IN THE SUPREME COURT OF NORTH DAKOTA

	)	**Supreme Court File No.**
In the Interest of Raymond J. Voisine	)	**#20190155**
----------	)	
State of North Dakota,	)	
Petitioner/Appellee	)	**Sheridan County File No.**
	)	**#42-08-R-00002**
v.	)	
	)	**APPELLANT'S BRIEF**
Raymond J. Voisine,	)	
Respondent/Appellant	)	

Appeal from the Order Denying Discharge entered May 10, 2019 in Sheridan County District Court, South Central Judicial District, North Dakota, the Honorable Bruce A. Romanick presiding.

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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Oral argument has been requested to emphasize and clarify the Petitioner's written arguments on their merits.

JURISDICTIONAL STATEMENT

[¶ 1] Jurisdiction in this matter is pursuant to N.D.C.C. § 25-03.3-19. The Sheridan County District Court issued a decision ordering Voisine remain civilly committed on May 10, 2019. Voisine timely filed this appeal on May 14, 2019.

ISSUE PRESENTED FOR REVIEW

I. **[¶ 2] Whether the District Court erred in granting the state's request for a continuance when the state's request was based upon the state's inability to follow the statute and Constitution**

II. **[¶ 3] Whether the District Court erred in denying Voisine's Motion in Limine and/or Objections**

III. **[¶ 4] Whether the District Court erred in denying, if it did, Voisine's Motion for Judgment as a Matter of Law**

IV. **[¶ 5] Whether the District Court's Order's factual findings regarding Prongs two, three, and the volitional control elements satisfy the state's burden of proving each element by clear and convincing evidence**

STATEMENT OF THE CASE

[¶ 6] This is a case of complete ignorance of, and/or complete disregard for, this Court's prior decisions regarding sexually dangerous individuals ("SDI"). It is an example of the district court wholly ignoring the actual facts of a case in order to get a pre-determined outcome. This brief will emphasize the district court's blatant failure to not only apply the law, but to also make a decision based upon facts. The argument found herein will be supplemented at oral argument.

[¶ 7] Petitioner filed a petition for civil commitment as an SDI on June 16, 2008. After a hearing, Voisine was initially committed to the North Dakota State Hospital ("NDSH") as an SDI on June 3, 2009.

[¶ 8] Voisine exercised his right to request a discharge hearing under N.D.C.C. § 25-03.3-18. A hearing on that request was scheduled for February 1, 2019. On January 30, 2019, the state filed a request to continue that scheduled hearing. The district court, against Voisine's objection (after not granting requested oral argument, and after making up facts not found on the record), continued the hearing. A review hearing was scheduled for March 25, 2019. Against objections by Voisine, the district court allowed both the report and testimony of the state's witness. The Sheridan County District Court determined that the state had established by clear and convincing evidence that Voisine remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied Voisine's discharge on May 10, 2019. Voisine appealed that decision on May 14, 2019.

STATEMENT OF THE FACTS

[¶ 9] Voisine was committed to the North Dakota State Hospital as an SDI on June 3, 2009. Voisine has remained at the NDSH for the last 9.5 years. Prior to this hearing the state of North Dakota last interviewed Voisine on December 15, 2016; a report based on records review through January of 2017 was filed with the Court on June 23, 2017 (Index #203). A subsequent and last review hearing prior to the present hearing was held on November 30, 2017.

[¶10] On October 9, 2018, Voisine requested a review hearing (Index #239). On October 17, 2018, a review hearing was scheduled for February 1, 2019 (Index #241). The undersigned requested that Dr. Stacey Benson ("Benson") be appointed as the Independent Examiner in this matter on October 22, 2018 (Index #244). On November 11, 2018, Benson was appointed as the Independent Examiner (Index #248). On January 29, 2019, Benson's evaluation was filed with the Court (Index #250). On January 30, 2019, the State requested a continuance on the grounds that they had not received the NDSH's report, and erroneously stated the undersigned did not object to the continuance (Index #254). The undersigned was never contacted by any member of the state before the state made this false claim to the tribunal (See N.D.R.Prof.Conduct 3.3). Voisine filed an objection to the continuance and/or a motion to dismiss on January 30, 2019 (Index #258). On January 31, 2019, the district court granted the state's request for a continuance (Index #260).

[¶11] The district court's order either intentionally or negligently misrepresented the facts and legal arguments. The misrepresentation was claiming the state's request was for "time to review the report by Dr. Benson filed on January 29, 2019" (Index #260). This

Court has been provided with all pertinent materials to see that the state never requested a continuance for this purpose. It was clearly because "the state has not received the state hospital's report of examination" (Index #254). The district court does, however, accurately point out that the respondent, respondent's counsel, and the independent examiner were prepared for the review hearing (An important fact based on this Court's precedence).

[¶12] After denying Voisine's Motion in Limine (Index #267) which objected to the hearing being held on Constitutional grounds as well as the state's evaluation and testimony being admitted, a hearing was held on March 25, 2019. The state called Dr. Peter Byrne ("Byrne") to testify that Voisine remained an SDI subject to continued civil commitment. Voisine called Dr. Stacey Benson ("Benson") who testified that she did not find Voisine to meet criteria as an SDI.

[¶13] After objection by Voisine to Byrne testifying (Transcript page 9, lines 15-16), Byrne testified to the following:

a. He interviewed Voisine in August of 2018 (Transcript page 11, lines 5-6), which was five months prior to the February 1, 2019, hearing which was continued because Byrne had not completed his report,
b. He works with a low-risk group of offenders in his normal duties (Transcript page 22, line 19),
c. Voisine's baseline risk as identified by the scientific instruments used by the professional community do not meet the definition of "likely" (Transcript page 27, lines 15-16),
d. Byrne's overriding of the STATIC-99R score was done because the district

court has previously accepted it (Transcript page 27, lines 21-22),

e. Not because there is any scientific research that supports his decision to override (Transcript page 30, lines 19-20).

f. Byrne is not a certified trainer on the STATIC-99R (Transcript page 31, line 9),

g. The only behavioral issue over the review period was Voisine having old food in his room (Transcript page 32, line 23),

h. Denial of offending is not a risk factor (Transcript page 33, lines 2-4).

i. Byrne claimed that Voisine was a unique incestual offender in that they generally have older victims according to a 1976 study (Transcript page 36, lines 21-25),

j. but Byrne couldn't remember the average age of the victims from the 43 year old study (Transcript pages 37-38, lines 25-2).

k. Byrne testified that because a district court previously believed that testimony he was offering it again (Transcript page 38, lines 6-7),

l. Byrne is not trained on the SRA-FV (Transcript page 43, line 23),

m. Voisine currently resides on Secure 4, which is the highest privileged, least restrict secure setting at the NDSH (Transcript page 44, lines 21-22),

n. The placement in Secure 4 is based upon how Voisine is currently behaving (Transcript page 45, lines 6-8),

o. Byrne can find no evidence that Voisine is currently capable of having sex (Transcript page 46, lines 3-5),

p. Byrne did not conduct the PCL-R on Voisine (Transcript page 50, lines 24-25),

q. The only objective test performed by Byrne was the STATIC-99R (Transcript page 51, lines 19-21) which says Voisine DOES NOT meet, and

r. When asked directly on the serious difficulty prong Byrne could only come up with "denial of the offending **THAT IS NOT NECESSARILY SCIENTIFIC**" (Transcript page 54, lines 17-18; emphasis added).

[¶14] At the close of direct examination by the State, Voisine moved for a Judgment as a Matter of Law as the state had not filed Byrne's report as an exhibit, and the state had not elicited any testimony from Byrne that Voisine had serious difficulty controlling his behavior (Transcript Page 24, lines 10-17).

[¶15] Voisine called Benson to testify on his behalf. Benson testified to the following in support of Voisine not meeting criteria as an SDI:

a. Voisine has a heart condition which requires Nytroglycerin and that Voisine had a stroke a week prior to the hearing (Transcript page 64, lines 5-9),

b. Voisine is illiterate and his first language is French (Transcript page 64, lines 11-15),

c. Secure 4, where Voisine resides, is an honor dorm for residents who exhibit the fewest behavioral problems (Transcript page 68, lines 9-15),

d. The only people helping Voisine accomplish work for treatment are other SDI's who have been found legally to have serious difficulty controlling their behavior (Transcript page 69, lines 16-21),

e. Voisine is at an advantage over the typical SDI in that he has multiple positive aspects in his life should he be released (Transcript page 70, lines 3-9).

f. Benson scored the PCL-R, resulting in a score of 16 which is below the

typical prisoner (Transcript page 72, lines 12-16),

g. She did not find a diagnosis in regards to prong two, which out of her 246 evaluations for SDI she has only found less than five individuals not to meet (Transcript pages 73-74, lines 15-7),

h. The diagnosis proffered by the state is not recognized by the manual used by the profession (Transcript page 76, lines 19-21).

i. Benson is a certified trainer in the STATIC-99R, the STABLE-2007, and the ACUTE-2007 (Transcript page 77, lines 19-20),

j. Based on this training above that of Byrne she found Voisine is roughly half as likely to reoffend when compared to the typical offender (Transcript page 84, lines 7-8),

k. She placed Voisine in a risk bin in accordance with her training provided by Dr. Amy Phenix, one of the creators of the STATIC-99R (Transcript page 86, lines 11-17),

l. Benson called Dr. Thornton, one of the creators of the STATIC-99R, to ask him directly about whether or not Voisine should get the benefit of age reduction, and Dr. Thornton said that Voisine should (Transcript pages 87-88, lines 6-13),

m. Benson agreed with Byrne that there is no scientific literature which supports the state's position that Voisine shouldn't get the benefit of age (Transcript page 88, lines 14-20).

n. Scientific studies have shown that pure actuarial is the best predictor of recidivism (Transcript pages 89-90, lines 15-8),

o. The state's attempt to override is less predictive of risk in these studies (Transcript page 90, lines 9-15).

p. Benson found that based off Voisine's actuarial risk, Voisine needs approximately 100 hours of treatment according to the manual (Transcript page 91, line 21)

q. Voisine has already done that amount of treatment (Transcript page 91, lines 24-25).

r. Benson testified that 95% of studies done by the profession have found that denial of offenses has no impact on risk to reoffend (Transcript page 101, lines 12-13),

s. Completing treatment lowers risk but noncompletion of treatment does not result in an increased risk to reoffend (Transcript page 102, lines 4-5),

t. She could find no evidence that Voisine has serious difficulty controlling his behavior (Transcript page 102, lines 13-21), and

u. Benson further offered that the uniqueness of incest-only offenders is that they are the classification of sex offenders that reoffend at the lowest rate (Transcript page 104, lines 19-20).

[¶16] The Sheridan County District Court found that the State had proven by clear and convincing evidence that Voisine remained an SDI subject to continued civil commitment and issued an order in that regard on May 10, 2019. Voisine filed his appeal on May 14, 2019. In its order, the district court found that Voisine met prong two because Byrne testified the same way prior state witnesses have testified (Order ¶15). In regards to prong three, the district court incorrectly found factually that Voisine committed the

original offenses in his 60's (Order ¶19), that nothing has changed from the time of the last evaluation (Order ¶21), and previous evaluations which were not discussed by the state or the court and which Voisine had no opportunity to rebut were used as clear and convincing evidence of this prong being met (Order ¶22). For purposes of serious difficulty controlling behavior, the district court found there has been little to no change in Voisine's treatment progress (Order ¶24) but did not identify any specific behaviors Voisine has done over the review period.

ARGUMENT

I. [¶ 17] The district court erred in granting the state's request for a continuance when the state's request was based upon an inability to follow the Statute and Constitution

[¶18] At civil commitment hearings, the State bears the burden of proving its case by clear and convincing evidence. *In re Rush*, 2009 ND 102, ¶ 9, 755 N.W.2d 720. The State must prove, by clear and convincing evidence, that an individual has previously "[e]ngaged in sexually predatory conduct, and has a congenital or acquired condition that is manifested by a sexual disorder, personality disorder, or other mental disorder which makes that individual likely to engage in further acts of sexually predatory conduct" which comprise a danger to the physical or mental health of others. *Id.* (citing N.D.C.C. § 25-03.3-01(8)). Both *Kansas v. Crane*, 534 U.S. 407 (2002) and N.D.C.C. §. 25-03.3 require proof of difficulty in controlling behavior by expert evidence on the record from which the district court, as the ultimate decision-maker, can conclude the individual has serious difficulty controlling his or her behavior. These well-established lines of cases demonstrate that the entire burden of this process rests on the state.

[¶19] In determining the constitutionality of the SDI statute, this Court wrote, "Our statute similarly requires annual examinations of the detained person's mental condition, annual notice that the individual has a right to petition for discharge and allows continued confinement only if there is clear and convincing evidence the person is still a sexually dangerous individual. N.D.C.C. §§ 25-03.3-17(2), 25-03.3-18(1), (4)." *In the Interest of M.D.*, 1999 ND 160, 598 N.W.2d 799. Note the Constitutionality of NDDC 25-03.3 rests entirely on there being an annual examination and review of the Respondent's current mental condition.

[¶20] In M.D., although this Court affirmed the lower court's ruling on a continuance and denied the Respondent's appeal, it did so because "We agree with the district court that the bulk of the delay in this case was attributable to M.D. and under these circumstances, we conclude the court did not err in denying M.D.'s motion to dismiss the proceedings" *In the Interest of M.D.*, 1999 ND 160 ¶ 18 , 598 N.W.2d 799. The present case is easily distinguishable from M.D. in that Voisine has not requested, nor have his actions given cause to continue this matter. Voisine, Benson, and the undersigned were prepared for the court date scheduled and the state had been provided with Benson's report. The district court did not dispute this fact in its order (Index #260).

[¶21] Not only has this Court written that an annual evaluation is necessary for Constitutional purposes, the statute itself states, "Each committed individual **MUST** have an examination of that individual's mental condition at least once a year. A report regarding the examination **MUST** be provided to the court…" NDCC 25-03.3-17(2) (Emphasis added). The last examination of Voisine ended with an interview over two

years ago, and a record review exactly two years ago. The last report provided to the Court was 18 months prior to the scheduled review hearing on February 1, 2019. Based on the plain language of the statute and corresponding case law, continued commitment of Voisine cannot pass constitutional or statutory scrutiny. Of note, Dr. Benson was capable of examining and providing the Court with a report in a little over two months. Byrne had interviewed Voisine in August, but could not prepare a report even with over five months to do so.

[¶22] The North Dakota Century Code further states, "If the committed individual files a petition for discharge and has not had a hearing pursuant to section 25-03.3-17 or this section during the preceding twelve months, the committed individual has a right to a hearing on the petition" NDCC 25-03.3-18(2). Voisine requested a Review Hearing in October of 2018. The last such hearing was held in November of 2017, approximately 14 months prior to the scheduled review hearing. The plain language of the statute entitled Voisine to a review hearing with the state being held to its burden of proof on February 1, 2019.

[¶23] "In the closely related context of civil commitment of persons who are mentally ill or chemically dependent, the statutory framework also allows the court to extend the time for the hearing 'for good cause.' N.D.C.C. § 25-03.1-19." *In the Interest of M.D.*, 1999 ND 160 ¶15, 598 N.W.2d 799. However, the only cause given by the state is that the State of North Dakota has not followed N.D.D.C. § 25-03.3-17(2), § 25-03.3-18(2), or M.D.. Clearly not following two separate statutes, especially in light of the fact that M.D. cites to those statutes as the pillars supporting the Constitutionality of SDI civil commitments cannot be found to be good cause. Accordingly, the district court erred in

granting the state's request for a continuance.

DISTRICT COURT ORDER

[¶24] To the extent this Court may wish to review the district court's order to continue under a discretionary standard, the district court's either intentional or negligent misrepresentation of the state's facts and Voisine's facts and legal arguments require a much different review. This accompanied by the underlying constitutionality of the continued commitment of Voisine requires a *de novo* review. The first misrepresentation was claiming the state's request was for "time to review the report by Dr. Benson filed on January 29, 2019" (Index #260). This Court has been provided with all pertinent materials to see that the state never requested a continuance for this purpose. It was clearly because "the state has not received the state hospital's report of examination" (Index #254).

[¶25] Had the district court not ignored Voisine's request for oral argument, this factual misrepresentation as well as the misunderstanding of the legal arguments presented by Voisine could have been clarified. For instance, the district court claimed Voisine's brief "does little more than state that a continuance should not be granted because the Respondent is prepared for the hearing." This is only true if the whole legal argument found within Voisine's brief that violating constitutional safeguards cannot be good cause to grant a continuance is wholly ignored, which it was. The district court does, however, accurately point out that the respondent, respondent's counsel, and the independent examiner were prepared for the review hearing. An important fact based on this Court's precedence.

[¶26] Furthermore, the district court alleges that Voisine "suggests that the review hearing must be held within a year of the date of the last hearing." Nowhere in Voisine's response is this legal or factual argument raised. It is important to note however, that the district court seems to suggest that once outside the 12-month period, that a continuance can be granted indefinitely since no objection was made to going past 12 months in the first place.

[¶27] The district court does accurately address the burden of the state, which is important in considering the motion to continue. Pursuant to Gomez and the entirety of N.D.C.C. § 25-03.3, Voisine was not even required to file a report with the district court. *In the Matter of Gomez*, 2018 ND 16, 906 N.W.2d 87. To state a continuance is needed by first factually misrepresenting the state's request, then by claiming a report not needed to proceed under the statute and case law is the basis for granting the continuance when the state has not followed the law and is not prepared to meet their burden is a violation of due process for Voisine.

[¶28] Finally, the district court claims Voisine's motion to dismiss lacks merit, while also claiming no grounds were cited to warrant dismissal. Again, this is done only after factually misrepresenting the issues and ignoring this Court's case law and the statute. In light of this, the district court's order cannot be viewed simply as discretionary and requires a *de novo* review.

[¶29] In his concurrence in Kulink, Justice Jensen wrote, "I write separately to urge the legislature or this Court to take action to address what I perceive to be a significant injustice created by the length of time it takes to complete the annual discharge petition proceedings provided by N.D.C.C. § 25-03.3-18." *Matter of Kulink*, 2018 ND 260 ¶ 12,

920 N.W.2d 446. This case presents clear facts and legal issues for this Court to address this "significant injustice."

[¶30] Justice Jensen further pointed out, "Some delays in these proceedings are necessary. For example, the committed individual is provided with an opportunity to undergo an independent examination. N.D.C.C. § 25-03.3-12." Id ¶ 17. The Petitioner acknowledges this as well, however, as the district court even addressed, Voisine, his attorney, and the independent examiner were all prepared to proceed with the review hearing on February 1, 2019. The only reason a continuance was asked for was due to the failure of the state to follow the statutory due process safeguards regarding civil commitment of sexually dangerous individuals. This cannot be considered a "necessary" or "good cause" basis to extend a review hearing.

II. [¶31] The District Court erred in denying Voisine's Motion in Limine and/or Objections

[¶32] This legal argument relies heavily if not entirely on the same facts as the previous issue presented to the Court, but the district court's order suggesting the state "was not required to file the report within 365 days of the previous report" (Order ¶11) goes directly against the plain language of the statute and will therefore be discussed separately. The statute states ""Each committed individual **MUST** have an examination of that individual's mental condition at least once a year. A report regarding the examination **MUST** be provided to the court…" NDCC 25-03.3-17(2) (Emphasis added). Voisine's motion asked that the district court either directly grant his request for discharge, or limit the state's presentation of evidence to that which it could have presented prior to the continuance being granted for the state's failure to follow the law.

[¶33] The district court never attempts to explain how the state is not required to follow the statute. The district court could have suggested that the language does not mean 365 days, but rather a yearly filing. Even if the district court had taken such position, the report filed by the state was 21 months after a previous report had been filed, and no report was filed in 2018, meaning whether the statute requires a report to be filed within 365 days or just every year is not a determination this Court needs to make, but rather just that a yearly report required to be filed per the statute was not done so within 365 days or in a calendar year.

[¶34] While the district court's ignoring of the statute is alarming to Voisine, it is a clear indication of Voisine's argument that the district court ignored the facts and law relevant to this matter in a desire to come to a pre-determined outcome.

III. [¶35] The district court erred by never directly addressing Voisine's Motion for Judgment as a Matter of Law, or erred by denying the motion

[¶36] This issue, like the prior two issues, relies mostly if not entirely on the same facts. This issue is separated out due to the district court writing that the state "complied with the language of N.D.C.C. § 25-03.3-17(2) and was not required to offer Dr. Byrne's report at the hearing" (Order ¶11). The district court offers no explanation of how the state followed the statute. The facts of this case speak for themselves.

[¶37] At the conclusion of the state's case in chief, Voisine moved for a Judgement as a Matter of Law pursuant to Rule 50 of the North Dakota Rules of Civil Procedure, asserting the state did not offer and the court did not accept an evaluation by the state's expert. The court put off ruling on the motion. Importantly, Voisine had filed an

objection and/or motion in limine regarding the report. The district court's response to the objection was that a different Judge had already granted the continuance. However, there was more to the objection which would have been presented had the state offered the exhibit.

[¶38] E.W.F provides the analysis for this issue. In that matter, this Court ruled that the state did not need to offer the report as an exhibit because the "State complied with the statutory requirements under N.D.C.C. §25-03.3-17(2) …." *In the Matter of E.W.F.*, 2008 ND 130, 751 N.W.2d 686. This case clearly establishes that the basis for not needing to offer the exhibit is that the statute is being followed. That was not the case in this matter. There is no factual argument that the state followed §25-03.3-17(2). It clearly did not.

[¶39] The last report filed prior to this hearing was June 23, 2017 (Index #203). If §25-03.3-17(2) is read in its strictest sense, then a report was required to be filed by June 23, 2018. If the benefit of the doubt is given to the state, and the statute merely means an evaluation is required to be filed every single calendar year, then the state still did not meet the statute, as no evaluation was filed in 2018. Instead, one was filed 21 months later in March of 2019 (Index #262). By not following the statute, the state was required to offer the evaluation as an exhibit.

[¶40] By not attempting to offer the exhibit Voisine was denied procedural due process as he was not allowed a contemporaneous opportunity to object. There was no foundation provided for the document. Objections would have been made under rules 901, 802, and 702 of the North Dakota Rules of Evidence. By not offering the exhibit, after failing to follow the statute, the evaluation is not a part of the record and the district court should have granted respondent's Motion for a Judgment as a Matter of Law. The district court's

order does not address the motion by Voisine. To the extent this Court may find the order does address the motion, the district court erred in denying this motion as the state did not follow the statute.

IV. [¶41] The District Court's Order's factual findings do not show the state met its burden of clear and convincing evidence regarding prongs two, three, and serious difficulty

[¶42] This Court has determined that civil commitments of sexually dangerous individuals are reviewed under a "modified clearly erroneous" standard. *In re Midgett*, 2007 ND 198, ¶ 6, 742 N.W.2d 803, 805. The Court will affirm the district court's decision unless the "[o]rder is induced by an erroneous view of the law, or [it is] firmly convinced the order is not supported by clear and convincing evidence." *In re Anderson*, 2007 ND 50, ¶ 21, 730 N.W.2d 570. Here, the district court's order is not supported by clear and convincing evidence that Voisine meets prongs two, three, or has serious difficulty controlling his behavior.

PRONG TWO: WHO HAS A CONGENITAL OR ACQUIRED CONDITION THAT IS MANIFESTED BY A SEXUAL DISORDER, A PERSONALITY DISORDER, OR OTHER MENTAL DYSFUNCTION

[¶43] The state attempted to argue that this prong is barred via Res Judicata. Six years ago, this Court stated in a 5-0 decision that this prong is not barred via Res Judicata. *Interest of Graham*, 2013 ND 171 837 N.W.2d 382. It remains the state's burden to prove by clear and convincing evidence that this prong is met.

[¶44] Although Byrne testified that he diagnosed Voisine with two different diagnoses, he also admitted the diagnoses themselves would not be in the DSM-5, which is the standard for diagnoses in the professional community. In other words, the state is asking this

Court to find a diagnosis exists that the medical community itself does not.

[¶45] Benson testified that she has performed approximately 246 evaluations regarding these civil commitment hearings and has found five or less people not to meet this prong. This testimony in conjunction with the fact that Byrne could not show where the medical profession accepted his diagnoses and provide criteria for them shows that the state has not proven by clear and convincing evidence this prong is met.

[¶46] The district court order suggests that the clear and convincing evidence to this prong being met is that "Byrne's diagnosis is consistent with the State's previous experts' opinons" (Order ¶15). This is just an attempt to override this Court's decision in *Graham* by district court fiat. If prong two is really open for litigation at each review hearing as determined by *Graham*, then simply parroting prior state experts is not clear and convincing evidence.

PRONG THREE: MAKES THAT INVIDUAL LIKELY TO ENGAGE IN FURTHER ACTS OF SEXUALLY PREDATORY CONDUCT TO CONSTITUTE A DANGER TO THE PHYSICAL OR MENTAL HEALTH OR SAFETY OF OTHERS

[¶47] This Court has determined an individual is deemed "likely to engage in further acts of sexually predatory conduct" if the individual's propensity towards sexual violence is of such a degree to pose a threat to others. *M.B.K.*, 2002 ND 25, ¶ 18, 639 N.W.2d 473. This definition becomes important in regard to what transpired in this case. Byrne's evaluation states that Voisine's "actuarially assessed risk of sexual recidivism does not meet the criteria of 'likely to engage in further acts of sexually predatory conduct.'"

[¶48] There was an attempt to claim that a clinical override was justified due to the age at which Voisine last offended. This can be attacked on two grounds. First, assume for a

second that Byrne's position, which lacked any study or backing by any professional outside of the NDSH, is correct. Ignoring the adjustment for age would only increase Voisine's risk to that of the average offender, which would not sufficiently distinguish Voisine from the dangerous but typical offender as required by Crane.

[¶49] Secondly, Benson contacted the creator of the instrument directly regarding this issue and was told that after running the data, there is no scientific basis not to give Voisine the benefit of age reduction. Once again, the scientific community has spoken on this issue. Byrne himself said Dr. David Thornton, whom Benson called on this issue, is a creator of the STATIC-99R and a well-respected doctor in this profession. The clear and convincing evidence is that Voisine's actuarially assessed risk is below that to meet prong three. The district court never addressed how Byrne's override is valid when the creator of the instrument says the risk should not be overridden. Furthermore, the factual finding by the district court that Voisine was in his 60's at the time of the original offenses is factually incorrect. The district court used this inaccuracy to discount Benson's opinion (Order ¶19).

[¶50] After first stating that the review of literature says denial is not a risk factor, Byrne then attempts to say Voisine's denial somehow increases his risk. Again, this is after stating the scientific profession does not see this as a risk factor. Once again, the state is asking this Court to override the scientific community.

[¶51] Furthermore, Benson testified that studies have been done to determine which method of calculating risk has been found to be the most accurate. Amongst these were pure actuarial, pure clinical, and various methods in between. The study found that pure

actuarial, which Byrne testified does not find Voisine to meet, is the most accurate. The state has failed to provide clear and convincing evidence that prong three is met.

SERIOUS DIFFICULTY: INDIVIDUAL WHO HAS SERIOUS DIFFICULTY CONTROLLING HIS BEHAVIOR

[¶52] If this Court determines that scientific backing is not required to meet prongs two and three, the Court must next determine whether the state has shown clear and convincing evidence Voisine has serious difficulty controlling his behaviors. Perhaps most telling regarding the lack of evidence in regard to this was Byrne's testimony that "there wasn't very much of that, if any" (Transcript page 15, lines 4-5) in regards to Resident Behavior Warnings, which would indicate Voisine's ability to control his behavior.

[¶53] Further testimony indicated Voisine was on secure IV, which is the least restrictive setting within the North Dakota State Hospital. This level was given to him by the individuals who monitor him 24 hours a day, 7 days a week, and determined that he is not acting out and is controlling his behaviors. This Court found in Voisine's last appeal that there were no residential behavior writeups over that review period. *Interest of Voisine,* 2018 ND 181, ¶18, 915 N.W.2d 647. This is now two review periods in a row with no residential behavior writeups that go towards serious difficulty controlling behavior.

[¶54] The district court claims in its order a lack of advancement in treatment means Voisine has serious difficulty controlling his behavior. This wholly ignores the fact that Voisine is illiterate, English is not his first language, and the "tutors" provided by the state hospital are committed individuals. It also ignores that Voisine carries medicine for

a heart condition yet, at the age of 76, falling asleep in group is proof he has difficulty controlling his behavior. Benson testified that the scientifically accepted data is that lack of treatment does not increase risk, but completion lowers risk. That risk, however, as Byrne testified to, is below likely to meet.

[¶55] This Court again has already addressed this position by the district court. By a 4-1 decision in Johnson three years ago, this Court decided "Lack of progress in treatment alone is insufficient to meet this requirement for commitment. We conclude a specific finding regarding whether Johnson has serious difficulty controlling his behavior was required to justify continuation of his commitment." *In the Interest of Johnson*, 2016 ND 29, 876 N.W.2d 25.

[¶ 56] In that case, this Court also analyzed the volitional control prong or serious difficulty,

> We defer to a district court's determination that an individual has serious difficulty controlling behavior when it is supported by specific findings demonstrating the difficulty. In G.L.D., we upheld a finding of serious difficulty controlling behavior when the individual frequently assaulted staff and his peers. 2011 ND 52, ¶ 7, 795 N.W.2d 346. In Wolff, we upheld a finding of serious difficulty when the individual yelled profanities, had an explosive temper, refused to attend treatment, and acted in a sexual manner with a peer. 2011 ND 76, ¶9, 796 N.W.2d 644. In Matter of M.D., we upheld a finding of serious difficulty when the individual had engaged in a sexual relationship with a peer and stated he would take advantage of a minor if he knew he would not be caught, would use drugs if they were offered to him, and would provide oral sex if someone came to his door and wanted it. 2012 ND 261, ¶ 10, 825 N.W.2d 838.
>
> *In the Interest of Johnson*, 2016 ND 29, 876 N.W.2d 25.

[¶ 57] In *T.A.G.*, this Court stated, "The status in treatment and one statement regarding 'cream pie' do not establish a serious difficulty controlling behavior sufficient to satisfy the *Crane* due process requirement." *Interest of T.A.G.*, 2019 ND 115, 926 N.W.2d 702.

In *R.A.S.*, this Court found "The isolated instances of refusing two doses of prescribed medication do not establish a serious difficulty controlling behavior." *In the Matter of R.A.S.*, 2019 ND 169, 930 N.W.2d 162. Finally, in *J.M.*, this Court found that an alleged altercation with another resident, a horseplay incident where J.M. threw a rock at another resident, and both experts testifying that J.M. had aggression issues was not clear and convincing evidence of serious difficulty. *In the Matter of J.M.*, 2019 ND 125, 927 N.W.2d 422.

[¶ 58] The present case fits closely with the three previously cited cases. In fact, if anything, Voisine has controlled his behaviors for two review periods to an extent greater than J.M., R.A.S., or T.A.G. There is no evidence of serious difficulty controlling behavior over the last two review periods.

CONCLUSION

[¶ 59] The district court first erred when it granted a continuance for the state when the state failed to follow the statute or Constitution. Next, the district court erred when it denied Voisine's Motion in Limine and/or Objections. Third, the district court incorrectly ruled the state followed the statute in providing the state's report. Finally, under N.D.C.C. 25-03.3, at a petition for discharge hearing, the state bears the burden of proving an individual *remains* a sexually dangerous individual subject to civil commitment by clear and convincing evidence. This requires a present-day determination of sexual dangerous. The record is void of clear and convincing evidence showing serious difficulty controlling behavior over the review period. The state did not provide clear and convincing evidence of prongs two and three being met.

[¶ 60] Based on the arguments set forth, the State has failed to meet its burden. The district court erred in in the multiple ways mentioned above. Voisine respectfully requests this Court reverse the decision of the district court and grant Voisine his immediate release.

Respectfully submitted this 29th day of August, 2019.

/Tyler J. Morrow

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IN THE SUPREME COURT OF NORTH DAKOTA

	)	**Supreme Court File No.**
In the Interest of Raymond J. Voisine	)	**#20190155**
----------	)	
State of North Dakota,	)	
Petitioner/Appellee	)	**Sheridan County File No.**
	)	**#42-08-R-00002**
v.	)	
	)	**CERTIFICATE OF**
Raymond J. Voisine,	)	**COMPLIANCE**
Respondent/Appellant	)	

[¶ 1] This Appellant's Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure as it only has 28 pages.

Dated: August 29, 2019.

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