

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

In the Interest of Robert R. Hoff

SEP 26 2012

Pamela Ann Nesvig,  
Assistant State's Attorney,

STATE OF NORTH DAKOTA

Petitioner-Appellee

-vs-

Robert R. Hoff,

Supreme Ct. No. 20120248

Respondent-Appellant,  
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**BRIEF OF PETITIONER-APPELLEE**

APPEAL FROM THE SOUTH CENTRAL DISTRICT COURT'S ORDER  
FOR CONTINUED COMMITMENT OF A SEXUALLY DANGEROUS  
INDIVIDUAL FROM A DISCHARGE HEARING MARCH 26, 2012

Burleigh County District Court  
South Central Judicial District  
The Honorable Bruce A. Romanick, Presiding

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**STATEMENT OF THE ISSUES**

- I. Whether requiring Mr. Hoff to remain handcuffed during the annual review hearing violated his right of due process to a fair trial.
- II. Whether sufficient evidence was presented to determine Mr. Hoff met the criteria to remain committed as a sexually dangerous individual.

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**STATEMENT OF THE CASE**

Hoff's statement of the case is substantially accurate and the State joins  
in the same.

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**STATEMENT OF THE FACTS**

Hoff's statement of the case is substantially accurate; however, the State believes additional facts are necessary for a complete understanding of the discharge hearing.

The State's expert, Dr. Lisota testified Mr. Hoff was initially determined to be a sexually dangerous individual in 2005. Tr. p. 15. After determining whether Mr. Hoff had engaged in sexually predatory conduct, Dr. Lisota testified as to whether Mr. Hoff suffered from a mental disease or defect. Id. at 12. Dr. Lisota testified that Mr. Hoff has a diagnosis of antisocial personality disorder. Id. at 13.

Dr. Lisota stated that generally, antisocial personality disorders are pervasive and include a pattern of disregard for the rights of others, and, since it is a personality disorder, it is not going to go away. Id. at 14-15. In order to diagnose antisocial personality disorder, an individual must meet three of seven different criteria, and Dr. Lisota testified that he believed Mr. Hoff met all seven of the criteria. Id. at 15. Further, Dr. Lisota testified that this diagnosis would be consistent with his score on the psychopathy checklist, and that every other evaluator, including state and independent, have found that Mr. Hoff has this diagnosis, with the exception of Dr. Riedel. Id. at 16. Evidence Mr. Hoff has this diagnosis, as stated by Dr. Lisota, include Mr. Hoff's struggle with authority figures, struggle complying with unit rules, and failing to conform with social norms with respect to lawful behaviors. Id. Specifically, Dr. Lisota testified that Mr. Hoff has had a total of 17 resident

1 behavior warnings, considered a high number, since his last review for Mr.  
2 Hoff's failure to follow unit directives. Id. at 17. Mr. Hoff also called a staff  
3 member a "cunt" and was written up for engaging in certain behaviors with  
4 female staff. Id.

6 Dr. Riedel disagreed with Dr. Lisota's diagnosis and had testified Mr.  
7 Hoff only met one or two of the seven requirements, but after questioning Dr.  
8 Riedel about his scoring for antisocial personality disorder, additional  
9 information was obtained. Id. at 93, 115-116. Dr. Riedel did not find that Mr.  
10 Hoff had met the requirement of deceitfulness even though he acknowledged  
11 he had scored Mr. Hoff high on psychopathy which makes Mr. Hoff a "better  
12 manipulator." Id. at 124. Further, Dr. Riedel acknowledged that he  
13 commented on Mr. Hoff's statements surrounding an insufficient fund case  
14 that Mr. Hoff's statements were consistent with what a psychopath would say.  
15 Id. at 124. After this acknowledgement, Dr. Riedel conceded that this would  
16 go towards deceitfulness in determining whether Mr. Hoff has antisocial  
17 personality disorder. Id. at 124-125.

20 Dr. Riedel testified initially that he did not find sufficient evidence to  
21 support the third component for antisocial personality disorder, which is  
22 impulsivity or failure to plan ahead. Id. at 125. However, Dr. Riedel testified  
23 he did not believe Mr. Hoff had planned out his GSI offenses and testified  
24 they would have been impulsive. Id. Dr. Riedel also testified he did not find  
25 any evidence Mr. Hoff met the fourth requirement for the disorder, irritability  
26 and aggressiveness. Id. However, Dr. Riedel testified he could not recall  
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1 reviewing reports involving Mr. Hoff assaulting his siblings, engaging in  
2 disorderly conduct and vandalism. Id. at 126. Dr. Riedel then testified he did  
3 not find the fifth requirement for antisocial personality disorder, the reckless  
4 disregard for the safety as others, as he did not believe the underlying GSI  
5 involving force and Mr. Hoff's past cruelty to animals were a sufficient  
6 pattern of behavior to find the fifth requirement, however, Dr. Riedel did  
7 concede that he may be jaded from working with sexually dangerous  
8 individual cases too long. Id. at 126-127.

11 Dr. Lisota testified regarding Mr. Hoff's test scores to determine his  
12 risk level. Dr. Lisota stated he relied on the Static-99R of five which meant  
13 that Mr. Hoff was 2.7 more likely than the average or typical sex offender to  
14 re-engage and a 35.5 percent chance of reconviction for a sexual crime within  
15 ten years. Id. at 18-19. Dr. Lisota's score on the Static-99R compared to past  
16 evaluations did not drastically differ from Mr. Hoff's past scores and was  
17 consistent with past evaluators. Id. at 19.

19 Dr. Lisota found Mr. Hoff to have scored a plus thirteen on the  
20 MnSOST-R which places Mr. Hoff in the "referred for commitment bin" and  
21 places Mr. Hoff in a category where there is a "78 percent chance of re-arrest  
22 or a sex crime over an interval of six years." Id. at 19-20. Dr. Lisota testified  
23 he had looked at Mr. Hoff's past scores on this instrument and the lowest  
24 score he had ever received was an eleven, but the majority of the evaluators  
25 place Mr. Hoff at a score of thirteen. Id. at 20. Dr. Lisota stated that the  
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actuarial tests placed Mr. Hoff at the moderate to quite high risk for sexual  
recidivism. Id. at 22.

Dr. Riedel testified Mr. Hoff scored a seven on the MnSOST-R. Id. at  
107. When questioned why he had changed Mr. Hoff's score on this test from  
an eleven in 2009, Dr. Riedel could not cite the "new information" he based  
his changed scoring results upon. Id. at 129, 132. When questioned  
specifically as to his scoring results Dr. Riedel was questioned about his  
scoring of number five on the test, was force or threat of force ever used to  
achieve compliance in any sex offense. Id. Dr. Riedel acknowledged he gave  
that question a negative three response, no force used in any offense, even  
though Mr. Hoff pled guilty to a forced gross sexual imposition offense. Id. at  
129-130. Further Dr. Riedel acknowledged that was different than the other  
evaluators who had scored Mr. Hoff. Id. at 130. Dr. Riedel further  
acknowledged that he was the lowest out of all of the evaluators on this test in  
Mr. Hoff's history. Id. at 132.

Dr. Lisota testified he reviewed Mr. Hoff's results on the Psychopathy  
Checklist Revised (PCL-R) and agreed with a score of thirty three. Id. at 22-  
23. Dr. Lisota stated that if an individual is deemed psychopathic, they are at  
increased risk for sexual re-offense. Id. Dr. Lisota testified that the PCL-R  
has a standard of error of measurement of plus or minus three points, and his  
score of thirty three would create a potential low of thirty, which is deemed  
the cut off for psychopathy. Id. at 23. Further, Dr. Lisota informed the court  
that past evaluators, including independent evaluators have all found Mr.

1 Hoff's PCL-R scores to range between thirty and thirty three. Id. Dr. Lisota  
2 testified that Mr. Hoff's score places him at greater risk for sexual re-offense  
3 and the combination of his psychopathy and his antisocial personality disorder  
4 indicates a high degree of risk. Id. at 24, 37.

6 Dr. Riedel scored Mr. Hoff in 2009 on the PCL-R at a thirty whereas  
7 at the hearing he testified he now found Mr. Hoff had a score of 27. Id. at 42,  
8 112. Dr. Riedel based this change in scoring on a change of information,  
9 however, when presented with the question of what information deemed the  
10 change, Dr. Riedel was unable to specifically indicate to the court what  
11 information he relied upon in coming to this conclusion. Id. at 119-120.

13 Dr. Lisota also testified regarding dynamic risk factors to show what  
14 an individual's short term risk for sexual re-offense. Id. at 24-25. Dr. Lisota  
15 did not find anything in the dynamic risk factors that would lead him to  
16 conclude Mr. Hoff no longer was at a high risk for sexual re-offense. Id. at  
17 25.

19 Dr. Lisota testified that Mr. Hoff would have serious difficulty  
20 controlling his behavior if he were discharged. Id. Dr. Lisota based his  
21 decision on Mr. Hoff's legal history, which he testified was quite extensive,  
22 and Mr. Hoff's lack of progress in treatment to date, including his excessive  
23 number of behavior warnings. Id. at 26. Specifically Dr. Lisota testified that  
24 Mr. Hoff has basically ended his year where he started in treatment as he went  
25 up one stage and then went down a stage. Id. Dr. Lisota found Mr. Hoff's use  
26 of sarcasm to be problematic and Mr. Hoff is defensive and tries to stay under  
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1 the radar in group by remaining silent, however, Mr. Hoff does encounter  
2 difficulties as he is impulsive. Id. Further, Dr. Lisota cited altercations with  
3 peers or staff as Mr. Hoff does not receive feedback very well and Mr. Hoff  
4 has problems participating in group. Id. at 26-27. Dr. Lisota did state that he  
5 has made some progression in treatment, however, that progress was not  
6 substantive and would not mitigate his risk for sexual re-offense. Id. at 27.

7  
8 Specific statements from Mr. Hoff that Dr. Lisota found concerning  
9 from group included “he’ll probably re-offend sexually, or sarcastically, in 30  
10 days post discharge. . . . he is a sex addict. If I get a taste, I want more and  
11 more.” Id. at 28. Dr. Lisota also testified that Mr. Hoff stated he doesn’t like  
12 authority figures and he generally does not tell the truth. Id. Dr. Lisota  
13 testified that Mr. Hoff demonstrates serious difficulty controlling his behavior  
14 and it would be worse in a less restrictive environment than the State Hospital.  
15 Id. Dr. Lisota testified he recommended the court return Mr. Hoff to the care  
16 and custody of DHS as a sexually dangerous individual. Id. at 29.

17  
18 Dr. Riedel testified in his direct exam that he was concerned that Mr.  
19 Hoff “relates to a rapist’s profile” and Mr. Hoff’s high relationship to  
20 “antisocial personality disorder profile and to borderline personality disorder  
21 profile.” Id. at 86. Ultimately, Dr. Riedel testified that he did not find that  
22 Mr. Hoff met the criteria for commitment. Id. at 116. However, Dr. Riedel  
23 admitted that Mr. Hoff has not changed his ability to follow rules at the State  
24 Hospital and get through their programming. Id. at 134.

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**ARGUMENT**

I. REQUIRING MR. HOFF TO REMAIN HANDCUFFED DURING  
THE ANNUAL REVIEW HEARING DID NOT VIOLATE HIS  
RIGHT OF DUE PROCESS TO A FAIR TRIAL.

Mr. Hoff's right to due process was not violated when he was required to wear restraints during his annual review hearing. This court applies a modified clearly erroneous standard of review when analyzing a district court's decision for commitment of a sexually dangerous individual. In re Maedche, 2010 ND 171, ¶ 9, 788 N.W.2d 331. "We will affirm a district court's commitment order unless the order is induced by an erroneous view of the law, or we are firmly convinced the order is not supported by clear and convincing evidence." Id., citing Matter of G.R.H., 2006 ND 56, ¶ 8, 711 N.W.2d 587. Mr. Hoff argues that sexually dangerous individuals should be considered under the same standard as a juvenile; however, this is not an appropriate classification. "Sexually dangerous individuals are distinctively dangerous due to the high probability that they will commit further acts of sexually predatory conduct if not confined in a secure facility." In re P.F., 2008 ND 37, ¶ 19, 744 N.W.2d 724. By virtue of their initial commitment, these individuals have already been determined to pose a danger to society, and because of this, there is justification to treat these individuals differently in order to protect the public. Id. at ¶ 20. Further, this Court has determined the State has a compelling interest that justifies treating sexually dangerous individuals differently. Id.

1 Sexually dangerous individuals are treated by some courts to be  
2 considered a pretrial detainee as both remain in custody as they are believed to  
3 be a danger to society. Serna v. Goodno, 567 F.3d 944, 948-49 (8th Cir.  
4 2009). Further it has been determined that the use of physical restraints is not  
5 in and of itself a violation of the Fourteenth Amendment to the Constitution  
6 during transport of sexually dangerous individuals. Thielman v. LEEAN, 282  
7 F.3d 478, 482 (7th Cir. 2002). At the hearing in this case, Mr. Hoff was  
8 restrained due to the court's determination that Mr. Hoff was a danger and Mr.  
9 Hoff would not suffer any prejudice by remaining restrained during the  
10 hearing. Tr. pp. 5-6. The court's assessment of Mr. Hoff's status was  
11 appropriate under the circumstances and his right to due process was not  
12 violated.

15 Should the Court determine the due process analysis in cases involving  
16 sexually dangerous individuals should mirror that of a juvenile's right to be  
17 free of restraint, it should be determined that Mr. Hoff's due process right was  
18 not violated. An individual's right to due process is violated in a juvenile trial  
19 when the court does not exercise its discretion and defers to law enforcement  
20 whether an individual should be restrained during a trial. In re R.W.S., 2007  
21 ND 37, ¶ 17, 728 N.W.2d 326. In this case, Mr. Hoff appeared for a hearing  
22 to determine whether he remained a sexually dangerous individual; a decision  
23 to be rendered by a judge, based upon the testimony of expert witnesses. Tr.  
24 pp. 3-6. The court did ask law enforcement present at the hearing their  
25 opinion whether Mr. Hoff was to remain restrained, however, it does not  
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1 appear from record that was the court's only factor in rendering its decision.  
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3 Id. Further, the court specifically stated "I'm the guy that makes the decision  
4 in this case." Id. at p. 5, ln. 25.

5 This Court has stated that the factors a juvenile court should consider  
6 in determining whether the accused should be restrained include "the  
7 accused's record, temperament, and the desperateness of his situation; the  
8 security situation at the courtroom and the courthouse; the accused's physical  
9 condition; and whether there was an adequate means of providing security that  
10 was less prejudicial." In re R.W.S., 2007 ND 37, ¶ 8, 728 N.W.2d 326. In  
11 Mr. Hoff's case the court stated, in response to his attorney's argument that no  
12 one said he was a danger, that he has been convicted of at least two felonies.  
13 Tr. p. 5. The court also referred to concerns that Mr. Hoff had been  
14 transported 90 miles for the hearing and the fact he was incarcerated and the  
15 sheriff's department wished for him to remain cuffed as he may be a danger.  
16  
17 Id.

18  
19 With respect to a juvenile proceeding, as they do not have the potential  
20 for jury prejudice, there must be a consideration of not inhibiting that  
21 individual's right to consult with their attorney during the proceeding. In re  
22 R.W.S., 2007 ND 37, ¶ 15, 728 N.W.2d 326. In this case, the court ensured  
23 Mr. Hoff was able to communicate with his attorney during the proceeding.  
24 Tr. pp. 5-6. Mr. Hoff was able to communicate on paper and orally even  
25 though he remained restrained during the hearing. Id. at pp. 4-6. Further, the  
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1 potential he could not write was the sole basis for which the objection was  
2 made by Mr. Hoff's attorney at the hearing. Id. at p. 4.

3  
4 Should the Court determine sexually dangerous individuals are subject  
5 to the same standards as a juvenile accused of a crime and Mr. Hoff's right to  
6 due process was violated, the violation of Mr. Hoff's right to due process was  
7 harmless. In re R.W.S., 2007 ND 37, ¶ 19, 728 N.W.2d 326. In this case, the  
8 error did not contribute to the court's finding that Mr. Hoff remained a  
9 sexually dangerous individual as the court's decision was based upon expert  
10 witness testimony, as outlined in the arguments to follow. Id. Therefore, any  
11 violation of due process in this case was harmless.  
12

13 II. SUFFICIENT EVIDENCE WAS PRESENTED TO DETERMINE  
14 MR. HOFF MET THE CRITERIA TO REMAIN COMMITTED  
15 AS A SEXUALLY DANGEROUS INDIVIDUAL.  
16

17 Sufficient evidence was presented to determine Mr. Hoff had met the  
18 criteria that he remains a sexually dangerous individual.

19 In reviewing the trial court's order, we give great deference to the  
20 court's credibility determinations of expert witnesses and the weight to  
21 be given their testimony. Id. The trial court is the best credibility  
22 evaluator in cases of conflicting testimony and we will not second-  
guess the court's credibility determinations. Matter of Hanenberg,  
2010 ND 8, ¶ 9, 777 N.W.2d 62.

23 In re Wolff, 2011 ND 76, ¶ 5, 796 N.W.2d 644. In this case Mr. Hoff  
24 completed an application for discharge on September 21, 2011. Appellant  
25 App. p. 7. The State is required to prove at a discharge hearing the individual  
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1 committed remains a sexually dangerous individual by clear and convincing  
2 evidence. Matter of Midgett, 2009 ND 106, ¶ 6, 766 N.W.2d 717.

4 A sexually dangerous individual is one who (1) has engaged in  
5 sexually predatory conduct; (2) has a sexual, personality, or other  
6 mental disorder; and (3) is likely to engage in further acts of sexually  
7 predatory conduct as a result of his disorder. N.D.C.C. § 25-03.3-  
8 01(8).

7 In re Wolff, 2011 ND 76, ¶ 6, 796 N.W.2d 644. Not only must the State show  
8 that the individual meets these three criteria, in order to comply with  
9 substantive due process, the State must also show the individual has serious  
10 difficulty controlling his behavior. Id. at ¶ 7; Midgett, 2009 ND 106, ¶ 6, 766  
11 N.W.2d 717; see also Kansas v. Crane, 534 U.S. 407, 412-13 (2002).

13 We construe the definition of a sexually dangerous individual to mean  
14 that proof of a nexus between the requisite disorder and dangerousness  
15 encompasses proof that the disorder involves serious difficulty in  
16 controlling behavior and suffices to distinguish a dangerous sexual  
17 offender whose disorder subjects him to civil commitment from the  
18 dangerous but typical recidivist in the ordinary criminal case.

17 Interest of J.M., 2006 ND 96, ¶ 10, 713 N.W.2d 518.

18 A. Clear and convincing evidence was presented to the court to find Mr.  
19 Hoff had engaged in sexually predatory conduct.

20 In this case, both experts agreed that Mr. Hoff had committed acts that  
21 would constitute sexually predatory conduct. The State's expert, Dr. Lisota,  
22 testified that the prior acts Mr. Hoff committed included a gross sexual  
23 imposition as a juvenile that involved Mr. Hoff having sexual contact with a  
24 ten year old girl and a gross sexual imposition as an adult that involved a  
25 "rape" with an intoxicated woman where Mr. Hoff was identified as the  
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2 aggressor. Tr. pp. 11. Dr. Riedel, Mr. Hoff's expert witness, testified that the  
3 first component had been met as well. Id. at p. 115. Clear and convincing  
4 evidence was presented to support Mr. Hoff had engaged in sexually  
5 predatory conduct.

6 B. Clear and convincing evidence was presented to the court to find Mr.  
7 Hoff had a sexual, personality or other mental disorder.  
8

9 The State proved by clear and convincing evidence that Mr. Hoff suffers  
10 from a sexual, personality or other mental disorder. At the discharge hearing,  
11 The State presented evidence that Mr. Hoff suffered from a mental disease or  
12 defect as Dr. Lisota testified that Mr. Hoff has a diagnosis of antisocial  
13 personality disorder. Tr. pp. 12-13. Dr. Lisota testified that he believed Mr.  
14 Hoff met all seven of the criteria listed to determine an individual has  
15 antisocial personality disorder, even though only three of the criteria are  
16 required for a diagnosis. Id. at 15. Dr. Lisota testified that this diagnosis is  
17 consistent with his score on the psychopathy checklist, and that every other  
18 evaluator, including state and independent, have found that Mr. Hoff has this  
19 diagnosis, with the exception of Dr. Riedel. Id. at 16.  
20

21 Dr. Lisota cited some specific examples to illustrate Mr. Hoff suffers  
22 from antisocial personality disorder as he struggles with authority figures,  
23 struggles complying with unit rules, and fails to conform with social norms  
24 with respect to lawful behaviors. Id. Specifically, Dr. Lisota testified that Mr.  
25 Hoff has had a total of 17 resident behavior warnings, considered a high  
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1 number, since his last review for Mr. Hoff's failure to follow unit directives,  
2 including name calling and his behavior toward female staff. Id. at 17.

3  
4 Dr. Riedel disagreed with Dr. Lisota's diagnosis, however it was  
5 apparent to the court after questioning Dr. Riedel about his scoring for  
6 antisocial personality disorder he should have found at least three of the  
7 requirements had been met. Id. at 115-116. Dr. Riedel did not find that Mr.  
8 Hoff had met the requirement of deceitfulness even though he acknowledged  
9 he had scored Mr. Hoff high on psychopathy which makes Mr. Hoff a "better  
10 manipulator." Id. at 124. Dr. Riedel admitted Mr. Hoff's statements  
11 surrounding an insufficient fund case were consistent with what a psychopath  
12 would say. Id. at 124. After this acknowledgement, Dr. Riedel conceded that  
13 this would go towards deceitfulness in determining whether Mr. Hoff has  
14 antisocial personality disorder; therefore Dr. Riedel should have indicated this  
15 requirement was met. Id. at 124-125.

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18 Dr. Riedel testified initially that he did not find sufficient evidence to  
19 support the third component for antisocial personality disorder, which is  
20 impulsivity or failure to plan ahead. Id. at 125. However, Dr. Riedel testified  
21 he did not believe Mr. Hoff had planned out his GSI offenses and testified  
22 they would have been impulsive; therefore Dr. Riedel should have found this  
23 component of the disorder had been met. Id. Dr. Riedel also testified he did  
24 not find any evidence Mr. Hoff met the fourth requirement for the disorder,  
25 irritability and aggressiveness, however, Dr. Riedel testified he could not  
26 recall reviewing reports involving Mr. Hoff assaulting his siblings, engaging  
27

1 in disorderly conduct and vandalism, therefore Dr. Riedel should have  
2 testified this component had been met. Id. at 125-126. Dr. Riedel then  
3 testified he did not find the fifth requirement for antisocial personality  
4 disorder, the reckless disregard for the safety as others, as he did not believe  
5 the underlying GSI involving force and Mr. Hoff's past cruelty to animals  
6 were a sufficient pattern of behavior to find the fifth requirement, however,  
7 Dr. Riedel did concede that he may be jaded from working with sexually  
8 dangerous individual cases too long. Id. at 126-127. Clear and convincing  
9 evidence was presented to the court to find Mr. Hoff has a diagnosis of  
10 antisocial personality disorder.  
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13 C. Clear and convincing evidence was presented to the court to find Mr.  
14 Hoff was likely to engage in further acts of sexually predatory conduct  
15 as a result of his disorder.  
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17 Through Dr. Lisota's testimony and statements made by Dr. Riedel at  
18 the hearing, clear and convincing evidence had been presented that Mr. Hoff  
19 was likely to engage in further acts of sexually predatory conduct as a result of  
20 his disorder. The actuarial test results that were testified to during the hearing  
21 indicated Mr. Hoff was likely to engage in sexually predatory conduct. Dr.  
22 Lisota scored Mr. Hoff on the Static-99R at a five which meant that Mr. Hoff  
23 was 2.7 more likely than the average or typical sex offender to re-engage and  
24 a 35.5 percent chance of reconviction for a sexual crime within ten years. Id.  
25 at 18-19. Dr. Lisota's score on the Static-99R compared to past evaluations  
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1 did not drastically differ from Mr. Hoff's past scores and was consistent with  
2 past evaluators. Id. at 19.

3  
4 Mr. Hoff's score on the MnSOST-R of thirteen as scored by Dr. Lisota  
5 deemed Mr. Hoff "referred for commitment bin" and placed Mr. Hoff in a  
6 category where there is a "78 percent chance of re-arrest or a sex crime over  
7 an interval of six years." Id. at 19-20. Dr. Lisota testified he had looked at  
8 Mr. Hoff's past scores on this instrument and the lowest score he had ever  
9 received was an eleven, but the majority of the evaluators place Mr. Hoff at a  
10 score of thirteen. Id. at 20. The actuarial tests place Mr. Hoff at the moderate  
11 to quite high risk for sexual recidivism. Id. at 22. Dr. Riedel's score of seven  
12 on the MnSOST-R is not reliable as he could not articulate what "new  
13 information" had come to light causing him to change Mr. Hoff's score on this  
14 test from an eleven in 2009. Id. at 107, 129, 132. Further, Dr. Riedel was  
15 questioned specifically as to his scoring results, his scoring of number five on  
16 the test, was force or threat of force ever used to achieve compliance in any  
17 sex offense. Id. Dr. Riedel acknowledged he gave that question a negative  
18 three response, no force used in any offense, even though Mr. Hoff pled guilty  
19 to a forced gross sexual imposition offense. Id. at 129-130. Dr. Riedel further  
20 acknowledged that he was the lowest out of all of the evaluators on this test in  
21 Mr. Hoff's history. Id. at 132.

22  
23  
24 Mr. Hoff's results on the PCL-R support clear and convincing  
25 evidence Mr. Hoff should remain committed. Dr. Lisota testified Mr. Hoff  
26 scored thirty three on the PCL-R. Id. at 22-23. Dr. Lisota stated that if an  
27

1 individual is deemed psychopathic, they are at increased risk for sexual re-  
2 offense. Id. Dr. Lisota testified that the PCL-R has a standard of error of  
3 measurement of plus or minus three points, and his score of thirty three would  
4 create a potential low of thirty, which is deemed the cut off for psychopathy.  
5 Id. at 23. Dr. Lisota testified that Mr. Hoff's score places him at greater risk  
6 for sexual re-offense and the combination of his psychopathy and his  
7 antisocial personality disorder indicates a high degree of risk. Id. at 24, 37.

8  
9  
10 Dr. Riedel's score on the PCL-R is not reliable in this case. Dr. Riedel  
11 previously scored Mr. Hoff in 2009 on the PCL-R at a thirty. However, in his  
12 current evaluation he testified he now found Mr. Hoff had a score of 27. Id. at  
13 42, 112. Dr. Riedel based this change in scoring on a change of information,  
14 however, when presented with the question of what information deemed the  
15 change, Dr. Riedel was unable to specifically indicate to the court what  
16 information he relied upon in coming to this conclusion. Id. at 119-120.

17  
18 Dr. Lisota also testified regarding dynamic risk factors to show what  
19 an individual's short term risk for sexual re-offense. Id. at 24-25. Dr. Lisota  
20 did not find anything in the dynamic risk factors that would lead him to  
21 conclude Mr. Hoff no longer was at a high risk for sexual re-offense. Id. at  
22 25. Clear and convincing evidence had been presented to the court to find Mr.  
23 Hoff would likely engage in future acts of sexually predatory conduct.

24  
25 D. Clear and convincing evidence was presented to the court to find Mr.  
26 Hoff has serious difficulty controlling his behavior.  
27

1 Mr. Hoff has serious difficulty controlling his behavior and clear and  
2 convincing evidence was presented to support his continued commitment.  
3

4 We have further explained that a diagnosis of antisocial personality  
5 disorder alone does not establish a nexus between the requisite  
6 disorder and future dangerousness. Interest of J.M., at ¶ 10. Rather, the  
7 evidence presented by the State must clearly show the antisocial  
8 personality disorder is likely to manifest itself in a serious difficulty in  
9 controlling one's behavior. Id. Neither Kansas v. Crane nor our case  
10 law, however, require the conduct evidencing the individual's serious  
11 difficulty in controlling his behavior to be sexual in nature. See Crane,  
12 534 U.S. at 412–13, 122 S.Ct. 867 (holding the Constitution only  
13 requires proof of serious difficulty in controlling behavior); Matter of  
14 R.A.S., 2009 ND 101, ¶ 19, 766 N.W.2d 712 (explaining that in order  
15 to continue an individual's commitment, North Dakota's statute does  
16 not require proof of conduct sexual in nature after the individual's  
17 initial commitment).

18 In re Wolff, 2011 ND 76, ¶ 7, 796 N.W.2d 644.

19 In this case, Dr. Lisota testified that Mr. Hoff would have serious  
20 difficulty controlling his behavior if he were discharged. Tr. p. 25. Dr. Lisota  
21 based his decision on Mr. Hoff's legal history, which he testified was quite  
22 extensive, and Mr. Hoff's lack of progress in treatment to date, including his  
23 excessive number of behavior warnings. Id. at 26. Specifically, Dr. Lisota  
24 testified that Mr. Hoff ended his year in treatment where he started as he went  
25 up one stage and then went down a stage. Id. Specifically, Dr. Lisota found  
26 Mr. Hoff's use of sarcasm to be problematic along with Mr. Hoff's  
27 defensiveness. Id. Mr. Hoff is defensive and tries to stay under the radar in  
group by remaining silent, and Mr. Hoff continues to show he is impulsive.  
Id. Further, Dr. Lisota cited altercations with peers or staff as Mr. Hoff does  
not receive feedback very well and Mr. Hoff has problems participating in

1 group. Id. at 26-27. Mr. Hoff has specifically stated “he’ll probably re-offend  
2 sexually, or sarcastically, in 30 days post discharge. . . . he is a sex addict. If  
3 I get a taste, I want more and more.” Id. at 28. Dr. Riedel even testified in his  
4 direct exam that he was concerned that Mr. Hoff “relates to a rapist’s profile”  
5 and Mr. Hoff’s high relationship to “antisocial personality disorder profile and  
6 to borderline personality disorder profile.” Id. at 86. Dr. Riedel admitted that  
7 Mr. Hoff has not changed his ability to follow rules at the State Hospital and  
8 get through their programming. Id. at 134.  
9  
10

11 Dr. Lisota testified that Mr. Hoff demonstrates serious difficulty  
12 controlling his behavior and it would be worse in a less restrictive  
13 environment than the State Hospital. Id. Dr. Lisota recommended the court  
14 return Mr. Hoff to the care and custody of DHS as a sexually dangerous  
15 individual. Id. at 29.  
16

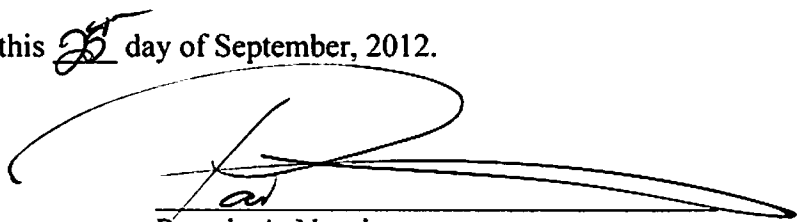
17 Where the experts disagree, the court’s discretion in this case should  
18 be given deference by this Court. “We have further explained that a choice  
19 between two permissible views of the weight of the evidence is not clearly  
20 erroneous.” In re Wolff, 2011 ND 76, ¶ 14, 796 N.W.2d 644; citing Matter of  
21 A.M., 2010 ND 163, ¶ 21, 787 N.W.2d 752. Dr. Lisota’s testimony supports  
22 the court’s finding that Mr. Hoff continues to have serious difficulty  
23 controlling his behavior and is likely to re-offend if he is released to the  
24 community, therefore the court’s decision in this regard should be affirmed.  
25  
26 Id.  
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**CONCLUSION**

Based upon the foregoing, the State requests that the District Court's decision be affirmed.

Dated this 25 day of September, 2012.



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Attorney for Petitioner-Appellee



1  
2 IN THE SUPREME COURT  
3 STATE OF NORTH DAKOTA

4 In the Matter of Robert R. Hoff

5 Pamela A. Nesvig )  
6 Assistant State's Attorney )

7 Petitioner-Appellee, )

8 -vs- )

9 Robert R. Hoff, )

Supreme Ct. No. 20120248

10 Respondent-Appellant, )

11 ..... )  
12 STATE OF NORTH DAKOTA )

13 COUNTY OF BURLEIGH )

14 Gwen Tardif, being first duly sworn, depose and say that I am a United  
15 States citizen over 21 years old, and on the 26<sup>th</sup> day of September, 2012, I  
16 deposited in a sealed envelope a true copy of the attached:

- 17 1. Brief of Petitioner-Appellee  
18 2. Affidavit of Mailing

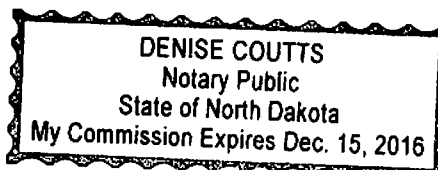
19 in the United States mail at Bismarck, North Dakota, postage prepaid,  
20 addressed to:

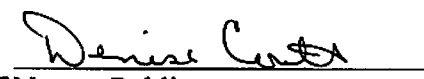
21 **GREGORY I. RUNGE**  
22 **ATTORNEY AT LAW**  
23 **1983 E CAPITOL AVE**  
24 **BISMARCK ND 58501**

25 which address is the last known address of the addressee.

26   
27 Gwen Tardif

Subscribed and sworn to before me this 26 day of September, 2012.



  
Notary Public  
Burleigh County, North Dakota  
My Commission Expires.