

IN THE SUPREME COURT OF NORTH DAKOTA

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<b>In the Matter of Cruz Muscha</b>	)	<b>Supreme Court File No.</b>
-----	)	<b>#20210071</b>
<b>Tonya Duffy, State's Attorney,</b>	)	
<b>Appellee,</b>	)	<b>Barnes County Court File No.</b>
	)	<b>#02-2012-MH-35</b>
<b>v.</b>	)	
	)	
<b>Cruz Muscha,</b>	)	
<b>Appellant.</b>	)	

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Appeal from the Order for Commitment issued February 8, 2021, by the Honorable James D. Hovey of the Barnes County District Court, Southeast Judicial District

**BRIEF OF THE APPELLANT  
ORAL ARGUMENT REQUESTED**

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Oral Argument:

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 Barnes County District Court issued a decision ordering Muscha remain civilly committed on February 8, 2021. Muscha timely filed this appeal on March 1, 2021.

ISSUE PRESENTED FOR REVIEW

- I. [¶ 2] **Whether the District Court's Order's factual basis regarding Muscha's behavior is sufficient to legally conclude Muscha has serious difficulty controlling his behavior.**

## STATEMENT OF THE CASE

[¶ 3] Petitioner filed a petition for civil commitment as a sexually dangerous individual (“SDI”) on December 3, 2012. After a hearing, Muscha was initially committed to the North Dakota State Hospital (“NDSH”) as an SDI on May 10, 2013.

[¶ 4] Muscha exercised his right to request a discharge hearing under N.D.C.C. § 25-03.3-18. A hearing on that request was held on January 11, 2021. The Barnes County District Court determined that the state had established by clear and convincing evidence that Muscha remained a sexually dangerous individual pursuant to N.D.D.C. § 25-03.3-01(8) and denied Muscha’s discharge on February 8, 2021. Muscha appealed that decision on March 1, 2021.

## STATEMENT OF THE FACTS

[¶ 5] Muscha petitioned for an annual review hearing pursuant to N.D.C.C. § 25-03.3-18 on whether he remained a sexually dangerous. A hearing was held on January 11, 2021. The state called Dr. Deidre M. D’Orazio (“D’Orazio”) to testify that Muscha remained a sexually dangerous individual subject to continued civil commitment.

[¶ 6] The Stustman County District Court found that the State had proven by clear and convincing evidence that Muscha remained a sexually dangerous individual subject to continued civil commitment and issued an Order in that regard on February 8, 2021. Muscha filed his appeal on March 1, 2021. In its Order, the district found that Muscha had advanced to level 3 of treatment (two levels higher than prior hearing), is residing at the Community Transition Center, socializes with peers, and is doing well with his treatment provider, but that Muscha was involved in horseplay and shows questionable motivation for change (District Court Order ¶’s 21-23).

## ARGUMENT

### **I. [¶ 7] The District Court’s Order’s factual basis regarding Muscha’s behavior is insufficient to legally conclude Muscha has serious difficulty controlling his behavior.**

[¶ 8] 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 Muscha has serious difficulty controlling his behavior.

[¶ 9] This Court previously analyzed the volitional control prong in *Johnson*,

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.

[¶ 10] Although *Wolff* recognized that the inability to control behavior need not be sexual in nature, the factual finding by the district court that calling a peer a “Freak,” slamming a door, throwing personal belongings, arguing with a peer, swearing, looking



down a staff member's shirt, and not progressing in treatment during a review period is a far cry from the above factual findings and does not support a legal conclusion that the state provided clear and convincing evidence that Muscha has serious difficulty controlling his behavior.

[¶ 11] This Court has previously analyzed similar factual findings. Specifically, 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. Therefore, the finding that T.A.G. is a sexually dangerous individual is clearly erroneous." *Interest of T.A.G.*, 2019 ND 115, 926 N.W.2d 702. Similarly, Muscha's questionable motivation for change combined with his being on the highest level of treatment with the least amount of restrictions at the CTC house does not establish serious difficulty controlling his behavior as required by *Crane*.

[¶ 12] 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. This case is factually similar to J.M. as the only incident alleged to have occurred over the review period is horseplay by Muscha and a peer.

## CONCLUSION

[¶ 13] 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 does not reflect clear and convincing evidence showing serious difficulty controlling behavior over the review period.

[¶ 14] Based on the arguments set forth, the State has failed to meet its burden. The district court erred in determining that there was clear and convincing evidence that Muscha remains a sexually dangerous individual. Muscha respectfully requests this Court reverse the decision of the district court and grant Muscha his immediate release.

Respectfully submitted this 18<sup>th</sup> day of May, 2021.

/Tyler J. Morrow

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<b>Tonya Duffy, State's Attorney,</b>	)	
<b>Appellee,</b>	)	<b>Barnes County Court File No.</b>
	)	<b>#02-2012-MH-35</b>
<b>v.</b>	)	
<b>Cruz Muscha,</b>	)	<b>CERTIFICATE OF</b>
<b>Appellant.</b>	)	<b>COMPLIANCE</b>

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[¶ 1] This Appellee’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.

Dated: May 18, 2021.

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IN THE SUPREME COURT OF NORTH DAKOTA

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In the Interest of Cruz Timothy Muscha, )  
)  
Respondent, )  
)  
)  
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)

**Case No. 20210075**

**CERTIFICATE OF  
SERVICE**

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[1] 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 Brief  
Appellant's Appendix  
Certificate of Compliance**

Electronically through the Court Electronic Filing System to:

Tonya Duffy, State's Attorney, [states\\_attorney@barnescounty.us](mailto:states_attorney@barnescounty.us)

Dated: May 18, 2021

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## IN THE SUPREME COURT OF NORTH DAKOTA

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In the Interest of Cruz Timothy Muscha,	)	
	)	
Respondent,	)	<b>Case No. 20210075</b>
	)	
	)	<b>CERTIFICATE OF</b>
	)	<b>SERVICE</b>
	)	

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[1] 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 Appendix-revised**

Electronically through the Court Electronic Filing System to:

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Dated: May 19, 2021

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