

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

IN THE INTEREST OF: J.M.	)	
	)	
State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	
J.M.,	)	Supreme Ct. No. 20180278
	)	
Defendant-Appellant	)	District Ct. No. 08-05-R-00104

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**BRIEF OF PLAINTIFF-APPELLEE**

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Appeal from Order Denying Discharged Issued July 12, 2018

Burleigh County District Court  
South Central Judicial District  
The Honorable David E. Reich, Presiding

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**STATEMENT OF THE ISSUES**

[¶1] Whether the district court properly found that J.M. remains a Sexually Dangerous Individual.

## STATEMENT OF THE CASE

[¶2] On March 23, 2005, a Petition for Commitment of a Sexually Dangerous Individual was filed with the District Court. A hearing was held in the matter and on October 28, 2005, Findings of Fact and Order for Commitment were filed. A notice of appeal was filed on November 3, 2005 and on June 8, 2006, the North Dakota Supreme Court issued its opinion affirming the District Court order.

[¶3] On October 19, 2006, Respondent filed a request for a discharge hearing. The Respondent waived a hearing and the District Court issued its order for continued commitment on August 17, 2007.

[¶4] On September 24, 2008, the Respondent filed a request for a discharge hearing. The Respondent thereafter filed a request to cancel hearing on January 13, 2009 and the District Court issued an order for continued treatment on February 27, 2009.

[¶5] On January 11, 2010, the Respondent filed a request for a discharge hearing. A hearing was held and on December 6, 2010, the District Court entered an order denying petition for discharge. The Respondent filed a notice of appeal on December 16, 2010 and on July 28, 2011, the North Dakota Supreme Court issued its opinion affirming the District Court order.

[¶6] On October 11, 2011, the Respondent filed a request for a discharge hearing. A hearing was held and the District Court filed its Findings and Order continuing treatment on May 3, 2012. The Respondent filed a notice

of appeal on May 31, 2012 and on January 23, 2013, the North Dakota Supreme Court issued its opinion affirming the District Court order.

[¶7] On February 22, 2013, the Respondent filed a request for a discharge hearing. The hearing was held on November 15, 2013 and on December 30, 2013, the District Court issued an order denying discharge. The Respondent filed a notice of appeal on January 6, 2014 and on June 24, 2014, the North Dakota Supreme Court issued its opinion affirming the District Court order.

[¶8] On December 5, 2014, the Respondent filed a request for a discharge hearing. The hearing was held on August 31, 2016 and the District Court issued its findings and order on September 20, 2016 denying discharge.

[¶9] On June 12, 2017, the Respondent filed a request for a discharge hearing. The hearing was held on December 1, 2017 and the State filed its post-hearing brief on December 22, 2017 and the Respondent filed his post-hearing brief on December 29, 2017. The District Court through Judge David E. Reich issued its order denying discharge on July 12, 2018. The Respondent filed a timely notice of appeal on July 17, 2018.

## STATEMENT OF THE FACTS

[¶10] The Respondent, J.M., stipulated that “Prong 1”, that J.M. had previously been found to have engaged in sexually predatory conduct, had been met. (Transcript of Annual Review Hearing (hereinafter “Tr.”) p. 4). The State’s expert witness, Dr. Peter M. Byrne, testified that J.M. continued to meet the criteria of a sexually dangerous individual. (Tr. p. 18). Dr. Byrne testified that J.M. has diagnoses of Other-Specified Paraphilic Disorder, Polymorphously Perverse; and Antisocial Personality Disorder. (Tr. pp. 6-7). J.M. has been diagnosed with both a sexual disorder and a personality disorder that makes him likely to engage in further acts of sexually predatory conduct. (Tr. pp. 13-14).

[¶11] J.M. has also exhibited poor control of his behavior while in the State Hospital. (Tr. pp. 10-13). J.M. would progress through the program and then act out and get demoted or set back in the program. (Tr. p. 10). The acting out involved rule violations and physical and verbal aggression toward another resident. (Tr. pp. 10-11). He received another write-up for throwing a rock at another resident. (Tr. p. 11). He also expressed anger in frustration by calling other residents offense names in his journal. (Tr. p. 12).

[¶12] Several actuarial risk assessment tools were utilized during the review which indicated that J.M. has a higher risk for re-offending. (Tr. pp. 14-16). Although J.M. is learning the concepts of controlling his behavior, his acting out and anger directed towards other residents in his statements in his journal and physically acting out against them shows that he is not applying

what he has learned, making him unlikely to be able to control his behavior outside of the secure setting of the State Hospital. (Tr. pp. 17, 19). According to J.M.'s independent evaluator, per J.M.'s report, he was engaging in "horseplay" when he threw rocks at another resident and, when he was written up for verbal and physical aggression towards another, he was attempting to de-escalate the situation. (Tr. pp. 107, 108-09). The independent evaluator did not follow up with staff or other's involved to determine if J.M.'s report was accurate. (Tr. p. 132). The independent evaluator did not dispute that J.M. had engaged in sexually predatory behavior and that he has a sexual or personality disorder, meeting prongs 1 and 2. (Tr. pp. 113-14).

[¶13] The District Court found that J.M. continued to meet the criteria for a sexually dangerous individual and issued an order denying discharge.



## ARGUMENT

[¶14] I. Whether the district court properly found that J.M. remains a Sexually Dangerous Individual.

[¶15] The standard of review that applies to commitments of sexually dangerous individuals is “modified clearly erroneous”. In re J.T.N., 2011 ND 231, ¶6, 807 N.W.2d 570. This Court will affirm the trial court’s order unless the order was based upon an erroneous view of law or there was not clear and convincing evidence that the respondent remains a sexually dangerous individual. Id. This Court gives great deference to the trial court’s credibility determinations and will not second-guess them. Id. At a review hearing, the State must prove by clear and convincing evidence that the respondent remains a sexually dangerous individual. Id. at ¶4. The State must prove that the respondent 1) has 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) is likely to engage in further acts of predatory conduct which constitutes a danger to others due to their condition; and 4) has serious difficulty controlling behavior. In re Mangelsen, 2014 ND 31, ¶ 7, 843 N.W.2d 8.

[¶16] J.M. stipulated that he met the first prong. Both experts agreed that J.M. has a sexual disorder or personality disorder and meets the second prong. They disagreed on the likelihood of engaging in further acts of sexually predatory conduct and ability to control his behavior. Both experts utilized various actuarial assessment tools to determine a risk for reoffending and both

experts found that he scored in the high risk category on the testing. Both experts further looked at “dynamic factors”, including his behavior at the State Hospital, his support group in the community, social influences, his history of treatment at the State Hospital, and his coping skills.

[¶17] The district court judge wrote a detailed order indicating that he considered the testimony of Dr. Byrne to be more persuasive and specified the testimony of Dr. Byrne that he considered when determining this case. The district court cited to Dr. Byrne’s opinion regarding the nexus between the sexual and personality disorder and the danger to others that is linked to a serious difficulty controlling behavior, whereas Dr. Benson did not. The district court also considered the fact that J.M. was acting out in a secured setting and that Dr. Benson reported that aggression continues to be an issue for J.M.

[¶18] In this case, the district court relied upon the opinion of Dr. Byrne over that of Dr. Benson. This Court has said that any claim that “the district court improperly relied on one expert's opinion over the other challenges the weight of the evidence, not the sufficiency of the evidence.” In re Thill, 2014 ND 89, ¶17. “A choice between two permissible views of the weight of the evidence is not clearly erroneous.” Id. (citing In re Mangelsen, 2014 ND 31, ¶8). The district court’s findings are supported by clear and convincing evidence through the testimony and reports of both Dr. Byrne and Dr. Benson and are not based upon an erroneous view of law.

**CONCLUSION**

[¶19] Based upon the foregoing, the State respectfully requests that the order denying discharged issued July 12, 2018 be affirmed.

Dated this 11th day of February, 2019.



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State of North Dakota, )  
 )  
 Plaintiff-Appellee, )  
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 -vs- )  
 )  
 J.M., )  
 )  
 Defendant-Appellant. )

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA )  
 ) ss  
 COUNTY OF BURLEIGH )

[¶] I, Stacey Baskerville, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 11th day of February, 2019, I served the following:

1. Brief of Plaintiff-Appellee

and that said email was served on the addresses of:

Tyler J. Morrow  
Attorney at Law  
service@kpmwlaw.com

Penny Miller  
North Dakota Supreme Clerk of Court  
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which addresses are the last known addresses of the addressees.

Stacey Baskerville  
Stacey Baskerville

Subscribed and sworn to before me this 11th day of February, 2019.

Mandy M. Pitcher  
Mandy Pitcher, Notary Public,  
Burleigh County, North Dakota.

