19] Even if this Court were to hold that the Petitioner is not entitled to discovery of independent evaluator's reports or to subpoena them to testify at a commitment proceeding, reversal in this case is not warranted. The District Court's order indicates that the parties stipulated that the Respondent has engaged in sexually predatory conduct. (Appellant's Appendix ("App.") p. 23, ¶ 4). The District Court found the Respondent has a diagnosis of Anti-Social Personality Disorder "find(ing) the testimony of Drs. Krance, Benson, and Reidel to be credible..." Id. at ¶ 6. Even without Dr. Benson's testimony, Drs.

testimony, Drs. Krance and Reidel both agreed the Respondent has a diagnosis of Anti-Social Personality Disorder. Without taking into account Dr. Benson's testimony and evaluation, as two of the three other examiners agreed to the diagnosis, the District Court would still have found that the Respondent suffers from a congenital or acquired condition manifested by a personality disorder.

[¶20] The District Court found that the Respondent was likely to engage in further acts of sexually predatory conduct stating that Drs. Krance and Benson agreed to that prong; that Dr. Reidel determined that his lower scores were based upon false or misleading information that J.J.G. had given him during the evaluation and he would likely change some of his scores to increase the risk level; and that Dr. Volk believed Respondent was unlikely to engage in further acts of sexually predatory conduct, but the District Court indicated it did not find his opinion to be controlling. (App. p. 24, ¶ 7). As the District Court did not find Dr. Volk's opinion to be controlling and noted that Dr. Reidel's information was based upon false or misleading information provided by the Respondent, even without Dr. Benson's testimony, the District Court did not note any issues with Dr. Krance's opinion. Id.

[¶21] As to the final prong, the District Court noted that J.J.G. admitted to lying to his PSI writer, lying to the examiners who testified at the hearing in order to manipulate the information used in the examinations, had numerous write-ups at the DOCR and the State Hospital and has not demonstrated the ability or willingness to try to control his behavior. Id. at ¶

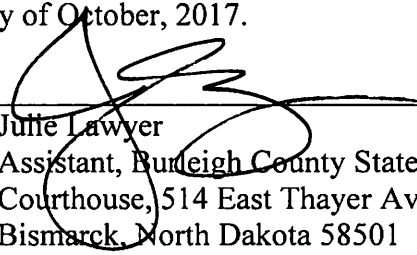
9. The District Court stated that it found Drs. Krance and Benson to be more credible when they testified that the Respondent would not be able to control his behavior. (App. p. 25, ¶10). However, it is clear from the District Court's order that it was the Respondent's own actions and testimony that supported the opinions of Dr. Krance and Dr. Benson. (App. p. 24, ¶9). Even without the testimony of Dr. Benson, the Respondent's actions and testimony would have supported Dr. Krance's opinion and not those of Dr. Reidel and Dr. Volk.

[¶22] Based on the above, even without Dr. Benson's testimony, the District Court would have found that the Petitioner proved, by clear and convincing evidence, that the Respondent is a sexually dangerous individual and that commitment was appropriate. Therefore, even if this Court were to hold that the Petitioner is prohibited from calling an independent evaluator as a witness, the District Court's order should be affirmed in this case.

### CONCLUSION

[¶23] Based upon the foregoing, the State respectfully requests that the district court's order denying discharge be affirmed.

Dated this 10 day of October, 2017.

  
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Julie Lawyer  
Assistant, Bundeigh County State's Attorney  
Courthouse, 514 East Thayer Avenue  
Bismarck, North Dakota 58501  
Phone No: (701) 222-6672  
BAR ID No: 05693  
bc08@nd.gov  
Attorney for Petitioner-Appellee

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Petitioner and Appellee, )  
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v. )  
J.J.G., ) Supreme Ct. No. 20170159  
 )  
Respondent and Appellant, ) District Ct. No. 08-2015-MH-00075  
..... )  
STATE OF NORTH DAKOTA )  
 ) ss  
COUNTY OF BURLEIGH )

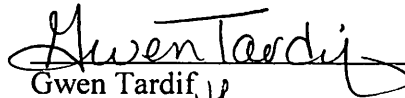
Gwen Tardif, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 10<sup>th</sup> day of October, 2017, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Petitioner-Appellee
- 2. Affidavit of Mailing

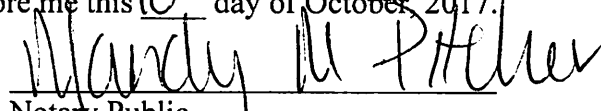
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Tyler Morrow  
Attorney at Law  
424 Demers Ave  
Grand Forks, ND 58201

which address is the last known address of the addressee.

  
Gwen Tardif

Subscribed and sworn to before me this 10<sup>th</sup> day of October, 2017.

  
Notary Public  
Burleigh County, North Dakota

