STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP002133

In re the Commitment of Kerby G. Denman:
STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KERBY G. DENMAN,

Respondent-Appellant.

On Appeal from an Order Denying a Wis. Stat. § 980.09 Petition for Discharge Entered in Sauk County Circuit Court, Judge James Evenson, Presiding

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BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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ISSUE PRESENTED

Was Kerby Denman Entitled to an Evidentiary Hearing on His Discharge Petition Based on the Independent Examiner's New Method of Risk Assessment?

The circuit court answered "No" and denied Denman's discharge petition without a hearing. (176; App. 101-03).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted, as the issue presented can be fully addressed by the briefs of the parties and involves the application of established law to the facts of this case.

STATEMENT OF THE CASE AND FACTS

Kerby Denman was committed under Wis. Stat. Ch. 980 in 1999. (27).[1] Since then he has filed petitions for discharge (108; 113; 150; 159; 167; 170) and supervised

[1] The original commitment order was reversed by this court because the state did not prove what was at the time an essential element of a ch. 980 proceeding—that Denman was within 90 days of release when the petition was filed. ***State v. Denman***, 2001 WI App 96, ¶¶2, 14-16, 243 Wis. 2d 14, 626 N.W.2d 296. The case was remanded for an evidentiary hearing on that element. ***Id.*** According to the records for this case on the Wisconsin Circuit Court Access website, the circuit court held an evidentiary hearing on remand on November 1, 2001, and found the petition was timely filed. However, the record does not contain any order relating to the proceedings on remand, and in particular does not contain a new commitment order.

release. (43; 45; 57; 69; 112; 149; 160; 171).[2] The petition for discharge Denman filed in December 2011 (150) proceeded to an evidentiary hearing on April 30, 2012 (181). The circuit court denied that petition at the conclusion of the hearing. (181:209-12).

This appeal concerns the petition for discharge Denman's trial attorney filed on November 21, 2013. (167; App. 104-13).[3] The petition was supported by the written report of a psychologist named Lakshmi Subramaniam. (167:6-7; 168; App. 109-10). Subramanian had also evaluated Denman in 2011 (155:Ex. 13) and had testified in support of his petition for discharge at the 2012 discharge hearing. (181:134-87).

As in her 2011 evaluation (155:Ex. 13) and her testimony at the 2012 discharge hearing (181:146-59,162-63), Subramanian concluded in her 2013 report that Denman has a qualifying ch. 980 mental disorder, but that the probability he will commit another sexually violent offense does not meet the legal threshold of "more likely than not." (168:5-6, 16, 18). While her 2013 report came to the same conclusion about Denman's risk as her 2011 report and her 2012 testimony, her

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[2] Denman was granted supervised release in 2004, but after being given several alternatives to revocation due to rule violations, his supervised release was ultimately revoked in 2011. (76; 77; 120; 143).

[3] Using a pre-printed form, Denman also prepared a *pro se* petition that was dated November 22, 2013, and filed December 4, 2013. (170). The circuit court's decision and order states that the discharge petition was filed on December 4, 2013, but it addresses only Subramanian's report, which is what trial counsel's petition cited as the basis for granting a discharge hearing. (176:1, 2-3; App. 101, 102-03). The two petitions should be treated as merged, with the circuit court's order disposing of both petitions.

method of assessing risk had changed since she wrote her 2011 report and testified at the 2012 discharge hearing.

This difference is evident in Subramanian's references to and use of the Static-99R actuarial instrument. In her 2011 report, she scored Denman as having a "5" on the Static-99R. (155:Ex. 13 at 10). To get the score-wise risk estimates, she then had to place Denman into one of four "reference" groups—routine or nonroutine, and, if he was in the latter group, whether he was in the "treatment need," "high risk/need," or "other" subgroup. (*Id.*). Based on the Static-99R evaluator's workbook from November 2009, the then-current edition, she placed Denman in the "high risk/need" group based on her comparison of his characteristics and history to those in the various subgroups. (*Id*.).

With this reference group, the Static-99R score of "5" resulted in recidivism rates of 25% in five years and 36% in ten years. (155:Ex. 13 at 10). She then conducted a review of various dynamic factors, such as psychopathy, sexual deviance, impulsivity, and treatment completion, making an essentially clinical judgment as to whether the various factors exacerbated or ameliorated the risk estimate obtained from the static factors covered by the actuarial instrument. (155:Ex. 13 at 10-12). In her testimony at the 2012 discharge hearing Subramanian reiterated the risk evaluation she undertook in her report. (181:146-59, 162-63).

By September 2013, when she prepared the report in support of the petition at issue in this appeal, Subramanian's method for assessing risk had changed. She again used the Static-99R, again scored Denman as having a "5" on that instrument, and again noted there were different reference groups that could apply for purposes of determining what that

score means—though, in accordance with the new, 2012 version of the Static-99R evaluator's workbook, those groups were now denominated "routine," "nonroutine," "treatment need," and "high risk/high need." (168:9). *See also* A. Phenix, L. Helmus, & R.K. Hanson, ***Static-99R & Static-2002R Evaluator's Notebook*** (July 26, 2012), at 5-8.[4] A score of "5" carries the following range of risk estimates across the four groups:

- 11% over five years for the routine group;
- 20% over five years and 28% over ten years for the nonroutine group;
- 16% over five years and 23% over ten years for the treatment need group; and
- 25% over five years over 36% over 10 years for the high risk/high need group.

(168:9).

It was in choosing the appropriate reference group to use in her 2013 evaluation that Subramanian took a new approach: She used a dynamic risk assessment scale to determine the reference group in which Denman should be placed. (168:9-10). The specific tool Subramanian used—the Violence Risk Scale – Sex Offender version (VRS-SO)—has been around since 2007. (168:10 n.4). But according to

[4] Unlike her 2011 report, Subramanian's 2013 report does not cite the 2012 workbook. However, that document is available at the Static-99's online clearinghouse, www.static99.org. (The specific address for the PDF version is http://www.static99.org/pdfdocs/Static-99RandStatic-2002R_EvaluatorsWorkbook2012-07-26.pdf.) The first page of the workbook notes it was initially issued in January 2012 and slightly updated in July 2012.

Subramanian's report, the usefulness of a dynamic risk assessment scale in general—and of the VRS-SO in particular—for guiding an evaluator's decision about the appropriate reference group came to light in research presented at two conferences of the Association for the Treatment of Sexual Abusers (ATSA). One presentation occurred sometime in 2011, the second occurred in October 2012. (168:9-10 and nn. 2 and 3).[5] Based on her scoring of the VRS-SO, Subramanian decided that Denman showed an improvement in dynamic risk factors and that this improvement placed Denman in the nonroutine reference group, placing his ten-year recidivism rate at 28% and making his lifetime probability of reoffending less than the legal threshold of "more likely than not." (168:10, 16).

The state moved to deny Denman's petition, arguing it failed to satisfy the standard under Wis. Stat. § 980.09. (174). In particular, the state claimed that Subramanian's conclusion was not based on new facts or information because the VRS-SO "is a 2007 instrument and was presented on in 2011 by Dr. Thornton" and Subramanian had been at a 2011

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[5] The first presentation is D. Thornton, *Interpreting SRA-FV total need scores*, presented at the Association for the Treatment of Sexual Abusers Conference, Toronto, ON (2011). This presentation has not apparently been published, at least not by itself, and is not available at the Static-99R online clearinghouse or the ATSA website. SRA-FV stands for Structured Risk Assessment—Forensic Version. ***In Re Detention of Ritter***, 312 P.3d 723, 724-25 (Wash. Ct. App. 2013), describes the instrument and its development.

The second presentation is R.K. Hanson and D. Thornton, *Preselection effects can explain group differences in sexual recidivism base rates in Static-99R validation studies*, presented at the Association for the Treatment of Sexual Abusers Conference, Denver, CO (Oct. 19, 2012). Though not published, this presentation is available at the Static-99R's online clearinghouse: http://www.static99.org/pdfdocs/Research-HansonThorntonSampleTypePresentation-2013-03-01.pdf.

presentation by Thornton based on an entry in her curriculum vitae. (174:2-3, *citing* 155:Ex. 12 at 8). From this the state concluded Subramanian's 2013 report "incorporates information she was aware of and declined to utilize at the 2012 trial." (174:3). Denman responded that Subramanian's use of the VRS-SO had not previously been considered by an expert testifying in a prior proceeding, and that under relevant case law the mere availability of the research or knowledge is not determinative. (175:2-4).

In a written decision, the circuit court held that Denman was not entitled to a full evidentiary discharge hearing. (176; App. 101-03). Based on its review of the April 2012 discharge hearing and Subramanian's report in support of the petition, the court concluded that Subramanian's report "is not based upon new facts or professional information or research that was not previously considered." (176:3; App. 103). The court characterized Subramanian's report as "essentially follow[ing] the same evaluative process using the same instruments as was done in 2011[,]" though it did acknowledge that "[s]he did incorporate one additional test or instrument, the Violence Risk Scale – Sex Offender Version (VRS-SO) into her 2013 evaluation and placed considerable weight upon its test results in reaching her conclusions." (176:3; App. 103).

Nonetheless, the court concluded her use of the VRS-SO was not enough to justify a new hearing:

> The VRS-SO, as well as the other instruments used by Dr. Subramanian[,] were available to her in 2011 and she had been trained on this instrument. The current petition of Mr. Denman states that in 2011 Dr. Subramanian scored Mr. Denman on the Static 99R alone but has since changed her method of assessing risk (P. 8, Petition for Discharge [167:8; App. 111]). The fact that

> she now is using the VRS-SO in her evaluation when it was available to her in 2011 but not used does not rise to the level of new information.

(176:3; App. 103).

ARGUMENT

Denman's Petition for Discharge was Supported by Sufficient Facts based on Research or Knowledge that was not Previously Considered in the 2012 Discharge Proceeding, and from those Facts a Reasonable Trier of Fact Could Conclude that Denman is not a Sexually Violent Person.

A. General legal principles governing § 980.09 discharge petitions.

Petitions for discharge from Chapter 980 commitments are governed by Wis. Stat. § 980.09. The statute "requires the circuit court to follow a two-step process in determining whether to hold a discharge hearing." ***State v. Arends***, 2010 WI 46, ¶3, 325 Wis. 2d 1, 784 N.W.2d 513. The first step of that process, mandated by § 980.09(1), is a "paper review by the court only of the petition and its attachments." ***Id.***, ¶25. "The standard here looks to what a court or jury 'may conclude' from the allegations in the petition." ***Id.***, ¶27.[6] "Thus, in order to pass § 980.09(1) review, the

[6] Wisconsin Statute § 980.09 was amended by 2013 Wis. Act 84, §§ 21, 23, effective December 14, 2013. The Act changed the standard under which the circuit court reviews the sufficiency of the petition. Before the Act, the standard was whether the petition alleges facts from which a fact-finder "may" conclude the person no longer meets the commitment criteria. Act 84 changed "may" to "would likely." The parties below, along with the circuit court, applied the standard in the

court must determine that a reasonable trier of fact could conclude from the facts alleged in the petition and its attachments that the petitioner does not meet the criteria for commitment as a sexually violent person." *Id*. Review at this stage is "very limited," and is designed "to weed out meritless and unsupported petitions." ***Id.***, ¶28.

The second step of the process, mandated by § 980.09(2), "is to determine whether the documents and arguments before the court contain 'facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person.'" ***Id.***, ¶37. At this stage, the court must consider the available items enumerated in sub. (2), specifically: current and past re-examination and treatment progress reports, relevant facts in the petition and the state's response, the arguments of

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2011-12 version of § 980.09, as there is no mention of the change made by Act 84.

Using the 2011-12 version of the statute was appropriate because Denman petitioned for discharge *before* Act 84 took effect. (167; 170). Act 84 contains no initial applicability provisions, and in the absence of express applicability language or "necessary implication" that legislation is intended to apply retroactively, it is generally applied prospectively. ***Bill's Distributing, Ltd. v. Cormican***, 2002 WI App 156, ¶9, 256 Wis. 2d 142, 647 N.W.2d 908. While procedural (as opposed to substantive) statutes may generally be applied retroactively, ***id.***, ¶10, that general rule does not apply if retroactive application "imposes an unreasonable burden on the party charged with complying with the new rule's requirements." ***Trinity Petroleum, Inc. v. Scott Oil Co., Inc.***, 2007 WI 88, ¶53, 302 Wis. 2d 299, 735 N.W.2d 1. If Act 84's change to § 980.09 is procedural, it nonetheless effectively imposes a new pleading standard, requiring an allegation that the new facts "would likely" lead a finder of fact to find a ch. 980 respondent should no longer be committed. To apply this new standard to pleadings filed before Act 84 took effect would impose an unreasonable burden on respondents. Therefore the rule of retroactivity should not apply.

counsel, and any other supporting documentation provided by the person or the state. ***Id.***, ¶32. Review at this stage is also "limited." ***Id.***, ¶¶38, 43. "The circuit court must determine whether the enumerated items contain any facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person."

The first step of the screening process under § 980.09(1) looks at whether the petitioner alleges "facts from which a court or jury may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person." This requirement does not appear in § 980.09(2), but as this court concluded in ***State v. Ermers,*** 2011 WI App 113, ¶37, n.14, 336 Wis. 2d 451, 802 N.W.2d 540, the only reasonable construction of these two provisions is that the "change" that must be alleged under sub. (1) "must also be shown by the documents considered under § 980.09(2) in order to obtain a discharge hearing."

Ermers also held that the "change in condition" necessary to warrant a full hearing on a discharge petition "includes not only a change in the person himself or herself, but also a change in the professional knowledge or research used to evaluate a person's mental disorder or dangerousness, if the change is such that a fact finder could conclude the person does not meet the criteria for commitment." 336 Wis. 2d 451, ¶31. As this court said:

> Expert opinions are typically relied upon by fact finders at the initial commitment hearing in deciding that a person's mental disorder and degree of dangerousness meet the statutory criteria. These opinions are based on the professional knowledge and research available at the

> time. We see no rationale for interpreting § 980.09(1) to prevent a committed person from obtaining a discharge hearing based on a change in that knowledge or research when, in the opinion of an expert, that change results in the person not meeting the criteria for commitment.

Id. (footnote omitted).

Whether the facts of this case satisfy these legal standards is a question of law this court decides independently of the trial court. ***State v. Fowler***, 2005 WI App 41, ¶8, 279 Wis. 2d 459, 694 N.W.2d 446.

B. Subramanian's report provided facts from which a reasonable trier of fact could conclude that Denman does not meet the criteria for commitment, and the primary factor on which Subramanian relied had not been considered by any expert testifying at any previous proceeding in this case.

This case concerns whether a change in the professional knowledge or research that exists and is potentially available at the time of a ch. 980 proceeding, but is not actually considered by any expert in that proceeding, may be used as the basis for a subsequent discharge proceeding in which an expert does consider the knowledge or research. As explained below, the relevant cases show that the change in information that may support a petition for discharge is not limited to professional knowledge or research that was wholly unavailable because it simply did not exist at the time of the last proceeding; rather, the question is whether the knowledge was *considered* by any of the experts (and thus the fact-finder) at the last proceeding that addressed whether the respondent was a sexually violent person. Thus, the circuit

court erred when it denied Denman's petition on the ground the VRS-SO was "available" to Subramanian in 2011.

> 1. Professional knowledge or research is new if the knowledge or research was not previously considered by an expert, regardless of when the knowledge or research was discovered or disseminated.

The relevant cases start with ***State v. Pocan,*** 2003 WI App 233, 267 Wis. 2d 953, 671 N.W.2d 860, which addressed whether the existence of a new research in the form of a diagnostic tool that arguably showed the respondent was not a sexually violent person could be a basis for a discharge petition, or whether only a change in the respondent's condition could provide that basis. ***Id.*** ¶¶9-11. In the course of holding that the new research could provide the basis for a petition, ***id.***, ¶¶12-13, the court noted that Pocan's discharge petition was based on actuarial tables that were "not available" at the time of the original commitment trial. ***Id.*** ¶4.

Pocan was re-affirmed and elaborated on in ***State v. Combs,*** 2006 WI App 137, 295 Wis.2d 457, 720 N.W.2d 684. Combs based his petition on the report of a new expert who concluded Combs did not meet the criteria for commitment, but did so based on a reinterpretation of the same historical facts and research that had been used by the experts who previously testified in the case. ***Id.***, ¶¶12-16. He argued that this new *opinion* was enough, but this court disagreed.

This court held that, unlike in ***Pocan***, Combs's expert's interpretation was not "'new' in the sense of being based on research or professional writings on how to interpret or score these instruments that were not available at the time of the commitment trial." ***Id.***, ¶27. Because ***Pocan*** did not address the claim Combs made, this court went on to decide

that a reinterpretation of previously considered information does not provide a basis for probable cause. ***Id.***, ¶¶28-32.

> We conclude the legislature did not intend that probable cause under Wis. Stat. § 980.09(2) may be established by an expert's opinion that a person is not sexually violent without regard to whether that opinion is based on matters that were *already considered* by experts testifying at the commitment trial or a prior evidentiary hearing. Rather, we conclude that the legislature intended that, in order to provide a basis for probable cause to believe a person is no longer sexually violent under § 980.09(2), *an expert's opinion must depend upon something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent*. By way of example, an opinion that a person is not sexually violent based at least in part on facts about the committed person that did not occur until after the prior adjudication would meet this standard, as would an opinion based at least in part on new professional knowledge about how to predict dangerousness….

Id., ¶32 (emphasis added; footnote omitted).

The standard adopted in ***Combs***, then, asks whether the professional knowledge or research is "new" because it was not "previously considered," *not* because it only came into existence after the last proceeding addressing whether the respondent is a sexually violent person. The cases following ***Combs*** buttress the conclusion that what matters is the time of *consideration* of the knowledge or research is the operative question, not the time of discovery or dissemination of the knowledge.

State v. Kruse, 2006 WI App 179, 296 Wis. 2d 130, 722 N.W.2d 742, was this court's first application of the

Combs standard. Kruse's discharge petition was easily disposed of under the standard because he did not argue the expert opinion in support of his petition depended on new information, and the record did not show the opinion depended on new information. ***Id.***, ¶¶37-40. Moreover, while the expert did note some new information about the respondent, her opinion was not based in any part on that information. ***Id.***, ¶41. Thus, the expert's opinion did not establish probable cause "because it does not, as required by ***Combs***, depend on any fact or professional knowledge or research that was not considered by experts testifying at the commitment trial." ***Id.***, ¶42.

Next came ***State v. Richard (Richard I)***, 2011 WI App 66, 333 Wis. 2d 708, 799 N.W.2d 509. The petition for discharge in that case was based on a recent research paper by the authors of the Static-99, which said the instrument should be revised to reflect the lower probability of sex offenders committing another sexually violent offense as they get older. ***Id.***, ¶8. Significantly, however, no expert re-evaluated the respondent *using* the new research. ***Id.***, ¶17. Nonetheless, relying on ***Pocan*** and ***Combs***, Richard argued that the *existence* of the new research provided probable cause. ***Id.***, ¶¶17, 19.

This court held that the new research *by itself* does not demonstrate that an offender's condition has changed; rather, the research must be associated with the respondent's specific condition and provide some insights into whether he still meets the ch. 980 criteria. ***Id.***, ¶13. In other words, the new research must be *considered* by an expert reviewing the respondent's case. As the court noted, ***Pocan*** "did not say that a new actuarial table by itself could be used as evidence that an offender was no longer a sexually violent person." 333 Wis. 2d 708, ¶17. And ***Combs*** requires that "to show

probable cause that an offender was no longer sexually violent, 'an expert's opinion must depend upon something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding.'" 333 Wis. 2d 708, ¶18, *quoting* ***Combs***, 295 Wis. 2d 457, ¶32. Because Richard had not undergone a new evaluation in which an expert considered how the new research applied to him, ***Pocan*** and ***Combs*** did not apply. 333 Wis. 2d 708, ¶19.

In ***State v. Schulpius***, 2012 WI App 134, 345 Wis. 2d 351, 825 N.W.2d 311, this court once again applied the ***Combs*** standard to conclude that the respondent's discharge petition did was insufficient. In that case, a reviewing expert initially changed his opinion based on changes to the Static–99 scoring, but in a subsequent report was equivocal about whether Schulpius was still dangerous and did not offer a specific recommendation regarding discharge. ***Id.***, ¶¶10-11. This information was presented during a discharge hearing at which Schulpius was denied discharge. ***Id.***, ¶14. During the next annual review process, the same expert filed another report, this time indicating he had erroneously scored Schulpius and opining that Schulpius was no longer a sexually violent person. ***Id.***, ¶¶16, 19.

This court held the expert's change in scoring was insufficient to entitle Schulpius to a discharge hearing under ***Combs*** and ***Kruse***. "Whether a changed expert opinion is enough for a discharge hearing depends on the *basis* for the change, that is, the new 'opinion must depend upon something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding.'" 345 Wis. 2d 351, ¶39, *quoting* ***Combs***, ¶32. The expert's "new" opinion was not based on any new fact about Schulpius, new professional knowledge, or new research that had never before been considered; instead, it

was based on his recalculation of the Static–99 score, an instrument that had previously been considered by experts who reviewed the case. ***Id.***, ¶40.

Finally, we return to the same respondent whose petition had failed to establish probable cause in ***Richard I***. In ***State v. Richard (Richard II),*** 2014 WI App 28, 353 Wis. 2d 219, 844 N.W.2d 370, the respondent had now been re-evaluated with the new research that resulted in revision of the Static-99—information that *could* have been considered in his previous discharge proceeding, but was not. The re-evaluation concluded Richard no longer met the commitment criteria, and this court held his petition did establish probable cause. ***Id.***, ¶¶2-3, 6-7, 18-20.

Taken together, these cases show that to warrant a discharge hearing based on an expert's opinion that the person does not meet the commitment criteria, the "opinion must depend upon something more than facts, professional knowledge, or research that *was considered* by an expert testifying in a prior proceeding that determined the person to be sexually violent." ***Combs***, 295 Wis. 2d 457, ¶32. *Cf.* ***Ermers***, 336 Wis. 2d 451, ¶35 ("the 'change' referred to in Wis. Stat. § 980.09(1) does not include an expert opinion that depends only on facts or professional knowledge or research that was considered by the experts testifying at the commitment trial.").

This standard clearly provides that the question is whether the change in professional knowledge or research was *considered* by any of the experts (and thus the fact-finder) at the last proceeding that addressed whether the respondent was a sexually violent person. Were there any doubt about the clarity of the standard's focus on consideration, that doubt is dispelled by ***Richard I*** and

Richard II. Those cases show that it is not enough that new information or research existed and *could* been considered at the prior proceeding. What matters is whether the information was applied to the respondent and considered during the prior proceeding. Thus, the change in information is not limited to professional knowledge or research that could not have been considered at the prior proceeding because it did not yet exist and thus was "unavailable."

In short, as this court summarized in ***Schulpius***:

> Given the plain language of Wis. Stat. § 980.09(2) and the relevant case law, we hold that, when determining whether to hold a hearing on a petition for discharge, the circuit court must determine whether the petitioner has set forth *new evidence, not considered by a prior trier of fact*, from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person.

345 Wis. 2d 351, ¶35 (emphasis added). This standard makes both logical and practical sense.

It makes logical sense because experts are not—and cannot be expected to be—immediately schooled in or trained on every new piece of research that is released in this constantly-developing area of psychology. Not every expert goes to the every professional conference (or to every session of those conferences), nor does every expert subscribe to every professional journal that is available, or read every article in every journal to which they subscribe.

Moreover, even an expert who does an outstanding job of staying abreast of the research does not—and should not be expected to—immediately adopt every new conclusion from every presentation of new research. An expert may reasonably wait for additional research or testing that verifies

or validates the new research. As an example in this case, William Merrick, the state's expert at the 2012 discharge hearing, does not use the Static-99R, but instead uses an "interim" version ("Static-99U") between that instrument and the original one because he questions the scientific soundness of the four reference groups the Static-99R developers use. (181:84-86).

Further, if the research results in creation of a new instrument of some sort, or a change in the use of an existing instrument, even an expert inclined to embrace the new research quickly will need (or want) training on the changes before they incorporate them into their practice.

Nor will all research be immediately appropriate in every case. Consider, for instance, the research about the effect of aging on the risk estimates that resulted in the revision of the Static-99. ***Richard I***, 333 Wis. 2d 708, ¶8; ***Richard II***, 353 Wis. 2d 219, ¶¶4-7. That research would not be relevant for some respondents until they age a few more years. If availability of the research is the determining factor, the age research could never be used for a respondent who does not reach the next age threshold until several years after the research is released, but who had filed a discharge petition in the intervening period, because the research was "available" but not applied to him given that it was not yet appropriate to do so.

Thus, deciding whether the research is new based on whether it was available would preclude use of research or information that, having just been discussed at a conference or published in a journal, was in existence at the time of a ch. 980 proceeding, but which no expert working on the case at that time considered because they did not know about it all or did not know enough about it to use it. That means some

new research would never get applied to a respondent unlucky enough to have an expert without the knowledge, time, or training to use the newest research. Applying the clearly articulated standard that asks whether the new knowledge or research was considered, instead of whether it was merely available, avoids this arbitrary result. It also avoids any constitutional concerns, for as this court has noted before in discussing the application of § 980.09, the robust review of the current status of a ch. 980 respondent that is contemplated by the discharge process is a critical factor in the constitutional validity of ch. 980. ***Ermers***, 336 Wis. 2d 451, ¶¶32-33; ***Richard II***, 353 Wis. 2d 219, ¶17.

In addition to these logical reasons for focusing on whether the new knowledge or research was considered by an expert, making mere "availability" determinative raises practical problems. What does it mean that the research was "available"? Is the research "available" when a single researcher gives a presentation at a conference, no matter how much the research is a work-in-progress, and has not yet been validated or cross-validated, subjected to peer review or other types of assessment by the profession? How about posting the research on a web log or list serve? Or is it only available after some modicum of additional review or validation or adoption by other researchers or clinicians? And, once we know what availability means, what evidence will be necessary for the circuit court to find it was in fact available?

Moreover, is it enough that the research was available at the time of the prior proceeding even though none of the experts were yet aware of it? Or must there be some evidence that the experts knew about the research at the point and consciously decided not to employ it? To illustrate the problem using this case, even if the presentation of research at a conference establishes "availability," the record does not

support the circuit court's conclusion that Subramanian had the information about the VRS-SO "available" to her in 2011, when she wrote her previous report. (176:3; App. 103). It is true that one of the ATSA presentations Subramanian cited (168:10 n. 3) addressed the determination of reference groups using the VRS-SO and two other similar tools. But as noted above (page 5, n. 5), that conference was in October 2012, *after* Subramanian wrote her 2011 report and after she testified at the April 2012 discharge hearing.

As for the 2011 presentation Subramanian cited, the title of that presentation refers to only *one* of the dynamic risk assessment scales discussed by the 2012 research (the SRA-FV), and that is not the scale Subramanian employed. (68:9: n. 2). Moreover, we have no idea of the content of the 2011 presentation because unlike the 2012 research it has not apparently been published or otherwise made available, at least not by itself. Perhaps it talked about the potential for the use of dynamic risk assessment scales like the SRA-FV generally and advised participants that research was on-going to test the usefulness of other such scales, like the VRS-SO. We do not know. We do know, however, that the circuit court was wrong to say Subramanian was "trained" in this research and, by implication, those tools in 2011. (176:3; App. 103). In fact, the curriculum vitae submitted with the request to appoint Subramanian as an examiner shows she has been trained *only* on the VRS-SO, *not* the SRA-FV, and even then was not trained until 2012, not 2011. (162:7).

In sum, the standard developed carefully in the line of cases discussed above, as well as logic and practicality, asks whether new professional knowledge or research was in fact considered in the prior proceeding, *not* whether the research *could have been* considered in the prior proceeding. The next

section shows that applying this standard to Denman's petition shows he is entitled to a discharge hearing.

2. The new research on which Subramanian relied was not considered at the 2011 discharge proceedings.

The primary factor forming the basis for the Subramanian's conclusion was *not* brought up by or any other expert at the April 2012 trial of Denman's previous discharge petition. Subramanian's 2011 report did not employ the VRS-SO (155:Ex. 13), and her testimony at the 2012 discharge hearing replicated her report (181:134-87).

Further, William Merrick, the state's expert at the 2012 hearing, did not use the Static-99R, but instead used an "interim" version ("Static-99U") between that instrument and the original one because he questions the scientific soundness of the four reference groups for the Static-99R. (181:84-86). Thus, he did not choose a reference group, and had no occasion to use a dynamic risk assessment scale in doing so. Nor did he use the VRS-SO in addressing Denman's dynamic risk factors; instead he provided a narrative of his clinical assessment of those factors. (155:Ex. 11 at 6-9; 181:87-106). Thus, Subramanian's opinion in her 2013 report was based "at least in part on facts about the committed person that did not occur until after the prior adjudication." ***Combs***, 295 Wis. 2d 457, ¶32.

Next, there can be no doubt that Subramanian's opinion depended at least in part on her use of the VRS-SO as a method of choosing the appropriate risk reference group and assessing risk generally. As the circuit court correctly discerned, Subramanian's opinion gave "considerable weight" to the VRS-SO. (176:3; App. 103). Thus, this case is not like ***Kruse***, for instance, where the expert noted there was

new information but did not rely on the new information in forming her opinion. 296 Wis. 2d 130, ¶41.

Finally, at this stage of the process, the issue is not whether the *weight* of the evidence supported Denman's discharge, but whether there are *any* facts from which a reasonable trier of fact *could* conclude that he did not meet the criteria for commitment. ***Arends***, 325 Wis. 2d 1, ¶40. As the supreme court stated in ***Arends***, "if the enumerated items do contain such facts, the presence of evidence unfavorable to the petitioner—a re-examination report reaching a conclusion that the petitioner was still more likely than not to sexually reoffend, for example—does not negate the favorable facts upon which a trier of fact might reasonably rely." ***Id.***

Subramanian's 2013 report contains facts from which a trier of fact could conclude that Denman does not meet the criteria for commitment. Using the VRS-SO as part of a new method of risk assessment, Subramanian placed Denman in a different reference group ("nonroutine" (168:10, 16) as opposed to "high risk/needs" (155:Ex. 13 at 10)) and concluded a lower risk estimate applied (20% over five years, 28% over 10 years (168:9, 16) versus 25% over five years, 36% over 10 years (155:Ex. 13 at 10)). And, by virtue of her scoring of the VRS-SO, she evidently has already taken account of most, if not all, the dynamic factors that might, in an evaluator's clinical judgment, add to (or subtract from, or leave unchanged) the risk estimate based solely on the Static-99R score. Overall, then, this new method of risk assessment paints a significantly different picture of Denman's risk to reoffend.

In short, Subramanian concluded that Denman is not more likely than not to reoffend. She based her evaluation on new professional knowledge and new research, the substance

of which was not considered by a previous jury or trier of fact at an evidentiary hearing. This is evidence from which a reasonable trier of fact could conclude that Denman no longer meets the standard of dangerousness required for commitment. Denman is therefore entitled to a hearing under Wis. Stat. § 980.09(2).

CONCLUSION

For the reasons set forth in this brief, this court should reverse the circuit court's order denying Denman a discharge hearing and remand the case to the circuit court with instructions to conduct a discharge hearing.

Dated this 3rd day of December, 2014.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,152 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of December, 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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