

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

In the Matter of Muscha

|                        |   |                            |
|------------------------|---|----------------------------|
| State of North Dakota, | ) |                            |
|                        | ) | Supreme Court No. 20130154 |
| Petitioner-Appellee,   | ) |                            |
|                        | ) |                            |
| -vs-                   | ) |                            |
|                        | ) | Case No.02-2012-MH-00035   |
| Cruz Timothy Muscha,   | ) |                            |
|                        | ) |                            |
| Respondent-Appellant.  | ) |                            |

**BRIEF OF APPELLANT**

APPEAL FROM MEMORANDUM OPINION  
 AND ORDER FOR COMMITMENT AS  
 SEXUALLY DANGEROUS INDIVIDUAL  
 DATED DECEMBER 20, 2012  
 BARNES COUNTY DISTRICT COURT  
 SOUTH EAST JUDICIAL DISTRICT  
 THE HONORABLE JOHN T. PAULSON, PRESIDING

MYHRE LAW OFFICE  
 By: Russell J. Myhre  
 Attorney at Law  
 341 Central Avenue, Suite 3  
 PO Box 475  
 Valley City, North Dakota 58072-0475  
 Telephone: (701) 845-1444  
 Fax: (701) 845-1888  
 ATTORNEY FOR RESPONDENT-  
 APPELLANT  
 CRUZ TIMOTHY MUSCHA

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| Myer v. Rygg, 2001 ND 123, 630 N.W.2d 62                  | ¶ 21                    |
| State v. Hernadez, 2005 ND 214, 707 N.W.2d 449            | ¶ 21                    |
| State v. Lewis, 291 NW2d 735 (ND 1980)                    | ¶ 13                    |
| State v. Osier, 1997 ND 170, 569 N.W.2d 441               | ¶ 21                    |

State v. Regan, No. 10-E-64 (Superior Court, Northern District,  
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State v. Vondal, 1998 ND 188, 585 NW2d 129 ¶ 13

**Publications**

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Abbott, Brian R., “Applicability of the New Static-99  
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## STATEMENT OF THE ISSUES

[¶1] Whether the trial court abused its discretion by allowing expert testimony and evaluation reports based upon the Static-99 and MnSOST-R to be entered into evidence in a commitment hearing upon a petition for a sexually dangerous individual and basing its decision upon the Static-99 and MnSOST-R, and whether this reliance constituted an erroneous view of the law?

## STATEMENT OF THE CASE

[¶ 2] **A. Nature of the case, course of the proceedings, and disposition in the trial court.**

[¶3] This is an appeal from an order for civil commitment of a sexually dangerous person. A Petition for Commitment of a Sexually Dangerous Person pursuant to Chapter 25-03.3 N.D.C.C. was filed with the Barnes County Clerk of Court on December 3, 2012, alleging that the Respondent (hereinafter “C.T.M”) was a sexually dangerous person. The Honorable John T. Paulson signed an Order for Detention and Notice of Hearing on that same date, and a preliminary hearing was held on December 10, 2012. Following the preliminary hearing, the trial judge found probable cause and ordered that an evaluation should be completed at the North Dakota State Hospital within sixty days. On December 21, 2012, the Respondent filed a motion for an independent evaluator, and an order appointing an independent evaluator was issued on January 2, 2013.

[¶4] Dr. Jennifer L. Krance conducted an evaluation of the Respondent and filed a report on behalf of the State, and Dr. Robert G. Reidel conducted an evaluation and filed a report on behalf of the Respondent.

[¶5] On March 5, 2013, the Respondent filed a motion and brief to exclude expert testimony based upon based upon the Static-99R, the Static-2002R, and the MnSOST-R actuarial risk assessment instruments; expert testimony based upon the use of dynamic factors, including those derived from the Stable-2007; and expert testimony as to the Respondent's future dangerousness. The State did not file a response to this motion, but later addressed the brief in its written closing arguments and brief. However, the Respondent indicated in its motion that any evidentiary ruling could be properly determined from the testimony at the hearing.

[¶6] A commitment hearing was held on March 7-8, 2013. Following the hearing, the trial court ordered the State and the Respondent to submit closing arguments and briefs on the issues presented at the hearing. The Respondent submitted his closing arguments and brief on March 28, 2013; and the State submitted its closing arguments and brief on the same date.

[¶7] The trial court issued a memorandum opinion on May 8, 2013; and the findings of fact, conclusions of law, order for commitment, and judgment were filed on May 10, 2013. The Respondent was found to be a sexually dangerous individual and committed to the North Dakota State Hospital for treatment. The Respondent filed a Notice of Appeal on May 20, 2013.

#### STATEMENT OF THE FACTS

[¶8] At the time the petition was filed, the Respondent was serving the remainder of a sentence for gross sexual imposition at the state penitentiary in Barnes County case number 02-06-K-00165. He had previously served his sentence, but his probation had been revoked on August 16, 2010. The Respondent had a record of sexually based

offenses going back to when he was a juvenile and through to the present as an adult, as well as for other non-sexually based offenses. Many of his charges had been either dismissed or had been reduced as part of plea agreements in those previous cases.

[¶9] At the hearing upon the petition filed by the State, two expert witnesses testified. Dr. Jennifer L. Krance, Psy.D., testified on behalf of the State and Dr. Robert G. Reidel, Ph.D., testified on behalf of the Respondent. Both testified as expert witnesses, had previously examined the Respondent, and had made reports of their examinations which were entered into evidence. The trial court also received documentary evidence, and pursuant to the trial court's order, both parties submitted their closing arguments and briefs.

[¶10] At the hearing, both expert witnesses agreed the Respondent met the first and second prongs of the statutory test for a "sexually dangerous individual, , in that he was

[A]n 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....

Section 25-03.3-01(8), N.D.C.C. However, they disagreed on the third prong of this statutory test, which goes on to define a sexually dangerous individual as an

[I]ndividual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others.

Id. The basic disagreement of the expert witnesses was regarding the use of the Moist-R, and its reliability as a predictive scientific instrument for the purposes of the statute. The Respondent, through its expert witness, argued that the State's use of the Moist-R was not reliable and that the test is outdated, and a better test would be MnSOST-3.1 The experts also testified regarding the ability of the Respondent to control his behavior, as set forth in Kansas v. Hendricks, 521 U.S. 346, 358, (1997). On this point, Dr. Redial testified

that with appropriate probationary supervision, the Respondent could control his behavior. Following the hearing and receiving the closing arguments and briefs from the State and the Respondent, the trial court issued a Memorandum Opinion on May 8, 2013, in which the trial court found the Respondent to be a sexually dangerous individual who has the danger of reoffending. On May 10, 2013, the trial court issued its Findings of Fact and Order for Commitment as Sexually Dangerous Individual.

[¶11] Muscha properly filed a Notice of Appeal on May 20, 2013.

## LAW AND ARGUMENT

### [¶12] A. Jurisdiction

[¶13] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, NDCC, which provide as follows:

An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right.

NDCC Section 29-28-03.

An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.

NDCC Section 29-28-06. State v. Lewis, 291 N.W.2d 735 (N.D. 1980). The Defendant's right to an appeal was reiterated in State v. Vondal, 1998 ND 188, 585 N.W.2d 129.

### [¶14] B. Standard of Review

[¶15] The standard of review in a civilly-committed, sexually dangerous individual is a modified clearly erroneous standard.



We review civil commitments of sexually dangerous individuals under a modified clearly erroneous standard in which we will affirm a district court's order "unless it is induced by an erroneous view of the law or we are firmly convinced [the order] is not supported by clear and convincing evidence."

In re Rubey, 2011 ND 165, ¶ 5, 801 N.W.2d 702 (quoting In re T.O., 2009 ND 209, ¶ 8, 776 N.W.2d 47).

**[¶16] Whether the trial court abused its discretion by allowing expert testimony and evaluation reports based upon the Static-99 and MnSOST-R to be entered into evidence in a commitment hearing upon a petition for a sexually dangerous individual and basing its decision upon the MnSOST-R, and whether this reliance constituted an erroneous view of the law?**

[¶17] This case has been extensively briefed and argued to the trial court. The focus of the issue in this case essentially goes to the use of and reliance upon the MnSOST-R to hold that the Respondent was civilly committed as a sexually dangerous individual. After receiving the reports from Dr. Krance and Dr. Reidel, the Respondent submitted a Motion to Exclude and Brief prior to the hearing in this matter. Both parties submitted written closing statements and briefs following the hearing. Additionally, the trial court issued a Memorandum Opinion and Findings of Fact and Order in this matter. These documents, together with the transcript of the hearing, are all attached to this brief and are incorporated herein in the Appendix to this brief.

[¶18] Prior to the hearing in this matter, the Respondent's motion identified the following issues to the trial court:

1. Both the State's evaluator and the Respondent's independent evaluator indicated in their reports that the MnSOST-R is not a valid actuarial risk assessment instrument;
2. There is some level of disagreement between the State's evaluator and the Respondent's independent evaluator as to the validity and applicability of the

interpretation of the assessment instruments, since the validity of the Static-99 have been criticized on several grounds, as more fully set forth in the attached article, Abbott, Brian R., “Applicability of the New Static-99 Experience Tables in Sexually Violent Predator Risk Assessments,” 2009 Sexual Offender Treatment, Vol. 4. Issue 1.

3. The Order in *State v. Regan*, No. 10-E-64 (Superior Court, Northern District, New Hampshire: April 12, 2011) discusses these issues at length.

Respondent’s Motion and Brief. The Respondent argued that the trial court should take cognizance of the criticism of the Static-99 in the Abbot article and the decision in Regan regarding the MnSOST-R, which found that evaluation tool not to be scientifically reliable, and exclude this evaluation tool from testimony and consideration.

[¶19] At the hearing, both experts testified about the reliability of the MnSOST-R. Dr. Krance testified that the MnSOST-R was used by her colleagues at the state hospital because it had been validated for North Dakota. Transcript (March 7, 2013) pp. 56. *See Id.* pp. 54-70 (March 7, 2013) for Dr. Krance’s testimony relating to the MnSOST-R and MnSOST 3.1; and pp. 14, 17-19 (March 8, 2013) for Dr. Reidel’s testimony relating to MnSOST-R and MnSOST 3.1. Both expert witnesses corrected calculations on the scoring instruments they used. *Id.* p. 57 (March 7, 2013) (Dr. Krance) and pp. 80-81 (March 8, 2013) (Dr. Reidel).

[¶20] The Respondent’s argument regarding the scientific reliability of the MnSOST-R was contained in its Motion and Brief filed previous to the hearing. The Respondent relies upon the Order in State v. Regan, No. 10-E-64 (Superior Court, Northern District, New Hampshire: April 12, 2011) to show that, at least in New Hampshire, the MnSOST-R has been held not to be scientifically reliable. This case is attached to the Respondent’s Motion and Brief which is attached as an exhibit to the Motion and Brief, which is attached in the Appendix hereto.

[¶21] While the New Hampshire court's analysis is based upon Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and the cases which follow that holding, North Dakota has not adopted these cases regarding the admissibility of scientifically based expert testimony; rather, in North Dakota, the courts rely upon the tests contained within the North Dakota Rules of Evidence.

[¶6] This Court has never explicitly adopted Daubert and Kumho Tire. See *Howe v. Microsoft Corp.*, 2003 ND 12, ¶ 27 n.1, 656 N.W.2d 285. Contrary to Hernandez's assertion, this Court is not required to follow Daubert and Kumho Tire, which involved admissibility of expert testimony in federal courts under the federal rules of evidence. This Court has a formal process for adopting procedural rules after appropriate study and recommendation by the Joint Procedure Committee, and we decline Hernandez's invitation to adopt Daubert by judicial decision. See *State v. Osier*, 1997 ND 170, ¶ 5 n.1, 569 N.W.2d 441 (refusing to adopt procedural rule by opinion in litigated appeal).

[¶7] Under North Dakota law, the admission of expert testimony is governed by N.D.R.Ev. 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[¶8] Rule 702, N.D.R.Ev., envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify. *Gonzalez v. Tounjian*, 2003 ND 121, ¶ 24, 665 N.W.2d 705. An expert need not be a specialist in a highly particularized field if the expert's knowledge, training, education, and experience will assist the trier of fact. *Myer v. Rygg*, 2001 ND 123, ¶ 14, 630 N.W.2d 62. A trial court has broad discretion to determine whether a witness is qualified as an expert and whether the witness's testimony will assist the trier of fact. *Harfield v. Tate*, 2004 ND 45, ¶ 21, 675 N.W.2d 155. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned decision, or it misinterprets or misapplies the law. *Rygg*, at ¶ 8. We have said we are reluctant to interfere with the broad discretion given to a trial court to decide the qualifications and usefulness of expert witnesses. *Id.* A trial court does not abuse its discretion in admitting expert testimony whenever the expert's specialized knowledge will assist the trier of fact, even if the expert does not possess a particular expertise or special certification. *Id.* at ¶ 15.

State v. Hernandez, 2005 ND 214, 707 N.W.2d 449.

[¶22] Following the hearing, the trial court directed both the State and the Respondent to submit closing arguments and briefs. Copies of these closing arguments are contained in the Appendix.

[¶23] The trial court then issued a Memorandum Opinion and Findings of Fact and Order, which are also contained in the Appendix.

[¶24] While it was not argued at the hearing, it now appears that the State's evaluators no longer use the MnSOST-R as an evaluation tool and have since adopted the MnSOST-3.1. However, Dr. Reidel has previously testified in a civil commitment hearing for a sexually dangerous individual regarding the MnSOST-R.

The district court's order reflects an appropriate consideration of the psychological assessments. Dr. Riedel testified he believed one of the tests employed, the Minnesota Sex Offender Screening Score Revised ("MnSOST-R"), was out-of-date and not being used in a way that was scientifically proper. Dr. Sullivan testified that while parts of the MnSOST-R may be out-of-date, other uses of the test "are still considered to be relevant and appropriate." The district court nevertheless found the MnSOST-R overestimated the risk of recidivism and concluded it should not be considered.

Matter of G.R.H., 2011 ND 21 [¶22], 793 N.W.2d 460. In that case, the Supreme Court did not rule on the admissibility of the MnSOST-R or upon its reliability, but rather pointed out that the district court had also considered the results of the Static-99-R test, which classified G.R.H. as a "high risk" individual, and held that this consideration of the psychological assessments showed proper care and caution, and was not clearly erroneous. Id. [23]. *See also In re T.O.*, 2009 ND 209, ¶ 5, 776 N.W.2d 47, in which Dr. Stacy Benson indicated in testimony that unverified information could have brought T.O.'s test score below the threshold for which commitment would be recommended using the MnSOST-R. In Interest of Whitetail, 2013 ND 143, the same two experts as in

this case examined Whitetail and came to conclusions which are similar to the instant case. Whitetail argued that Dr. Krance had overestimated his likelihood of recidivism because Dr. Krance had used the “old norms” for the MnSOST-R. Id. ¶13]. While the majority held that the district court’s finding that Whitetail was a sexually dangerous individual was not induced by an erroneous view of the law and was supported by clear and convincing evidence, Justice Kapsner strongly dissented on the grounds that the State had not met its burden of proof under Chapter 25-03.3, N.D.C.C. Id. [¶¶ 18-33].

[¶25] In the instant case, the trial court specifically held that the MnSOST-R was an appropriately validated instrument to use in North Dakota and found “Dr. Krance’s use of the MnSOST-R and the Static-99R [were] appropriate measures of recidivism and appropriate to use in this case.” Memorandum Opinion, pp. 6-7. Here, the Respondent argues that the testimony of Dr. Reidel, together with the arguments contained in the Respondent’s Motion to Exclude and the materials attached thereto, clearly shows that the reliance of Dr. Krance and the trial court upon the MnSOST-R was not based upon the appropriate level of “scientific, technical, or other specialized knowledge” required under Rules 702 and 703, NDREvid, and the same should have been excluded and not considered by the trial court in its decision.

### **CONCLUSION**

[¶26] The trial court abused its discretion by allowing expert testimony and evaluation reports based upon the Static-99 and MnSOST-R to be entered into evidence in a commitment hearing upon a petition for a sexually dangerous individual and basing its decision upon the MnSOST-R, in contravention of the standards required under Rule 702, NDREvid. This constituted a clearly erroneous view of the law on the part of the trial

court, and the State failed to sustain its burden of proof.

Dated this 18<sup>th</sup> day of September, 2013.



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Russell J. Myhre  
Attorney at Law  
ND ID#: 03180  
341 North Central Avenue North STE 3  
P.O. Box 475  
Valley City, ND 58072  
Telephone: (701) 845-1444  
Fax: (701) 845-1888  
Attorney for Appellant

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**


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| State of North Dakota, | ) |                               |
|                        | ) | Supreme Court No. 20130154    |
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|                        | ) | Criminal No. 02-2012-MH-00035 |
| -vs-                   | ) |                               |
|                        | ) |                               |
| Cruz Timothy Muscha,   | ) | CERTIFICATE OF SERVICE        |
|                        | ) |                               |
| Respondent-Appellant.  | ) |                               |
|                        | ) |                               |

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I, Russell J. Myhre, do hereby certify that on September 18, 2013, I served the following documents:

1. Appellant's Appendix (PDF to Opposing Counsel and Supreme Court)
2. Appellant's Brief (PDF to Opposing Counsel and Word to Supreme Court)

On:

Lee Grossman  
Attorney at Law  
230 4<sup>th</sup> St NW, Room 301  
Valley City, ND 58072-  
[lgrossman@barnescounty.us](mailto:lgrossman@barnescounty.us)

Supreme Clerk of Court  
ND Supreme Court  
State Capitol  
Judicial Wing, 1<sup>st</sup> Floor  
600 East Blvd Ave., Dept. 180  
Bismarck, ND 58505-0530  
[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

Dated this 18<sup>th</sup> day of September, 2013.

I, Russell J. Myhre, hereby certify that pursuant to Rules 5(b) and 5(f), NDRCivP, that on the 18th day of September, 2013, I deposited, with postage prepaid by first class mail, in the United States post office at Valley City, North Dakota, a true and correct copy of the following document(s):

1. Appellant's Appendix
2. Appellant's Brief

The copies of the foregoing were securely enclosed in an envelope and addressed as follows:

Cruz Timothy Muscha  
North Dakota State Hospital  
2605 Circle Drive  
Jamestown, ND 58401-6905

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.



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Russell J. Myhre  
Attorney for Respondent-Appellant  
ND ID # 03180  
341 Central Ave. N., Ste. 3  
P.O. Box 475  
Valley City, ND 58072  
Telephone: (701)845-1444  
Fax: (701)845-1888



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| State of North Dakota, | ) |                               |
|                        | ) | Supreme Court No. 20130154    |
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| -vs-                   | ) |                               |
|                        | ) |                               |
| Cruz Timothy Muscha,   | ) | CERTIFICATE OF SERVICE        |
|                        | ) |                               |
| Respondent-Appellant.  | ) |                               |
|                        | ) |                               |

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I, Russell J. Myhre, do hereby certify that on September 24, 2013, I served the following documents:

1. Appellant's Appendix page 3
2. Appellant's Appendix page 91a

On:

Lee Grossman  
Attorney at Law  
230 4<sup>th</sup> St NW, Room 301  
Valley City, ND 58072-  
[lgrossman@barnescounty.us](mailto:lgrossman@barnescounty.us)

Supreme Clerk of Court  
ND Supreme Court  
State Capitol  
Judicial Wing, 1<sup>st</sup> Floor  
600 East Blvd Ave., Dept. 180  
Bismarck, ND 58505-0530  
[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

Dated this 18<sup>th</sup> day of September, 2013.




---

Russell J. Myhre  
Attorney for Respondent-Appellant  
ND ID # 03180  
341 Central Ave. N., Ste. 3

P.O. Box 475  
Valley City, ND 58072  
Telephone: (701)845-1444  
Fax: (701)845-1888