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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO. 20080043

In the Matter of R.A.S.

FILED
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Cass County State's Attorney,

MAR 16 2009

Appellee.

STATE OF NORTH DAKOTA

vs.

R.A.S.,

Appellant.

APPELLEE'S BRIEF

Appeal from December 2, 2008 Order Denying Discharge
East Central Judicial District
District Court File No. 09-04-R-0187
The Honorable Steven E. McCullough, Judge

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[¶3] ISSUES PRESENTED

- [¶4] I. Whether the State has proven by clear and convincing evidence that RAS remains a sexually dangerous individual and is likely to engage in further acts of sexually predatory conduct.
- [¶5] II. Whether the State has proven that RAS has serious difficulty controlling his behavior.

[¶6] STATEMENT OF THE CASE

[¶7] The State concurs with the statement of the case provided in RAS's brief.
dated January 29, 2009.

[¶8] STATEMENT OF THE FACTS

[¶9] The State generally concurs with the Statement of Facts provided within RAS's brief, with the following clarifications and additions:

- [¶10] 1. At the time of the original commitment in 2004, the State called not only Drs. Etherington and Belanger from the North Dakota State Hospital (NDSH), but also Dr. Gulkin, an independent expert. All three concluded RAS met the standard for civil commitment. Although no transcript of the proceeding was prepared because the commitment order was not appealed, the related evaluations are of record as State's Exhibit Nos. 4, 6 and 7, Docket Nos. 36, 39 and 40.
- [¶11] 2. RAS states that his expert, Dr. Gilbertson, testified that Dr. Belanger (formerly of NDSH) projected his own sexually deviant issues onto RAS when he evaluated him in 2004. RAS also states Dr. Gilbertson testified that Dr. Belanger's evaluation of RAS is "not objective nor scientifically accurate". RAS's Brief at 4. It appears RAS has drawn conclusions beyond Dr. Gilbertson's testimony. Dr. Gilbertson did not testify that Dr. Belanger projected any of his own issues into the RAS evaluation. He did opine that Dr. Belanger was an impaired psychologist. Dr. Gilbertson stated that "you", presumably meaning experts within this field, want to ensure evaluators are "clean as a hound's tooth" so that someone cannot later claim they were impaired

or lacked objectivity. (Tr. at 105-106.) Dr. Gilbertson did not testify that Dr. Belanger had actually lost objectivity, rather that “we”, presumably again meaning other professionals in this field, believe an impaired psychologist has *presumptively* lost objectivity. (Tr. at 105.) Nor did Dr. Gilbertson specifically say that Dr. Belanger’s evaluation was not scientifically accurate, although Dr. Gilbertson reached different conclusions than the three psychologists who evaluated RAS in 2004 and the State’s expert in 2008.

[¶12] 3. Although Dr. Sullivan (from NDSH) testified she did not believe Dr. Belanger’s 2004 evaluation was erroneous, she further explained that it was consistent with Dr. Etherington’s 2004 evaluation. (Tr. at 60, 62.)

[¶13] 4. Dr. Sullivan diagnosed RAS with at least paraphilia, not otherwise specified, with exhibitionist and non-consenting features. (Tr. at 28.) She also testified that he manifests features of psychopathy, or antisocial personality disorder. Id. She further characterized RAS’s combination of psychopathy and paraphilia as the “deadly duo”, concluding he remained at elevated risk for committing sexually violent offenses. (Tr. at 28, ln. 14-17.) She testified that it was quite clear from RAS’s offending history and his convictions that violence and sex were “fused in his mind”. (Tr. at 39, ln. 20-24.) Furthermore, she

stated that although RAS has not in several years said so, he has a history of admitting fantasies about killing his victims. (Tr. at 40, ln. 17-20.)

[¶14] 5. Dr. Sullivan testified that RAS's inability to control his sexual and/or sexually offensive exhibitionistic behavior at the NDSH SDI unit would make it appear impossible for him to control his behavior out on the streets. (Tr. at 41, ln. 7-14.)

[¶15] 6. RAS describes as "fact" that the initial risk assessment tools were "miscalculated." RAS's Brief at 5. The State acknowledges that in 2008 RAS's expert scored the psychometric tools to different and lesser results, but does not acknowledge or concur that the original NDSH scoring was "miscalculated" or that RAS was entitled to a lower risk assignment.

[¶16] 7. The State acknowledges that *at the time of the January 2008 hearing*, no civilly committed individuals had yet been released from NDSH. However, while mentioning this fact, RAS makes no related argument in his Brief.

[¶17] 8. The State acknowledges Dr. Sullivan testified she heard that North Dakota has the lowest standard to commit an individual. However, Dr. Sullivan also indicated she was repeating comments she heard from others, not an understanding she gleaned from her own research. (Tr.

at 52, ln. 15 - Tr. at 53, ln. 2.) Again, while mentioning this fact, RAS makes no related argument in his Brief.

[¶18] 9. Dr. Sullivan testified there was no internal nor external pressure on her to keep civilly committed sex offenders permanently within the NDSH. (Tr. at 53, ln. 3-6.)

[¶19] 10. Other pertinent facts are referenced, as appropriate, throughout this Brief.

[¶20] The State refers to the North Dakota State Hospital as “NDSH” and a sexually dangerous individual as “SDI” throughout the remainder of this brief,

[¶21] ARGUMENT

[¶22] I. Standard of Review.

[¶23] This Court applies a modified clearly erroneous standard to review of a district court's denial of a petition for discharge from civil commitment as a sexually dangerous individual (SDI) under N.D.C.C. ch. 25-03.3. Matter of G.R.H., 2008 ND 222, ¶ 7, 758 N.W.2d 719. Accordingly, this Court will affirm a district court's denial unless the order is "induced by an erroneous view of the law or we are firmly convinced it is not supported by clear and convincing evidence." Id.

[¶24] II. The State has proven, and the District Court did not err in finding, by clear and convincing evidence that RAS remains a sexually dangerous individual and is likely to engage in further acts of sexually predatory conduct.

[¶25] At a discharge hearing the State has the burden to prove by clear and convincing evidence that the committed person remains a SDI. N.D.C.C. § 25-03.3-18(4). A SDI is one who: (1) has engaged in sexually predatory conduct, and (2) has a congenital or acquired condition that is manifested by a sexual disorder, personality disorder or other mental disorder or dysfunction that (3) 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.C.C. § 25-03.3-01(8). The phrase "likely to engage in further acts of sexually predatory conduct" means the individual's propensity towards sexual violence is of such a degree as to pose a threat to others. Matter of Hehn, 2008 ND 36, ¶19, 745 N.W.2d 631. In addition to these

statutory provisions, in order to satisfy substantive due process requirements the individual must be shown to have serious difficulty controlling his behavior. Id. (citing Kansas v. Crane, 534 U.S. 407, 413 (2002)). This last factor will be addressed in more detail in §III of this Brief.

[¶26] In this case, the district court found clear and convincing evidence RAS continued to be a SDI. (Opinion and Order Denying Petition for Discharge, Docket No. 118.)

[¶27] A. **Weight of the Evidence**

[¶28] RAS argues the District Court's December 1, 2008, Order denying discharge should be overturned because his expert (Dr. Gilbertson) had more experience than the State's expert (Dr. Sullivan) and therefore the District Court should have accepted his expert's opinion. RAS's Brief at 8. RAS's argument is essentially about the relative weight of differing opinions.

[¶29] RAS cites no authority for the proposition, nor is the State aware of any, that a district court must accept a particular opinion in the face of conflicting viewpoints by qualified experts. This Court has repeatedly held that the evaluation of the credibility of conflicting evidence rests solely with the trial court. Hehn, at ¶ 23 (citing Alumni Ass'n. v. Hart Agency, Inc., 283 N.W.2d 119, 121 (N.D. 1979)). In Hehn, NDSH and independent experts disagreed about whether Hehn should be civilly committed. This Court indicated it could be reasonably inferred the trial court found the State's testimony more credible. "It is not the function of this court to

second-guess the credibility determinations made by the trial court.” Id.; G.R.H., at ¶ 7.

[¶30] 1. Psychometric Tests and Psychopathy Checklist

[¶31] The State acknowledges Dr. Gilbertson’s credentials to conduct SDI evaluations. However, Dr. Sullivan, testifying for the State, also has an impressive resume in this area of practice. (State’s Exhibit No. 1, Docket No. 85.) Dr. Sullivan reviewed the prior evaluation and psychometric scoring of RAS by Dr. Etherington. Dr. Sullivan also scored three psychometric tools. She scored RAS at a +9 on the MNSOST-R. (Tr. at 20, ln. 2.) That score placed RAS in a high-risk category with a 54% risk to be rearrested for a sexual offense within six years. (Tr. at 20, ln. 5-20; State’s Exhibit No. 4, Docket No. 88.) She scored RAS at a 3 on the RRASOR, which represents a moderate risk, with a 37% re-conviction rate at ten years. (Tr. at 22, ln. 6-10.) She also scored RAS at a 7 on the Static-99, which represents a high risk, with a 52% re-conviction rate at fifteen years. (Tr. at 22, ln. 12-18.) Dr. Sullivan acknowledged RAS might be a 6 on that tool, but noted the risk category and percentages remained the same. (Tr. at 22, ln. 12-18.; Tr. at 25, ln. 5-7, 13-15.) In addition to these three tools, Dr. Sullivan also scored RAS on the PCL-R-2nd, a tool that measures psychopathy. She indicated RAS scored a 30 or above, which connotes a psychopath. (Tr. at 28, ln. 4-13.) Accordingly, he possesses more psychopathic traits overall than 99% of the 1,236 North American adult male forensic psychopathic patients in the normative sample of the PCL-R-2nd. (State’s Exhibit No. 2, page 2,

Docket No. 86.) Dr. Sullivan characterized *psychopathy* as “antisocial personality disorder plus” and useful for distinguishing somebody from the regular antisocial personality disorder (Tr. at 26, ln. 7-9.) According to Dr. Sullivan, a psychopath’s general personality style is being an “extremely arrogant, cold, abusing, deceitful, manipulative, dysempathetic, manipulative person.” (Tr. at 27, ln. 6-9.)

[¶32] 2. Diagnosis and the “Deadly Duo”

[¶33] Dr. Sullivan also diagnosed RAS with a paraphilia not otherwise specified with exhibitionistic and non-consenting features. (Tr. at 28, ln. 1-8.) She testified that RAS’s combination of paraphilia and psychopathy is colloquially known as the “deadly duo,” meaning he remains at an elevated risk for sexually violent offenses. (Tr. at 28, ln. 12-17.) With this combination, an individual is at the “highest possible risk for future sexual offending,” higher than the other risk assessment tools can estimate. (Tr. at 26, ln. 15-24; State’s Exhibit No. 2, page 2, Docket No. 86.) This combination connotes a person that will “re-offend more quickly and more certainly” than other types of sex offenders. (Tr. at 27, ln. 11-17, 22-23.)

[¶34] 3. Treatment

[¶35] Dr. Sullivan testified that there are five stages of intensive sex offender treatment at NDSH. She further testified RAS has not successfully completed sex offender treatment, had trouble progressing out of stage 1, believed that in 2007 RAS had at some point refused to continue treatment (although that was not entirely clear

to Dr. Sullivan) and at the time of the January 2008 hearing he was not participating in treatment. (Tr. at 43, ln. 5 - Tr. at 45, ln. 22.)

[¶36] 4. Behavior While at NDSH

[¶37] In addition to the psychometric tools, diagnosis and lack of treatment programs. Dr. Sullivan wrote and testified about RAS's past behavior while at NDSH. (State's Exhibits 2 and 3, Docket Nos. 86 and 87; Tr. at 32 - 45.) That behavior included multiple exhibitionistic episodes, physically violent situations and efforts to establish inappropriate relationships with NDSH personnel. (Tr. at 36 - 41.) Dr. Sullivan indicated it was difficult to perceive how RAS could control his sexual behavior outside of the structured setting of NDSH when he could not do so within it. (Tr. at 41, ln. 7-14.)

[¶38] As a counterpoint, Dr. Gilbertson felt "some" of RAS's exhibitionist behaviors at NDSH may not be for "sexual intent or sexual arousal, but just kind of nasty." (Tr. at 108, ln. 5-8.) Dr. Gilbertson indicated it was unclear to him that RAS intended female staff to view his masturbation. However, if it was intentional, then it was a sexual act which "concerned" Dr. Gilbertson. (Tr. at 108, ln. 9-18.)

[¶39] About one of those situations, Dr. Sullivan explained that RAS, while in administrative segregation, exposed himself on camera to staff, simultaneously discussing his physical endowments, how he was unable to get any sex within NDSH, and referred to excrement and his penis in the same sentence, apparently linking them in a manner that was akin to one of his predicate criminal sexual offenses. (Tr. at 37,

ln. 14 - Tr. at 38, ln. 5.) The State is unable to perceive how this act was unintentional.

[¶40] 5. Acknowledgments by Dr. Gilbertson

[¶41] RAS's expert, Dr. Gilbertson, testified that RAS should be released, and that he probably would not have supported civil commitment in the first instance. (Tr. at 113, ln. 22 - Tr. at 114, ln. 2.) However, Dr. Gilbertson acknowledged that RAS spent little time in the public realm in the last twenty years and "has not done well on conditional release." (Tr. at 109, ln. 21 - Tr. at 110, ln. 5; Tr. at 110, ln. 21 - Tr. at 111, ln. 1.) Dr. Gilbertson also acknowledged that while RAS had exhibited better behavioral control in the few months immediately prior to his meeting with RAS, RAS apparently got worse thereafter. (Tr. at 112, ln. 19 - Tr. at 113, ln. 9.)

[¶42] To the extent that numbers matter, Dr. Gilbertson's opinion is contrary to NDSH Drs. Etherington, Belanger and Sullivan, as well as independent expert Dr. Gulkin. Although perhaps only modestly relevant, the State notes that the Hon. Steven E. McCullough was not, in December 2008, the first and only court to find that RAS should be or remain civilly committed, but rather the latest. The Hon. Lawrence A. Leclerc committed RAS in 2004, and the Hon. Steven L. Marquart denied RAS discharges in 2005 and 2006 after hearings.

[¶43] 6. Other Considerations

[¶44] RAS does not argue now, nor in the past, that he did not commit the predicate criminal sexual offenses to be a SDI under N.D.C.C. ch. 25-03.3. Copies

of the related convictions were provided in 2004 as Exhibit Nos. 1 and 2, Docket Nos. 33 and 34.

[¶45] B. **Alleged Bias**

[¶46] RAS also argues the opinion of the State's expert was "biased" and "subjective" because: (1) she testified there was no evidence that Dr. Belanger's previous expert opinion in sex offender evaluations was invalid, (2) she ignored the principles of the general scientific community when she minimized whether RAS would experience a significant decline in his recidivism due to his age and (3) she did not use the 2003 coding rules for scoring the Static-99 tool. RAS's Brief at 9-10.

[¶47] 1. Dr. Belanger

[¶48] A bit of perspective about Dr. Belanger's role in RAS's initial commitment is worthwhile. First, a respondent may appeal an order for commitment, but must file a notice of appeal within thirty days after the entry of the order. N.D.C.C. § 25-03.3-19. The commitment order in this case was entered on July 30, 2004 (Docket No. 30). The State also filed a notice of entry of order on August 20, 2004. RAS never appealed that commitment, several years have passed and an appeal of that decision is no longer timely. Second, the credibility of Dr. Belanger's 2004 testimony is irrelevant because the question before the District Court here was not whether RAS should have been committed in 2004, but whether at the time of the January 2008 hearing RAS remained a SDI. The standard for determining whether an individual should *remain* civilly committed is the same as the standard for the

initial commitment. N.D.C.C. § 25-03.3-18(4). Consequently the issue was whether the State provided clear and convincing evidence in the 2008 discharge hearing, not the 2004 commitment proceeding. For all the reasons discussed herein, the State asserts it met that burden. Lastly, Dr. Belanger's opinion was one of three opinions proffered by the State during the 2004 commitment proceeding. The two others were by Dr. Etherington (NDSH), as well as by Dr. Gulkin, an independent expert. Both submitted written evaluations (Docket Nos. 19 and 29, respectively) and testified at the hearing. All three experts concluded RAS should be committed as a SDI. At the time, the statute required the State to provide at least two experts. N.D.C.C. § 25-03.3-13. The statute was modified in the 2007 legislative session to require "expert evidence." In other words one expert could suffice, rather than at least two experts. Id. The State disagrees that Dr. Belanger's 2004 evaluation was inherently invalid - it was consistent with two other experts.

[¶49] RAS argues Dr. Sullivan should be impeached because she was trying to defend Dr. Belanger "to protect the state hospital from civil lawsuits and civil liability." RAS's Brief at 9. This argument is pure speculation. Dr. Belanger's self-reported misconduct does not automatically invalidate RAS's initial civil commitment proceeding, nor is there any evidence that Dr. Belanger's conduct exposed NDSH to any civil liability. See State v. McLain, 312 N.W.2d 343, 346 (N.D. 1981) (purely impeaching evidence usually is a poor basis to grant a new trial); see also Syvertson v. State, 2005 ND 128, ¶ 9, 699 N.W.2d 855 (if the newly discovered evidence is of

such a nature that it is unlikely to change the results of the original trial, the court's denial of the new trial motion is not an abuse of discretion); State v. Garcia, 462 N.W.2d 123, 124 (N.D. 1990). There is no evidence the State knew or should have known about Dr. Belanger's conduct before he reported it to his supervisor. Accordingly, there is no basis for imposing liability on the State for any testimony he gave during the period of time he engaged in this conduct. See Syvertson, at ¶ 9-10 (knowledge of the misconduct by State's expert witness by some State agencies could not be imputed to State's Attorney). Here RAS has offered no evidence that any State official had any knowledge of Dr. Belanger's conduct. Based on the foregoing, there is no basis for arguing Dr. Sullivan's testimony was skewed by a need to protect NDSH from civil actions for damages.

[¶50] 2. Principles in Scientific Community

[¶51] RAS argues Dr. Sullivan's testimony was biased and/or subjective because she failed to adhere to general principles in the scientific community. RAS's Brief at 9-10. Specifically, he argues Dr. Sullivan's testimony was biased because she disagreed that RAS would necessarily experience a significant decline in the risk to re-offend because he was then forty-one years old. It is instructive to explore the context of Dr. Sullivan's testimony on this point. During Dr. Sullivan's cross examination the following exchange occurred:

Q. [Mr. Edinger] Doctor, according to published scientific literature, isn't it

true that once a sex offender reaches the age of 40 their chances of re-offending or committing a sex offense decreases by 12 percent?

A. [Dr. Sullivan] I don't believe there's -- if you could point out the published study that says that it's 12 percent. I don't have -- I'm not aware of anything that says it's 12 percent specifically.

Q. You are aware of scientific journals that say there's a decreased likelihood of re-offending once a sex offender reaches the age of 40?

A. There are studies saying there's a gradual decrease to some extent. but I don't believe it's stated anywhere categorically that it's 12 percent.

(Tr. at 47.) It appears RAS got the 12% number from page 28 of Dr. Gilbertson's report. (Petitioner's Exhibit No. 8, Docket No. 92.) The report states "there is a decline in [sexual offenders'] sexual recidivism rates to approximately 12% at 40 to 50 years of age." Id. (citations omitted). The report does not indicate the rate categorically drops 12%, or to 12%, at age forty for every sex offender, nor that RAS in particular has dropped 12%. or to 12%.

[¶52] Prior to this exchange Dr. Sullivan testified on direct examination about age and the risk of recidivism:

Q. [Mr. Burdick] ... To what extent is [RAS's] age relevant to your consideration of this case at all?

A. [Dr. Sullivan] Age in general is relevant because studies do show that as individuals age risk of sexual offending does decrease to some extent. But that is an individualistic factor that needs to be looked at quite specifically. It also needs to be looked at by the type of offense that is committed. For example, rapists in general -- age affects the risk of rapists and sooner in the age span, life span than it does say child molesters. But, again, it needs to be looked at very individualistically. It's my understanding that [RAS] is in his early 40s. I don't believe that the research shows conclusively that he has aged out of a significant amount of risk. He is certainly not in the highest area of his risk according to the research, but he certainly is not aged completely out of risk. If he was, say, in his late 50's, 60's, something like that, then that would -- age would be a significant decrease in his risk factors, risk. But at this point he's certainly not completely aged out of any risk whatsoever. The -- on the actuarial risk assessment instruments, he's aged out of a couple of the risk items on some risk instruments. But that doesn't mean [sic] that he's risked -- aged out of risk altogether.

(Tr. at 12 -13.)

[¶53] Dr. Sullivan's testimony cited above shows a careful consideration of the relationship between age and an individual's risk of future offending. Moreover, RAS's argument that Dr. Sullivan "is unaware of any scientific studies that support this theory" (that the risk of recidivism is inversely related to an individual's age) is contrary to her testimony. Accordingly, Dr. Sullivan's testimony about the relationship between age and recidivism does not reflect a failure to apply principles generally accepted in the scientific community.

[¶54] 3. Static-99 Coding Rules

[¶55] RAS further argues Dr. Sullivan's testimony was biased because she did not use the 2003 coding rules for scoring the Static-99. However, RAS does not cite anything from the record showing that if Dr. Sullivan had used the 2003 coding rules she would have concluded that RAS was at no risk or a low risk of committing a future sexual offense. It is instructive to note that the authors of the revised coding rules for the Static-99 explained:

It is important to remember that no item definitions [in the instrument] have been changed and no items have been added or subtracted. Present changes [to the coding rules] reflect the need for a clearer statement of intent of the items as the use of the instrument moves primarily from the hands of researchers and academics into the hands of primary service providers...

Andrew Harris, Amy Phenix, R. Karl Hanson, and David Thornton, Static-99 Coding Rules Revised 9 (2003) (emphasis added).

[¶56] Dr. Sullivan testified that NDSH uses the 1999 rules, which established the norms for the tool and formed the basis for the related risk assessments. According to Dr. Sullivan, the risk assessments have not been tested against the 2003 rules. (Tr. at 23, ln. 15 - Tr. at 25, ln. 15.)

[¶57] In the absence of any direct evidence that an expert is required to use the 2003 scoring rules, or that if Dr. Sullivan used those rules she would have calculated a significantly different score on the Static-99, RAS's claim on this issue should be rejected. Furthermore, the Static-99 tool is just one of several tools used by NDSH. Moreover, as this Court noted in previous decisions, actuarial instruments may not be as important as an expert's clinical judgment as to whether a respondent is a SDI who is likely to commit a future sexual offense. See Hehn, at ¶28 (the fact that "actuarial test scores did not give rise to scores showing a high risk of re-offending does not preclude the fact-finder from coming to an alternative conclusion").

[¶58] The State asserts RAS's allegation of bias and subjectivity are without foundation or merit.

[¶59] C. **District Court Opinion**

[¶60] The State asserts it provided the District Court ample information by way of professional diagnoses, lack of treatment progress, psychometric scoring and past and recent behavior by RAS to support the denial of a discharge pursuant to North

Dakota's statute and the requirements of Crane (the latter is addressed in further detail in §III of this Brief). The District Court reviewed the evidence, noted the distinction between the State's and RAS's experts, concluded the State's evidence was "credible and believable" and that the State had met its burden. (Opinion and Order Denying Petition for Discharge, Docket No. 118.) Its credibility determination in the presence of conflicting testimony does not warrant second-guessing by an appellate court. Hehn, at ¶ 23; G.R.H., at ¶ 7. The State asserts there is no basis to find the District Court erroneously interpreted the law nor that its December 1, 2008. Opinion and Order was unsupported by clear and convincing evidence.

[¶61] III. **The State has proven, and the District Court did not err in finding, that RAS has serious difficulty controlling his behavior.**

[¶62] In Kansas v. Crane, 534 U.S. 407, 413 (2002) the United State's Supreme Court concluded that commitment of a SDI cannot be constitutionally sustained without a determination that the person to be committed has serious difficulty controlling his behavior. G.R.H., at ¶ 7. There must be a nexus between the disorder and dangerousness, proof of which encompasses evidence showing the individual has serious difficulty controlling his behavior, which suffices to distinguish a SDI from other dangerous persons. Id.

[¶63] RAS argues that although he may have committed many incidents of indecent exposure at NDSH, he has not committed any within the community. The State notes, as an aside, that the absence of such convictions, while informative, is

not conclusive of his never having committed any such acts. Having said that, Dr. Gilbertson acknowledged that during his adult life, RAS spent little time in the public realm, has not done well when on conditional release and committed multiple sexual crimes when he was in the public realm. (Tr. at 109, ln. 17 - Tr. at 111, ln. 1.) RAS quotes Dr. Gilbertson's report that RAS's exhibitionistic behavior at NDSH "may be" tied to his institutional living status. Dr. Gilbertson believes "*some* of this is just purely to get back at the system." (Tr. at 108, ln. 2-8)(emphasis added). However, Dr. Gilbertson further acknowledges that *if* RAS drew the attention of female NDSH staff to his masturbation then "I would have concerns, yes ... it may be more sexual." (Tr. at 108, ln. 9 - Tr. at 109, ln. 4.) As noted in §II.A.4, ¶39, of this Brief, and Dr. Sullivan's description of RAS's behavior, it is difficult to imagine that RAS *accidentally* exposed himself to NDSH staff. (Tr. at 37, ln. 14 - Tr. at 38, ln. 5.) The District Court referred to additional behavior in its Opinion and Order. (App. at A10-11.)

[¶64] RAS also argues he has not committed any "sexually predatory acts" while housed at NDSH. However, RAS does not identify whether and where such a requirement exists for continued SDI civil commitment. The State asserts it has no such burden of proof.

[¶65] Dr. Sullivan testified it was clear from RAS's conviction and offending history that violence and sex are "fused in his mind." (Tr. at 39, ln. 20 - Tr. at 40, ln. 3.) Dr. Sullivan further testified that the concept of sadism is also relevant for RAS

because an offender with sadism, combined with antisocial personality disorder or psychopathy, may eventually kill their victims. Dr. Etherington (NDSH) had previously diagnosed RAS with sadistic features and RAS has, in the past, freely admitted to fantasizing about killing his victims, albeit Dr. Sullivan noted that RAS had not admitted that in the past several years. (Tr. at 40, ln. 11-21.)

[¶66] Dr. Sullivan administered the PCL-R-2nd psychopathy checklist to RAS. She also reviewed prior checklist results by Dr. Etherington. Dr. Sullivan testified that RAS scored “30, 33, 34. something like that”. (Tr. at 28, ln. 8-11.) In her written report, Dr. Sullivan reflected a score of “33 or 34”. Docket No. 66, p. 1. She indicated that result indicates he is “unusually detached, cold, grandiose, manipulative, willing to lie and lacking empathy and remorse.” *Id.*, p. 2. She also diagnosed RAS with “at least paraphilia not otherwise specified with exhibitionist and non-consenting features. (Tr. at 28, ln. 1-4.) Dr. Sullivan indicated that a score of 25 or 30, plus a paraphilia: “sort of negates the scores on the risk assessment instruments ... because it indicates that the person is at the highest possible risk for future sexual offending that we can estimate ... higher than what these risk assessment instruments could possibly estimate”; “there’s no way to quantify what the risk is, but we know it is extremely high and the person will re-offend faster and more certainly than the risk assessment instruments can estimate”; “they re-offend more quickly and more certainly than any other types of sex offenders”; and these observations apply to RAS. (Tr. at 26, ln. 25-26; Tr. at 27, ln. 9-23.) Refer also to the discussion about the

“deadly duo” in §II.A.2 of this Brief.

[¶67] In its Opinion, the District Court noted there may be some uncertainty about the standard of proof required of the State on the additional Crane element about difficulty controlling behavior. However, the District Court concluded the State presented evidence sufficient to satisfy either a preponderance or clear and convincing standard. (Opinion and Order Denying Petition for Discharge, footnote 1, App. at A7-8.) In so doing the District Court, among other things, reviewed RAS’s sexual misconduct while at NDSII, noted his lack of treatment progress, referenced the “deadly duo” and concluded RAS has serious difficulty controlling his behavior.

[¶68] CONCLUSION

[¶69] The State asserts the District Court's Opinion and Order Denying Petition for Discharge, dated December 1, 2008, satisfies the remand for detailed findings of fact and conclusions of law in Matter of R.A.S., 2008 ND 185, ¶¶ 9-10, 14, 765 N.W.2d 771 and supports its denial of discharge. For the reasons set forth, the State respectfully requests this Honorable Court affirm the district court's order denying discharge to RAS.

Respectfully submitted this 16th day of March, 2009.

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[¶70] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on this 16th day of March, 2009, to: Richard Edinger at edingerlaw@cableone.net.

Birch P. Burdick