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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP002665

In re the commitment of Anthony Jones:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ANTHONY JONES,

Respondent-Appellant-Petitioner.

On Petition for Review of a Decision of the Court of Appeals Affirming a Judgment Entered in the Dane County Circuit Court, the Honorable Rhonda L. Lanford, Presiding

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BRIEF AND APPENDIX OF RESPONDENT-APPELLANT-PETITIONER

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ISSUE PRESENTED

At Anthony Jones's 980 commitment trial, the state presented expert testimony relying in part on two actuarial instruments: the MnSOST-R and the RRASOR. Jones had moved pretrial to exclude these instruments under the ***Daubert*** standard, arguing they are obsolete, were constructed using faulty means, and have been shown to be unreliable. The circuit court permitted their introduction. Did the court adequately scrutinize the instruments for reliability as ***Daubert*** requires?

The circuit court admitted the testimony about the instruments.

The court of appeals affirmed the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both argument and publication are customary for this court.

STATEMENT OF THE CASE AND FACTS

The state petitioned for Anthony Jones's commitment in 2013, when he was nearing release from prison. (1:1-2). The petition recited Jones's sexual assault history, and included a report by Dr. Anthony Jurek. (1:2-9). Jurek asserted that Jones suffered from antisocial personality disorder, which predisposed him to commit sexual assaults. (1:2,9).

Jurek also opined that Jones was more likely than not to commit another sexually violent offense. He based this opinion on four actuarial instruments: the RRASOR, the MnSOST-R, the Static-99, and the Static-99R. (32:Exh.2:9-11; App. 119-121).

After the court found probable cause and ordered Jones to be detained awaiting trial, the state submitted a second report by Dr. Bradley Allen. (5; 32:Exh.6).

Jones filed a motion to exclude (among other things) any testimony about the MnSOST-R and the RRASOR, because the instruments were not reliable under ***Daubert***. (24). The motion, and an associated affidavit from Dr. Richard Wollert (supplemented with four journal articles) alleged that the instruments were antiquated—having been created using decades-old samples of offenders—and so do not reflect the decline in re-offense rates in the past twenty years. The motion also noted the instruments do not account for the decrease in recidivism seen in middle-aged offenders (Mr. Jones was 55 at the time) and argued that they were developed using inadequate samples. (24:6-7).

The motion also noted that the MnSOST-R was not developed with a random sample, but by the intentional addition and removal of certain types of offenders to increase the overall re-offense rate (24:8), and that it has been found to perform "no better than chance for identifying sexual recidivists." (25:2).

Regarding the RRASOR, the motion alleged that the ten-year recidivism rates were simply the five-year rate multiplied by 1.5, rather than being grounded in any emprical finding. (24:1-2, 8). An attached journal article by Wollert called this assumption "invalid" and showed how it would consistently overstate long-term risk. (24:109; App. 119-21).

The state filed a response contending that the testimony should be admitted. (30).

The court held a two-day evidentiary hearing at which Jurek, Allen and Wollert testified. (64; 65). At the conclusion of this hearing, the court gave an oral ruling rejecting Jones's ***Daubert*** challenge:[1]

> The evidence respondent seeks to exclude is evidence acquired through the use of three actuarial tools, the Minnesota Sex Offender Screening Tool Revised, the [MnSOST-R], the [RRASOR], and Static-99 and Static 99-R. Dr. Jurek testified that he used all of these tools in assessing Mr. Jones. Dr. Allen testified that he used Static-99 but not the other two. Mr. Jones called one expert, primitive and were "outdated." The primary criticism of the test[s] centered around the fact that they did not adequately account for Mr. Jones's age in determining his recidivism because it was undisputed by the expert that as a sex offender ages, recidivism goes down. Mr. Jones is currently 55 years old. The other stats, which is Wisconsin statute on expert testimony.
>
> This statute was revised in 2011 and tracks federal rule 702 also known as the ***Daubert*** standard or the Daubert rule named after ***Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 1993***. It is axiomatic. The Court can look to federal cases interpreting those rules. Because there is a dearth of case law, this Court will look primarily at federal law, interpreting rule 702 and parties also in their briefs submitted have relied on federal cases in making their arguments regarding the admissibility of this testimony.

[1] The transcripts of this case contain numerous apparent errors and omissions. Excerpted portions have been edited for accuracy where it is possible to deduce the likely remarks from context; such emendations are indicated by brackets.

Judges may admit testimony resting on scientific, technical or otherwise specialized knowledge that will assist the trier of facts. Federal courts have interpreted rule 702 states that it does not condition admissibility on the state of the published literature [or] [a] complete and flaw free set of data, that a witness is qualified as an expert by knowledge, skill, experience, training, or education, and that expert may testify in the form of an opinion if the testimony is based upon sufficient facts or data. The testimony is principles and methods, and the witness has applied the principles and methods reliably to the facts of the case, and that was [***United States v. Mikos***, 539 F.3d 706 (7th Cir. 2008)]. ***Daubert*** makes clear, do not constitute a definitive checklist or test. Daubert adds that the gatekeeping inquiry must be tied to the facts of a particular case. And that was reiterated in ***[Kumho Tire v. Carmichael***, 526 U.S. 137 (1999)].

All three experts who testified were knowledgeable about all three tests that are being challenged. Dr. Jurek uses all of the tests in his day-to-day practice at DOC. Dr. Jurek uses the Static-99. Dr. [Wollert] has used static and [RRASOR] in the past, but finds them antiquated and no longer uses them. The evidence at the hearing through the witnesses show that all of the tests and the testimony offered were the product of sufficient facts or data and the product of reliable principals and methods.

The Court does not accept Mr. Jones's definition of peer review in his brief or argued at this hearing. And that while publication in a journal is the most rigorous, it is not the only way to peer review. The witnesses testified that these tests are routinely published on both in journals and in published papers. There are websites that are conferences and training that peers and experts can attend. Static-99 alone has 60 cross-validation studies, according to Dr. Jurek. All of the instruments were subject of extensive review. They have been written about, and even criticized [in] the papers that he has submitted.

They have also been used in other cases, in other jurisdictions, and the Court was not able to find any cases where these tests were stricken based on admissibility or based on a ***Daubert*** challenge. The tools have been debated, reviewed, and revised. This is not junk science, which is what ***Daubert*** sought to reject. These actuarial tools are widely used in predicting recidivism in sex offenders. Did the defendants. Both Dr. Jurek, and Dr. Allen testified that they did. They reviewed Mr. Jones's records and all the information they had and testified that this is the type of information reasonably relied upon by experts in their field.

And there was no evidence suggesting or even challenging that they administered the test incorrectly or interpreted the actuarial data incorrectly. So this prong is met. Some analogies reviewed. I actually liked Dr. [Wollert]'s analogy best when he stated that using these actuarial tools is like driving an older car that does not have all of the safety devices that new cars have. Just because they are safer cars to drive, and both cars get you from point A to point B regardless of the additional safety features. Much like a person driving a car without modern safety features, the State proceeds at its own peril if Mr. Jones, through cross-examination can convince a jury that Dr. Jurek and Dr. Allen's is antiquated, and does that Mr. Jones's criticisms of the actuarial tools are only that, criticisms, and cannot form the basis for this court to exclude this testimony.

The weight to give this testimony is for the jury to decide. This is a weight, not an admissibility analysis. ***Daubert***'s goal as expressed in [***Kumho Tire***], is to make certain that an expert, whether employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relative field. The Court is satisfied that this testimony presented meets all of the requirements for admissibility, and Mr. Jones's motion to exclude is denied.

(65:46-50; App. 106-11). The court entered a one-page order denying Jones's motion. (34).

Jurek testified at Jones's jury trial, including testimony about the disputed instruments. (70:15-48). The jury found Jones a sexually violent person and he was committed. (44; 45).

The court of appeals affirmed Jones's commitment by summary order. ***State v. Jones***, No. 2015AP2665, 2017 WL 1324281 (Wis. Ct. App. April 10, 2017) (App. 101-05). It summarized the trial court's oral decision, including the "older car" analogy, and concluded that the ***Daubert*** challenge was simply a "disagreement" between "experts" that did not merit exclusion. ***Id.*** at 4.

ARGUMENT

The circuit court and court of appeals failed to apply ***Daubert*** and applied no meaningful scrutiny to the instuments.

A. Introduction and standard of review

Before 2011, expert testimony was admissible in Wisconsin if it would help the jury and "the witness was qualified to testify." ***Seifert v. Balink,*** 2017 WI 2, ¶174, 372 Wis. 2d 525, 888 N.W.2d 816 (Zeigler, J., concurring). "Reliability was considered a credibility determination left for the jury." ***Id.***, ¶223 (Gableman, J., concurring). So, if a witness was sufficiently "qualified" on a relevant subject—that is, if he or she was considered an "expert"—that witness's testimony was admissible.

By 2011 Wis. Act 2, the legislature raised the bar. No longer were the trial courts to defer to the witness's status as a

qualified expert. Instead they were to look at the offered testimony itself, to see whether it was "reliable": whether it was "based upon sufficient facts or data, … the product of reliable principles and methods [and] applied reliably to the facts of the case." Wis. Stat. § 907.02(1) (2011-12). This was Wisconsin's adoption of ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

Though the circuit court took two days of testimony in Jones's case, in the end, it did not apply the ***Daubert*** standard. We know this because its decision did not engage with any of Wollert's testimony or, for the most part, Jurek's. Instead, it deferred to Jurek's "expert" status, determining that any problems with the reliability of his testimony should be resolved by the jury. This would have been correct under Wisconsin's old law, but it is not ***Daubert***.

This court reviews a circuit court's admission or exclusion of scientific evidence for an erroneous exercise of discretion. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. The decision will be sustained if the circuit court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2006 WI App 248, ¶151, 297 Wis. 2d 70, 727 N.W.2d 857.

B. Actuarial instruments and ch. 980

Understanding this case requires a grasp of both actuarial instruments and their use in ch. 980 trials.

Often (as here), the only testimony in a ch. 980 trial is expert testimony. The only witnesses are examiners, who describe the person's history, offer diagnoses as to his mental condition, and opine about his dangerousness. This last

issue—the likelihood that the subject of the petition will commit a new sexual offense if released—is frequently the only element in dispute.

In the 1990s, researchers began developing and releasing tools meant to give an objective picture of a person's risk of reoffending. These tools, sometimes called actuarial instruments, ask a series of questions about the person's history and, based on the answers, place the person in a particular category, usually indicated by a number. Generally, a person assigned a higher number is believed to present a greater risk, on average, than a person assigned a lower number.

But the developers of these instruments also went further. They released tables indicating what they believed to be the actual re-offense rates for groups of people assigned particular numbers. Thus, for example, a score of 3 on the RRASOR corresponded with a group of offenders of whom 24.8 percent would reoffend within five years. Those in the business of evaluating sex offenders for commitment often rely on these numbers in performing their assessments. They also often communicate them to juries (as they did in this case). The legitimacy of these numbers is often a crucial issue in ch. 980 proceedings.

Two of the first instruments created were the RRASOR (Rapid Risk Assesment for Sex Offender Recidivism) and the MnSOST-R (Minnesota Sex Offender Screening Tool-Revised), released in 1997 and 1999, respectively. They gained currency as studies showed that actuarial instruments did a better job of predicting recidivism than what had gone before—the unstructured clinical judgments of evaluators. (64:19-20).

C. The problems with the RRASOR and the MnSOST-R

But the RRASOR and MnSOST-R were among the very first products of a very young field of study. Over the years, flaws in these instruments have been exposed.

For one thing, both instruments were developed using the scant data available at the time. For the MnSOST-R (a sixteen-item instrument developed by the Minnesota Department of Corrections to determine treatment needs for Minnesota sex offenders (24:4)), that meant a development sample (the group of offenders studied to determine what factors to include in the instrument) of just 256 Minnesota prisoners released between 1988 and 1990. (32:Exh.2:11; App. 116). Given this small sample size, there was no analysis of which of the sixteen items contributed to recidivism risk; Wollert and Jurek both agreed that MnSOST-R has been shown to contain items with no correlation at all. (64:67-69,151-53).

The RRASOR had larger samples: its author, working for the Solicitor General of Canada, surveyed eight prior studies to generate a total of 2,592 offenders. However, half of these studies had follow-up periods of five years or fewer, and consisted of offenders released from prisons in Canada, the U.S., and the UK as far back as 1958. (24:10, 17-20).

The developers of both instruments also compounded their sample issues by making certain untested assumptions. The MnSOST-R developers did not actually use a random sample: they intentionally excluded incest-only offenders (who generally have lower recidivism rates) and added subjects who they knew had reoffended. They did this in order to inflate the "base rate"—that is, the number of offenders in their sample who would reoffend. (64:154-56).

This decision has a dramatic impact on the risk predictions the instrument generates. Wollert testified that this development method for the instrument "virtually guarantees a high false positive rate overestimating the probability of recidivism." (64:161).

Meanwhile, to deal with the dearth of studies lasting longer than five years, the RRASOR's developer simply assumed that the longer-term (ten-year) recidivism rate would be 150% of the five-year rate. (24:24-25; App. 107-08) (emphasis added; citations omitted). No explanation was provided for the choice of this particular number, or for the assumption that it holds across all scores and levels of risk. As Wollert testified, this approach is "just flat wrong"; his work, included with Jones's motion, explains that when compared with the actual data obtained by tracking offenders over 15 years or more, the assumption is consistently proven to be false. (65:9-10; 24:108-09; App. 116-17).

However flawed to begin with, MnSOST-R and RRASOR have not improved with age. As Wollert and Jurek both testified, observed re-offense rates have declined substantially since the instruments were published. (65:35; 64:75-76). The instruments do not reflect this decline. Thus their risk predictions, based on rates observed in offenders released between 1958 and 1994, are inflated. (Even Allen, one of the state's experts, testified that he was not "comfortable" using the RRASOR because it is "an outdated instrument." (64:11-112)).

Finally, both instruments fail to account for the decline in recidivism rates as offenders pass through the middle decades of life. All three experts agreed that this decline exists (64:73,118-19,152-53), but the MnSOST-R and the

RRASOR treat Jones the same at 55 years old as it would if he were 31.

In sum, the RRASOR and the MnSOST-R were flawed to begin, and are now obsolete. In fact, the developers of both the RRASOR and MnSOST-R have disavowed or abandoned them.

The Minnesota Department of Corrections replaced the MnSOST-R in January 2012 with a new instrument, the MnSOST-3 (which has itself since been revised).[2] The newer instrument uses only 3 of the 16 items from the MnSOST-R. ***Id.*** at 2; (64:159). In their paper introducing the new instrument (also included with Jones's motion (24:79-106)), the developers note that the old MnSOST-R, when applied to a contemporary sample of sex offenders, has an "area under the curve" of .55—that is, it could distinguish between recidivists and non-recidivists just slightly better than the flip of a coin.[3] Karl Hanson, who developed the RRASOR, went on to create the Static-99, which has itself been revised several times. He has made publicly available an affidavit, in which he states that for more than a decade, he has recommended against using the RRASOR, and particularly its re-offense rates, because they are inflated.[4] He also notes, in accord with Wollert's testimony, that the 10-year recidivism

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[2] *The Minnesota Sex Offender Screening Tool-3.1 (Mn-SOST-3.1): An Update to the MnSOST-3*, at 3, (Minnesota Department of Corrections 2012) *available at* http://www.ct.gov/ctsc/lib/ctsc/MnSOST3-1DOCReport.pdf.

[3] Grant Duwe et al., *Using Logistic Regression Modeling to Predict Sexual Recidivism: the Minnesota Sex Offender Screening Tool-3 (MnSOST-3)* SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT at 16; (24:2,94).

[4] Affidavit of Dr. Karl Hanson at 3, *available at* http://static99.org/pdfdocs/Legal-Thorton-Hanson_Affidavits(2016).pdf.

rate was estimated by "certain untested assumptions" and that he no longer considers it credible. ***Id.***

D. Jurek's testimony on the RRASOR and MnSOST

At the ***Daubert*** hearing, Jurek defended his use of the RRASOR and MnSOST-R to evaluate Jones. Regarding the artificially inflated recidivism rates of the MnSOST-R, he testified that the developers had thought they "actually reflected the base rate of actual recidivism in the real world." (64:40-41). He did not provide any explanation for this belief, or explain why he continued to hold it when the developers of MnSOST-R had recognized the problem and created a new instrument that accounts for the lower observed rates.

Jurek also testified that, despite its age and deficiencies, the MnSOST-R has 12 times been found to have a positive relationship to recidivism. There is a lesser and a greater problem with this defense. The lesser problem is that Jurek did not explain when these studies were conducted, and thus whether they reflect current reality. (64:34).

The greater problem is that having "a positive relationship to recidivism" says *absolutely nothing* about whether a given instrument's risk percentages are accurate. A positive relationship with recidivism is typically defined by a measure called the "area under the curve" or AUC. What this number defines is the likelihood that an instrument will assign a higher score to a recidivist than a non-recidivist. (64:157).

So, an instrument with a moderate AUC, as the MnSOST-R has sometimes (but not always, see the "coin-flip" discussion above) been shown to have, is moderately good at assigning higher scores to recidivists than to non-recidivists. This fact tells us nothing about whether the

absolute risks it assigns to offenders are accurate. Regarding the 57% recidivism rate shown by the MnSOST-R, Jurek's testimony provided no basis at all to believe its accuracy. (32:Exh.2:11; App. 121).

He made a similar error with the RRASOR, saying he uses it because "there's a fair number of studies that establish that it is strongly related to risk of sexual recidivism." (64:25). Again, even if true, this tells us nothing about whether its risk estimates are any good. (In fact, in his report, Jurek claims the RRASOR's .71 AUC means that it "predicts with 71% accuracy whether a given individual will or will not reoffend." For the reasons just explained, this is simply wrong.)

Jurek also testified that he uses the RRASOR because he believes the offenders he evaluates "are pretty much the same" as those who were studied to develop it, though he did not provide any data supporting this claim. (64:53-54). (Curiously, he also testified that the RRASOR remains useful in part because it is more accurate for offenders with a deviant arousal pattern and for male-oriented pedophiles—neither of which describes Jones. (64:26, 75-77).)

E. The circuit court failed to apply ***Daubert*** to Jurek's testimony about the RRASOR and the MnSOST-R

The court nevertheless admitted Jurek's testimony about the RRASOR and the MnSOST-R. Though the court's oral decision was lengthy, nowhere did it discuss the evidence it had received about the instruments or Jones's argument that they were unreliable. The *only* factual statements it made about the RRASOR and the MnSOST-R themselves were that they were "widely used," that Jurek used them, that they had been discussed and criticized. (25:48-49). It is not clear what

led the court to conclude that RRASOR and MnSOST are "widely used"—in fact, according to a 2016 survey published in the newsletter of the Association for the Treatment of Sexual Abusers, 94% of evaluators do not use these instruments.[5] And of course, the fact that the instruments have been discussed and criticized says nothing about their reliability.

That leaves the fact that Jurek used them. This seems to be the real thrust of the circuit court's decision—that Jurek was an expert, and he thought the instruments reliable. This was certainly the basis of the court of appeals' decision:

> At the ***Daubert*** hearing, the defense expert disagreed with the State's expert witnesses about the reliability of the actuarial instruments. That disagreement, however, does not lead inexorably to the exclusion of the evidence, but rather goes to the weight of the evidence—a decision for the trier of fact. The court properly exercised its discretion when it denied Jones's motion to exclude evidence under WIS. STAT. § 907.02(1).

Jones, No. 2015AP2665, at 4 (App. 104).

But this is not the ***Daubert*** standard. It is the old Wisconsin standard: where a witness was qualified as an expert, the testimony came in. ***Daubert*** requires more. It requires the *court* to decide whether testimony is reliable, rather than deferring to the proffered views of an "expert." *See* ***Kumho Tire v. Carmichael***, 526 U.S. 137, 157 (1999) ("nothing in either ***Daubert*** or the Federal Rules of Evidence requires a district court to admit opinion evidence that is

[5] Sharon M. Kelley et al., *How do Professionals Assess Sexual Recidivism Risk? An International Survey of Practices*, available at http://newsmanager.commpartners.com/atsa/issues/2016-12-21/5.html.

connected to existing data only by the *ipse dixit* of the expert").

The circuit court's decision amounted to a throwing up of the hands. Faced with disagreement between expert witnesses, it did not examine their testimony for reliability, but instead declared the jury could sort out the dispute. This is understandable. The legislature has placed a substantial burden on the courts by adopting ***Daubert***, because it is impossible for judges to make reasonable judgments about reliability without delving, at least somewhat, into unfamiliar fields of study. But ***Daubert*** is now the law in Wisconsin. Now it is not enough to declare questions about the scientific validity of evidence—that is, its reliability—to be questions about "weight" rather than "admissibility." The new statute specifically makes reliability a question of admissibility.

The circuit court failed to meaningfully address the reliability of the RRASOR and the MnSOST-R. Its decision mentioned, in passing, one of the acknowledged issues with the instruments—their failure to account for aging—but it did not explain why this failure does not render them unreliable. As to the other defects raised by Jones, the decision did not even mention them. The circuit court failed either to "examine[] the relevant facts" or to use a "demonstrated rational process." ***May v. May***, 2012 WI 35, ¶39, 339 Wis. 2d 626, 813 N.W.2d 179. It thus erroneously exercised its discretion. ***Id.***

CONCLUSION

Because the circuit court erroneously exercised its discretion by failing to assess the reliability of expert testimony, Anthony Jones respectfully requests that this court reverse his commitment and remand for a new trial.

Dated this 12th day of October, 2017.

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 3,956 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 12th day of October, 2017.

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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; and (3) 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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