

IN THE SUPREME COURT OF NORTH DAKOTA

---

In the Interest of O.H.W	)	Supreme Court File No.
-----	)	#20190137
State of North Dakota,	)	
Petitioner/Appellee	)	Cass County Court File No.
	)	#09-04-R-00904
v.	)	
O.H.W.,	)	APPELLANT'S BRIEF
Respondent/Appellant	)	

---

**Appeal from the Findings of Fact, Conclusions of Law, and Order Denying Discharge entered April 18, 2019 in Cass County District Court, East Central Judicial District, North Dakota the Honorable Stephanie N. Stiel presiding.**

---

**APPELLANT'S BRIEF  
ORAL ARGUMENT REQUESTED**

---

Tyler J. Morrow  
Attorney for Appellant  
ND #06923  
Kraus-Parr, Morrow, and Weber  
424 Demers Avenue  
Grand Forks, ND 58201  
Ph.: (701) 772-8991  
service@kpmwlaw.com

## TABLE OF CONTENTS

Table of Contents.....	2
Table of Authorities.....	3
Jurisdictional Statement..... ¶	1
Issues Presented for Review..... ¶	2
Statement of the Case..... ¶	3
Statement of the Facts..... ¶	5
Argument..... ¶	7
Conclusion..... ¶	14

TABLE OF AUTHORITIES

CASES

*In re Midgett*, 2007 ND 198, 742 N.W.2d 803.....¶ 8

*In re Anderson*, 2007 ND 50, 730 N.W.2d 570.....¶ 8

*In re Johnson*, 2016 ND 29, 876 N.W.2d 25.....¶ 9

*Interest of G.L.D.*, 2011 ND 52, 795 N.W.2d 346.....¶ 9

*Matter of Wolff*, 2011 ND 76, 796 N.W.2d 644.....¶ 9

*Matter of M.D.*, 2012 ND 261, 825 N.W.2d 838.....¶ 9

*Interest of Voisine*, 2018 ND 181, 915 N.W.2d 647.....¶ 11

*Interest of T.A.G.*, 2019 ND 115, 926 N.W.2d 702.....¶ 12

*In the Matter of R.A.S.*, 2019 ND 169, 930 N.W.2d 162.....¶ 12

*In the Matter of J.M.*, 2019 ND 125, 927 N.W.2d 422.....¶ 12

STATUTES

N.D.C.C. § 25-03.3.....Passim

N.D.C.C. § 25-03.3-19.....¶ 1

N.D.C.C. § 25-03.3-18.....¶ 4, 5

N.D.C.C. § 25-03.3-01(8).....¶ 4

Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner’s written arguments on their merits.

## JURISDICTIONAL STATEMENT

[¶ 1] Jurisdiction in this matter is pursuant to N.D.C.C. § 25-03.3-19. The Cass County District Court issued a decision ordering O.H.W. remain civilly committed on April 18, 2019. O.H.W. timely filed this appeal on May 3, 2019.

ISSUE PRESENTED FOR REVIEW

- I. [¶ 2] Whether the District Court's Order's factual basis regarding O.H.W.'s behavior is sufficient to legally conclude O.H.W. has serious difficulty controlling his behavior.

## STATEMENT OF THE CASE

[¶ 3] Petitioner filed a petition for civil commitment as a sexually dangerous individual (“SDI”) on September 14, 2004. After a hearing, O.H.W. was initially committed to the North Dakota State Hospital (“NDSH”) as an SDI on April 11, 2005.

[¶ 4] O.H.W. exercised his right to request a discharge hearing under N.D.C.C. § 25-03.3-18. A hearing on that request was held on March 8, 2019. The Cass County District Court determined that the state had established by clear and convincing evidence that O.H.W. remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied O.H.W.’s discharge on April 18, 2019. O.H.W. appealed that decision on May 3, 2019.

## STATEMENT OF THE FACTS

[¶ 5] O.H.W. petitioned for an annual review hearing pursuant to N.D.C.C. § 25-03.3-18 on whether he remained a sexually dangerous individual. A hearing was held on March 8, 2019. The state called Dr. Erik L. Fox (“Fox”) to testify that O.H.W. remained a sexually dangerous individual subject to continued civil commitment. Fox testified that an attraction to children was based entirely on history (Transcript page 28, line 9), antisocial personality disorder has a “burnout decade” (Transcript page 30, line 24), O.H.W.’s behaviors in regard to antisocial personality disorder have diminished (Transcript page 35, line 1), the STATIC-99R is entirely based on history (Transcript page 35, line 4), the SRA-FV is loaded historically (Transcript page 36, line 24), the history in the first prong is used to load the SRA-FV, the pedophilic disorder, and the STATIC-99R (Transcript page 37, line 19), the PCL-R is scored on history (Transcript page 39, line 5), the SVR-20 is historically based (Transcript page 42, line 6), he sees O.H.W.’s negative behavior decreasing and positive behaviors increasing (Transcript page 49, lines 16-17), O.H.W.’s behavioral write-ups over the review period do not include physical altercations with anyone (Transcript page 51, lines 2-3), and O.H.W. has progressed in treatment over the review period (Transcript page 51, line 12).

[¶ 6] The Cass County District Court found that the State had proven by clear and convincing evidence that O.H.W. remained a sexually dangerous individual subject to continued civil commitment and issued an Order in that regard on April 5, 2019. O.H.W. filed his appeal on April 9, 2019. In its Order, the district court found that O.H.W.’s “past and present actions show that he has a serious inability to control his behavior....” (District Court Order ¶ 17). In regards to O.H.W.’s present actions, Fox testified that the concerns were hitting a wall while calling someone a bitch, hitting a display case while calling someone a fucking idiot, and having a list of people’s names (Transcript page 50, lines 10-13).

## ARGUMENT

### **I. [¶ 7] The District Court’s Order’s factual basis regarding O.H.W.’s behavior is insufficient to legally conclude O.H.W. has serious difficulty controlling his behavior.**

[¶ 8] This 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 district court’s decision unless the “[o]rder 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 district court’s order is not supported by clear and convincing evidence that O.H.W. has serious difficulty controlling his behavior.

[¶ 9] This Court previously analyzed the volitional control prong in *Johnson*,

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. In *G.L.D.*, we upheld a finding of serious difficulty controlling behavior when the individual frequently assaulted staff and his peers. 2011 ND 52, ¶ 7, 795 N.W.2d 346. In *Wolff*, we upheld a finding of serious difficulty when the individual yelled profanities, had an explosive temper, refused to attend treatment, and acted in a sexual manner with a peer. 2011 ND 76, ¶9, 796 N.W.2d 644. In *Matter of M.D.*, we upheld a finding of serious difficulty when the individual had engaged in a sexual relationship with a peer and stated he would take advantage of a minor if he knew he would not be caught, would use drugs if they were offered to him, and would provide oral sex if someone came to his door and wanted it. 2012 ND 261, ¶ 10, 825 N.W.2d 838.

*In the Interest of Johnson*, 2016 ND 29, 876 N.W.2d 25.

[¶ 10] Although *Wolff* recognized that the inability to control behavior need not be sexual in nature, the factual finding by the district court does not support a legal conclusion that the state provided clear and convincing evidence that O.H.W. has serious difficulty controlling his behavior. The district court order relies heavily on past behaviors, and the present behaviors do not rise to the level of serious difficulty controlling behavior.

[¶ 11] The district court cites to *Voisine* in order to try and rope in past conduct by O.H.W. After doing so, the district court then looks at O.H.W.’s reports during prison, behavioral warnings

from 2015 and 2016, and charges from 2012 and 2013 (District Court Order ¶ 24). While this Court did state in *Voisine* past conduct is relevant, the concurrence was concerned the district court relied upon write-ups outside of the review period. *Interest of Voisine*, 2018 ND 181, 915 N.W.2d 647. This case calls into question just how far back a district court may go as the last behavioral warnings were from three years prior, and the write-ups from prison went back to 2004 and earlier (Transcript page 49, lines 20-23). As discussed in the statement of facts portion of this brief, Fox himself acknowledges a vast majority of the argument from the state is driven by data O.H.W. cannot change. This is the reason the volitional control/serious difficulty/*Crane* element was added by the United States Supreme Court in the first place. O.H.W.'s behaviors in 2004 and prior do not go to whether or not he has a present-day serious difficulty in controlling his behavior, as required by the statute and *Crane*.

[¶12] What's left from this review period is O.H.W. hitting a wall while calling someone a bitch, hitting a display case while calling someone a fucking idiot, and having a list of people's names. This Court has recently addressed multiple cases with similar fact patterns. In *T.A.G.*, this Court stated, "The status in treatment and one statement regarding 'cream pie' do not establish a serious difficulty controlling behavior sufficient to satisfy the *Crane* due process requirement." *Interest of T.A.G.*, 2019 ND 115, 926 N.W.2d 702. In *R.A.S.*, this Court found "The isolated instances of refusing two doses of prescribed medication do not establish a serious difficulty controlling behavior." *In the Matter of R.A.S.*, 2019 ND 169, 930 N.W.2d 162. Finally, in *J.M.*, this Court found that an alleged altercation with another resident, a horseplay incident where J.M. threw a rock at another resident, and both experts testifying that J.M. had aggression issues was not clear and convincing evidence of serious difficulty. *In the Matter of J.M.*, 2019 ND 125, 927 N.W.2d 422.

[¶ 13] The present case fits closely with the three previously cited cases. There is no evidence that O.H.W. physically assaulted staff or peers or that he sexually acted out with staff or peers. Nothing on the record reflects clear and convincing evidence that O.H.W. presently has serious difficulty controlling his behavior.

## CONCLUSION

[¶ 14] Under N.D.C.C. 25-03.3, at a petition for discharge hearing, the State bears the burden of proving an individual *remains* a sexually dangerous individual subject to civil commitment by clear and convincing evidence. This requires a present-day determination of sexual dangerous. The record is void of clear and convincing evidence showing serious difficulty controlling behavior over the review period.

[¶ 15] Based on the arguments set forth, the State has failed to meet its burden. The district court erred in determining that there was clear and convincing evidence that O.H.W. remains a sexually dangerous individual. O.H.W. respectfully, requests this Court reverse the decision of the district court and grant O.H.W. his immediate release.

Respectfully submitted this 27<sup>th</sup> day of August, 2019.

/Tyler J. Morrow

Tyler J. Morrow (ND# 06923)  
Kraus-Parr, Morrow, Weber  
424 Demers Ave  
Grand Forks, ND 58201  
Telephone: (701) 772-8991  
service@kpmwlaw.com  
*Attorney for Respondent-Appellant*

IN THE SUPREME COURT OF NORTH DAKOTA

---

<b>In the Interest of O.H.W</b>	)	<b>Supreme Court File No.</b>
-----	)	<b>#20190137</b>
<b>State of North Dakota,</b>	)	
<b>Petitioner/Appellee</b>	)	<b>Cass County Court File No.</b>
	)	<b>#09-04-R-00904</b>
<b>v.</b>	)	
<b>O.H.W.,</b>	)	<b>CERTIFICATE OF</b>
<b>Respondent/Appellant</b>	)	<b>COMPLIANCE</b>

---

[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure as it only has 10 pages.

Dated: August 27, 2019.

/s/ Tyler J. Morrow  
Tyler J. Morrow (ND #06923)  
Kraus-Parr, Morrow, & Weber  
424 Demers Ave  
Grand Forks, ND 58203  
T: (701) 772-8991  
F: (701) 795-1769  
[service@kpmwlaw.com](mailto:service@kpmwlaw.com)  
*Attorney for Respondent/Appellant*

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

---

<b>In the Interest of</b>	)	
<b>O.H.W.,</b>	)	<b># 09-04-R-00904</b>
	)	<b># 20190137</b>
<b>Appellant,</b>	)	
	)	
	)	<b>CERTIFICATE OF SERVICE</b>
	)	

---

The undersigned, being of legal age, being first duly sworn deposes and says that he served a true and correct copy of the following document(s):

**Appellant's Brief with Certificate of Compliance**  
**Appellant's Appendix**

Electronically through the Court Electronic Filing System to:

Leah Viste, Assistant State's Attorney, sa-defense-notices@casscountynd.gov

Dated: August 27, 2019.

/s/ Tyler J. Morrow  
Tyler J. Morrow (ND# 06923)  
Kraus-Parr, Morrow, & Weber  
424 Demers Ave  
Grand Forks, ND 58201  
T: (701) 772-8991  
F: (701) 795-1769  
[service@kpmwlaw.com](mailto:service@kpmwlaw.com)  
*Attorney for Appellant*

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

---

<b>In the Interest of</b>	)	
<b>O.H.W.,</b>	)	<b># 09-04-R-00904</b>
	)	<b># 20190137</b>
<b>Appellant,</b>	)	
	)	
	)	<b>CERTIFICATE OF SERVICE</b>
	)	

---

The undersigned, being of legal age, being first duly sworn deposes and says that he served a true and correct copy of the following document(s):

**Appellant's Appendix-revised title page**

Electronically through the Court Electronic Filing System to:

Leah Viste, Assistant State's Attorney, sa-defense-notices@casscountynd.gov

Dated: September 4, 2019.

/s/ Tyler J. Morrow  
Tyler J. Morrow (ND# 06923)  
Kraus-Parr, Morrow, & Weber  
424 Demers Ave  
Grand Forks, ND 58201  
T: (701) 772-8991  
F: (701) 795-1769  
[service@kpmwlaw.com](mailto:service@kpmwlaw.com)  
*Attorney for Appellant*