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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REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

Denman's Petition for Discharge was Supported by New Research not Previously Considered by a Trier of Fact, and that Research is Sufficient to Allow a Reasonable Trier of Fact to Conclude Denman is not a Sexually Violent Person.

As the state recognizes (brief at 6), the circuit court implicitly found that Kerby Denman's 2013 discharge petition satisfied the standard under Wis. Stat. § 980.09(1) and so proceeded to the second step of the process under § 980.09(2), which 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.'" ***State v. Arends***, 2010 WI 46, ¶37, 325 Wis. 2d 1, 784 N.W.2d 513. Review under this second step is "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." ***Id.***, ¶43 (emphasis added).[1]

The circuit court denied Denman's petition on the ground that it was "not based on new facts or professional

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[1] As noted in Denman's brief-in-chief (at 7 n.6), the circuit court applied the statutory standard in effect before it was amended by 2013 Wis. Act 84, and Denman contends that was the applicable standard. While the state suggests the Act 84 amendment could be applied to Denman's petition (brief at 4 n.1), it does not ask this court to do so and with one exception (*id*. at 11) its brief cites the pre-Act 84 standard (*id*. at 4, 6, 11, 14). Thus, this case should be decided using the pre-Act 84 standard.

information or research that was not previously considered." (176:3; A-Ap. 103). As described in Denman's brief-in-chief (at 2-6), the circuit court rejected Denman's claim that his evaluator, Lakshmi Subramanian, used new research to support her conclusion, the new research being that the Violence Risk Scale – Sex Offender Version (VRS-SO) can be used to select the appropriate Static-99R reference group for the offender. (168:9-10). The circuit court concluded that Subramanian's use of the VRS-SO was not "new" because that instrument was available for use at the time of Subramanian's previous evaluation in 2011 and the discharge trial in 2012. (176:3; A-Ap. 103).

In his brief-in-chief (at 11-19), Denman argued that the circuit court's conclusion was wrong because, under the cases interpreting § 980.09, what matters is whether the new professional knowledge or research was *considered* at a prior proceeding, not whether it was merely in existence and *could* have been considered. The state does not expressly address this argument. It does make a passing reference to the VRS-SO being in existence at the time of the previous discharge proceeding (brief at 13), but it does not develop an argument that the mere availability of research in the past, as opposed to consideration of that research, precludes its use in a subsequent proceeding. Indeed, it even acknowledges that an expert's opinion "must be based on matters that were not already considered" in a prior proceeding. (State's brief at 5). Accordingly, the state has conceded that the circuit court was wrong to deny Denman's petition on the ground that the VRS-SO was "available" and could have been used during the prior proceedings. ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed to be conceded); ***State v. Petit,*** 171 Wis. 2d 627, 646-47, 492

N.W.2d 633 (Ct. App. 1992) (this court declines to address undeveloped argument) .

Denman also argued that the research about the use of the VRS-SO to select a Static-99R reference group was not considered in his 2012 discharge proceeding (brief-in-chief at 20-21) and, indeed, *could not* have been considered because the research was not available until after the 2012 discharge hearing. (*id*. at 18-19). The state (brief at 10) concedes that no expert applied the VRS-SO in the 2012 discharge proceeding. Further, it does not dispute Denman's claim that Subramanian *could not* have applied the VRS-SO in her 2011 evaluation or at the April 2012 discharge trial in the way she did in her 2013 evaluation, so the state has conceded that point, too. ***Charolais Breeding***, 90 Wis. 2d at 109.

Having effectively conceded that the circuit court was wrong to deny Denman's petition on the ground that the VRS-SO—and, by implication, the research regarding the way she used the VRS-SO in her 2013 evaluation—was "available" and could have been used during the prior proceedings, the state instead argues that the use of the VRS-SO to find the appropriate Static-99R reference group is not new evidence for purposes of § 980.09 because: 1) the VRS-SO was applied to the same historical facts of Denman's case that were present in 2012; and 2) the VRS-SO is not widely accepted or reliable. For the following reasons, these claims must be rejected.

Application of the VRS-SO to the historical facts of the case

First, the state argues, Subramanian's use of the VRS-SO is not new evidence because it does not change "any of the underlying facts of Denman's case" (brief at 10) but instead "relied on" the facts of the case that had already been presented to the circuit court (brief at 11). It is true, of course,

that the VRS-SO does not and can not change the historical facts of Denman's case. But that is true of *any* new professional knowledge or research that involves interpreting the facts of a case and figuring out whether the facts show the respondent has a mental disorder or is likely to reoffend.

Consider, for example, ***State v. Richard***, 2014 WI App 28, 353 Wis. 2d 219, 844 N.W.2d 370 (***Richard II***), where the respondent was evaluated using the updated norms of the Static-99R. Because that instrument looks at a respondent's static factors, the application of the Static-99R necessarily relied on the same historical facts as those considered in previous evaluations; indeed, the state made just that point in arguing the petition should be denied, and the circuit court apparently agreed. ***Id.***, ¶¶9, 15. But this court concluded the new version of the Static-99 was still new evidence for purposes of § 980.09 despite its application to the existing historical fact:

> [A] petition alleging a change in a sexually violent person's status based upon a change in the research or writings on how professionals are to interpret and score actuarial instruments is sufficient for a petitioner to receive a discharge hearing, if it is properly supported by a psychological evaluation applying the new research.

Id., ¶20. This holding follows from the well-established rule that a change of historical fact about the respondent himself is not the only kind of new evidence that matters under § 980.09. Instead, the change in condition to which the statute refers includes:

> not only a change in the person himself or herself, but also a change in the professional knowledge and 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 a sexually violent person.

State v. Ermers, 2011 WI App 113, ¶34, 336 Wis. 2d 451, 802 N.W.2d 540. *Cf.* ***State v. Pocan***, 2003 WI App 233, 267 Wis. 2d 953, 671 N.W.2d 860 (under previous version of § 980.09, a petitioner is entitled to a discharge hearing despite there being no improvement in his condition because of new actuarial tables which showed a reduced reoffense risk).

Thus, when the new evidence cited in a discharge petition is a change in professional knowledge or research, it does not matter that the new knowledge or research is used to interpret or analyze the same historical facts considered in previous proceedings. As in ***Richard II***, what matters is that there is new research that was not previously considered and that is used to evaluate the historical facts of the case. In this case the new, previously unconsidered research addressed the use of the VRS-SO to measure a respondent's dynamic risk factors and, based on that measurement, to fit him into the appropriate Static-99R reference group. Thus, contrary to the state's claim (brief at 11, 12), using the same historical facts to score the VRS-SO does not mean the VRS-SO is not new evidence. Indeed—and also contrary to the state's claim—Denman's case is indistinguishable from ***Richard II***, for here, too, "the petition relied on a change in research or writings on how professionals interpret and score the Static-99." (State's brief at 13).

General acceptance and reliability of VRS-SO

Second, the state claims that the VRS-SO is not new evidence for purposes of § 980.09 because it is not an instrument on which a trier of fact could reasonably rely, as it is not generally accepted and has not been shown to be

reliable. (State's brief at 11-14). This argument is wrong on multiple levels.

As one authority for its claim, the state cites ***Arends***, 325 Wis. 2d 1, ¶32, which, according to the state, holds that courts "must consider whether [the new research] is reliable enough for a fact finder to conclude that the petitioner no longer meets the criteria for commitment." (State's brief at 14). But that paragraph in ***Arends*** says nothing about a court considering the reliability of the new research or knowledge. It simply lists the materials a court may consider during the second step of the petition review process.

The state also cites ***Richard II*** as authority for its claim, asserting that case should be interpreted to mean that research must be "new, reliable, and respected" to qualify as new evidence. (State's brief at 13). But the state provides no basis whatever for this proposed interpretation. The state's discussion of ***Richard II*** on this point consists of four conclusory sentences that offer no reasoning in support of its interpretation and is devoid of quotations from, or even citations to, the decision. A careful reading of the decision finds no references to general acceptance or reliability or to similar concepts that would support the state's interpretation.

So ***Arends*** and ***Richard II*** do not support the state's claim that a judge should consider the general acceptance and reliability of new research cited in a discharge petition. In fact, none of the cases interpreting § 980.09 support that notion, and for good reason: For ch. 980 respondents like Denman, general acceptance and reliability are not material to the *admissibility* of the new research; thus, they are not material to whether a discharge petition is supported by new evidence.

Up until recently, the admissibility of scientific testimony or evidence in Wisconsin has not depended on its general acceptance or its reliability. ***State v. Peters,*** 192 Wis. 2d 674, 688, 534 N.W.2d 867 (Ct. App. 1995). Wisconsin repudiated the general acceptance test in favor of the relevancy test 40 years ago in ***Watson v. State,*** 64 Wis. 2d 264, 273-74, 219 N.W.2d 398 (1974). And because we adopted the relevancy test, our standard for expert testimony was also unaffected by the reliability standards articulated in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1992). ***Peters,*** 192 Wis. 2d at 687.

While the rules of evidence were amended by 2011 Wis. Act 2 to adopt the ***Daubert*** standard, the initial applicability of the amendments the ***Daubert*** standard does not apply in ch. 980 cases in which the original petition was filed before February 1, 2011. ***State v. Alger***, 2015 WI 3, ¶¶2, 4, ___ Wis. 2d ____, ___ N.W.2d ___. The petition in Denman's case was filed in 1997. (1). Thus, all proceedings in this case are governed by the basic relevancy test.

Under the relevancy test, general acceptance and reliability are not predicates to admission, but grist for cross-examination and a weight and credibility issue for the fact finder. ***Peters***, 192 Wis. 2d at 688, 690 (relevant scientific evidence is admissible in Wisconsin "regardless of the scientific principle that underlies the evidence" and whether that evidence or testimony is accepted or believed "is a question of credibility for the finder of fact, but it clearly is admissible."). Thus, it is meritless to claim that the VRS-SO can not be new evidence unless it is generally accepted and shown to be reliable.

Interspersed with its argument about general acceptance and reliability is the state's claim that a court is

"free to weigh" the report supporting a discharge petition. (State's brief at 5, 14). For this it cites ***State v. Schulpius***, 2012 WI App 134, ¶28, 345 Wis. 2d 351, 825 N.W.2d 311. "Free to weigh" overstates the matter, however, for the discussion of this point in ***Schulpius*** is an application of the controlling statement in ***Arends*** that "[t]he 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." ***Arends***, 325 Wis. 2d 1, ¶39. As the court explained in ***Arends***:

> 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 conclusion.

Id. A footnote to this statement provided three other examples where the court properly determined that a trier of fact could not reasonably rely on the expert's opinion. ***Id.***, ¶39 n.21.

Here, the state does not argue, and there is nothing in the record to suggest, that Subramanian is not qualified to render an opinion or that she misapplied or misunderstood the law in reaching that opinion. The other examples listed in the ***Arends*** footnote are equally inapplicable: Subramanian's opinion is not based solely on historical facts and expert knowledge already considered in a prior proceeding; and she did not conclude that Denman was still a sexually violent person. *Cf.* ***State v. Kruse***, 2006 WI App 179, 296 Wis. 2d 130, 722 N.W.2d 742; ***State v. Fowler***, 2005 WI App 41, 279 Wis. 2d 459, 694 N.W.2d 446; ***State v. Thiel***, 2004 WI App 140, 275 Wis. 2d 421, 685 N.W.2d 890. There is, therefore, no basis for concluding that Subramanian's use of the VRS-SO is not a fact on which a trier of fact could reasonably rely.

One more point on the VRS-SO's general acceptance and reliability. As is evident from the research cited by Subramanian (168:9-10 and nn. 2 and 3), the researchers recommending the use of the VRS-SO (and similar tools) to find the appropriate Static-99R reference group are part of the Static-99 development group. *See* R.K. Hanson, D. Thornton, L.-M. Helmus, and K.M. Babchishin, ***What Sexual Recidivism Rates Are Associated with Static-99R and Static-2002R Scores?***, Sexual Abuse: A Journal of Research and Treatment (Jan. 15, 2015) (in press), at 7.[2] In fact, the latest Static-99R Evaluator's Workbook includes a report-writing template that expressly refers to the use of the VRS-SO to find the right reference group. A. Phenix, L.-M. Helmus, & R.K. Hanson, ***Static-99R & Static-2002R Evaluator's Handbook*** (Jan. 1, 2015), at 29.[3] The state extols the Static-99 as "highly respected and relied upon" (brief at 13), and it seems highly unlikely the developers of that instrument would consider using the VRS-SO as an aid to applying the Static-99 if they deemed it unacceptable or unreliable.

Finally, the state argues in passing that Denman has failed to explain why a reasonable fact finder could conclude he does not meet the criteria for commitment based on Subramanian's application of the new research. (State's brief at 13). As argued in Denman's brief-in-chief (at 21), 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"

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[2] Page references to this article are to the PDF version at http://amyphenix.com/docs/Hanson_et_al_in_press_What_sexual_recidivism_rates_are_associated_with_St-99-R_and_St-02R_scores.pdf.

[3] This document is not available at the Static-99 Clearinghouse; instead, it is at http://amyphenix.com/docs/Static-99R_and_Static-2002R_Evaluators_Workbook_2015_01_01.pdf.

(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 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.

The use of the VRS-SO provides a better gauge of Denman's recidivism risk than using unstructured clinical judgment to decide which reference group is appropriate. Indeed, the Static-99 developers recommend use of tools like the VRS-SO in making Static-99R reference group decisions precisely because they believe that approach is superior to using clinical judgment to make that decision. Hanson, *et al.*, ***Sexual Recidivism Rates***, at 6-7, 24-25; L. Helmus, R.K. Hanson, D. Thornton, K.M. Babchishin, & A.J.R. Harris, ***Absolute Recidivism Rates Predicted by Static-99R and Static-2002R Sex Offender Risk Assessment Tools Vary Across Samples: A Meta-Analysis***, 39 Criminal Justice & Behavior 1148, 1167 (2012).[4] Given the new research justifying the use of an instrument like the VRS-SO and the assertion—if believed—that it yields a more accurate risk assessment, a fact finder could conclude based on this new research information that Denman no longer meets the standard of dangerousness required for commitment.

[4] Copy available at http://www.static99.org/pdfdocs/Research-HelmusEtAl(2012)ActuarialBaseRateVariability-2013-10-25.pdf.

CONCLUSION

For the reasons given above and in Denman's brief-in-chief, 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 5th day of February, 2015.

Respectfully submitted,

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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 2,957 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 5th day of February, 2015.

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