

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interest of Lawrence Didier

)	
Frederick Fremgen,)	Supreme Court No.
Stutsman County State’s Attorney)	202000217
Petitioner & Appellee)	
)	
vs.)	Stutsman County No.
)	47-2010-MH-00113
Lawrence Didier)	
Respondent & Appellant)	

Appellee’s Brief

On Appeal From Findings of Fact, Conclusions of Law, and Order Denying Discharge
Filed on August 12, 2020, Stutsman County District Court, Southeast Judicial District,
the Honorable Cherie Clark Presiding

ORAL ARGUMENT REQUESTED

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¶1. Issue Presented for Review

¶2. Whether Didier has been shown to have serious difficulty controlling his behavior that distinguishes Didier from the typical recidivist in the ordinary criminal case.

¶3. Statement of the Case and Nature of the Case

¶4. Didier appeals the denial of his motion for discharge from civil commitment.

¶5. Didier only disputes the District Court’s finding that he has serious difficulty controlling his behavior, therefore concedes he has engaged in sexually predatory conduct and that he has a congenital or acquired condition that is manifested by a sexual disorder, personality disorder, or other mental disorder or dysfunction, and that the disorder makes him likely to engage in further acts of sexually predatory conduct. *Brief of Appellant* ¶ 2.

¶6. Course of Proceedings and Disposition Below

¶7. Didier was previously convicted of two counts of sexual assault, one count of gross sexual imposition, and one count of indecent exposure occurring in 1988, 1998, and 2008. *In the Matter of Lawrence Didier*, 2019 ND 263, ¶2, 934 N.W.2d 417, ¶2, 47-2010-MH-00113 Index # 20-24. After these convictions, in May 2010, the State petitioned the district court to commit Didier as a sexually dangerous individual. *Id.*

¶8. In November 2010, the court ordered Didier’s commitment pursuant to N.D.C.C. ch. 25-03.3. *In the Matter of Lawrence Didier*, ¶2. Didier applied for discharge in April 2018. *Id.* On January 9, 2019, the court held a hearing on his application. *Id.* Dr. Deirdre D’Orazio, a doctor of clinical and forensic psychology, completed an annual re-evaluation of Didier, *Id.*, and diagnosed Didier as a pedophile who was

likely to re-offend, and that “the nature, severity, and manifestation of his mental disorders suggest that he will have serious difficulty controlling his sexual behavior if he is discharged from the hospital at this time.” 47-2010-MH-00113 Index # 106 at 28.

- ¶9. On January 15, 2019, the court issued an order denying Didier’s application. 47-2010-MH-00113 Index # 116. Didier appealed to the Supreme Court of North Dakota arguing that there was insufficient facts to conclude that he remained a sexually dangerous individual, primarily because “the entirety of the evidence resides in past conduct or conduct that neither the state itself nor the state’s expert witness offered as a factual basis.” *In the Matter of Lawrence Didier*, 2019 ND 263, ¶7.
- ¶10. The Supreme Court affirmed the district court’s order denying Didier’s discharge holding that clear and convincing evidence supported finding that Didier would have serious difficulty controlling his behavior and that Didier was likely to engage in further acts of predatory conduct. *Id.*, ¶8. The Court reasoned that “Taken together, both Didier's past and present conduct, the court's finding Didier has serious difficulty controlling his behavior is not clearly erroneous and is supported by clear and convincing evidence.” *Id.*, ¶9.
- ¶11. On November 7, 2019, Didier moved for discharge. 47-2010-MH-00113 Index # 126. Dr. Deirdre D’Orazio, a doctor of clinical and forensic psychology, completed an annual re-evaluation of Didier and filed her report on January 9, 2020. 47-2010-MH-00113 Index # 140. Dr. D’Orazio concluded that Didier continued to meet the

criteria for a sexually dangerous individual. 47-2010-MH-00113 Index # 140 at 36.

¶12. Dr. D’Orazio diagnosed Didier with the following:

- a. Pedophilic disorder, non-exclusive type, sexually attracted to males.
- b. Antisocial personality disorder, rule-out.
- c. Other specified disruptive, impulse-control, and conduct disorder (polymorphous sexual compulsivity).
- d. Intellectual disability, mild.
- e. Alcohol use disorder, severe, in sustained remission, in a controlled environment.

47-2010-MH-00113 Index # 140 at 22.

¶13. Dr. D’Orazio expressed concern over Didier’s lack of progress in treatment when she stated that “Mr. Didier has been afforded sexual offense treatment on multiple occasions and he failed to meaningfully apply his treatment evidenced by subsequent sexual offending. The presence and serious symptoms of his mental disorders, associated impairment in controlling behavior and persistent sexual reoffending set Mr. Didier apart from the dangerous but typical recidivist in the ordinary criminal case.” 47-2010-MH-00113 Index # 140 at 35.

¶14. Dr. D’Orazio concluded in her report saying that “I find that [Didier] remains likely to engage in further acts of sexually predatory conduct and that he would have serious difficulty controlling his behavior if he were discharged, even provisionally with conditions from the State Hospital at this time.” 47-2010-MH-00113 Index # 140 at 36.

- ¶15. On November 25, 2019, an independent examiner, Dr. Stacey Benson was appointed. 47-2010-MH-00113 Index # 137. Didier did not file Dr. Benson’s report, and Dr. Benson did not testify during the July 31, 2020 discharge hearing. 47-2010-MH-00113. Meanwhile, Dr. D’Orazio appeared and testified.
- ¶16. On August 12, 2020, the District Court issued an order denying Didier discharge. 47-2010-MH-00113 Index # 163. Didier appealed. 47-2010-MH-00113 Index # 167.

¶17. Statement of facts

- ¶18. The State disagrees with the Appellant’s edition of the facts because the Appellant’s edition is lacking substantial material facts.
- ¶19. Dr. D’Orazio explained serious difficulty, also known as volitional control or self-control as the ability to manage one’s behaviors in the moment and that it relates to judgement and decision making. *Transcript of Proceedings* July 31, 2020 [hereinafter T], 43.
- ¶20. Dr. D’Orazio testified that Didier had shown serious difficulty controlling his behavior at the hospital. T 43. Dr. D’Orazio testified that Didier’s serious difficulty in controlling his behavior in a “tightly controlled environment” like the State Hospital is “a very clear indication, particularly, in addition to his history, that if that was removed from him, he would reoffend.” T 44.
- ¶21. Dr. D’Orazio pointed out that Didier has lot of difficulty in judgment, making behavioral choices that are prosocial and nonviolent, and some of Didier’s behavior and negative writeups during the current review period fortified her opinion that

Didier has serious difficulty in controlling his behavior. Dr. D’Orazio stated some examples as follow:

He can tend to be quite impulsive and that is associated with a lot of emotional dysregulation. There have been numerous occasions where he has stormed out of group, gotten into arguments with peers and has not been able to consistently and meaningfully participate in the treatment that's afforded to him. He was in Level 1 of the three-level program. He had achieved Level 2 at one point but he was demoted due to his behaviors.

T 22.

¶22. Didier’s demotion from Level 2 to Level 1 was as a result of his rules violations, and Dr. D’Orazio explained the difference between the two levels and why Didier got himself to be demoted:

[T]he primary thing that you need to do to be in Level 2 is to be able to manage his behaviors and sit through treatment groups and not yell and storm out and be able to hear feedback, and he has problems at that level, so he was put back down to Level 1. And Level 1 is not very -- it doesn't focus on the person's individual sex offending; it's more broad-based, so Level 2 is really where -- what we say the substantive sex offender treatment starts.

T 37.

¶23. Dr. D’Orazio gave some examples of Didier’s lack of accountability as follows:

He's partially completed some assignments, like his relapse prevention planning. However, on the whole, he continues to really struggle with applying treatment concepts involving taking accountability, for example, he will be asked what the risks are for reoffending, and he will say things that were not related to his past offenses at all, and he won't acknowledge the things that were related to his offenses, like being in isolated locations with people, taking advantage of relationships, his sexual interest in children, et cetera. So there's a lack of

accountability, and there's just a real impulsivity, which is a serious difficulty controlling behavior. Even in role-plays and in assignments when asked and given time to think about what's the proper response to this or what is a prosocial response in this scenario, he will come up with something that's violent. So he's got difficulty understanding the treatment concepts in that regard; and, of course, that -- those types of things are needed for being healthy in the community, and he will need to sit and think about his decisions before he acts on them. He won't be able to get so emotionally disregulated and act out violently or sexually.

T 23-24

¶24. Dr. D'Orazio testified that Didier's lack of accountability and impulsivity shows serious difficulty in controlling his behavior. T 23.

¶25. Dr. D'Orazio expressed concern with how Didier frequently gets himself in trouble with female staff, and how that is linked to his sexual misbehavior as follows:

I would like to add a particular feature that he's not understanding, which has a direct nexus to sexual misbehavior. He is quite habitually and getting himself in trouble with female staff at the hospital. He asked female staff to -- or he tells them their shoes are untied so that they will lean over and he can look at their breasts. He has also touched female staff persons, moved the hair off of someone's face and tries to look down the tops of the shirts of female staff, and it's been very hard for him to understand how that type of behavior is related to his sex offending. He doesn't connect, and he continues to engage in that behavior; that's another example of having difficulty understanding and applying the concepts the treatment program is working on with him.

T 24-25, 77.

¶26. Dr. D'Orazio testified that Didier's inability to control his behavior is also manifested by his poor performance in treatment:

Mr. Monek, the treatment provider, believes that Mr. Didier has

a lot of difficulty managing his emotions in the moment; that he's very quick to anger, and he's very difficult to provide him feedback, although there have been several occasions where Mr. Didier has taken feedback from the staff; but, on the whole, he has difficulty accepting redirection when he's showing problematic behaviors, and so if he has difficulty redirecting when someone is saying to him, you know, don't do that. This is a problem. The expectation is that he will have even more difficulty when staff are not there to attempt to redirect.

T 26.

¶27. Regarding Didier's behavioral notes, Dr. D' Orazio testified that Didier's 12 behavioral notes during the current review period was the most she had seen:

So I will say that for the past several years, as I have been doing these, I have not experienced more negative behavior notes during a review period than that of Mr. Didier's during this review period, which there's 12 negative behavior notes and there's three positive behavior notes.

T 27. Dr. D'Orazio continued:

[T]here are numerous involving being antagonistic towards peers, yelling at a peer, calling him a freak, storming into his room. Staff asked him not to slam his door; he ignored staff and slammed it twice, getting into arguments with peers again. In July of 2019, he was noted to have some significant behavior management problems, showing again, that dysregulation with his emotions, not taking feedback from staff. He was redirected -- not -- I am sorry not redirecting after responding to a peer who made negative comments; he threw a broom and dustpan, yelled and cursed, slammed the door, threw objects in his room. He has in other occasions showed impulsivity and physical aggression. There was an incident where a person lightly kicked his leg, and he became very, very upset. Staff needed to intervene, and he kicked the person. There was a yelling match, and Mr. Didier had a lot of difficulty managing his temper. There are several other examples of instances where he's lost his temper, has been argumentative and has not redirected.

T 28-29.

- ¶28. Dr. D’Orazio expressed deep concern over a particular incident where Didier intentionally removed his GPS monitoring device:

In a different category than those, there was one that I consider quite salient is that he intentionally removed his GPS device, and this is – they wear the GPS, Global Position Satellite device, there at the hospital to help prepare for those who – this will be a reality for them in the community because GPS monitoring is often required, and so it's a way of monitoring the individual and preparing the person for subsequent monitoring, and he intentionally removed this; and, in some jurisdictions, that would be a crime to do so.

T 29.

- ¶29. Regarding how these negative behaviors show Didier’s serious difficulty in controlling his behaviour, Dr. D’Orazio explained that:

[T]aken as a whole, you know, we have someone who basically behaves as his diagnosis implies he would, particularly, with impulse control deficits and difficulty, be it, through the Mild Intellectual Disability or through the Antisocial Personality Disorder features a real difficulty, making decisions in the short-term that reflect higher priorities in the long-term and are directly connected to a risk or violent behavior and sexual behavior.

T 30.

- ¶30. Regarding how Didier’s mental disorders are linked to his serious difficulty in controlling his behavior, Dr. D’Orazio testified that Didier’s historical pedophilia gives him strong urges towards children and other vulnerable individuals. T 44. Dr. D’Orazio testified that when Didier is faced with his high level of sexual arousal, he can’t suppress his sexual interests and that the disorder facilitates his motivation for

sexually offending, and “impairs his ability to control his urges.” T 44-45.

¶31. Dr. D’Orazio expressed concern over Didier’s past statement that Didier wanted to taste his child’s penis, and as soon as he started orally copulating his son, he was “hooked” on it. T 46. Dr. D’Orazio explained that “statement of being "hooked on it," you know, it is self-admitted of an addictive process, and he also indicated that there were occasions when he wanted to stop but he didn't, which is a pretty textbook example of controlling -- serious difficulty controlling behavior.” *Id.*

¶32. Another mental disorder which Dr. D’Orazio linked to Didier’s difficulty in controlling his behavior is Didier’s impulse control disorder. T 45. Dr. D’Orazio explained that Didier “experiences urges with impulse to gratify the urge with very deficient judgment about the effects, the effects of the behaviors are not part of the decision to act.” T 45.

¶33. Dr. D’Orazio linked Didier’s impulsivity to psychopathy and antisocial personality traits and expressed concern that Didier employs a “very slight element of sophistication where he tries to do things to get away with it...” *Id.* An example is selecting vulnerable others because that population may be less likely to ell, turning minor relationships into offense opportunities, threatening victims should they tell. *Id.*

¶34. Dr. D’Orazio testified that Didier’s has ongoing difficulty appreciating the wrongfulness of his behavior despite the sanctions, which leads him to re-offend even while on probation. *Id.* Dr. D’Orazio testified that Didier’s persistence in re-

offending shows “deficiency in controlling one’s behavior from having been aware of the outcomes.” *Id.*

¶35. Dr. D’Orazio recommended that Didier remain at the North Dakota State Hospital in order to apply himself fully to the treatment that is afforded him, get into and complete Level 2, then get into Level 3 and get transferred to the CTC house which is less restrictive alternative to full confinement. T 47.

¶36. On August 12, 2020, the District Court issued an order finding that Didier remained a sexually dangerous individual, and denied Didier discharge from the North Dakota State Hospital. 47-2010-MH-00113 Index # 163. In its order, the District court noted that Dr. Benson, Didier’s independent examiner “did not appear and did not file a report. The Court takes all legal presumptions by Benson’s failure to appear.” 47-2010-MH-00113 Index # 163 at 2.

¶37. Law and Standard of Review for order denying petition for discharge

¶38. The standard of review for an order denying a petition for discharge from civil commitment as a sexually dangerous individual follows.

This Court reviews civil commitments of sexually dangerous individuals under a “modified clearly erroneous” standard of review. *Interest of Tanner*, 2017 ND 153, ¶ 4, 897 N.W.2d 901. We will affirm a district court’s order denying a petition for discharge unless it is induced by an erroneous view of the law or we are firmly convinced it is not supported by clear and convincing evidence. *Id.*; *Matter of Wolff*, 2011 ND 76, ¶ 5, 796 N.W.2d 644. We accord “great deference to the [district] court’s credibility determinations of expert witnesses and the weight to be given their

testimony.” *Tanner*, at ¶ 4; *Wolff*, at ¶ 5.

At a discharge hearing, the State must prove by clear and convincing evidence that the committed individual remains a “sexually dangerous individual” under N.D.C.C. § 25-03.3-18(4). *Matter of Hehn*, 2015 ND 218, ¶ 5, 868 N.W.2d 551. Under N.D.C.C. § 25-03.3-01(8), the State must prove three elements:

(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.

Tanner, 2017 ND 153, ¶ 4, 897 N.W.2d 901. Further, “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.” *Matter of Hehn*, 2008 ND 36, ¶ 19, 745 N.W.2d 631 (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)). We therefore construe “sexually dangerous individual” as meaning “proof of a nexus between the requisite disorder and dangerousness 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.” *Wolff*, 2011 ND 76, ¶ 7, 796 N.W.2d 644 (quoting *Interest of J.M.*, 2006 ND 96, ¶ 10, 713 N.W.2d 518).

In the Interest of Voisine, 2018 ND 181, ¶¶ 5-6, 915 N.W.2d 647.

¶39 “The court may consider sexual and nonsexual conduct demonstrating an individual’s serious difficulty controlling behaviour[.]” *In the Matter of Lawrence Didier*, ¶4 (Citing *Matter of R.A.S.*, 2019 ND 169, ¶ 7, 930 N.W.2d 162). The Court further noted:

Evidence in the record supports the district court's finding clear and convincing evidence exists that the respondent will have serious difficulty controlling his behavior. "To determine whether an individual has serious difficulty in controlling behavior, all relevant conduct may be considered." *In re J.T.N.*, 2011 ND 231, ¶ 13, 807 N.W.2d 570. "[C]onduct in proximity to the hearing is relevant, the past still has some relevance." *Voisine*, 2018 ND 181, ¶ 18, 915 N.W.2d 647. The court's *421 findings relied on Dr. D'Orazio's report which mentioned several of Didier's past offenses that occurred prior to the review period. In 2008, Didier was convicted for indecent exposure and sexual assault. In 2010, he was interviewed for allegedly committing sexual assault on a cognitively impaired woman. The same year, he approached young children in Walmart, and pestered female greeters and he twice attended a circus against explicit prohibition from his probation officer. The court additionally relied on Dr. D'Orazio's opinion which specifically noted Didier "will have serious difficulty controlling his sexual behavior if he is discharged from the hospital at this time."

In the Matter of Lawrence Didier, ¶8.

The Court noted several examples that showed that Didier would have serious difficulty controlling his behavior:

The district court found Didier's inability to control his behavior persists. The court noted while Didier did not have any formal write-ups in the current review period, his inappropriate behavior evidences his inability to control his behavior, including his inability to take responsibility for his actions, creating excuses, lack of motivation for completion, and lack of ability to effectively participate in treatment. The court cited numerous examples showing Didier's inability to control his behavior. Didier gets angry and leaves the day room, pouts and slams doors when things do not go his way. Didier failed to complete homework assignments, gave superficial answers to questions, copied answers from others, and strayed off topic. Didier remained uncommitted to his relapse plan, writing down answers regardless of whether they fit. He is stagnant in progress toward treatment goals. His therapist believed this was due to his lack of motivation.

On one occasion, in the current review cycle, Didier traded notebooks with a peer, receiving a verbal warning that such conduct was against the rules. When confronted about inappropriate behavior or possible rule violations, he refused to accept responsibility. Like Voisine, review of the record reflects “more than just lack of progress, it showed a lack of participation.” 2018 ND 181, ¶ 21, 915 N.W.2d 647. Taken together, both Didier's past and present conduct, the court's finding Didier has serious difficulty controlling his behavior is not clearly erroneous and is supported by clear and convincing evidence.

¶40. The Supreme Court of North Dakota has held that the district court may draw a negative inference from a respondent's failure to call its expert witness to testify at the discharge hearing. In *In re E.W.F.*, 2008 ND 130, ¶ 16, 751 N.W.2d 686, the Court stated:

E.W.F. did exercise his right to an independent psychological evaluation. E.W.F. did not, however, call the independent psychologist to testify at the discharge hearing. The district court noted E.W.F.'s failure to call the evaluating psychologist, stating in its opinion and order denying E.W.F.'s petition for discharge that it found clear and convincing evidence partly because:

[The State] presented evidence of [E.W.F.]'s individual assessments and [E.W.F.]'s individual behaviors. The *691 State's evidence was unrebutted (and really unchallenged in the main as [E.W.F.] chose not to offer any expert opinion from his expert, Dr. Gilbertson). [E.W.F.]'s argument is without merit. The State has met its burden as to the third prong of the [sexually dangerous individual] definition.

It was not improper for the district court to draw a negative inference from E.W.F.'s failure to call his independent expert psychologist and to use the negative inference in determining whether there was clear and convincing evidence of E.W.F.'s likelihood of engaging in further acts of sexually predatory conduct. See *First Nat'l Bank of Belfield v. Burich*, 367 N.W.2d 148, 152 (N.D.1985) (citation omitted) (explaining that in a civil

proceeding, a “[party]’s failure to offer evidence refuting or otherwise explaining [the opposing party’s witness]’s testimony warrants the inference that [the opposing party’s witness]’s statements were true and correct”).

In re E.W.F., ¶ 16.

¶ 41. Argument

¶ 42. The District Court properly found that Didier has serious difficulty controlling his behavior.

¶43. Didier continues in the same pattern of behavior that shows that he would have serious difficulty controlling his behavior. When comparing Didier’s behavior in the current review year to the previous review year, the evidence shows that Didier’s behaviour in fact became worse in the current review year. Despite noting that Didier did not have any formal write-ups in the previous review year, the Supreme Court nevertheless affirmed the district court’s order denying discharge mainly because of Didier’s refusal to accept responsibility, lack of progress and lack of participation. *In the Matter of Lawrence Didier*, ¶ 9.

¶44. In the current review year, Didier still continued to show serious difficulty controlling his behavior: he got 12 negative write-ups, continued refusing to take responsibility, got demoted from level 2 to level 1, failed to complete assignments, struggled with applying treatment concepts involving taking accountability, impulsivity, storming out of groups and arguing with peers. T 22, 37, 23-24.

¶45. Appellant downplays the numerous incidents where Didier was being antagonistic towards peers, yelling at a peer, and calling him a freak, storming into his room

and when Staff asked him not to slam his door, he ignored staff and slammed it twice, getting into arguments with peers again. *See Brief of Appellant*, ¶ 10, T 28-29. Dr. D’Orazio however testified that these incidents show Didier’s difficulty in managing his anger. T. 28-29. She further testified that Didier has impulse control disorder, and she linked that disorder to Didier’s psychopathy and antisocial personality traits. T 45.

¶46. Didier’s serious difficulty controlling his behavior is also shown by his frequent troubles with female staff. Dr. D’Orazio expressed concern about Didier telling female staff that their shoes are untied so that they will lean over and he can look at their breasts. T 24-25. Didier also touched female staff, moved the hair of someone's face and tries to look down the tops of the shirts of female staff to which Dr. D'Orazio, testified that “[Didier] doesn't connect, and he continues to engage in that behavior; that's another example of having difficulty understanding and applying the concepts the treatment program is working on with him". T 77.

¶47. Appellant also failed to mention in his brief that Didier intentionally removed his GPS monitoring device. *See Brief of Appellant*, T 29. This was of particular concern for Dr. D’Orazio because Didier knew that the GPS monitoring was required in the community as a way of monitoring individuals, yet Didier intentionally removed it. T 29.

¶48. Putting these together, Dr D’Orazio testified that Didier’s ongoing difficulty in appreciating the wrongfulness of his behavior despite the sanctions, leads him to

re-offend even while on probation, and this persistence in re-offending shows “deficiency in controlling one’s behavior from having been aware of the outcomes.” T 45.

¶49. Didier simply continues to behave without forethought especially considering the harm caused to victims which goes to show serious difficulty in controlling his behavior. Despite the knowledge that he is being watched very closely, and knowing that the results of his actions could determine not only whether he will remain in Level 1 or level 2, but also his eventual discharge, yet Didier continued to accrue 12 negative write-ups because he could not control himself.

¶50. Finally, Dr. D’Orazio linked Didier’s mental disorders to his serious difficulty in controlling his behavior. According to Dr. D’Orazio, Didier’s historical pedophilia gives him strong urges towards children and other vulnerable individuals, and when Didier is faced with his high level of sexual arousal, he can’t suppress his sexual interests and that disorder facilitates his motivation for sexually offending, and “impairs his ability to control his urges.” T 44-45.

¶ 51. The District Court properly took all legal presumptions by Dr Bensons’ failure to appear.

¶52. Didier had the opportunity to rebut Dr. D’orazio’s testimony, but failed to do so, and the District Court noted Didier’s failure. Index # 163, ¶ 4. Just like in *In re E.W.F.*, Didier exercised his right to an independent psychological evaluation, and was appointed an expert, Dr. Benson at the expense of the State but he chose not to offer any expert opinion from Dr. Benson. *See In re E.W.F.*, ¶ 16. The State

however called its expert, Dr. D’Orazio to testify, and also offered Dr. D’Orazio’s report as evidence.

¶53. By failing to call his expert Dr. Benson or offer Dr. Benson’s report as evidence, the State’s evidence remained unrebutted. Didier’s argument is therefore without merit, making it proper for the District Court to draw a negative inference from Didier’s failure to call Dr. Benson and to use the negative inference in determining whether there was clear and convincing evidence of Didier’s likelihood of engaging in further acts of sexual predatory conduct. *See In re E.W.F.*, ¶ 16, Index # 163, ¶ 4.

¶ 54. Conclusion

¶55. Taken as a whole, Didier's past and present conduct shows serious difficulty controlling his behavior, and that sets him apart from the dangerous by typical recidivist in a criminal case.

¶56. The State asks the Court to affirm the order denying the petition for discharge from civil commitment as a sexually dangerous individual.

Dated: December 11, 2020.

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¶57. Oral Argument Requested

¶58. Oral argument has been requested to clarify Appellee's written arguments on their merits.

¶59. Certificate of Compliance

¶60. The "Brief of Plaintiff-Appellee State of North Dakota," filed on December 11, 2020, by the attorney for the Appellee, Assistant State's Attorney Joseph K. Nwoga, complies with the 38 page limit in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The "Brief of Plaintiff-Appellee State of North Dakota" is 22 pages.

Dated: December 11, 2020.

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¶61. Certificate of Service

¶62. On December 11, 2020, the Appellee's Brief, Oral Argument Requested, and Certificate of Compliance, were served by e-mail to the attorney for the Appellant, Tyler Morrow, at tyler@kpmwlaw.com and his E-service email address as listed

on the North Dakota Supreme Court website: service@kpmwlaw.com

¶63. On December 11, 2020, the Appellee's Brief, Oral Argument Requested, and Certificate of Compliance, were filed electronically with the Clerk of the North Dakota Supreme Court via the Supreme Court portal.

December 11, 2020.

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