

**Supreme Court No. 20180278
District Court No. 08-05-R-104**

NORTH DAKOTA SUPREME COURT

In the Interest of J.M.

State of North Dakota

(Petitioner and Appellee)

v.

J.M.

(Respondent and Appellant)

Appeal from the Order Denying Discharge issued July 12, 2018, by the Honorable David
E. Reich of the Burleigh County District Court, South Central Judicial District

REPLY BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

Table of Contents.....2

Table of Authorities.....3

Law.....¶ 1

Facts.....¶ 5

Conclusion.....¶17

TABLE OF AUTHORITIES

CASES

In the Interest of M.D., 1999 ND 160598 N.W.2d 799.....¶ 1

In re Mangelsen, 2014 ND 31, ¶ 14, 843 N.W.2d 8.....¶ 3

Interest of P.F., 2006 ND 82, ¶ 29, 712 N.W.2d 610.....¶17

LAW

[¶ 1] In 1999, this Court set out the “modified clearly erroneous” standard of review in civil commitment of sexually dangerous individuals. The Court “will affirm an order for involuntary treatment unless it is induced by an erroneous view of the law or if we are firmly convinced it is not supported by clear and convincing evidence.” In the Interest of M.D., 1999 ND 160598 N.W.2d 799.

[¶ 2] Over the last twenty years, this Court has had approximately 125 appeals to review under this standard. Outside of well-written dissents by former Justice Carol Kapsner, this Court has never found a district court’s order to not be supported by clear and convincing evidence. This leads to one of two conclusions. Either the mathematical improbability that not one district court order out of 125 orders before this court was only supported by no evidence, a scintilla of evidence, reasonable suspicion, probable cause, substantial evidence, or a preponderance of the evidence, or this Court is not actually using the standard it created twenty years ago.

[¶ 3] Pointing to the latter as the possible reason for this phenomenon, this Court previously wrote, “We give great weight to the court’s credibility determinations, and we do not reweigh expert testimony or second-guess credibility determinations made by the trial court in sexually dangerous individual proceedings.” In re Mangelsen, 2014 ND 31, ¶ 14, 843 N.W.2d 8. This leaves respondents in sexually dangerous individual civil commitments proceedings without an appropriate appeal process. Since all these hearings

rely mostly if not entirely on expert testimony, and this Court refuses to reweigh that testimony, there is no possible way for a respondent to argue the record is not supported by clear and convincing evidence. Either this Court needs to change its review standard to what is being done in North Dakota and subject that review standard to scrutiny, or it needs to remedy this conflict in the case law. As it sits now, respondents are incapable of arguing the second aspect of the review standard.

[¶ 4] Specifically to this case, because the district court relied on both experts, and did not say one expert was more credible than the other, the respondent is not asking this court to determine credibility, but to simply look at whether the facts in this case rise above no evidence, a scintilla of evidence, reasonable suspicion, probable cause, substantial evidence, or a preponderance of the evidence.

FACTS

[¶ 5] Dr. Byrne (“Byrne”) was on his “6th or 7th” SDI evaluation (Transcript pg 19, line 24); Dr. Benson (“Benson”) was on her 230th (Transcript pg 93, line 23).

[¶ 6] Byrne did not interview JM (Transcript pg 6, line 13); Benson has interviewed JM for over 13 hours throughout his stay at the state hospital (Transcript pg 94, lines 20-25). Benson and/or her staff also interviewed JM’s brother, current girlfriend, and mother (Transcript pg 113, lines 4-5).

[¶ 7] Byrne's report consisted of 48 pages created by the state hospital, and the rest was a template provided by the state hospital (Transcript pg 20, line 13;24).

[¶ 8] Byrne agrees Benson reviewed more of JM's record than he did (Transcript pg 23, line 15).

[¶ 9] Byrne agrees Benson has a higher qualification than he does on the STATIC-99R (Transcript pg 25, line 18); Benson testifies Byrne's score is not accurate (Transcript pg 115, line 19). Benson states JM's score is shown to need 300 hours of treatment (Transcript pg 122, line 8); JM has completed approximately 6000 hours of treatment (Transcript pg 122, line 12).

[¶ 10] Byrne did not score the STATIC-99R in accordance with the manual for the instrument (Transcript pg 28, lines 17-19; pg 29, lines 3-5). Byrne catches an error in the template regarding the sample to place Mihulka in regarding the STATIC-99R (Transcript pg 29, line 23). The error would lower JM's recidivism rate (Transcript pg 30, line 5).

[¶ 11] Byrne did not score the PCL-R himself (Transcript pg 34, line 13); Benson did (Transcript pg 99, line 22).

[¶ 12] Byrne cannot say whether a residential behavior warning used as evidence that JM cannot control his behavior was horseplay or aggression (Transcript pg 42, line 13; page 44, line 17); Benson identified this behavior as horseplay (Transcript pg 109, line 1).

[¶ 13] Byrne did not know a residential behavior warning used as evidence that JM cannot control his behavior was overturned (Transcript pg 46, line 15); Benson was able to provide the details of this incident (Transcript pg 107).

[¶ 14] Byrne agrees the sexual disorder he diagnosed JM with is not in the diagnostic manual used by the profession (Transcript pg 50, line 23).

[¶ 15] Byrne was unaware JM has completed treatment (Transcript pg 54, line 21); Benson was aware of JM's treatment completion (Transcript pg 96, line 16).

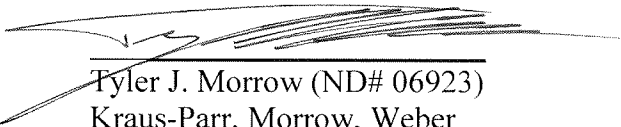
[¶ 16] Byrne does not know what the sex offender treatment program is at the North Dakota State Hospital (Transcript pg 67, line 25); Benson was able to identify this treatment program as the Core Treatment Program (Transcript pg 96, line 13).

CONCLUSION

[¶ 17] This Court has repeatedly stated “we will not engage in a ‘contest over percentage points’ when it comes to determining whether an individual meets the requirements for civil commitment.” Interest of P.F., 2006 ND 82, ¶ 29, 712 N.W.2d 610. However, district courts and this Court repeatedly point to scores on instruments as the basis for clear and convincing evidence. This is yet another of a myriad of circular, illogical arguments within the sexually dangerous individual commitment realm.

[¶ 18] The record before this Court shows that Dr. Benson was the most experienced, the best trained, the most knowledgeable, and did the most thorough evaluation of the two doctors. It is time this Court use the standard of review formed twenty years ago and find that the district court order is not supported by clear and convincing evidence on the record. It is time to let JM go home to his family.

Respectfully submitted this 26th day of February 2019.



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IN THE SUPREME COURT
OF NORTH DAKOTA

State of North Dakota,)	
)	#08-05-R-104
Appellee,)	#20180278
)	
VS.)	
)	CERTIFICATE OF SERVICE
J.M.,)	
)	
Appellant.)	

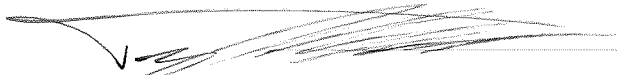
The undersigned, being of legal age, being first duly sworn deposes and says that he served a true and correct copy of the following document(s):

Appellant's Reply Brief

Electronically through the Court Electronic Filing System to:

Julie Lawyer, Assistant State's Attorney, bc08@nd.gov

Dated: February 26, 2019.



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