20190015
FILED
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JUNE 2, 2019
STATE OF NORTH DAKOTA

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

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| **In the Interest of Lawrence Didier** | | |
| | ) | |
| **Frederick Fremgen,** | ) | Supreme Court No. |
| **Stutsman County State's Attorney** | ) | 20190015 |
| Petitioner & Appellee | ) | |
| | ) | |
| vs. | ) | Stutsman County No. |
| | ) | 47-2010-MH-00113 |
| **Lawrence Didier** | ) | |
| Respondent & Appellant | ) | |

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# APPELLEE'S BRIEF

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On Appeal From Findings of Fact, Conclusions of Law, and Order Denying Discharge Issued February 15, 2019, Stutsman County District Court, Southeast Judicial District, the Honorable Cherie Clark Presiding

ORAL ARGUMENT REQUESTED

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## [¶ 3] STATEMENT OF THE ISSUES

[¶ 4] ISSUE #1. Judge Clark's Order did not violate Didier's due process rights nor did it violate Rule 52(a) because Judge Clark properly found that the State had proved all four elements, including that Didier had an inability to control his behaviors, by clear and convincing evidence, and she specifically stated the facts upon which she relied for her legal conclusion.

[¶ 5] ISSUE #2. Didier was given a fair hearing comporting with due process including reasonable notice or opportunity of the claims of opposing party and the opportunity to rebut the claims.

## [¶ 6] STATEMENT OF THE CASE

[¶ 7] The Petitioner concurs with the statement of the case provided in Respondent's brief, except according to the Register of Actions, the discharge hearing was held on January 9, 2019. Judge Clark signed the Findings of Fact, Conclusions of Law, and Order Denying Discharge on January 14, 2019, but it was not entered into the register of actions until January 15, 2019.

## [¶ 8] STATEMENT OF THE FACTS

[¶ 9] At the January 9, 2019 hearing, Didier stipulated that Dr. D'Orazio was a qualified expert. (Tr. at 9.) Didier also stipulated to the admission into evidence of Dr. D'Orazio's SDI Annual Re-evaluation report as Exhibit 1 (Doc ID# 114). (Tr. at 7-8.)

[¶ 10] Contrary to Didier's recitation of the facts (App. Br., ¶¶ 6-11), Exhibit 2 (doc. ID #114) along with Dr. D'Orazio's testimony at the hearing is full of testimony

regarding Didier's lack of volitional control–even during the review period.

[¶ 11] ARGUMENT

[¶ 12] This Court should affirm Judge Clark's Order because (1) the order did not violate Didier's due process rights nor did it violate Rule 52(a) of the North Dakota Rules of Civil Procedure because Judge Clark properly found that the State had proved all four elements, including that Didier had an inability to control his behaviors, by clear and convincing evidence, and she specifically stated the facts upon which she relied for her legal conclusion; and (2) Didier was given a fair hearing comporting with due process including reasonable notice or opportunity of the claims of opposing party and the opportunity to rebut the claims.

[¶ 13] Standard of Review

[¶ 14] The North Dakota Supreme Court applies "a modified clearly erroneous" standard of review to commitments of sexually dangerous individuals under Chapter 25–03.3 of the North Dakota Century Code. In the Interest of D.V.A., 2004 ND 57, ¶ 7, 676 N.W.2d 776; In the Interest of M.B.K., 2002 ND 25, ¶ 9, 639 N.W.2d 473; In the Interest of M.D., 1999 ND 160, ¶ 34, 598 N.W.2d 799. This Court has found that it will affirm a district court's commitment order unless the order is induced by an erroneous view of the law, or [the Court is] firmly convinced the order is not supported by clear and convincing evidence. D.V.A., at ¶ 7; M.B.K., at ¶ 9; M.D., at ¶ 34. "The trial court is the best credibility evaluator in cases of conflicting testimony and we will not second-guess the court's credibility determinations." Matter of Wolff, 2011 ND 76, ¶ 5, 796 N.W.2d 644 (2011).

[¶ 15] "The appeal must be limited to a review of the procedures, findings, and conclusions of the committing court." N.D.C.C. § 25-03.3-19.

[¶ 16] Law and Analysis

[¶ 17] Under the "modified clearly erroneous standard of review," the Court should affirm Judge Clark's commitment order. She meticulously applied the appropriate law, which is set forth and analyzed below, to the facts of the case and did not commit any legal error. Judge Clark made detailed factual findings to support her conclusion that the State had met its burden of proof. Finally, clear and convincing evidence exists throughout the record to support the commitment order.

***[¶ 18] Judge Clark's Order did not violate Didier's due process rights nor did it violate Rule 52(a) because Judge Clark properly found that the State had proved all four elements, including that Didier had an inability to control his behaviors, by clear and convincing evidence, and she specifically stated the facts upon which she relied for her legal conclusion.***

[¶ 19] Sexually Dangerous Individual ("SDI") cases have three statutorily-required prongs and one constitutionally-required prong. The first three prongs are derived from North Dakota Century Code section 25-03.3-01(8), which defines an SDI as follows:

> [A]n individual who is shown to have engaged in sexually predatory conduct and who 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 constitute a danger to the physical or mental health or safety of others.

Case law has effectively broken the definition into three prongs: (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, a personality disorder, or other mental

disorder or dysfunction; and (3) the disorder makes the individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. In re G.R.H., 2006 ND 56 ¶ 6, 711 N.W.2d 587.

[¶ 20] The Court must also analyze an additional prong in SDI cases that is manifested by the individual's substantive due process rights. "Although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' that liberty interest is not absolute." Kansas v. Hendricks, 521 U.S. 344, 356 (1997) (internal citations omitted). The right in avoiding physical restraint "may be overridden even in the civil context" because "'[t]here are manifold restraints to which every person is necessarily subject for the common good." Id. "Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." Id.

[¶ 21] Consequently, in addition to the three statutory requirements, substantive due process requires the State to prove the individual has serious difficulty controlling his behavior. Matter of Hehn, 2008 ND 36, ¶19, 745 N.W.2d 631 (citing Kansas v. Crane, 534 U.S. 407, 413 (2002). In Crane, the United State's Supreme Court concluded that commitment of a SDI cannot be constitutionally sustained without a determination that the person to be committed has serious difficulty controlling his behavior. G.R.H., at ¶ 7.

[¶ 22] In discharge hearings, the State has the burden of proving all four of these prongs, the three statutory prongs and the Crane substantive due process prong, by clear and convincing evidence. See N.D.C.C. § 25-03.3-18(4) (providing the State's burden of

proof in a discharge hearing is "to show by clear and convincing evidence that the committed individual remains a sexually dangerous individual.").

[¶ 23] Judge Clark properly found that the State had met its burden for all four prongs in the Order Denying Discharge. Moreover, she comported with Rule 52(a) of the North Dakota Rules of Civil Procedure, which requires the district court to "find the facts specially and state its conclusions of law separately."

[¶ 24] Didier does not dispute in his brief any of the first three prongs. Moreover, at the hearing, Didier stipulated that the State had proven prongs one and two. (Tr. at 9, 63.) Despite this, the Court clearly set forth the factual findings to support her legal conclusion that the State had met its burden of proof on the first three prongs as well as on the fourth prong.

[¶ 25] *First prong analysis.*

[¶ 26] For the first prong, that Didier is a person who has previously engaged in sexually predatory conduct, the Court found as follows:

> The Court finds Didier previously engaged in sexually predatory conduct as defined in N.D.C.C. § 25-03.3-01(9). Didier was convicted of Sexual Assault in 1988, Gross Sexual Imposition in 1988, Indecent Exposure in 2008, and Sexual Assault in 2008. In 2010, Didier was adjudged a sexually dangerous individual and committed to the care, custody, and control of the Department of Human Services.

(App. at 8.) Additionally, there is ample evidence in the record that supports Judge Clark's finding, so this Court should find her factual finding is supported by clear and convincing evidence. And Judge Clark also did not commit any legal error in her

conclusion that the State had met its burden of proof for Prong 1. She appropriately cited caselaw and noted that Didier had stipulated to this prong being met on the record. (Id.)

[¶ 27] *Second prong analysis.*

[¶ 28] For the second prong, that Didier has a diagnosis of a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction, Judge Clark also noted that Didier had stipulated to it being met on the record. Judge Clark also made independent factual finding as follows:

> On July 11, 2018, Dr. D'Orazio diagnosed Didier with having (1) Pedophilic Disorder, Non-exclusive Type, Sexually Attracted to Both; (2) Antisocial Personality Disorder, rule-out; (3) Disruptive, Impulse-Control, and Conduct Disorder (Polymorphous Sexual Compulsivity); (4) Intellectual Disability–Mild; and (5) Alcohol Use Disorder, Severe, In Sustained remission, in a controlled environment. . . . Dr. D'Orazio testified to the same at the hearing. . . The Court finds that the report and testimony are credible, further finding that the State has met its burden of establishing that Didier has the required congenital or acquired conditions pursuant to N.D.C.C. ch. 25-03.3.

(App. at 8-9.) Here again, Judge Clark complied with Rule 52(a) and made detailed factual finding, even when the parties' had stipulated to it. Independent evidence exists in the record to support Judge Clark's factual finding so this Court should find that her factual finding is supported by clear and convincing evidence. Neither did Judge Clark commit legal error in making this determination as it is directly in line with the requirements of 25-03.3-01(8) and caselaw. Importantly Judge Clark also was able to assess the expert's credibility regarding these diagnoses. Therefore the Court should find the standard of review is met for prong two as well.

[¶ 29] *Third prong analysis.*

[¶ 30] Didier not stipulate to Prong 3 at the hearing, but he does not appear to be raising it on appeal. In his oral argument at the discharge hearing Didier's attorney stated with respect to Prong 3, that he did not agree that Didier's "condition makes [him] likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others," however he stated, "[t]he Court can weigh that. I'm not going to address that issue because I don't think we have to." (Tr. at 63.)

[¶ 31] It is unnecessary to reproduce all of the Court's factual findings and analysis regarding this prong because they were so extensive. See (App. at 9-12.) Judge Clark went into great detail and recited much of Dr. D'Orazio's testimony in finding by clear and convincing evidence that "Didier's conditions make him likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others." (App. at 9-12.) Therefore, Judge Clark complied with Rule 52(a) in making detailed factual findings. Moreover, this Court can easily find clear and convincing evidence in the record to support her factual findings. And she comported with the law in drawing her conclusion so there was no error committed in her factual findings. Therefore, the standard of review is met for this prong as well.

[¶ 32] *Fourth prong analysis.*

[¶ 33] Didier seems to be focusing solely on Crane substantive due process prong and his blanket procedural due process argument on appeal. Ap. Br.; see also, (Tr. at 63-64.) He asserts that Judge Clark's "factual basis regarding Didier's behavior is insufficient to

legally conclude Didier has an inability to control his behaviors." (Ap. Br. ¶ 12.) He claims Judge Clark's detailed factual findings that Didier has serious difficulty controlling his behavior are not supported by clear and convincing evidence. (Id. ¶ 13.) He appears to be ignoring the pages of detailed factual findings Judge Clark made because he insists there was no new evidence during the review period. (Id. ¶ 15.) However, there is no authority to support the proposition that there must be evidence of sexual misconduct *during* the review period in order to prove lack of volitional control. The bright line rule Didier is proposing to create is dangerous and not supported by case law.

[¶ 34] It is certainly true that reading Crane together with Rule 52(a) of the North Dakota Rules of Civil Procedure, requires the district court to "specifically state the facts upon which it relied to determine whether the committed individual had serious difficulty in controlling his behavior." In re Johnson, 2015 ND 71, ¶ 9, 861 N.W.2d 484, 487 (N.D. 2015); In re Midgett, 2009 ND 106, ¶ 8, 766 N.W.2d 717, 719 (N.D. 2009) (finding the district court erred because the district court did not specifically state the facts upon which it relied "or even make a finding on whether Midgett had serious difficulty in controlling his behavior").

[¶ 35] In conformance with Rule 52(a) Judge Clark provided detailed rationale and factual findings when she found that the State had met its burden of proof in showing by clear and convincing evidence that the respondent has serious difficulty controlling his behavior. The respondent would like to push even further, however. He wishes to create a

brightline rule that there must be affirmative acts of misconduct and they must be present for every review cycle in order for the State to meet its burden. (Ap. Br. ¶¶ 13-15.)

[¶ 36] Didier relies heavily on In the Interest of Johnson, for his assertion that there must be specific examples of misconduct during the review period. (Ap. Br. ¶ 14 (quoting In the Interest of Johnson, 2016 ND 29, ¶ 5, 876 N.W. 2d 25 (N.D. 2016).) However, Johnson does not require specific instances of misconduct, and it certainly does not require specific instances of misconduct during the review period. In Johnson, the Court stated, "We defer to a district court's determination that an individual has serious difficulty controlling behavior when it is supported by *specific findings demonstrating the difficulty*. 2016 ND 29, ¶ 5 (emphasis added).

[¶ 37] "Specific findings demonstrating the difficulty," see id. and specific instances of affirmative acts of misconduct/misbehavior are two entirely different things. It is true that the examples set forth in Johnson all included specific instances of misconduct. However, the case does not say there must be specific instances of misconduct, it merely provides them as examples. Moreover, it does *not* say there must be examples of affirmative acts of misconduct during the review period.

[¶ 38] At this point, it is necessary to parse out the danger of adopting a bright line rule requiring specific examples of affirmative acts of misconduct during every review period. Didier is in a highly controlled environment at the State Hospital. The record shows that Didier's big issue is impulse control with relation to pedophilia. See (tr. at 11). Just as there is no alcohol at the State Hospital so the respondent's impulses are never challenged

with respect to alcohol, there are also no children at the state hospital so his impulses are never challenged with respect to his pedophilia. See (tr. at 12-13 (describing the defendant's alcoholic use disorder and noting it is in remission because he is in a controlled environment)).

[¶ 39] The respondent is also conflating acting out sexually with behavior problems in general. It can be seen in the transcript when Didier's attorney asks the doctor, "you mentioned behaviorally, he's doing very well. If you ask him to go do work, he's doing very well. Would you agree with those two statements?" and the doctor stated, "I believe that he's performing his vocational assignments well." He goes on, "Okay. And his behavior has been doing well," and she continues, "He hasn't had *behavior* problems." (Tr. at 55 (emphasis added).)

[¶ 40] The bigger issue in Johnson seemed to be that the Court failed to make factual findings about his serious difficulty controlling his behavior–"Rather, the court found Johnson's progression in treatment inadequate and thus concluded his unsatisfactory engagement in treatment warrant[ed] continued commitment." 2016 ND 29, ¶ 7.

[¶ 41] In contrast, there certainly is evidence that Didier is unable to control his behavior. Dr. D'Orazio testified that she diagnosed him with "Other Specified Disruptive Impulse Control and Conduct Disorder. (Tr. at 12.) She explained the diagnosis means Didier has a "broad difficulty controlling his impulses in a sexual way." (Tr. at 12.) It is extremely important to note that Dr. D'Orazio is the diagnosing doctor here. While it is true that Didier refused to be examined by Dr. D'Orazio (Re-evaluation, doc ID #114),

Dr. D'Orazio was qualified as an expert witness, so she was allowed to base her opinion on hearsay under Rule 703 of the North Dakota Rules of Evidence.

[¶ 42] Judge Clark also aptly pointed out that past conduct is relevant in determining inability to control behavior. (App. ¶¶ 17-18 (quoting In the Interest of Voisine, 2018 ND 181, ¶ 18, 915 N.W.2d 647, 654-55 ("The district court also found that, while no evidence was presented as to any recent resident behavior write-ups, the court in the last discharge hearing had found Voisine had 18 write-ups since April 2013, demonstrating an unwillingness to follow rules in a highly-structures setting. The court found this, along with his lack of progress in treatment, shows he continues to have serious difficulty in controlling his behavior. We conclude that while conduct in proximity to the hearing is relevant, the past still has some relevance.").)

[¶ 43] Next, Judge Clark considered Dr. D'Orazio's testimony regarding Didier's serious difficulty controlling his sexual behavior–quoting Dr. D'Orazio's report as follows: "Dr. D'Orazio has indicated that 'the nature, severity, and manifestation of [Didier's] mental disorders suggest that he will have serious difficulty controlling his sexual behavior if he is discharged from the hospital at this time.'" (App. at 13.) Judge Clark also factored in Didier's past convictions; the fact he showed little progress when he was placed in out-patient sexual offender treatment; the time when he was interviewed by police for "allegedly committing sexual assault on a 30-year old cognitively impaired female"; that in the same year he was also "approaching young children at the Jamestown Walmart and pestering female greeters"; and the fact that the same year he also went to

the circus against the explicit orders of his probation officer. (App at 13.)

[¶ 44] Judge Clark appropriately noted the nexus requirement for the Crane prong. (App. at 12 ("In order to satisfy this prong, the State must establish a "nexus between the requisite disorder and dangerousness, [which] encompasses proof that the disorder involves serious difficulty in controlling behavior and suffices to distinguish a dangerous sexual offender whose disorder subjects him to civil commitment from the dangerous but typical recidivist in the ordinary criminal case.'")(quoting In re Graham, 2013 ND 171, ¶ 11, 837 N.W.2d 382, 385 (N.D. 2013).) Judge Clark made a thoughtful factual finding on this element by considering Dr. D'Orazio's explanation of how Didier's "past instances are the product of his disorders interacting in a way that manifests volitional impairment. (App. at 14 (quoting Dr. D'Orazio's re-evaluation report ("Volitional impairment is further evident in his persistence of re-offense after sanction and multiple sexual related infractions while on probation after being sanctioned for sexual offending behavior. This suggests he is unlikely to be deterred by the risk of criminal punishment. Volitional impairment is further evident in his sexual offending persisting despite emotional distress, knowledge of its wrongfulness, treatment, or self-motivated attempts to control it. His alcohol substance abuse further inhibits his restraint system, judgment, and impulse control.").)

[¶ 45] Judge Clark expanded upon Dr. D'Orazio's report, noting the

following:

> Even since his time in the North Dakota State Hospital, Didier has had serious difficulty controlling his behavior. In the past review cycle of 2016-2017, Didier appeared to have difficulty controlling his behavior, especially when angry. On one occasion in March of 2016, he and another peer got into an argument before group and returned with 15 minutes left, refusing to state what had happened. Doc. No. 88, pg. 42. On April 7, 2016, Didier became upset when a peer took the iron he wanted to use, 'disrupt[ing] the milieu of the unit.' Doc. No. 88, pg. 42. He continued to swear and yell in his room, with staff noting this as "a Major violation." Doc. No. 88, pg. 42. Additionally, his inability to control his anger was documented on July 20, 2016 when he yelled at staff for calling him out on some of his behaviors, slamming his door, knocking his clothes off the dresser, and throwing his book on his bed. Doc. No. 88, pg. 8.
>
> This inability to control his anger persists. The progress notes from this review cycle on 5/10/17 to 8/10/17 indicate that he 'appears to lack awareness of himself to the extent that he doesn't recognize the times when he gets angry and leaves dayroom.' Doc. No. 106. Pg. 14. Additionally during this reporting period, it was noted that he 'continues to work on pouting and slamming doors when things don't go his way,' also noting that he continues to 'work on his temper.' Doc. No. 106, pg. 14.
>
> Additionally, his inability to control behavior manifests when things do not go the way he wishes for them to go. On August 28, 2016, when told by one staff member that he was not to start his ward duty early, he went to another staff to ask, and when he was again told no, he became upset, slamming his door and making loud noises in his room. Doc. No. 88, pg. 8. This same behavior was reported this review cycle when staff noted that he has been impatient and when he does not get something he 'has gone to various staff to get what he wants instead of waiting.' Doc. No. 106, pg. 12. He appears to have little patience, and will "staff shop" in an attempt to get what he wants instead of accepting no for an answer or waiting.
>
> He is also not progressing in treatment. He often fails to complete homework assignments, gives superficial answers to questions or copies answers that others have given, and strays off topic. Doc. No. 106, pg. 13. It was noted that he 'struggles with relapse prevention plan; has real problems completing plan . . . appears he writes down answers regardless of if they fit . . . when given feedback will change answers to what other people

> say; did not complete polygraph because kept changing responses.' Doc. No. 106, pg 14. He additionally 'came out with another uncharged victim,' with the report noting that he 'continues to struggle with comprehension.' Doc. No. 106, pg. 14. Dr. D'Orazio confirmed that Didier's therapist believes Didier's therapy has plateaued due to lack of motivation. Doc. No. 106, pg. 15.
>
> Additionally, even though he does not have "formal" write-ups, the record indicates that he has also engaged in inappropriate behavior. On one occasion this review cycle, he traded notebooks with a peer, receiving a verbal warning that such conduct was against the rules. Doc. No. 106, pg. 13. When confronted about inappropriate behavior or possible rule violations, he refuses to accept responsibility. Doc. No. 106, pg. 13 ('[C]onfronted for attempting to break boundaries with a peer . . . wanted to 'bump fists' with peer . . . **had many excuses and showed limited ownership of behavior**."). He additionally continues to show that when he has an urge, he is unsure what to do. He shared in group about a time in the past when he was 'touching former girlfriend on butt after hugging each other . . . stated police came and told him to stay away . . . said he thought about having sex with her between the hug and touching her butt); **did not understand what to do and did not ask for help.**" Doc. No. 106, pg. 14 (emphasis added). It was also testified by Dr. D'Orazio that Didier has engaged in inappropriate behavior with evaluators in the past, specifically lifting his shirt up on one occasion.

(App. at 14-16.)

[¶ 46] Judge Clark also analyzed the question of whether there needed to be any new affirmative instances of misconduct during the review period:

> The Court appreciates that Didier may do his vocational work without hesitation and may not have had any sexual related incidents in the most restrictive environment of the North Dakota State Hospital where he is under almost constant supervision; however, his past and present actions show that he has a serious inability to control his behavior and would continue to have such a difficulty in a least restrictive environment such as the community at this time. The expert reports and testimony clearly show that Didier does not take his treatment seriously nor does he have the ability to control his frustrations or urge to go from staff to staff when he does not get something he wants. . . .

(App. at 11.)

[¶ 47] Judge Clark considered Didier's lack of participation in treatment as a factor, but it was far from the only factor she considered, as the previous paragraph demonstrates. See Voisine, 2018 ND 181, ¶¶ 20-21 ("We have said '[l]ack of progress in treatment *alone* is insufficient to meet this requirement for commitment. However, review of the record reflects more than just lack of progress, it showed a lack of participation in treatment, falling asleep in group, and times when Voisine did not attend treatment . . . .").

[¶ 48] The Court should affirm Judge Clark's commitment order. She did not commit any error in applying the law. She properly analyzed all three prongs necessary for civil commitment of a SDI. She also properly analyzed the fourth substantive due process "Crane prong." She complied with Rule 52(a) of the North Dakota Rules of Civil Procedure, giving the Court detailed factual findings to analyze the basis of her rationale in finding that the State had met its burden of proof. Moreover, clear and convincing evidence exists throughout the record to support the commitment order.

***[¶ 49] Didier was given a fair hearing comporting with due process including reasonable notice or opportunity of the claims of opposing party and the opportunity to rebut the claims.***

[¶ 50] Didier also is making a general procedural due process argument. (Ap. Br. ¶ 9.) It is unclear what Didier means about due process in this argument. The case he cites is not helpful either–since it deals with procedural due process and the withdrawal of disability benefits, that is, the withdrawal of a property interest without due process. Flink

v. North Dakota, 1998 ND 11, ¶ 1, 574 N.W.2d 784 (N.D. 1998); see also Beckler v. North Dakota, 418 N.W.2d 770, 772 (N.D. 1988) ("The Fourteenth Amendment places procedural constraints on governmental decisions depriving individuals of interests enjoying the status of "property.").

[¶ 51] In the present case there is certainly a liberty interest (see Hendricks, 521 U.S. at 356) –which is dealt with above, but there is not an implicated property interest. In Flink, the ALJ's decision was reversed because the ALJ's conclusion "ignor[ed] and fail[ed] to explain medical evidence to the contrary." 1998 ND 11, ¶11, 574 N.W.2d at 788. However, Didier requested and was granted an independent evaluation, but did not offer the evaluation report as an exhibit and put on no testimony to its contents. (Tr. at 6.)

[¶ 52] Didier also contends he was not notified of the facts to support D'Orazio's conclusions because her report "does not include the facts that support her conclusion that Didier has difficulty controlling his behavior." (Id. ¶ 11.) Didier does not identify anything in the register of actions to which he did not have access. Didier's attorney admitted he had received a copy of Dr. D'Orazio's report at the discharge hearing. (Tr. at 7.) Didier had access to the entire record before the hearing. He also had an opportunity to cross examine Dr. D'Orazio through is attorney at the hearing. His attorney had access to the entire record in this case before his hearing.

[¶ 53] Didier also seems to argue that "the scores used to determine likeliness in prong three were also clear and convincing evidence in prong four . . . ." (Ap. Br. ¶ 11.) He states the Court has never found the argument persuasive but cites no case. However,

Judge Clark did not rely solely on the test scores in her analysis for prong four, as set forth in the previous section. In fact she barely mentioned the test scores in her analysis of the fourth prong.

[¶ 54] For these reasons, if the Court finds that Didier's procedural due process rights are implicated in this case, it should find that Didier was given a fair hearing comporting with due process including reasonable notice or opportunity of the claims of opposing party and the opportunity to rebut the claims.

[¶ 55] Oral Arguments Should be Held

[¶ 56] Didier has not requested oral arguments in this matter. However, the State respectfully asserts that oral arguments should be held because Didier's attorney is asking the Court to create a dangerous bright line rule that could have serious consequences on the entire State of North Dakota and its SDI jurisprudence. These issues are complicated and there is a lot of case law to parse through. Both parties should have an opportunity to clarify and articulate their reasoning in front of this Court.

**[¶ 57] CONCLUSION**

[¶ 58] The respondent asks the Court to reverse and grant Didier his immediate release. App. Br. ¶ 17. However, even if the Court were to find in Respondent's favor, the appropriate remedy is to reverse and remand for further factual findings. See, e.g., Midgett, 2009 ND 106, ¶ 10 (reversing and remanding for "detailed factual findings on whether Midgett has serious difficulty controlling his behavior").

[¶ 59] For the foregoing reasons, the State respectfully requests that this Honorable

Court affirm Judge Clark's Order Denying Discharge.

Dated June 2, 2019.

*/s/ Lilie A. Schoenack*

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**APPELLEE'S RULE 32(e) CERTIFICATE OF COMPLIANCE**

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[¶1] This "Appellee's Brief," filed on June 2, 2019, by attorney for the Respondent and Appellee, Lilie A. Schoenack, complies with the 8000 word count limit for proportionally spaced face set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedures. It also does not exceed the 38 page limit for monospaced typeface as it only has 24 pages including exempted material under Rule 32(a)(8)(D).

Dated June 2, 2019.

*/s/ Lilie A. Schoenack*

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**CERTIFICATE OF SERVICE**

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[¶ 1] On June 2, 2019, a copy of the document "Appellee's Brief" was electronically served electronically via the Supreme Court E-Filing portal to the Appellant's attorney, Tyler Morrow, at tyler@kpmwlaw.com and his E-service email address as listed on the North Dakota Supreme Court website: service@kpmwlaw.com.

Dated June 2, 2019

*/s/ Lilie A. Schoenack*

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

| | | |
|---|---|---|
| **In the Interest of Lawrence Didier** | | |
| | ) | |
| **Frederick Fremgen,** | ) | Supreme Court No. |
| **Stutsman County State's Attorney** | ) | 20190015 |
| Petitioner & Appellee | ) | |
| | ) | |
| vs. | ) | Stutsman County No. |
| | ) | 47-2010-MH-00113 |
| **Lawrence Didier** | ) | |
| Respondent & Appellant | ) | |

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## CERTIFICATE OF SERVICE

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[¶ 1] On June 7, 2019, a copy of the document "Appellee's Brief" was served electronically via the Supreme Court E-Filing portal to the Appellant's attorney, Tyler Morrow, at tyler@kpmwlaw.com and his E-service email address as listed on the North Dakota Supreme Court website: service@kpmwlaw.com.

Dated June 7, 2019

*/s/ Lilie A. Schoenack*

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