

IN THE SUPREME COURT OF NORTH DAKOTA

In the Matter of J.B.)	Supreme Court File No.
-----)	#20200238
Kathleen K. Murray, State's Attorney,)	
Petitioner/Appellee)	Wells County Court File No.
)	#52-05-R-00002
v.)	
)	APPELLANT'S BRIEF
J.B.,)	
Respondent/Appellant)	

**Appeal from the Memorandum Decision and Order of Commitment entered
September 3, 2020 in Wells County District Court, Southeast Judicial District,
North Dakota the Honorable James D. Hovey presiding.**

**APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED**

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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

Law.....¶ 7

Argument.....¶ 15

Conclusion.....¶ 25

TABLE OF AUTHORITIES

CASES

Morrison v. Olson, 487 U.S. 654, 693-94 (1988).....¶ 11

In re Rubey, 2012 ND 133, 818 N.W.2d 731.....¶ 11, 20

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60.....¶ 12, 25

State v. Morris, 331 N.W.2d 48, 58 (N.D. 1983).....¶ 14

State v. Rippley, 319 N.W.2d 129, 134 (N.D. 1982).....¶ 14

United States v. Herrera, 584 F.2d 1137 (2d Cir. 1978).....¶ 14

STATUTES

N.D.C.C. § 25-03.3.....Passim

N.D.C.C. § 25-03.3-19.....¶ 1

N.D.C.C. § 25-03.3-24.....¶2, 4, 7-10, 15, 17-19, 23, 25

N.D.C.C. § 25-03.3-18.....¶ 4, 6

N.D.C.C. § 25-03.3-01(8).....¶ 4,6

N.D.C.C. § 25-03.3-17.....¶ 7, 8, 17

N.D.C.C. § 25-03.3-02.....¶ 7, 10, 17, 19

N.D.C.C. § 1-02-20.....¶ 13, 23

CONSTITUTION

Article VI Section
8..... ¶10

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 Wells County District Court issued a decision ordering J.B. remain civilly committed on September 3, 2020. J.B. timely filed this appeal on September 9, 2020.

ISSUE PRESENTED FOR REVIEW

- I. [¶ 2] **Whether a non-party unelected member of the executive branch having authority over the judicial branch pursuant to N.D.C.C. §25-03.3-24 is Constitutional.**

STATEMENT OF THE CASE

[¶ 3] Petitioner filed a petition for civil commitment as a sexually dangerous individual (“SDI”) on January 19, 2005. After a hearing, J.B. was initially committed to the North Dakota State Hospital (“NDSH”) as an SDI on September 12, 2005.

[¶ 4] J.B. 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 June 29, 2020. Following the hearing J.B. petitioned the district court for community placement pursuant to N.D.C.C. §25-03.3-24. The Wells County District Court determined that the state had established by clear and convincing evidence that J.B. remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied J.B.’s petition for community placement on September 3, 2020. J.B. appealed that decision on September 9, 2020.

STATEMENT OF THE FACTS

[¶ 5] Respondent J ■ B ■ (“B ■”) was committed as a sexually dangerous individual pursuant to NDCC §25-03.3 on September 12, 2005. On June 29, 2020, a review hearing was held to determine the present-day status of this matter. The state called Dr. Deirdre D’Orazio (“D’Orazio”) to testify that B ■ remained a sexually dangerous individual and B ■ was not ready for Post-Commitment Community Placement. B ■ called Dr. Stacey Benson (“Benson”) who testified that B ■ remained a sexually dangerous individual, but that B ■ was ready for Post-Commitment Community Placement.

[¶ 6] The Wells County District Court determined that the state had established by clear and convincing evidence that J.B. remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied J.B.’s petition for community placement on September 3, 2020.

LAW

[¶7] Three sections of the statute govern the release and/or commitment of sexually dangerous individuals. N.D.C.C. §25-03.3-17 governs when the executive director determines an individual no longer meets criteria as a sexually dangerous individual and petitions the court for release. N.D.C.C. §25-03.3-18 controls when the state and respondent disagree as to whether respondent presently meets the definition of a sexually dangerous individual and an adversarial hearing is conducted to determine whether the state can provide clear and convincing evidence that the respondent presently meets criteria. Finally, N.D.C.C. §25-03.3-24 is used when a respondent still meets criteria as a sexually dangerous individual but, as constructed, the executive director petitions the district court for community placement. Each section makes clear that the **final determination** as to the outcome of the case is decided by the District Court **Judge**. Furthermore, N.D.C.C. §25-03.3-02 grants the district court with original jurisdiction over these matters.

[¶8] J.B. offers that N.D.C.C. §25-03.3-17 does not apply on this appeal as the executive director has not petitioned for release. N.D.C.C. §25-03.3-18 applies, however, J.B. concedes the state has met its burden of providing clear and convincing evidence that J.B. remains a sexually dangerous individual. However, that does not end the analysis. An available remedy under the statute is community placement. Thus, an analysis of N.D.C.C. §25-03.3-24 is required.

[¶9] N.D.C.C. §25-03.3-24 authorizes in pertinent part, "...The executive director may place a committed individual in the community for treatment on an outpatient basis only pursuant to a court order. The executive director may petition the court at any time

for community placement...”

[¶10] The North Dakota Constitution Article VI establishes the Judicial branch in the State of North Dakota. For purposes of this brief, J.B. refers to Section 8, which reads, “The district court shall have original jurisdiction of all causes...The district court shall have authority to issue such writs as are necessary to the proper exercise of its jurisdiction.” This section along with N.D.C.C. §25-03.3-02 give the district court the legal authority to issue any writs necessary to exercise its jurisdiction, which includes community placement pursuant to N.D.C.C. §25-03.3-24.

[¶11] While the Constitution contains no express separation-of-powers clause, the United States Supreme Court has repeatedly “reaffirmed the importance in our constitutional scheme of the separation of government powers into the three coordinate branches.” *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988). Additionally, this Court has previously incorporated the *Crane* standard into these proceedings, noting “substantive due process requires proof that the individual facing commitment has serious difficulty controlling his behavior.” *In re Rubey*, 2012 ND 133, 818 N.W.2d 731.

[¶12] For over 200 years, the United States Supreme Court has recognized that the courts must obey the constitution rather than the law-making department of the government. *Marbury* also recognized that the Constitution is a superior unchangeable rule of action and governs the legislatures as well as courts, executives, and it shall not be altered by acts pleasing to the passing whims of legislative assemblies. *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60. *Marbury* further discussed the court’s role in this analysis, “...This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature,

the Constitution, and not such ordinary act, must govern the case to which they both apply."

[¶13] In N.D.C.C. § 1-02-20, the North Dakota Legislature has created a severability clause which addresses this role of the court, "In the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section, or part of such title, but is confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment has been rendered."

[¶14] A generally accepted principle of constitutional law is that a party may challenge the constitutionality of a statute only as applied to him. *State v. Morris*, 331 N.W.2d 48, 58 (N.D. 1983), citing *State v. Rippley*, 319 N.W.2d 129, 134 (N.D. 1982). He must show that the allegedly unconstitutional feature of the statute injures him. *Morris*, supra; see *United States v. Herrera*, 584 F.2d 1137 (2d Cir. 1978).

ARGUMENT

I. A non-party to the action unelected member of the executive branch having authority over the judicial branch under N.D.C.C. §25-03.3-24 is Unconstitutional.

[¶15] Based upon the above law, J.B. now argues that as constructed, N.D.C.C. §25-03.3-24 is Unconstitutional in that it places a non-party to the action unelected member of the executive in charge of the Judiciary and provides the state with a remedy not available to J.B., and that the remedy for this error is to allow any party to petition for community commitment.

[¶16] To address standing, as noted above, J.B. must show that the

unconstitutional feature of the statute injures him. This is done in two ways. First, the statute affords the state with an argument in these proceedings which is unavailable to J.B. Secondly, the application of the statute makes it so that J.B. cannot be placed on community commitment, depriving him of access to the world. Testimony by D’Orazio and Benson is in conflict as to this specific point. J.B. has standing.

[¶17] N.D.C.C. §25-03.3 provides the district court with three possible decisions to make in these matters, as sections 17, 18, and 24 all require an order issued by the district court. Furthermore, N.D.C.C. §25-03.3-02 grants district courts original jurisdiction over these matters. As the North Dakota Constitution addresses, one of the plenary powers afforded district courts is the ability to issue any writs deemed necessary to execute the court’s jurisdiction. Both the statute and the North Dakota Constitution grant district courts with the ability to order community placement.

[¶18] By requiring that the executive director of the North Dakota Department of Human Services, a non-party to this action, first petition the district court under N.D.C.C. §25-03.3-24, the North Dakota Legislature violated both the Separation of Powers Doctrine and the Due Process Rights of J.B.

[¶19] In regard to the Separation of Powers Doctrine, the law as constructed requires district courts to serve at the whim of a non-elected member of the executive in issuing decisions in these matters under N.D.C.C. §25-03.3-24, even though the Constitution authorizes these same judges to issue whatever writs are deemed necessary in the exercise of their jurisdiction, which is granted in N.D.C.C. §25-03.3-02. This places the non-elected executive director, who is not a party to the action, in a position of authority over the judges in clear violation of the Separation of Powers Doctrine.

[¶20] Both *Crane* and *Rubey* address substantive due process rights in these matters. This is important in that it reflects both the United States Supreme Court's and this Court's position that fundamental rights and fairness must be addressed in these matters. Furthermore, procedural due rights must be addressed.

[¶21] This case shines a bright light on why these due process rights, both procedural and substantive, must be addressed. Benson, using her training, education, and experience in her field, came to the professional conclusion that J.B. is ready for community placement, whereas D'Orazio determined J.B. was not ready. As currently constructed, the statute eliminates Benson's opinion, and does not afford J.B. the right to argue the professional opinion determined by his appointed independent examiner. Had the opinions switched (D'Orazio said he is ready, and Benson said he is not), J.B. would currently be on community placement; a clear imbalance in these matters.

[¶22] Giving the state this advantage is clearly against fundamental fairness and procedural due process. The state is free to argue for any of the three means by which someone may be released and/or committed under the statute, whereas J.B., and any respondent in these matters, is only able to argue one possible outcome to the court, which, as noted above, has the ability to issue a decision under any of the three sections of N.D.C.C. §25-03.3. Only the state, however, can argue for sections 17 and 24 as the statute is currently constructed. This does not place the two parties in an equal position and violates the due process rights of J.B.

[¶23] N.D.C.C. § 1-02-20 authorizes this Court to address this violation. The remedy proposed by J.B. is to do the following to N.D.C.C. § 25-03.3-24, "The executive director may place a committed individual in the community for treatment on an

outpatient basis only pursuant to a court order. ~~The executive director~~ Either party may petition the court at any time for community placement....” This severs the part of the statute which is Unconstitutional while keeping intact the remainder of the statute. Under this interpretation, J.B. can argue for a remedy afforded the district court by both the Constitution and the statute, and a non-elected non-party member of the executive branch is no longer in a position of authority over district courts.

[¶24] The reports and testimony of both D’Orazio and Benson establish that J.B. has reached a high point of his time at the North Dakota State Hospital. He is currently on both the highest level of treatment and lowest level of monitoring, being placed at the CTC House, which is a separate facility than the hospital, but still on hospital grounds. Both doctors found J.B. is very active in treatment. D’Orazio testified the best pathway would be treatment completion at the CTC level and then graduate to community placement but could not say what J.B. had left to complete in treatment. Benson testified J.B. has spent more time at the CTC house than she has seen in her previous 250+ evaluations. He has clearly reached a point where the next logic step is to allow him into the community under supervision.

CONCLUSION

[¶25] Based upon the above facts, law, and argument, J.B. asks this Court to find that N.D.C.C. § 25-03.3-24 as currently constructed is Unconstitutional in that it violates the Separation of Powers Doctrine and Due Process rights of J.B. The North Dakota Constitution and N.D.C.C. § 25-03.3-24 both authorize district courts to place respondents on community placement, but the statute requires the executive branch to first grant permission to the district court. As *Marbury* decided over 200 years ago, the

Constitution, and not the statute, must decide these matters. The Constitution authorizes district courts to issue any writs necessary to exercise their jurisdiction.

[¶26] Additionally, if this Court finds the statute as constructed to be Unconstitutional, J.B. asks that this Court remand back to the district court to determine if J.B. has met his statutorily required evidentiary burden to show that he is ready for community placement. Evidence was provided at the review hearing, however, because the district court determined the statute as constructed is Constitutional, it did not address whether J.B. had proven by a preponderance of the evidence he was ready for community placement.

Respectfully submitted this 19th day of January, 2021.

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)	CERTIFICATE OF
J.B.,)	COMPLIANCE
Appellant)	

[¶ 1] This Appellee’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.

Dated: January 19, 2021.

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Appellant)	

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
Appellant's Appendix
Certificate of Compliance

Electronically through the Court Electronic Filing System to:

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J.B.,)	SERVICE
Appellant.)	

[1] 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-revised

Electronically through the Court Electronic Filing System to:

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And upon appellant at his last known address by placing a true and correct copy of said documents in a sealed envelope with USPS:

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