MENTAL HEALTH—SEX OFFENDERS: THE NORTH DAKOTA SUPREME COURT CONTEMPLATES THE USE OF SELF-INCRIMINATING STATEMENTS WHILE DENYING A PETITION FOR DISCHARGE *In re G.R.H.*, 2008 ND 222, 758 N.W.2d 719

ABSTRACT

In *In re G.R.H.*, the North Dakota Supreme Court affirmed the trial court's order rejecting G.R.H.'s petition for discharge from commitment as a sexually dangerous individual. G.R.H.'s previous criminal history, his confessions during treatment, his diagnosis of anti-social personality disorder and sexual attraction to adolescents, and his lack of self-control satisfied the definition of a sexually dangerous individual. G.R.H. disclosed he had contact with previously unknown adolescent victims during a homework exercise and polygraph at a treatment center. In her concurrence, Justice Kapsner labeled these disclosures as self-incriminating statements. Distinguishing *In re G.R.H.* from *Allen v. Illinois*, Justice Kapsner explained that North Dakota's sexually dangerous individual commitment jurisprudence allows a trial court to consider both refusal to disclose and disclosure of additional sexually predatory conduct as evidence of the need to continue commitment. Additionally, North Dakota law currently prohibits the use of final determinations of civil commitments as evidence in subsequent criminal proceedings, but North Dakota law is silent as to the use of evidence considered in order to determine whether someone is a sexually dangerous individual. *In re G.R.H.* has fueled challenges to civil commitments of sexually dangerous individuals based upon the use of self-incriminating statements. The facts of *In re G.R.H.* reveal the need to amend the commitment statutes to limit the use of self-incriminating statements disclosed during treatment to the hearing for determination of a sexually dangerous individual and prohibit the use of those statements in subsequent criminal proceedings.

I. FACTS

In 1994, G.R.H. was convicted of felony gross sexual imposition for having consensual sex with a female five years his junior.[1] Only nineteen at the time of the offense, G.R.H. spent three years in prison before being

1. Brief of Respondent-Appellant at 3, *In re* G.R.H., 2006 ND 56, 711 N.W.2d 587 (No. 20040287). G.R.H. was sentenced to ten years in state prison for this conviction. *In re* G.R.H. (*G.R.H. I*), 2006 ND 56, ¶ 2, 711 N.W.2d 587, 589.

paroled and put on probation in 1997.[2] Within two years of his parole, G.R.H. was convicted of a crime on three more occasions.[3] The most serious of the three convictions, felony corruption of a minor, was for sexual contact with a sixteen-year-old female.[4] G.R.H. served five years in jail as a result of the new convictions and the revocation of his parole for the 1994 conviction.[5]

Prior to G.R.H.'s scheduled release in 2004, the State filed a petition to civilly commit the twenty-nine-year-old G.R.H. as a sexually dangerous individual.[6] The district court found G.R.H. to be a sexually dangerous individual, and the court committed him to a treatment facility.[7] G.R.H. brought an appeal of the district court's order for commitment before the North Dakota Supreme Court, arguing there was insufficient evidence to justify commitment as a sexually dangerous person.[8] G.R.H. also argued the commitment violated constitutional due process and double jeopardy provisions.[9] However, the North Dakota Supreme Court affirmed G.R.H.'s commitment.[10]

G.R.H. first requested to be discharged from commitment in August 2005, but no hearing was held because the outcome of the appeal of his initial commitment was still pending.[11] His second request for discharge

---

2. Brief of Petitioner-Appellee at 1, *In re* G.R.H., 2006 ND 56, 711 N.W.2d 587 (No. 20040287). G.R.H.'s parole was revoked in 1998, and he served ninety days in jail for failing to notify his probation officer of his change of address, ceasing sex offender treatment, and failing to register as a sex offender. *Id.* at 1-2.

3. *Id.* at 2. The convictions were misdemeanor delivery of alcohol to a minor, misdemeanor failure to register as a sex offender, and felony corruption or solicitation of a minor. *Id.*

4. Brief of Respondent-Appellant, *supra* note 1, at 3. G.R.H. was twenty-four years old when he had sexual contact, involving oral sex, with a minor. *Id.*

5. Brief of Petitioner-Appellee, *supra* note 2, at 2-3.

6. *G.R.H. I*, ¶ 3, 711 N.W.2d at 589. North Dakota defines "sexually dangerous individual" as:

> an 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. It is a rebuttable presumption that sexually predatory conduct creates a danger to the physical or mental health or safety of the victim of the conduct. For these purposes, mental retardation is not a sexual disorder, personality disorder, or other mental disorder or dysfunction.

N.D. CENT. CODE § 25-03.3-03 (2008). *See* § 25-03.3-03 (providing statutory basis for a petition to commit a sexually dangerous individual). If such a petition is successful, the individual is committed to a treatment facility. § 25-03.3-13.

7. *G.R.H. I*, ¶ 3, 711 N.W.2d at 589-90.

8. *Id.* ¶ 7, 711 N.W.2d at 590.

9. *Id.* ¶ 10, 711 N.W.2d at 592.

10. *Id.* ¶ 28, 711 N.W.2d at 597.

11. *In re* G.R.H. (*G.R.H. II*), 2008 ND 222, ¶ 2, 758 N.W.2d 719, 721. The committed sexually dangerous individual is notified at least once a year that he is entitled to a discharge

was denied in 2006.[12] Another request was made in 2007, and the district court scheduled a hearing on the matter in the spring of 2008.[13] Prior to the hearing, two experts evaluated G.R.H., as well as his records, and came to opposite conclusions as to whether G.R.H. remained a sexually dangerous individual.[14] During the evaluations, the State's expert was made aware of statements G.R.H. made during treatment.[15] These statements revealed sexual contact with multiple additional adolescent victims after G.R.H.'s first release from prison.[16] Agreeing with the State's evaluator, the district court determined G.R.H. remained a sexually dangerous individual.[17]

G.R.H. appealed the district court's order, this time arguing the State failed to provide sufficient evidence satisfying the three-element definition of "sexually dangerous individual" under North Dakota statute.[18] Affirming the district court, a majority of the North Dakota Supreme Court held the State met its burden of proof to show G.R.H. remained a sexually dangerous individual and, therefore, the court denied the petition for discharge.[19] Justice Kapsner concurred but wrote separately to explain G.R.H. could have challenged the commitment arguing it was punitive in effect.[20] But, because G.R.H. failed to raise this issue, the court affirmed the district court's order.[21]

---

hearing and may file a petition for discharge with the court that committed him. § 25-03.3-18 (2008).

12. *G.R.H. II*, ¶ 2, 758 N.W.2d at 721.

13. *Id.*

14. *Id.* ¶ 3, 758 N.W.2d at 721. The State's evaluator concluded G.R.H. remained a sexually dangerous individual, while the independent evaluator determined G.R.H. was not a sexually dangerous person. *Id.* ¶¶ 3-4, 758 N.W.2d at 721.

15. *Id.* ¶ 8, 758 N.W.2d at 722.

16. *Id.* "In addition to the offenses for which he had been convicted, G.R.H. has admitted to having had sexual contact with a 13- and a 14-year-old girl when he was 19; a 17-year-old girl when he was 24; a 13-, a 14-, a 16-, and two 17-year-old girls when he was 25; and a 16-year-old girl when he was 27." *Id.*

17. *Id.* ¶ 5, 758 N.W.2d at 721.

18. *Id.* ¶¶ 8, 12, 758 N.W.2d at 722-23. On petition for discharge, the State must provide clear and convincing evidence that the individual:

> [1] engaged in sexually predatory conduct . . . [2] has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction [3] 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.

N.D. CENT. CODE § 25-03.3-01(8) (2008).

19. *G.R.H. II*, ¶¶ 11, 13-14, 758 N.W.2d at 723-24.

20. *Id.* ¶ 26, 758 N.W.2d at 727 (Kapsner, J., concurring).

21. *Id.* ¶ 27, 758 N.W.2d at 727.

II. LEGAL BACKGROUND

Liberty is one of the basic rights secured from erroneous deprivation by the United States Constitution.[22] Liberty has long been held to include "freedom from physical restraint," although this protection is not absolute.[23] In fact, incarceration has become the dominant form of punishment for criminals.[24] In the interest of liberty, certain procedural safeguards are available to criminal defendants when incarceration is at stake.[25] Confinement has also been used in civil matters as a means to protect the safety of the public from people who are unable to control their actions.[26] The United States Supreme Court, however, has struggled with deciding what procedural safeguards should be available to those who are confined under civil law.[27] This section focuses on how the United States Supreme Court has addressed challenges to civil commitment statutes and examines North Dakota's approach to the civil commitment of sexually dangerous individuals in light of federal precedent.

A. THE CIVIL AND CRIMINAL DIVIDE

An explanation of the purpose of criminal law and civil law is sometimes used in order to distinguish the two.[28] Criminal law is meant to punish defendants who have committed an offense against society.[29] Civil law, on the other hand, is meant to make a person or entity whole for damage sustained as a result of actions originated by the adverse party.[30] The divide between the two types of law may be obvious in many situations, but it becomes less clear when the proceedings are more of a hybrid.[31] Commitment of sexually dangerous individuals often encompasses

22. U.S. CONST. amends. V, XIV.

23. Kansas v. Hendricks, 521 U.S. 346, 356 (1997).

24. Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 297 (1974).

25. Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 686 (1999). *See generally* U.S. CONST. amends. V-VI, VIII (providing protections such as grand jury indictment, prohibition of double jeopardy, right against self-incrimination, due process, speedy trial, jury trial, right to confrontation, assistance of counsel, and prohibition of cruel and unusual punishment).

26. *Hendricks*, 521 U.S. at 357.

27. *See generally* Allen v. Illinois, 478 U.S. 364, 374 (1986) (deciding whether the Fifth Amendment right prohibiting the use of self-incriminating statements applies to civil commitment); *Hendricks*, 521 U.S. at 369-71 (deciding whether prohibition against double jeopardy or the *Ex Post Facto* Clause applies to civil commitments).

28. Klein, *supra* note 25, at 679-80.

29. *Id*. at 679.

30. *Id*. at 679-80.

31. *Id*. at 680.

confinement, a feature normally associated with criminal sanctions.[32] Yet, commitment of the sexually dangerous is considered civil because it allows the State to take care of individuals that cannot take care of themselves.[33]

1. *Non-Punitive Purpose*

Beginning in *Allen v. Illinois*,[34] the United States Supreme Court examined the hybrid nature of civil commitment statutes while remaining cognizant of the purpose of those laws.[35] In *Allen*, the trial court ordered the petitioner to submit to a psychiatric evaluation, and, over the petitioner's objection, the psychiatrists testified to their opinions that the petitioner was likely to commit sexual offenses in the future.[36] The trial court declared the petitioner a sexually dangerous person after finding the petitioner's actions indicated he was likely to commit sex offenses.[37] On appeal, the petitioner argued the Illinois law relating to civil commitment of sexually dangerous persons was criminal in nature; thus, the State's use of self-incriminating statements violated the petitioner's Fifth Amendment rights.[38] The United States Supreme Court held the Illinois law was not criminal, so the petitioner was not entitled to protection against self-incrimination.[39]

While the Supreme Court determined the Illinois law was civil rather than criminal, the Court explained a civil label was not dispositive.[40] Instead, the Court determined it was necessary to evaluate the "purpose or effect" of the law in order to determine whether the law was so punitive as to "negate the State's intention" that the law be civil.[41] Using this standard, the Court held the purpose of commitment was not to punish, but rather to provide treatment for the offenders only as long as they needed it.[42] The

32. *Id*.

33. Aman Ahluwalia, *Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 489, 492 (2006).

34. 478 U.S. 364 (1986).

35. *Allen*, 478 U.S. at 368-69. While this was the first examination of civil commitment of the sexually dangerous, the Supreme Court previously addressed the standard of proof necessary for civil commitment of the mentally ill. *See* Addington v. Texas, 441 U.S. 418, 429-33 (1979) (distinguishing traditional civil commitment proceedings from criminal proceedings and holding the standard of proof for traditional civil commitment proceedings was "clear and convincing").

36. *Allen*, 478 U.S. at 366. The petitioner's statements to the psychiatrists were not admissible, but the psychiatric opinions based upon the statements were admissible. *Id.*

37. *Id.* at 366-67.

38. *Id.* at 365-66. The Fifth Amendment provides no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

39. *Allen*, 478 U.S. at 375.

40. *Id*. at 369.

41. *Id*. (quoting United States v. Ward, 448 U.S. 242, 248-49 (1986)).

42. *Id*. at 369-70.

Court found important the fact the Illinois statute at issue expressly stated the law was "civil in nature."[43] The Court also reasoned the law was not punitive in effect because it allowed release upon a showing that the individual was no longer dangerous and because the law disavowed the main goals of punishment: retribution and deterrence.[44] Accordingly, the Court held the condition of the offender's confinement was not punitive; therefore, the State's intention was not negated.[45]

In *Kansas v. Hendricks*,[46] the Supreme Court reaffirmed its purpose approach to laws related to civil commitment of the sexually dangerous.[47] In *Hendricks*, a Kansas law for the civil commitment of the sexually dangerous went into effect shortly before Hendricks, an individual with a history of molesting children, was to be released from prison.[48] Hendricks was committed after a jury found beyond a reasonable doubt that Hendricks was a sexually violent predator.[49] The Kansas Supreme Court reversed Hendricks' commitment by ruling the state law violated substantive due process because it did not require a finding of mental illness.[50] The United States Supreme Court granted the State of Kansas' petition for certiorari and Hendricks' cross petition.[51] Hendricks' cross-petition argued his forced confinement was punishment, the result of a criminal proceeding, and therefore the Constitution's prohibition against double jeopardy and *ex post facto* laws applied.[52]

Looking to the purpose of the statute, the Supreme Court decided the statute was non-punitive because it was neither retributive nor a deterrent, the two primary objectives of punishment.[53] Instead, the purpose of the statute was to separate the offenders from the general public and to provide the offenders with treatment.[54] The Court also clarified that even if the committed individual was untreatable, a statute should not be ruled punitive

43. *Id*. at 368.
44. *Id*. at 369-70.
45. *Id*. at 374.
46. 521 U.S. 346 (1997).
47. *Hendricks*, 521 U.S. at 368-69.
48. *Id.* at 350.
49. *Id.* at 355-56.
50. *Id*. at 356.
51. *Id*. at 350.
52. *Id*. at 360-61.
53. *Id*. at 361-62. The statute was not retributive because a criminal conviction is not a pre-requisite for commitment, nor is it necessary to prove an element of intent, and it was not a deterrent because committed individuals suffer from a mental disorder that makes them unable to control their actions. *Id*. at 362-63. The Court's finding that the statute was non-punitive "remove[d] an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims." *Id*. at 369.
54. *Id*. at 365.

simply for confining the individual for the safety of the public.[55] Explaining the legitimate use of confinement in the context of civil law, the Court held that Kansas' requirement of a "mental abnormality" or "personality disorder," coupled with proof of future dangerousness, satisfied the need to limit civil commitment to those unable to control their dangerous behavior.[56]

2. *Serious Difficulty in Controlling Behavior*

In *Kansas v. Crane*,[57] the Supreme Court again addressed the requirements of civil commitment of the sexually dangerous, this time analyzing substantive due process.[58] In *Crane*, the State of Kansas sought to civilly commit Crane, a convicted sexual offender who suffered from exhibitionism and an anti-social personality disorder.[59] While exhibitionism alone would not have been enough to classify Crane as a sexual predator, the combination of his disorders fell within the requirements of the Kansas statute.[60] Crane petitioned the trial court for summary judgment, arguing both that the State was statutorily required to prove he was likely to commit more offenses and that he completely lacked control of his behavior.[61] After the trial court rejected Crane's request, a jury found beyond a reasonable doubt that Crane was a sexual predator; Crane was thus committed.[62]

On appeal of Crane's commitment as a sexually violent predator, the Kansas Supreme Court held the trial court failed to make a finding that Crane was completely unable to control his behavior, as required under *Hendricks*.[63] The Kansas Supreme Court had construed *Hendricks*' language of "unable to control [his] dangerousness" far too strictly.[64] Disagreeing with the state supreme court's reading of *Hendricks*, the United States Supreme Court held that a total lack of control of one's behavior was not necessary for civil commitment.[65] Such a requirement was unrealistic and would risk disallowing civil commitment of the most "highly dan-

55. *Id*. at 366.
56. *Id*. at 356-60.
57. 534 U.S. 407 (2002).
58. *Crane*, 534 U.S. at 409.
59. *Id.* at 411. "The essential feature of Antisocial Personality Disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) 701 (rev. 4th ed. 2000).
60. *Id*. at 416-17 (Scalia, J., dissenting).
61. *Id*. at 417 (Scalia, J., dissenting).
62. *Id.* (Scalia, J., dissenting).
63. *Id*. at 411.
64. *Id*. at 410-11.
65. *Id*. at 413.

gerous persons suffering severe mental abnormalities" because even those people retain some control over their behavior.[66] Instead, a finding of "serious difficulty in controlling behavior" was sufficient to distinguish the civilly committed sexual offender from the typical criminal.[67]

B. NORTH DAKOTA'S COMMITMENT OF THE SEXUALLY DANGEROUS

North Dakota law has, in many ways, incorporated the United States Supreme Court's approach to challenges of civil commitment statutes.[68] In fact, the incorporation began in the first appeal of the civil commitment of a sexually dangerous individual brought before the North Dakota Supreme Court.[69] With subsequent challenges, the North Dakota Supreme Court has made use of United States Supreme Court precedent to develop the legitimacy of commitment of the sexually dangerous under North Dakota law.[70] This section explains how North Dakota has adopted the purpose approach to justify the commitment of sexually dangerous individuals, and how the state has developed the definition of a sexually dangerous individual.

1. *Adoption of the Purpose Approach*

The 1999 case of *In re M.D.*[71] (*M.D. I*) involved an individual who argued his commitment was improper because it violated the double jeopardy prohibition and because there was insufficient evidence to support a finding for commitment.[72] The North Dakota Supreme Court held the state's double jeopardy clause was not violated because the statute was civil and there was sufficient evidence to support the district court's findings for commitment.[73] In doing so, the court adopted the United States Supreme

66. *Id*. at 412.

67. *Id*. at 413.

68. *See infra* Part II.B.1-2 (explaining North Dakota's adoption of the non-punitive purpose approach and defining sexually dangerous individuals in light of the United States Supreme Court's precedent).

69. *In re* M.D. (*M.D. I*), 1999 ND 160, 598 N.W.2d 799. Specifically, this was the first appeal of the commitment of a sexually dangerous individual under North Dakota Century Code chapter 25-03.3. *Id.* ¶ 33, 598 N.W.2d at 806-07.

70. *See In re* R.A.S., 2009 ND 101, ¶ 17, 766 N.W.2d 712, 716 (holding the *Crane* requirement that the individual has a "serious difficulty controlling his behavior" must be shown by clear and convincing evidence); *In re* G.R.H. (*G.R.H. I*), 2006 ND 56, ¶ 18, 711 N.W.2d 587, 594-95 (holding North Dakota's civil commitment statute satisfies the *Crane* substantive due process standard); *M.D. I*, ¶¶ 26-31, 598 N.W.2d at 805-06 (holding the commitment statute was civil rather than criminal; therefore, the appellant's argument that his commitment violated double jeopardy was unfounded).

71. 1999 ND 160, 598 N.W.2d 799.

72. *M.D. I*, ¶¶ 24, 33, 598 N.W.2d at 804, 806-07. M.D. also challenged his commitment by arguing the petition for commitment should have been dismissed because of undue delay and improper public disclosure. *Id.* ¶¶ 11, 19, 598 N.W.2d at 802, 804.

73. *Id*. ¶¶ 31, 39, 598 N.W.2d at 806, 808.

Court's purpose approach and established the standard of review when a finding of civil commitment of the sexually dangerous is challenged.[74]

Noting the similarities between the Kansas and North Dakota statutes, the North Dakota Supreme Court utilized the *Hendricks* analysis to declare the North Dakota statute constitutional.[75] Applying the *Hendricks* reasoning, the court first examined the legislature's intent and held the purpose of the statute was to create a civil law because it closely mirrored the language of the civil commitment of the mentally ill.[76] The double jeopardy clause, therefore, did not apply unless there was clear proof that the application of the statute was so punitive, either in "purpose or effect," that the State's intent to create a civil statute was invalid.[77] The North Dakota Supreme Court determined the statute was not punitive because it gave annual notice of the right to petition for discharge and confined offenders only as long as they were still sexually dangerous individuals.[78] The court held the statute created a civil proceeding and, therefore, was constitutional.[79]

The North Dakota Supreme Court also established the standard of review for an appeal of commitment as a sexually dangerous person.[80] As a case of first impression, the court held the standard of review was "modified clearly erroneous" and "the [district] court's findings of fact [would be affirmed] unless they [were] induced by an erroneous view of the law" or if the court was "firmly convinced [the findings were] not supported by clear and convincing evidence."[81] The court's analysis of the district court's findings focused on whether the presented evidence satisfied the statutory definition of a sexually dangerous individual.[82] Recognizing that clear and convincing evidence was present, the court held the order for M.D.'s commitment was proper.[83]

---

74. *Id.* ¶¶ 31, 34, 598 N.W.2d at 806-07.

75. *Id.* ¶¶ 26-29, 598 N.W.2d at 805-06.

76. *Id.* ¶ 27, 598 N.W.2d at 805.

77. *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

78. *M.D. I*, ¶ 29, 598 N.W.2d 799, 806. M.D.'s argument that the statute was punitive was similar to the argument made and dismissed in *Hendricks*. *Id.* ¶ 29, 598 N.W.2d at 806.

79. *Id.* ¶ 31, 598 N.W.2d at 806.

80. *Id.* ¶ 33, 598 N.W.2d at 806-07.

81. *Id.* ¶ 34, 598 N.W.2d at 807.

82. *Id.* ¶¶ 35-39, 598 N.W.2d 799, 807-08.

83. *Id.* ¶ 39, 598 N.W.2d at 808. Looking at M.D.'s previous conviction of gross sexual imposition, his diagnosis of paraphilia and personality disorder, and his history of grooming his victims, the court found clear and convincing evidence he was a sexually dangerous individual. *Id.* "The essential features of paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving[:] 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting person that occur over a period of at least 6 months." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) 566 (rev. 4th ed. 2000).

2. *Definition of a Sexually Dangerous Individual*

Expanding on the foundation laid in *M.D. I*, a three-element test to classify a person as a "sexually dangerous individual" developed from the statutory definition under North Dakota law.[84] This three-element test has been applied to evaluate the initial commitment as well as a petition for discharge by a previously committed individual.[85] Under the first element, the person must have "engaged in sexually predatory conduct."[86] The second element requires the person to have "a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction."[87] Under the third element, a court must find the disorder makes the person "likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others."[88] This section addresses each of the three elements and discusses the necessity of finding a serious difficulty in controlling behavior.

a. Sexually Predatory Conduct

The definition of sexually predatory conduct encompasses a wide array of generally offensive behavior.[89] The behavior includes engaging in, and attempting to engage in, sexual acts or sexual contact with the victim, as well as forcing the victim to have sexual contact.[90] Predatory conduct is

---

84. *In re* G.R.H. (*G.R.H. I*), 2006 ND 56, ¶ 6, 711 N.W.2d 587, 590; N.D. CENT. CODE § 25-03.3-01(8) (2008). The chapter pertaining to the civil commitment of sexually dangerous individuals, North Dakota Century Code chapter 25-03.3, was enacted in 1997. *See G.R.H. I*, ¶ 17, 711 N.W.2d at 590.

85. *Compare G.R.H. I*, 2006 ND 56, ¶¶ 6-9, 711 N.W.2d 587, 590-91 (applying the three-element test to uphold the petitioner's initial commitment), *with In re* E.W.F., 2008 ND 130, ¶¶ 9-16, 751 N.W.2d 686, 689-91 (applying the three-element test to deny petitioner's request for discharge). The three-element test is utilized to determine who is a sexually dangerous individual, but the test is part of a larger commitment process. *See* Lori Conroy, *Letting in the Light: The Need for Independent Review of Sex Offender Assessments in North Dakota*, 85 N.D. L. REV. 171, 182-83 (2009) (explaining the commitment process from initiation to petition for discharge).

86. *G.R.H. I*, ¶ 6, 711 N.W.2d at 590.

87. *Id.*

88. *Id.*

89. § 25-03.3-01(9)(a)-(b).

90. *Id.* Sexual contact is defined as "any touching of the sexual or other intimate parts of an individual for the purpose of arousing or satisfying sexual or aggressive desires." *Id.* § 25-03.3-01(7). Sexual act is defined as:

> [5] sexual contact between human beings, including contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or the vulva and the vulva; or the use of an object that comes in contact with the victim's anus, vulva, or penis. Sexual contact between the penis and the vulva, or between the penis and the anus, or an object and the anus, vulva, or penis of the victim, occurs upon penetration, however slight. Emission is not required.

Id. § 25-03.3-01(6).

further explained as having sexual contact under various factual circumstances, such as using force or threatening the victim, acting when the victim is impaired or incapacitated, acting when the victim is a minor under fifteen; incest between a parent or guardian and a minor over the age of fifteen is also considered predatory conduct.[91] Reviewing an offender's past criminal convictions is sometimes the starting and stopping point for inquiry into the first element of sexually predatory conduct.[92] Many of those committed as sexually dangerous individuals have a criminal history that easily satisfies the broad definition of the statute, requiring no further analysis.[93] When the first element is disputed, the argument often relates to the factual circumstances of the crime, such as whether the crime was a sexual offense, whether force was used during the crime, or when the conviction was overturned.[94]

---

91. *Id.* § 25-03.3-01(9)(a)-(b). The specific statutory language prohibits sexual contact or sexual acts if:

> (1) The victim is compelled to submit by force or by threat of imminent death, serious bodily injury, or kidnapping directed toward the victim or any human being, or the victim is compelled to submit by any threat that would render an individual of reasonable firmness incapable of resisting;
>
> (2) The victim's power to appraise or control the victim's conduct has been substantially impaired by the administration or employment, without the victim's knowledge, of intoxicants or other means for purposes of preventing resistance;
>
> (3) The actor knows or should have known that the victim is unaware that a sexual act is being committed upon the victim;
>
> (4) The victim is less than fifteen years old;
>
> (5) The actor knows or should have known that the victim has a disability that substantially impairs the victim's understanding of the nature of the sexual act or contact;
>
> (6) The victim is in official custody or detained in a treatment facility, health care facility, correctional facility, or other institution and is under the supervisory authority, disciplinary control, or care of the actor; or
>
> (7) The victim is a minor and the actor is an adult[.]

Id. § 25-03.3-01(9)(a). Sexual contact is specifically included if: "(1) The actor knows or should have known that the contact is offensive to the victim; or (2) The victim is a minor, fifteen years of age or older, and the actor is the minor's parent, guardian, or is otherwise responsible for general supervision of the victim's welfare." *Id.* § 25-03.3-01(9)(b).

92. *See In re* M.D. (*M.D. I*), 1999 ND 160, ¶ 36, 598 N.W.2d 799, 807 (finding the first element met by conviction of gross sexual imposition for engaging in sexual acts with a minor).

93. *See In re* Barrera, 2008 ND 25, ¶ 6, 744 N.W.2d 744, 746 (finding the first element met by conviction of gross sexual imposition with a seven-year-old); *In re* E.W.F., 2008 ND 130, ¶ 11, 751 N.W.2d 686, 689 (finding the first element met by conviction of gross sexual imposition for molesting a five-year-old); *In re* J.M., 2006 ND 96, ¶ 12, 713 N.W.2d 518, 522 (finding the first element met by conviction of "corruption of a minor involving a sexual act committed on a minor victim after [the offender] had sexual intercourse with a fifteen-year-old girl" and a conviction of "gross sexual imposition after admitting [the offender] had digitally penetrated a nine-year-old girl"); *M.D. I*, ¶ 36, 598 N.W.2d at 807 (finding the first element met by conviction of gross sexual imposition for engaging in sexual acts with a minor).

94. *See, e.g.*, *In re* Anderson, 2007 ND 50, ¶ 25, 730 N.W.2d 570, 576 (finding the first element met by conviction of sexual assault on fifteen-year-old girl while the offender was seventeen, even though the offender argued the assault did not involve force); *In re* P.F., 2006 ND 82, ¶¶ 20-21, 712 N.W.2d 610, 615-16 (finding the first element met by conviction of criminal

As the North Dakota Supreme Court determined in *In re P.F.*,[95] the first element analysis does not always end at convictions.[96] In *P.F.*, the petitioner argued that his two convictions for criminal trespass were not sexual offenses and that an overturned conviction for gross sexual imposition could not be considered.[97] After examining the definition of conduct and the context of the statute, the court held sexually predatory conduct encompassed all conduct, including conduct that did not result in a charge or conviction.[98] The court noted the evidence in all three offenses implicated P.F. in predatory conduct.[99]

The North Dakota Supreme Court has also determined that sexually predatory conduct only includes acts that were specifically described in the statutory language.[100] In *In re Voisine*,[101] the court evaluated a trial court's finding that sexually predatory conduct included incest between a sixty-five year old father and his adult children.[102] While the conduct was "criminal and morally reprehensible," it did not satisfy the definition of sexually predatory conduct.[103] Due to the trial court's erroneous view of the law, the supreme court reversed and remanded.[104]

b. Disorder Requirement

Instead of focusing on criminal history, analysis of the second element concentrates on whether the individual has some type of disorder.[105] Prior to a hearing for commitment, the individual is evaluated by one or more State experts and may also retain his or her own expert to evaluate the alleged condition.[106] The evaluation is based upon all court records and all relevant psychological and medical records or reports and may include an assessment of the individual.[107] Testimony based upon these evaluations

---

trespass and overturned conviction of gross sexual imposition because the underlying acts of the crime, whether charged for or convicted of, showed sexually predatory conduct).

95. 2006 ND 82, 712 N.W.2d 610.

96. *P.F.*, ¶ 21, 712 N.W.2d at 616.

97. *Id.* ¶ 20, 712 N.W.2d at 615.

98. *Id.* ¶ 21, 712 N.W.2d at 616; *see also* N.D. CENT. CODE § 25-03.3-15 (2008) (noting "evidence of prior sexually predatory conduct or criminal conduct, including a record of the juvenile court, is admissible" in a proceeding for commitment).

99. *P.F.*, ¶ 20, 712 N.W.2d at 616.

100. *In re* Voisine, 2010 ND 17, ¶ 12, 777 N.W.2d 908, 912.

101. 2010 ND 17, 777 N.W.2d 908.

102. *Id.* ¶¶ 2, 11, 777 N.W.2d at 910, 912.

103. *Id.* ¶ 10, 777 N.W.2d at 912.

104. *Id.* ¶ 15, 777 N.W.2d at 913.

105. *In re* M.B.K., 2002 ND 25, ¶ 11, 639 N.W.2d 473, 476.

106. N.D. CENT. CODE § 25-03.3-12 (2008).

107. *Id.*

aids the trial court in evaluating the second element.[108] The North Dakota Supreme Court has further noted it is the trial court's responsibility to evaluate the credibility of the expert testimony.[109] Consequently, the reviewing court will defer to the trial court in the event there is conflicting testimony between experts.[110]

To satisfy this element, the State must produce expert evidence to show the individual has a condition that is made evident through a sexual, personality, or other mental disorder.[111] While the definition of "disorder" in the context of a sexually dangerous individual does not specify which disorders are included, mental retardation is specifically excluded.[112] A finding of a sexual disorder such as pedophilia satisfies the second element, as does a combination of a sexual disorder and a personality disorder.[113] However, an individual's disorder does not have to be a sexual disorder.[114] For instance, a finding of anti-social personality disorder satisfies the second element, yet it does not implicate a sexual disorder.[115]

There is some authority to suggest anti-social personality disorder alone should not satisfy this element.[116] Under that authority, the fact that a substantial portion of typical criminals could be diagnosed with anti-social personality disorder makes the use of that disorder suspect in establishing the disorder requirement.[117] Nevertheless, the North Dakota Supreme Court

---

108. *See, e.g.*, *In re* Anderson, 2007 ND 50, ¶ 29, 730 N.W.2d 570, 577-78 (finding the second element met through an evaluator's testimony about the offender's anti-social personality disorder).

109. *See In re* Hehn, 2008 ND 36, ¶ 23, 745 N.W.2d 631, 637 (finding the trial court's reliance on the State's psychologists, instead of independent evaluators, was not error).

110. *Id.*

111. *M.B.K.*, ¶ 11, 639 N.W.2d at 476 (providing that expert evidence must be admitted relating to the offender's condition); *see also* § 25-03.3-01(8) (defining the second element as an individual "who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction").

112. § 25-03.3-01(8).

113. *See, e.g.*, *In re* E.W.F., 2008 ND 130, ¶ 11, 751 N.W.2d 686, 689 (finding the second element met by a diagnosis of paraphilia and pedophilia); *In re* M.D. (*M.D. I*), 1999 ND 160, ¶ 38, 598 N.W.2d 799, 808 (finding the second element met by a diagnosis of paraphilia, with a fixation on adolescent males, and anti-social personality disorder).

114. *Compare M.D. I*, ¶ 38, 598 N.W.2d at 808 (finding the second element met by a diagnosis of paraphilia, with a fixation on adolescent males, and anti-social personality disorder), *with In re* J.M., 2006 ND 96, ¶ 13, 713 N.W.2d 518, 522 (finding the second element met by a diagnosis of anti-social personality disorder).

115. *See, e.g.*, *J.M.*, ¶ 13, 713 N.W.2d at 522 (finding the second element met by a diagnosis of anti-social personality disorder). *But see In re* G.R.H. (*G.R.H. I*), 2006 ND 56, ¶ 43, 711 N.W.2d 587, 600 (Kapsner, J., dissenting) (questioning whether a diagnosis of anti-social personality disorder satisfies the statutory definition).

116. *See In re* Anderson, 2007 ND 50, ¶ 48, 730 N.W.2d 570, 583 (Kapsner, J., dissenting) (noting other jurisdictions have determined anti-social personality disorder is insufficient to civilly commit a person).

117. *See G.R.H. I*, ¶ 40, 711 N.W.2d at 599 (Kapsner, J., dissenting) (explaining "40%-60% of the male prison population are diagnosable with antisocial personality disorder.").

has held that, while anti-social personality disorder does not per se meet the second element, such a diagnosis is sufficient as long as there is a showing of a nexus between the disorder and a serious difficulty controlling one's behavior.[118]

c. Future Predatory Conduct

Using expert testimony, the third element requires a finding that the individual's disorder makes the individual "likely to engage in further acts of sexually predatory conduct."[119] Countering an argument that the term "likely" is vague, the North Dakota Supreme Court has interpreted the phrase to mean the "individual's propensity towards sexual violence is of such a degree as to pose a threat to others."[120] Cognizant of that potential danger, the focus of the third element analysis is on the likelihood of reoffending and the causal relationship between an individual's disorder and such likelihood.[121]

In order to gauge the likelihood of reoffending, expert evaluators often utilize actuarial tests as a measurement for recidivism.[122] These actuarial tests are statistical models that attempt to document a correlation between risk factors and certain outcomes.[123] Evaluators rate the individual according to specific factors depending on the type of test.[124]

Among the types of actuarial tests that are commonly used in civil commitment of the sexually dangerous are the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR), the Static-99, and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R).[125] Designed to measure recidivism among sex offenders using few variables, the RRASOR includes four factors: "(1) prior sexual offenses, (2) age at risk less than 25,

118. *J.M.*, ¶ 10, 713 N.W.2d at 522.

119. N.D. CENT. CODE § 25-03.3-13 (2008). *See also* § 25-03.3-01(8) (defining the third element as an individual who has a disorder "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").

120. *In re* M.B.K., 2002 ND 25, ¶¶ 12-18, 639 N.W.2d 473, 476-77; *see also* Ahluwalia, *supra* note 33, at 492 (explaining the "likely" standard of Minnesota, Washington, and Wisconsin).

121. *G.R.H. I*, ¶ 16, 711 N.W.2d at 594.

122. *See, e.g.*, *In re* J.M., 2006 ND 96, ¶ 14, 713 N.W.2d 518, 523 (finding the third element met by a diagnosis of disorder and by actuarial test scores).

123. *In re* Anderson, 2007 ND 50, ¶ 56, 730 N.W.2d 570, 586 (Kapsner, J., dissenting).

124. Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment With Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1469-71 (2003).

125. *Anderson*, ¶ 57, 730 N.W.2d at 586 (Kapsner, J., dissenting). *See also In re* Barrera, 2008 ND 25, ¶¶ 10-11, 744 N.W.2d 744, 746-47; *In re* Hehn, 2008 ND 36, ¶ 21, 745 N.W.2d 631, 636.

(3) extrafamilial victims, and (4) male victims."[126] The Static-99 expands upon the RRASOR by including the same four factors, but also adding "the number of prior sentencing dates[,] . . . any convictions for non-contact sex offenses[,] . . . index case nonsexual violence[,] . . . prior nonsexual violence[,] . . . any stranger victims," and "whether the individual is single."[127] The MnSOST-R, on the other hand, measures sixteen variables, including the relationship between the offender and its victims, the offender's age, and the offender's criminal history.[128] In all of these tests, a score is calculated and then compared to the known recidivism rate of offenders with similar scores.[129] This calculation and comparison method has been criticized because deprivation of liberty is based not upon the offender's own behavior, but upon the behavior of others who are statistically similar.[130]

The North Dakota Supreme Court has cautioned that judicial decision-making should not be replaced by actuarial scores or a contest over percentage points.[131] In fact, an individual may still be found sexually dangerous despite actuarial scores that indicated the individual was not likely to recidivate.[132] Accordingly, while actuarial scores may be used as a part of the evaluation, testimony by those who know the individual may also help an evaluator to determine whether the individual is likely to reoffend.[133]

d. Serious Difficulty Controlling Behavior

In addition to the statutory requirements of the definition of sexually dangerous individual, a finding that the individual has a "serious difficulty controlling his behavior" is required to distinguish the individual from a typical criminal.[134] To satisfy this requirement, behavior while in confinement is often evaluated, including failing to progress in treatment, breaking rules, or lacking empathy for victims.[135] This requirement does not constitute a fourth element to the statutory definition of a sexually dangerous

126. Janus & Prentky, *supra* note 124, at 1469; *see also Anderson*, ¶ 58, 730 N.W.2d at 586-87 (Kapsner, J., dissenting) (explaining RRASOR factors).

127. *Anderson*, ¶ 60, 730 N.W.2d at 587 (Kapsner, J., dissenting).

128. Conroy, *supra* note 85, at 185; *Anderson*, 2007 ND 50, ¶ 61, 730 N.W.2d at 587-88 (Kapsner, J., dissenting).

129. *Anderson*, ¶ 64, 730 N.W.2d at 588-89 (Kapsner, J., dissenting).

130. Janus & Prentky, *supra* note 124, at 1476-77 (citing *In re* Linehan, 518 N.W.2d 609, 616 (Minn. 1994) (Coyne, J., dissenting)).

131. *Hehn*, ¶ 21, 745 N.W.2d at 636.

132. *Id.*; *In re* M.D. (*M.D. II*), 2008 ND 208, ¶ 10, 757 N.W.2d 559, 562.

133. *Hehn*, ¶ 24, 745 N.W.2d at 637; *M.D. II*, ¶¶ 9-11, 757 N.W.2d at 561-62.

134. *Hehn*, ¶ 19, 745 N.W.2d at 636; *accord* Kansas v. Crane, 534 U.S. 407, 413 (2002).

135. *See M.D. II*, ¶ 11, 757 N.W.2d 559, 562 (finding an inability to control behavior based on a failure to progress in treatment); *see also In re* R.A.S., 2009 ND 101, ¶ 16, 766 N.W.2d 712, 716 (finding an inability to control behavior based on acts while in confinement).

individual.[136] Instead, the requirement may be viewed as a condition that must be satisfied before an individual may be committed.[137] This finding is also subject to the clear and convincing standard used for the definition of a sexually dangerous individual.[138]

III. ANALYSIS

Justice Sandstrom wrote the majority opinion for the North Dakota Supreme Court affirming the district court's denial of the petition for discharge in *G.R.H. II*, holding the State provided clear and convincing evidence that G.R.H. remained a sexually dangerous individual.[139] Justice Kapsner wrote a concurring opinion in which she agreed affirming the district court's order was appropriate under the circumstance, but asserted the facts of the case implicated an issue not raised by G.R.H. on appeal.[140] In her concurrence, Justice Kapsner expanded upon G.R.H.'s argument that required disclosure was unfair and discussed the constitutional implications of the use of self-incriminating statements in commitment proceedings.[141]

A. THE MAJORITY OPINION

On appeal, G.R.H. argued the State failed to provide sufficient evidence satisfying the three-element definition.[142] Conceding the first element, G.R.H. argued the State failed to meet its burden to prove the final two elements of a sexually dangerous individual finding.[143] The court disagreed with G.R.H., holding evidence supported the district court's finding that G.R.H. had a condition that was manifested by a disorder or dysfunction.[144] Further, the court held evidence supported the finding that G.R.H. was likely to engage in predatory behavior in the future.[145]

1. *Sexually Predatory Conduct*

Because G.R.H. did not contest the district court's finding he had engaged in sexually predatory conduct, the court did not address the first

136. *R.A.S.*, ¶ 15, 766 N.W.2d at 716.
137. *Id.*
138. *Id.* ¶ 17, 766 N.W.2d at 716.
139. *In re* G.R.H. (*G.R.H. II*), 2008 ND 222, ¶¶ 1, 5, 14, 758 N.W.2d 719, 720-21, 724. Justice Sandstrom's majority opinion was joined by Justice Crothers, Justice Maring, and Chief Justice VandeWalle. *Id.* ¶ 15, 758 N.W.2d at 724.
140. *G.R.H. II*, ¶¶ 26-27, 758 N.W.2d at 727 (J. Kapsner, concurring).
141. *Id.* ¶¶ 23-25, 758 N.W.2d at 725-27.
142. *Id.* ¶¶ 8, 12, 758 N.W.2d at 722-23.
143. *Id.* ¶ 5, 758 N.W.2d at 721.
144. *Id.* ¶ 11, 758 N.W.2d at 723.
145. *Id.* ¶ 13, 758 N.W.2d at 724.

element of the definition of a sexually dangerous individual.[146] G.R.H.'s criminal history, however, easily fell under the definition of sexually predatory conduct because his gross sexual imposition conviction involved a victim younger than fifteen years of age, and his corruption of a minor conviction involved a sixteen-year-old.[147] The court also explained all sexually predatory conduct may be considered under the analysis of a sexually dangerous individual; even conduct "which did not result in a charge or conviction."[148] Arguably, the court could have considered G.R.H.'s confession to contact with additional adolescent victims between his two imprisonment terms if G.R.H. would have challenged the findings under this element.[149]

2. *Disorder Requirement*

G.R.H. argued the second element was not met because, at the discharge hearing, the State failed to provide clear and convincing evidence he had a condition manifested by a disorder.[150] At the discharge hearing, there was conflicting testimony between experts as to the diagnosis of G.R.H.'s disorder.[151] The independent expert evaluator appointed on G.R.H.'s behalf testified that G.R.H. did not meet the second element; the State's expert testified to the contrary.[152] G.R.H. implicitly argued the independent evaluator's report and testimony were more reliable because the report and testimony were more thorough, making the district court's finding unsupported by clear and convincing evidence.[153]

---

146. *See id.* ¶ 5, 758 N.W.2d at 721 (noting G.R.H. contested the second and third elements without contesting the first element).

147. *Compare In re* G.R.H. (*G.R.H.* I), 2006 ND 56, ¶ 2, 711 N.W.2d 587, 589 (explaining G.R.H.'s previous convictions), *with* N.D. CENT. CODE §§ 25-03.3-01(9)(a)(4), (7) (2008) (defining sexually predatory conduct as sexual contact with a victim if "[t]he victim is less than fifteen years old" or "[t]he victim is a minor and the actor is an adult").

148. *G.R.H. II*, ¶ 7, 758 N.W.2d at 722.

149. *See id.* ¶¶ 7-9, 12-13, 758 N.W.2d at 722-24 (noting conduct not resulting in a charge or conviction may be considered in an analysis under North Dakota Century Code section 25-03.3-01(8)).

150. *Id.* ¶ 8, 758 N.W.2d at 722.

151. *Id.* ¶¶ 3-4, 758 N.W.2d at 721.

152. Brief of Petitioner-Appellee at 2-3, *In re* G.R.H., 2008 ND 222, 758 N.W.2d 719 (No. 20080102). The independent evaluator diagnosed G.R.H. with psychoactive substance abuse—abusing more than one psychoactive substance—and also "found personality disorder not otherwise specified with some borderline, antisocial, narcissistic, schizophrenic-like behavior, and paranoid features." *G.R.H. II*, ¶¶ 3-4, 758 N.W.2d at 721. The State's expert diagnosed G.R.H. with anti-social personality disorder and paraphilia, not otherwise-specified hebephilia—the sexual attraction to adolescents. *Id.*

153. *See* Brief of Respondent-Appellant ¶ 37, *In re* G.R.H., 2008 ND 222, 758 N.W.2d 719 (No. 20080102) (noting Dr. Coombs' (State's expert) report was only nine pages long while Dr. Riedel's (independent expert) report was eighty-one pages in length).

Rejecting G.R.H.'s argument, the court held the district court's analysis of the second element was supported by clear and convincing evidence.[154] The district court sided with the State's expert for two reasons.[155] First, the testimony of the State's evaluator was more reliable because his opinion was better-informed.[156] The State evaluator's testimony reflected consideration of the additional adolescent victims, something lacking in the independent evaluator's initial testimony.[157] Second, the diagnosis asserted by the State's evaluator was more credible because consideration of the additional adolescent victims supported G.R.H.'s diagnosis of a sexual attraction to adolescents, in addition to anti-social personality disorder.[158] Although he initially diagnosed G.R.H. with anti-social personality disorder, the independent evaluator conceded during testimony that a diagnosis of hebephilia was more justified if the additional victims were considered.[159] Accordingly, as to the second element, the court held the district court's findings were supported by clear and convincing evidence.[160]

3. *Future Predatory Conduct*

G.R.H. argued the third element was not met because the State failed to provide clear and convincing evidence his condition made him likely to commit more acts of sexually predatory conduct.[161] The testimony of the two experts diverged on the third element as well, with the State's expert opining G.R.H. was likely to reoffend and the independent expert coming to the opposite conclusion.[162] G.R.H., again, argued the independent evaluator's testimony was more credible because that evaluator conducted numerous risk assessments and completed an eighty-one page report; the State's expert did not initially conduct any tests, but instead updated assessments done by previous evaluators.[163]

---

154. *G.R.H. II*, ¶ 11, 758 N.W.2d at 723.

155. *See id*. (finding both Dr. Coombs' testimony and diagnosis more reliable).

156. *Id*.

157. *Id*. The Court explained the district court believed Dr. Riedel was credible, just less informed. *Id*. On cross examination, Dr. Riedel conceded that consideration of the additional victims was absent from his initial report and a diagnosis of hebephilia would be more justified. Brief of Petitioner-Appellee, *supra* note 152, ¶ 5.

158. *G.R.H. II*, ¶ 3, 758 N.W.2d at 721.

159. *Id*. ¶ 8, 758 N.W.2d at 722-23; Brief of Respondent-Appellant, *supra* note 153, ¶ 36; Brief of Petitioner-Appellee, *supra* note 152, at 2.

160. *G.R.H. II*, ¶ 11, 758 N.W.2d at 723. Consistent with its earlier determination that the trial court is the best evaluator of credibility in cases of conflicting testimony, the court did not "second-guess the credibility determinations made by the trial court." *Id*. ¶ 7, 758 N.W.2d at 722 (quoting *In re* Hehn, 2008 ND 36, ¶ 23, 745 N.W.2d 631, 637).

161. *G.R.H. II*, ¶ 12, 758 N.W.2d at 723.

162. *Id*. ¶ 12, 758 N.W.2d at 723-24; Brief of Respondent-Appellant, *supra* note 153, ¶ 53.

163. Brief of Respondent-Appellant, *supra* note 153, ¶ 51.

The court rejected G.R.H.'s argument and agreed with the district court's finding that the third element was satisfied by clear and convincing evidence.[164] The court gave three justifications as to why the district court's findings were supported by clear and convincing evidence.[165] First, the court noted the State's expert testified G.R.H.'s likelihood to reoffend was bolstered by reevaluated actuarial tests that placed G.R.H. between a twenty-one and sixty-five percent chance of reoffending.[166] The independent evaluator also testified to the results of tests, but his results placed G.R.H. at a different risk of reoffending.[167] Consistent with previous decisions, the court noted it would not be caught in "a contest over percentage points" as to whether or not an individual was likely to reoffend.[168] Although the test scores alone were not conclusive, they did not need to be.[169]

Second, G.R.H. demonstrated his lack of self-discipline while in treatment.[170] G.R.H. engaged in rule-breaking behavior during treatment by calling sex-line numbers and having sexual relations with visitors.[171] As a result, G.R.H.'s treatment status was downgraded due to lack of self-control.[172] Both his rule-breaking behavior and his admission of additional adolescent victims indicated G.R.H. had a serious difficulty controlling his behavior.[173]

Third, the combination of G.R.H.'s disorders and actions proved G.R.H. would be more likely to engage in predatory conduct if released.[174] The State's expert testified that G.R.H's anti-social personality disorder and his sexual attraction to adolescents, mixed with his rule-breaking behavior and his admission to additional adolescent victims, made him more likely to commit another offense.[175] The court explained that unlike a typical criminal, G.R.H.'s inability to control his behavior made him more likely to

---

164. *G.R.H. II*, ¶ 13, 758 N.W.2d at 724.

165. *See infra* text accompanying notes 166-78.

166. *G.R.H. II*, ¶ 12, 758 N.W.2d at 723. G.R.H.'s score placed him at "a twenty-one percent likelihood of reoffending in ten years" on the RRASOR, "a fifty-two percent likelihood of reconviction in fifteen years" on the Static-99, and "a six-year likelihood of rearrest rate for a sexual offense of fifty-six percentage" on the MnSOST-R. *Id.*

167. *Id.* ¶ 13, 758 N.W.2d at 724.

168. *Id.* (quoting *In re* Hehn, 2008 ND 36, ¶ 21, 745 N.W.2d 631, 636).

169. *G.R.H. II*, ¶ 13, 758 N.W.2d at 724.

170. *Id.* ¶ 12, 758 N.W.2d at 723.

171. Brief of Petitioner-Appellee, *supra* note 152, at 10.

172. *G.R.H. II*, ¶ 12, 758 N.W.2d at 723.

173. *Id.* ¶ 13, 758 N.W.2d at 724. This finding satisfied the requirements of *Hehn* and *Crane* that there must be a finding the individual has serious difficulty controlling his behavior. *See supra* text accompanying notes 134-38.

174. *G.R.H. II*, ¶ 13, 758 N.W.2d at 724.

175. *Id.* ¶¶ 12-13, 758 N.W.2d at 723-24.

reoffend if not kept in treatment.[176] For these reasons, the district court's finding that G.R.H. was likely to engage in further acts of predatory conduct was supported by clear and convincing evidence.[177] Accordingly, the court affirmed the district court's finding that G.R.H. remained a sexually dangerous individual and upheld the district court's order denying G.R.H.'s petition for discharge.[178]

B. JUSTICE KAPSNER'S CONCURRING OPINION

With the sole concurrence, Justice Kapsner wrote separately to explain G.R.H.'s continuing confinement was based upon self-incriminating statements.[179] Justice Kapsner pointed out G.R.H. could have argued his civil commitment was punitive, so the prohibition against self-incriminating statements applied.[180] The concurrence was an expansion of G.R.H.'s supporting argument that it was unfair to force committed individuals, as a part of their treatment, to disclose past misdeeds or have their refusal to disclose past misdeeds held against them.[181] However, G.R.H. failed to specifically raise an argument that this unfairness made the statutes punitive in effect.[182] Therefore, it was appropriate to affirm the district court's findings.[183]

Justice Kapsner began by noting the similarity between civil commitment and criminal law, which both end in deprivation of liberty.[184] Yet, as Justice Kapsner explained, constitutional challenges to civil commitment laws have been overcome by arguing the purpose of the laws was not to punish, but to provide treatment for the offender.[185] As Justice Kapsner noted, the North Dakota civil commitment law could be defended against constitutional challenges because it specifically provided placement of individuals "in an appropriate facility or program at which treatment is available."[186]

---

176. *Id.* ¶ 13, 758 N.W.2d at 724.

177. *Id.*

178. *Id.* ¶ 14, 758 N.W.2d at 724.

179. *Id.* ¶ 23, 758 N.W.2d at 725-26 (Kapsner, J., concurring).

180. *Id.* ¶ 26, 758 N.W.2d at 727.

181. Brief of Respondent-Appellant ¶ 36, *In re* G.R.H., 2008 ND 222, 758 N.W.2d 719 (No. 20080102).

182. *G.R.H. II*, ¶ 26, 758 N.W.2d at 727 (Kapsner, J., concurring).

183. *Id.* ¶ 27, 758 N.W.2d at 727.

184. *Id.* ¶ 17, 758 N.W.2d at 725.

185. *Id.* (citing Kansas v. Hendricks, 521 U.S. 346, 361 (1997) and Allen v. Illinois, 478 U.S. 364, 373-74 (1986)).

186. *G.R.H. II*, ¶ 19, 758 N.W.2d at 725 (Kapsner, J., concurring) (quoting N.D. CENT. CODE § 25-03.3-13 (2008)).

Justice Kapsner's analysis did not stop there, however, because a law's civil label is not enough when a defendant can provide the "clearest proof" the statute is "so punitive in either purpose or effect as to negate" the intention of the State.[187] This approach was attempted in *Allen*, where the petitioner argued an Illinois civil commitment law was punitive; thus, he should have been entitled to the prohibition against self-incrimination.[188] The argument in *Allen* was unsuccessful, but Justice Kapsner noted important differences between *Allen* and *G.R.H. II*.[189]

First, North Dakota law specifically invalidates any confidentiality between a patient and a psychiatrist in the context of civil commitment, which means that any information disclosed during treatment can be used against the individual.[190] North Dakota law also limits admissibility of the outcomes of civil commitments in subsequent criminal cases.[191] However, no such limit exists for the actual facts relied upon for commitment, so self-incriminating statements may be used during the civil commitment hearing and any subsequent criminal case.[192] Unlike criminal proceedings, the term of confinement is indefinite when an individual is committed based upon statements made during treatment.[193] This was not the situation in *Allen*, as Illinois law disallowed the use of statements to psychiatrists during treatment in any subsequent criminal proceeding.[194]

Second, North Dakota civil commitment jurisprudence holds that failure to comply with treatment may be used to determine an individual's status as a sexually dangerous individual.[195] If individuals refuse to admit past sexual conduct as a part of their treatment, their refusal can be used against them at a commitment hearing.[196] As Justice Kapsner summarized,

---

187. *G.R.H. II*, ¶ 22, 758 N.W.2d at 725 (Kapsner, J., concurring) (quoting *Allen,* 478 U.S. at 369).

188. *Allen,* 478 U.S. at 370.

189. *G.R.H. II*, ¶ 21, 758 N.W.2d at 725 (Kapsner, J., concurring).

190. *Id.* ¶ 23, 758 N.W.2d at 725-26; *see also* § 25-03.3-05 (explaining the abrogation of confidentiality).

191. § 25-03.3-16.

192. *G.R.H. II*, ¶ 23, 758 N.W.2d at 726 (Kapsner, J., concurring).

193. *Id.*

194. Allen v. Illinois, 478 U.S. 364, 368 (1986).

195. *G.R.H. II*, ¶ 24, 758 N.W.2d at 726 (Kapsner, J., concurring).

196. *Id.* ¶ 25, 758 N.W.2d at 727. *See also* Klein, *supra* note 25, at 713-14 (describing an individual's decision of whether to invoke the Fifth Amendment or answer to his or her detriment as a "Hobson's choice"); Merrill A. Maiano, *Sex Offender Probationers and the Fifth Amendment: Rethinking Compulsion and Exploring Preventative Measures in the Face of Required Treatment Programs*, 10 LEWIS & CLARK L. REV. 989, 999 (2006) (describing a situation where sex-offenders are forced to incriminate themselves in the face of revoked probation or face incarceration for revealing the details of uncharged offenses as a "Catch 22"); Anita Schlank and Rick Harry, *Essay: The Treatment of the Civilly Committed Sex Offender in Minnesota: A Review of the Past Ten Years*, 29 WM. MITCHELL L. REV. 1221, 1223-24 (2003) (describing a "Hobson's

"[i]f disclosure is demanded as a prerequisite to treatment and either the disclosure or the failure to comply is the basis for continuing confinement, the ability to assert a privilege has been lost."[197] Such a dilemma and the resulting loss of liberty, according to Justice Kapsner, might have proven the civil commitment statutes were punitive in effect.[198] The concurrence closed by noting G.R.H. did not raise such a challenge, and by stating the case should not be viewed as precluding a properly-raised argument with facts similar to those in *G.R.H. II*.[199]

IV. IMPACT

The focus of the court throughout its analysis, both in the majority opinion and the concurrence, was on the confessions G.R.H. made during treatment.[200] In terms of North Dakota case law, *G.R.H. II* is an expansion of the scope of conduct that can be considered for an analysis of whether a person is a sexually dangerous individual.[201] Further, the concurrence has fueled challenges to civil commitments in North Dakota.[202]

A. SCOPE OF SEXUALLY PREDATORY CONDUCT

Early in its majority opinion, the court explained all sexually predatory conduct could be considered for the purposes of civil commitment, and the court then proceeded to focus on the admission by G.R.H. that he engaged in such conduct with additional victims.[203] The court's explanation stemmed from *P.F.*, but the court's holding in that case resulted from its consideration of conduct that resulted in a charge or conviction.[204] G.R.H.'s conduct resulted in neither a charge nor a conviction, yet the court stated all conduct, presumably including G.R.H.'s disclosures of additional victims, could be considered.[205] Compared to the analysis in *G.R.H. II*, the *P.F.* holding now takes into account all conduct that did not result in a charge or conviction, as well as the conduct contained in disclosures by

---

choice" for sex offenders who will have disclosed information used against them in civil commitment hearings or have their refusal to participate in treatment also used against them).

197. *G.R.H. II*, ¶ 25, 758 N.W.2d at 727 (Kapsner, J., concurring).

198. *Id.* ¶ 26, 758 N.W.2d at 727.

199. *Id.* ¶ 27.

200. *See id.* ¶¶ 1-27, 758 N.W.2d at 720-27 (referring to the statements eleven times in the majority opinion and four times in the concurrence).

201. *See supra* text accompanying notes 146-49.

202. *See infra* text accompanying notes 213-16.

203. *G.R.H. II*, ¶ 7, 758 N.W.2d at 722.

204. *In re* P.F., 2006 ND 82, ¶ 21, 712 N.W.2d 610, 616.

205. *G.R.H. II*, ¶ 7, 758 N.W.2d at 722.

committed individuals.[206] Thus, if there was any doubt as to the scope of relevant sexually predatory conduct, *G.R.H. II* should be viewed as an affirmation that all sexually predatory conduct is relevant under the analysis of a sexually dangerous individual, including disclosures made by committed individuals themselves.[207]

B. CHALLENGES TO THE CIVIL COMMITMENT LAWS

Justice Kapsner's concurrence, noting *G.R.H. II* should not be viewed as precluding a punitive challenge, alluded to potential challenges based on the use of self-incriminating statements.[208] The success of an argument that the civil commitment of the sexually dangerous is punitive when self-incriminating statements are used against an individual would depend upon distinguishing *Allen*, just as Justice Kapsner's concurrence sought to do in *G.R.H. II*.[209] An important difference for Justice Kapsner was the fact that Illinois law barred the statements Allen made to psychiatrists from future use in criminal prosecution, something absent from North Dakota law.[210] Other jurisdictions have rejected similar claims of violations of the Fifth Amendment Self-Incrimination Clause, but those jurisdictions also recognize that the statements cannot be used in later criminal proceedings.[211]

---

206. *Compare P.F.*, 2006 ND 82, ¶ 21, 712 N.W.2d at 616 (holding all conduct, including that which did not result in a charge or conviction, may be included in analysis), *with G.R.H. II*, ¶¶ 7-8, 758 N.W.2d at 722-23 (noting all conduct, including self-incriminating statements, can be included in analysis).

207. *See, e.g.*, *In re* Vantreece, 2009 ND 152, ¶ 17, 771 N.W.2d 585, 591 (citing *G.R.H. II* for the proposition that all sexually predatory conduct may be considered); *In re* A.M., 2009 ND 104, ¶ 10, 766 N.W.2d 437, 440 (citing *G.R.H. II* for the proposition that all sexually predatory conduct may be considered). The North Dakota Supreme Court has subsequently explained that only conduct that meets the specific definition of "sexually predatory conduct" may be considered for the first element of a sexually dangerous individual analysis, while "all conduct of a sexually predatory nature" may be considered for determination of the second element and "all relevant conduct should be considered" for the third element. *See In re* Voisine, 2010 ND 17, ¶¶ 12-14, 777 N.W.2d 908, 912-13 (holding incest between consenting adults does not meet the statutory definition of "sexually predatory conduct").

208. *See G.R.H. II*, ¶ 26, 758 N.W.2d at 727 (Kapsner, J., concurring) (explaining "[t]his case should not be understood, however, to mean the issue could not be examined, if properly raised").

209. *G.R.H. II*, ¶ 21, 758 N.W.2d at 725 (Kapsner, J., concurring) (explaining "[t]he circumstances in *Allen* were different from those G.R.H. has experienced").

210. *Id.* ¶¶ 21, 23, 758 N.W.2d at 725-26 (Kapsner, J., concurring). Arguably, a committed individual would have to assert the Fifth Amendment privilege to not answer the questions and also fear he would be committed even if he did not answer the questions. *See* State v. Crabtree, 2008 ND 174, ¶ 23, 756 N.W.2d 189, 197 (holding: (1) statements made by a probationer, who voluntarily took a polygraph and admitted to having sexual contact with a minor, were not compelled because the probationer was not coerced; and (2) that he would not be punished for asserting the privilege).

211. *See, e.g.*, *In re* Sutton, 828 So. 2d 1081, 1082 (Fla. Dist. Ct. App. 2002) (noting the Fifth Amendment does not allow an individual subject to commitment to avoid a deposition, but also noting the individual may object to specific questions if the answer would incriminate the individual); Madison v. Craven, 169 P.3d 284, 290 (Idaho 2007) (noting the Fifth Amendment

The success of a future challenge to a North Dakota civil commitment of the sexually dangerous would hinge upon an acceptance that continuing confinement based upon self-incrimination or refusal to self-incriminate, combined with a lack of protection against future criminal prosecution, is in fact "the clearest proof" envisioned by the majority in *Allen*.[212]

A similar argument was raised in *In re Maedche*,[213] where incriminating statements made during a probationary pre-polygraph interview and examination were later used as evidence in a civil commitment proceeding.[214] After being committed as a sexually dangerous individual, Maedche appealed arguing the trial court's consideration of the statements made during the polygraph violated his privilege against self-incrimination.[215] The North Dakota Supreme Court rejected this argument when it held that Maedche had "not offered 'the clearest proof' that North Dakota's statutory scheme is 'so punitive' that it must be considered criminal."[216]

Self-Incrimination Clause does not apply to statements of a prisoner admitting to sexual attraction to his daughter because the statements could not be used in future criminal proceedings); Bankes v. Simmones, 963 P.2d 412, 419-20 (Kan. 1998) (noting the Fifth Amendment Self-Incrimination Clause does not apply to the Kansas Sexual Predator Act because the Act is civil, but also noting that if a prisoner is given no choice but to provide incriminating information, the State must give the prisoner immunity or be barred from using that information at subsequent criminal proceedings); Razor v. Commonwealth, 960 S.W.2d 472, 474 (Ky. App. 1997) (holding a probationer's right against self-incrimination is not violated when an admission of crimes was required as part of treatment because the statements could not be used in subsequent criminal prosecution); *In re* Canupp, 671 S.E.2d 614, 617 (S.C. Ct. App. 2008) (noting the Fifth Amendment does not allow an individual subject to commitment as a sexually violent predator to refuse to take the stand altogether, but also noting he can refuse to answer questions that would incriminate him); *In re* Fisher, 164 S.W.3d 637, 654 (Tex. 2005) (noting the Fifth Amendment does not allow an individual subject to commitment to avoid the stand altogether, but also noting if the individual were to blurt out incriminating statements, the court would excise the statements from the record or grant the individual immunity). *But see In re* Commitment of Mark, 2006 WI 78, ¶¶ 14-15, 33, 292 Wis.2d 1, ¶¶ 14-15, 33, 718 N.W.2d 90, ¶¶ 14-15, 33 (finding statements made to a parole officer about an attempt to forcibly enter a neighbor's residence to have sex may be a violation of the Self-Incrimination Clause during a trial to commit the individual as sexually dangerous).

212. *Compare* Allen v. Illinois, 478 U.S. 364, 369 (1986) (describing clearest proof), *with G.R.H. II*, ¶¶ 21-23, 758 N.W.2d at 725-26 (Kapsner, J., concurring) (explaining lack of protection against use of evidence in a "subsequent criminal proceeding" and inability to assert privilege when "disclosure or the failure to comply is the basis for continuing confinement").

213. 2010 ND 171, 788 N.W.2d 331.

214. *Id.* ¶¶ 4-6, 788 N.W.2d at 333-34. The statements "disclosed previously unknown sexual contact with minors that had occurred when he was an adult." *Id.* ¶ 4, 788 N.W.2d at 333.

215. *Id.* ¶ 19, 788 N.W.2d at 337.

216. *Id.* ¶ 23, 788 N.W.2d at 337. Justice Kapsner dissented from the majority opinion, explaining that the record in *Maedche* demonstrated why the sexually dangerous individual law was punitive in nature. *Id.* ¶ 30, 788 N.W.2d at 338 (Kapsner, J., dissenting).

C. CHANGES TO THE CIVIL COMMITMENT LAWS

At minimum, *G.R.H. II* is illustrative of the opposing interests that compete in programs to treat sex offenders.[217] The confined individuals who are a part of the treatment program have an interest to avoid incriminating themselves during treatment.[218] The State has an interest both to treat the individuals in order to protect the safety of the public and to prosecute serious crimes.[219] North Dakota law currently approaches this situation by prohibiting the use of final determinations in civil commitments in subsequent criminal proceedings.[220] However, North Dakota law is silent as to the use of evidence considered in order to determine whether someone is a sexually dangerous individual.[221]

Commentators offer a number of suggestions to resolve the tension between the competing interests in treatment programs that require disclosure of past misdeeds. There is a consensus among these commentators that disclosure by the offender is necessary for treatment to be successful.[222] The commentators' opinions, however, diverge on what should be done once the disclosures are made. One commentator posits mandatory polygraph testing is an indispensible part of sex offender treatment, but acknowledges the individual should be allowed to not answer incriminating questions.[223] Another commentator commends Wisconsin's approach, which makes polygraph testing optional and declines to punish an individual who refuses to participate in polygraph testing.[224] Some suggest it is necessary to grant outright immunity during polygraph testing, but another believes granting immunity is inconsistent with the goals of treatment

---

217. *See* Maiano, *supra* note 196, at 1000 (describing "conflict between the government's interest in treating sex offenders, the government's interest in prosecuting sex offenders, and the offender's right to remain silent during the course of government mandated treatment"); Angela Kebric, *Polygraph Testing in Sex Offender Treatment: A Constitutional and Essential Tool for Effective Treatment*, 41 ARIZ. ST. L. J. 429, 439-40 (2009) (describing "tension between two competing interests: [p]reserving a sex offender's privilege against self-incrimination and obtaining information necessary for effective treatment.").

218. Kebric, *supra* note 217, at 440.

219. Maiano, *supra* note 196, at 1000.

220. *In re* G.R.H. (*G.R.H. II*), 2008 ND 222, ¶ 23, 758 N.W.2d 719, 726 (Kapsner, J., concurring) (citing N.D. CENT. CODE § 25-03.3-16 (2008)).

221. *G.R.H. II*, ¶ 23, 758 N.W.2d at 726 (Kapsner, J., concurring).

222. David Heim, Note, *Damned If You Do, Damned If You Don't—Why Minnesota's Prison-Based Sex Offender Treatment Program Violates the Right Against Self-Incrimination*, 32 WM. MITCHELL L. REV. 1217, 1249 (2006); Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 367 (1998); Kebric, *supra* note 217, at 440; Schlank & Harry, *supra* note 196, at 1223-24.

223. Kebric, *supra* note 217, at 443, 447.

224. Maiano, *supra* note 196, at 1019-20.

because it undermines the gravity of sex offenses.[225] Still others believe denial should be embraced for a limited time so the individual can progress in treatment and eventually overcome denial.[226]

A sensible change to North Dakota law, which is necessary as demonstrated in *G.R.H. II*, is to ameliorate the problem by balancing the interests involved in committing the sexually dangerous.[227] If treatment and its rehabilitative result are improved through confession by the committed individual, then confession should be encouraged in the interest of public safety.[228] The committed individuals, however, should not fear prosecution based upon their honest disclosures.[229] A rational compromise would be to limit the use of facts disclosed during confessions to the hearing for determination of a sexually dangerous individual and prohibit the use of those facts in future criminal prosecutions.[230] Such an approach balances the interests involved and minimizes the possibility of punitive challenges based upon the arguments raised in Justice Kapsner's concurrence.[231] The proper and most effective venue for this change to North Dakota law is with the policy-making legislative branch.[232] While affording sexually dangerous individuals greater procedural protections may not be politically popular, the legal community "must always remain cognizant that the fervor of a rightfully outraged public to prevent [heinous] crimes cannot be

---

225. *Compare* Jamie Tanabe, *Right Against Self Incrimination v. Public Safety: Does Hawaii's Sex Offender Treatment Program Violate the Fifth Amendment?*, 23 U. HAW. L. REV. 825, 854 (2001), *and* Heim, *supra* note 222, at 1249, *with* Maiano, *supra* note 196, at 1015-16.

226. Heim, *supra* note 222, at 1247; Kaden, *supra* note 222, at 370.

227. *See* Maiano, *supra* note 196, at 1019-20 (noting Wisconsin's approach to sex offender treatment).

228. *See* Kebric, *supra* note 217, at 439 (arguing polygraph testing effectuates treatment, reduces recidivism, and increases the public safety); Heim, *supra* note 222, at 1249 (arguing "[i]mmunity would also encourage the offender to accept responsibility and complete the therapy process).

229. *See* Maiano, *supra* note 196, at 999-1000 (noting competing interests in sex offender treatment).

230. *See id*. at 1019-20 (noting Wisconsin's approach to sex offender treatment). A major criticism of this approach is that prosecutors will be inhibited from pursuing charges for what could be heinous crimes, but this does not completely foreclose prosecution, only the use of the statements in the subsequent prosecution. *See* Heim, *supra* note 222, at 1249 (stating "immunity would not harm the State's interests if it does not plan to use the statements in the future"); Tanabe, *supra* note 225, at 851 (stating "a defendant is immunized from prosecution based on his immunized statements but is not immunized from any and all prosecution"); Maiano, *supra* note 196, at 1016 (stating "immunity only foreclose[s] prosecution based on the compelled testimony").

231. Maiano, *supra* note 196, at 1019-20; *In re* G.R.H. (*G.R.H. II*), 2008 ND 222, ¶ 26, 758 N.W.2d 719, 727 (Kapsner, J., concurring). *But see In re* Maedche, 2010 ND 171, ¶ 21, 788 N.W.2d 331, 337 (explaining a subsequent challenge based upon arguments similar to those raised in *G.R.H. II*'s concurrence).

232. *See In re* Voisine, 2010 ND 17, ¶ 10, 777 N.W.2d 908, 912 (explaining "[t]he function of the courts is to interpret the law, not to legislate, regardless of how much we might desire to do so" (internal quotations omitted)).

allowed to overcome the necessary safeguards to individual liberty the law has established."[233]

V. CONCLUSION

In *G.R.H. II*, the North Dakota Supreme Court held there was clear and convincing evidence G.R.H. remained a sexually dangerous individual.[234] G.R.H.'s previous criminal history, his confessions during treatment, his diagnosis of anti-social personality disorder and sexual attraction to adolescents, and his lack of self-control satisfied the definition of a sexually dangerous individual.[235] Justice Kapsner's concurrence fueled challenges based upon self-incriminating statements, which could be avoided by disallowing use of such statements in subsequent criminal trials.[236]

*Paul J. Gunderson**

233. *In re* J.M., 2006 ND 96, ¶ 18, 713 N.W.2d 518, 523.

234. *G.R.H. II*, ¶ 14, 758 N.W.2d at 724.

235. *Id.* ¶¶ 8, 11-13, 758 N.W.2d at 722-24.

236. *See supra* text accompanying notes 227-33 (arguing North Dakota law should disallow the use of self-incriminating statements in subsequent criminal proceedings).

*J.D. candidate at the University of North Dakota School of Law. A special thank you to my wife, Meredith Gunderson, and to my parents, family, and professors for their patience, support, and continuous encouragement.