STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2133

In re the Commitment of Kerby G. Denman:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KERBY G. DENMAN,

Respondent-Appellant.

APPEAL FROM AN ORDER DENYING A PETITION FOR DISCHARGE ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE JAMES EVENSON, PRESIDING

BRIEF OF PETITIONER-RESPONDENT

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ISSUE PRESENTED

A discharge petition must contain new evidence from which a reasonable trier of fact could conclude that the petitioner no longer meets the criteria for sexually violent person commitment. Here, Kerby G. Denman relies on the same doctor who draws the same conclusion that she did at Denman's last discharge trial. Did

Denman show a change that a finder of fact could rely upon to conclude that Denman no longer meets the criteria for commitment?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF FACTS

Denman's statement of the case and statement of facts are sufficient to frame the issues for review. The State will include additional relevant facts in the argument section of this brief.

ARGUMENT

The circuit court properly denied Denman's petition for discharge.

A. Standard of review.

This case requires this court to interpret and apply Wis. Stat. § 980.09. The interpretation and application of a statute is a question of law that this court reviews *de novo*, but benefitting from the analysis of the previous courts. *State v. Arends*, 2010 WI 46, ¶ 13, 325 Wis. 2d 1, 784 N.W.2d 513.

Whether an expert's report is based on research upon which a trier of fact could reasonably rely is an issue for the court to decide in determining, under Wis. Stat. § 980.09(2), whether a discharge hearing is required, and this determination is, itself, a question of law this court reviews *de novo*. *See State v. Fowler*, 2005 WI App 41, ¶ 8, 279 Wis. 2d 459, 694 N.W.2d 446.

B. Relevant statute.

Wisconsin Stat. § 980.09 states:

> [**(1)**] A committed person may petition the committing court for discharge at any time. The court shall

deny the petition under this section without a hearing unless the petition alleges facts from which the 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.

(2) The court shall review the petition within 30 days and may hold a hearing to determine if it contains facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. In determining under this subsection whether facts exist that might warrant such a conclusion, the court shall consider any current or past reports filed under s. 980.07, relevant facts in the petition and in the state's written response, arguments of counsel, and any supporting documentation provided by the person or the state. If the court determines that the petition does not contain facts from which a court or jury may conclude that the person does not meet the criteria for commitment, the court shall deny the petition. If the court determines that facts exist from which a court or jury could conclude the person does not meet criteria for commitment the court shall set the matter for hearing.

(3) The court shall hold a hearing within 90 days of the determination that the petition contains facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. The state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person.

(4) If the court or jury is satisfied that the state has not met its burden of proof under sub. (3), the petitioner shall be discharged from the custody of the department. If the court or jury is satisfied that the state has met its burden of proof under sub. (3), the court may proceed under s. 980.08 (4) to determine whether to modify the petitioner's

existing commitment order by authorizing supervised release.

Wis. Stat. § 980.09.[1]

C. Legal principles.

Chapter 980 provides a multi-step procedure for dealing with discharge petitions under Wis. Stat. § 980.09. First, the circuit court engages in a paper-only review confined to the four corners of the petition, including attachments. *Arends*, 325 Wis. 2d 1, ¶¶ 25 n.17, 30. If the review does not disclose facts "from which the 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," the circuit court must deny the petition without holding any further hearing. Wis. Stat. § 980.09(1).[2]

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[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The Legislature amended Wis. Stat. § 980.09 and the amended statute became effective on December 14, 2013. 2013 Wisconsin Act 84. The statute now requires the court to deny the petition if it does not contain facts from which the court or jury "would likely conclude" the person is no longer sexually violent. 2013 Wisconsin Act 87, §§ 21, 23.

Act 84 does not specify an effective date. Act 84 resulted in a procedural change to the discharge process, rather than a substantive change. The change in the discharge standard affects the procedural mechanism for a trial, not the substantive right to petition for a discharge trial itself. "A statute may be applied retroactively if: 1) by express language or by necessary implication, the statutory language reveals legislative intent that it apply retroactively, or 2) the statute is remedial or procedural rather than substantive." *Snopek v. Lakeland Medical Center*, 223 Wis. 2d 288, 294, 588 N.W.2d 19 (1999). This court could apply Act 84 retroactively. But in this case, under either the "would likely conclude" or "may conclude" standard, Denman's petition fails.

[2] In Wis. Stat. § 980.09, the first subsection is unnumbered. The State refers to the first subsection as (1). *See Arends*, 325 Wis. 2d 1, ¶ 23 n.16.

If the petition passes the screen the Legislature established in Wis. Stat. § 980.09(1), the circuit court moves to a second level of review.

> Wisconsin Stat. § 980.09(2)
>
> contains a second level of review before a petitioner is entitled to a discharge hearing. Unlike § 980.09(1), where only the petition and its attachments are reviewed, the court in this step is required to examine all of the following items:
>
> (1) any current and past re-examination reports or treatment progress reports filed under Wis. Stat. § 980.07;
>
> (2) relevant facts in the petition and in the State's written response;
>
> (3) arguments of counsel; and
>
> (4) any supporting documentation provided by the person or the State.

Arends, 325 Wis. 2d 1, ¶ 32.

The court must decide whether the record contains facts that could support relief for the petitioner at the discharge hearing. *Id.* ¶ 38. The court need not take each document at face value. *Id.* ¶ 39. "The court's determination that a court or jury could conclude in the petitioner's favor must be based on facts upon which a trier of fact could reasonably rely." *Id.* The court is free to weigh the reports. *State v. Schulpius*, 2012 WI App 134, ¶ 28, 345 Wis. 2d 351, 825 N.W.2d 311. But the court cannot weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner. *Arends*, 325 Wis. 2d 1, ¶ 40.

The expert's opinions in the reports must be based on matters that were not already considered by experts that testified at the commitment trial or prior evidentiary hearings. *State v. Combs*, 2006 WI App 137, ¶ 32, 295 Wis. 2d 457, 720 N.W.2d 684. To show a change, an opinion needs to be offered based in part on new professional knowledge about how to predict dangerousness or a

change in the person himself or herself. *State v. Ermers*, 2011 WI App 113, ¶ 34, 336 Wis. 2d 451, 802 N.W.2d 540.

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." *Schulpius*, 345 Wis. 2d 351, ¶ 35.

Third, if the petition survives review under both Wis. Stat. § 980.09(1) and (2), "the court shall set the matter for a hearing." Wis. Stat. § 980.09(2). The court shall order a discharge hearing under Wis. Stat. § 980.09(3) when there are facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. Wis. Stat. § 980.09(2).

D. The circuit court properly denied Denman's petition under Wis. Stat. § 980.09(2).

The circuit court correctly denied Denman's discharge petition because it did not contain facts from which a court or jury may conclude that Denman does not meet the criteria for commitment. *See* Wis. Stat. § 980.09(2). The petition alleged that Denman's risk was below the more likely than not standard (168:18). But the petition did not rely on new information. This court should affirm the circuit court's decision.

The circuit court must have found that Denman's "petition allege[d] facts from which the 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." *See* Wis. Stat. § 980.09(1). The court moved to the next part of Wis. Stat. § 980.09, and "determine[d] if [the petition] contain[ed] facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person." Wis. Stat. § 980.09(2).

1. Denman's 2012 trial revolved around what risk he posed if released.

In 2012, the parties disputed whether Denman's dangerousness still made it more likely than not that he would commit an act of sexual violence if released. But parties agreed that Denman had been convicted of a sexually violent offense and has a disorder predisposing him to commit acts of sexual violence: pedophilia.

Dr. William Merrick gave Denman a score of four on the RRASOR, and that score correlated with a high risk of reoffending (181:82-83). On the Static-99 Denman scored a six, which also meant Denman posed a high risk to reoffend (181:83). Dr. Merrick applied the Static-99-Update to determine that Denman presented a risk to be reconvicted of 22 percent in five years and 32 percent in ten years (181:84). Dr. Merrick testified that those percentages underestimate risk because the relevant risk measure is Denman's lifetime, not ten years (181:85).

Dr. Lakshmi Subramanian scored Denman on the Static-99, but applied the risk percentages from the Static-99-Revised, not the Static-99-Update (181:146-47). Dr. Subramanian scored Denman as a five on the Static-99R and placed his risk for reconviction higher based on the Static-99 than Dr. Merrick did. She placed Denman's risk of reconviction at 25 percent in five years and 36 percent in ten years (181:146-47).

Denman was on supervised release in 2004, but he violated the rules of his supervised release and received an alternative to revocation. He violated rules by possessing a weapon, newspaper articles with adolescent girls pictured, coloring books, reading books for kids, including a book on how to style girls' hair, and laminated pictures of young girls (181:88-90).

Denman was again placed on supervised release in 2006, and this time his supervision was revoked (181:90). In 2006, his rule violations stemmed from having a box cutter and knives, laminated photographs of at least one child, unapproved visitors, unauthorized

contact with a former girlfriend, and sexual contact with his brother's dog on two occasions (181:90-91).

The third time Denman was placed on supervised release he again violated the conditions of his release and was revoked (181:91). While on supervised release, Denman either found or trapped a bird in his garage and had sexual contact with the bird (181:91-92). Denman had also recorded names and addresses of staff members at Sand Ridge as well as a television news personality, and had various pornographic videos with troublesome names: *Animal Attractions*, *Animal Attractions 2*, and *Dream Girls Coming of Age* (181:92).

The doctors disagreed, not on the static risk factors measured by the actuarials, but on the impact that the dynamic risk factors had on Denman's dangerousness.

Dr. Merrick identified several areas of concern after evaluating Denman. First, Denman's sexual deviance and sexual preoccupation presented a risk of reoffending (181:93). Dr. Merrick was concerned about Denman's secrecy and strong reactions to negative emotional experiences (181:94-95). He believed that Denman was sexually preoccupied, and tried to hide it (181:94). Denman's actions during his supervised release showed sexual preoccupation (181:96). Sexual preoccupation presents the strongest correlation between recidivists and non-recidivists (181:97). Dr. Merrick worried that stress caused Denman to fail to identify problems or think about the consequences of his actions (181:95).

Dr. Merrick believed Denman made progress in addressing his distorted attitudes, and his socio-affective functioning (181:99-100). Dr. Merrick found Denman's self-management to still be a risk factor, and concluded that Denman had not made substantial progress in that area (181:101-02). Denman had not yet completed treatment (181:102-05).

Dr. Merrick concluded that Denman's set of dynamic risk factors had not changed and that placed his risk in line with the actuarial risk (181:106) Dr. Merrick concluded that Denman was more likely than not to commit a sexually violent act if released (181:106).

Dr. Subramanian disagreed. She examined Denman's prior periods of supervised release, and found it significant that during the third period there were no rule violations involving children (181:145). She noted that twice in that period Denman had accidental and incidental contact with children and he took the initiative not to interact with the children (181:145).

Dr. Subramanian concluded that Denman did not present a risk based on psychopathy (181:150). She believed Denman had made progress regarding sexual deviance finding no evidence that Denman had current problems with hyper-sexuality or compulsive sexual behavior (181:151-52). She did not believe Denman was preoccupied with sex (181:152-53). She determined Denman had made progress in socio-emotional functioning, including emotional congruence with children, interpersonal relationships with adults, and the ability to have supportive relationships (181:155). Dr. Subramanian also found Denman made progress in lifestyle impulsivity, and that his advancement in treatment reduced his risk (181:156-57).

According to Dr. Subramanian, one of Denman's risk factors was boredom (181:162). He also lacked the ability to follow certain rules, and Dr. Subramanian did not recommend him for supervised release (181:161-62). She did not worry about Denman's secrecy because he passed polygraphs in the past (181:163-64). She did not find his fixation with having sexual contact with animals related to his sexual preoccupation with children (181:164-66).

Nothing has changed since Denman's 2012 discharge trial.

2. Denman's petition fails to present new evidence not considered at his 2012 discharge hearing.

In 2013, Dr. Subramanian drew the same conclusions she drew at the 2012 trial. She still diagnosed Denman with pedophilia and believed that the pedophilia predisposed Denman to acts of sexual violence (168:5-6). She again scored Denman a five on the Static-99R (168:9). She concluded that Denman still did not meet the criteria for supervised release (168:18).

She still believed Denman made progress regarding sexual deviance and found no evidence to conclude that Denman had current problems with hyper-sexuality or compulsive sexual behavior (168:10-12). She still did not believe Denman was preoccupied with sex (168:12). She still felt Denman had made progress in socio-emotional functioning, including emotional congruence with children, interpersonal relationships with adults, and the ability to have supportive relationships (168:12-13). Dr. Subramanian also still felt Denman made progress in lifestyle impulsivity, and that his advancement in treatment reduced his risk (168:13-17).

The only new item in Dr. Subramanian's report is her discussion of the Violence Risk Scale – Sex Offender Version (VRS-SO) (168:10). But this tool did not change any of the underlying facts of Denman's case and did not change Dr. Subramanian's conclusion.

Dr. Subramanian described the VRS-SO as a rating scale consisting of seven static factors and 17 dynamic factors (168:10).[3] She concluded that the VRS-SO placed Denman into the "Nonroutine" sample of the Static-99R, and placed his risk at 20 percent in five years and 28 percent in ten years (168:9-10).

While no expert applied the VRS-SO prior to Denman's 2012 discharge trial, it is not new information from which a fact finder

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[3] The static items are: age at release, age at first sex offense, sex offender type, prior sex offenses, unrelated victims, victim gender, and prior sentencing dates. Stephen C. P. Wong, et al., *Assessing risk change in sexual offender treatment using the Violence Risk Scale – sexual offender version: a brief overview*, Sexual Offender Treatment, Vol. 8 (2013) (found at http://www.sexual-offender-treatment.org/115.html last visited January 14, 2014.

The dynamic items are: sexually deviant lifestyle, sexual compulsivity, offense planning, criminal personality, cognitive distortions, interpersonal aggression, emotional control, insight, substance abuse, community support, released to HRS, sexual offending cycle, impulsivity, compliance with community supervision, treatment compliance, deviant sexual preference, intimacy deficits. *Id.*

could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person. *See Schulpius*, 345 Wis. 2d 351, ¶ 35. The VRS-SO relied on information already presented to the circuit court. The VRS-SO differs from the Static-99 only because it incorporates dynamic risk factors. Those factors were considered by past examiners and by the court at Denman's 2012 discharge trial.

The circuit court concluded that the petition did not present any new information (176:3). It determined that the VRS-SO was not new information (176:3).

Because Denman's petition does not provide the court with new information, the circuit court properly denied Denman's discharge petition.

3. The VRS-SO is not a new fact from which a fact finder could conclude that Denman is no longer dangerous.

The application of the VRS-SO to Denman is insufficient to require a discharge trial. The VRS-SO is not new professional knowledge likely to keep a fact finder from finding Denman to be sexually violent.

A new actuarial scale can be enough to meet the requirement to get a new discharge trial. *See State v. Pocan*, 2003 WI App 233, ¶¶ 4, 12, 267 Wis. 2d 953, 671 N.W.2d 860; *Ermers*, 336 Wis. 2d 451, ¶¶ 36-38. However, a new actuarial score does not ensure a new discharge trial. *See State v. Richard*, 2011 WI App 66, 333 Wis. 2d 708, 799 N.W.2d 509 (*Richard I*). "An expert's opinion that is not based on some new fact, new professional knowledge, or new research is not sufficient for a new discharge hearing under Wis. Stat. § 980.09(2)." *Schulpius*, 345 Wis. 2d 351, ¶ 35.

A court trying to determine whether a discharge hearing is warranted is not required to "take every document a party submits at face value." *Arends*, 325 Wis. 2d 1, ¶ 39. Rather, courts must

dismiss petitions that are based on expert opinions upon which no trier of fact could reasonably rely.

> The court's determination that a court or jury could conclude in the petitioner's favor must be based on facts upon which a trier of fact could reasonably rely. For example, if the evidence shows the expert is not qualified to make a psychological determination, or that the expert's report was based on a misunderstanding or misapplication of the proper definition of a sexually violent person, the court must deny the petition without a discharge hearing despite the report's stated conclusions.

Id.

The VRS-SO attempts to quantify the same underlying information already considered. The VRS-SO was developed in 2007 and has not gained acceptance among professionals in the field as a tool for measuring the risk of reoffense. Further research is required to establish the reliability of the VRS-SO results and understand what changes during treatment. R. Karl Hanson and Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, Psychological Assessment Vol. 21, No. 1, at 9 (2009).[4] It is not a fact upon which a trier of fact could reasonably rely.

The VRS-SO is a third-generation risk assessment tool. *Id*. There are three generations of risk assessments defined as follows: first generation involved unstructured professional opinions; second generation involved actuarial risk scales composed of static, historical factors (e.g., criminal history); and third generation involved assessments of "criminogenic needs" or dynamic risk factors. *Id.* at 2. "Dynamic risk factors are defined as characteristics that are capable of change, and changes on these factors are associated with increased or decreased recidivism risk." *Id.*

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[4] www.static99.org/pdfdocs/hansonandm-b2009riskassessment.pdf (last visited January 14, 2015).

This case is not like *Pocan*, 267 Wis. 2d 953. The facts in that case justified a discharge trial because the new expert used "actuarial tables not available when Pocan was originally committed." *Id.* ¶ 4. The VRS-SO was available prior to Denman's 2012 discharge trial. It was published in 2007.

In addition to not being new, it is not widely used by experts in the field of sexually violent persons. There are no published state or federal appellate court decisions referring to the VRS-SO. The complete absence of references to the VRS-SO in case law indicates that it is not widely used by professionals evaluating persons subject to commitment proceedings.

Research may support a petition for discharge "if the change is such that a fact finder could conclude the person does not meet the criteria for a sexually violent person." *See Ermers*, 336 Wis. 2d 451, ¶ 1. Denman fails to explain why a reasonable fact finder could rely on the VRS-SO and consideration of dynamic risk factors to conclude that Denman does not meet the commitment criteria. Denman failed to meet the requirement of Wis. Stat. § 980.09(2) to require a discharge trial.

This case is distinguishable from *State v. Richard*, 2014 WI App 28, 353 Wis. 2d 219, 844 N.W.2d 370 (*Richard II*). In *Richard II*, the petition relied on a change in research or writings on how professionals interpret and score the Static-99. *Richard II*, 353 Wis. 2d 219, ¶ 20. The Static-99 and its revision, the Static-99R, are highly respected and relied upon actuarial instruments. A Westlaw search of all state and federal opinions for "Static-99" returns over 300 published opinions.

The language in *Richard II* that seems to indicate that scoring a new actuarial and applying it to the petition is sufficient to warrant a discharge trial should not be read as strongly as Denman urges. There are many different actuarials and many more research papers published. This court, in *Richard II*, did not mean that any new actuarial or research automatically results in meeting the standard for a discharge trial. Instead, *Richard II* must be interpreted to mean that any new, reliable, and respected research or actuarial tool meets the standard for a discharge trial.

In Denman's brief, he explains that not all research tools are created equal. Denman's brief at 16-17. He explains that experts may wait for additional research of additional verification or validation of the new research. *Id.* Because of these concerns, a discharge trial is not required whenever a discharge petition relies upon any tool that had not previously been relied upon. Circuit courts must consider whether that tool is reliable enough for a fact finder to conclude that the petitioner no longer meets the criteria for commitment. *See Arends*, 325 Wis. 2d 1, ¶ 32. To make this determination, courts are free to weigh the reports. *See Schulpius*, 345 Wis. 2d 351, ¶ 28.

Denman does not rely on a change in an actuarial instrument that is widely relied upon by professionals. Instead, he relies on an actuarial that has not gained wide acceptance in the eight years since its publication. No reasonable fact finder could rely upon the VRS-SO to determine that Denman no longer met criteria.

Denman's petition met the requirements of Wis. Stat. § 980.09(1). However, Denman's claims are insufficient under Wis. Stat. § 980.09(2) to warrant a full discharge trial. His petition and the documents reviewed by the circuit court do not contain facts from which a court or jury may conclude that the person does not meet the criteria for commitment. Therefore, the court properly denied the petition. *See* Wis. Stat. § 980.09(2). This court should affirm the circuit court's order denying discharge without a discharge hearing.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the circuit court's order denying Denman's petition for discharge.

Dated this 22nd day of January, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,010 words.

Dated this 22nd day of January, 2015.

_____

Christine A. Remington
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 22nd day of January, 2015.

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