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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP2665

In re the commitment of Anthony Jones:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ANTHONY JONES,

Respondent-Appellant-Petitioner.

On 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

REPLY BRIEF

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The circuit court gave no meaningful scrutiny to the instruments and thus failed to apply ***Daubert***.

Like the circuit court's decision, the state's argument on the reliability of the MnSOST-R and the RRASOR recites the legal standard but largely ignores the instruments themselves. It forswears any assessment of what it calls the "overall correctness" of the instruments. State's Brief at 2-3. It seems to think a court can decide a method is "reliable" without asking whether it tells us what it purports to tell us. But this is impossible. To decline to examine the merits of the instruments themselves is to leave the question of reliability to the expert witness. And as Jones has said, this amounts to abandoning ***Daubert*** and applying Wisconsin's discarded "limited gatekeeper approach"—where expert testimony was admissible so long as the witness was qualified. Opening Brief at 14-15.

So, for example, as Jones noted in his first brief, Jurek based his claim that the MnSOST-R and the RRASOR are reliable on studies showing a "positive relationship to recidivism." Opening Brief at 12-13. But as Jones also explained, what this means is that they have shown a moderate ability to assign higher numerical scores to recidivists than to non-recidivists. It does not mean that the re-offense *rates* they report have been shown to be accurate. But these rates (e.g., the 57% recidivism rate given by the MnSOST-R) are the numbers Jurek told the jury—despite having provided no evidence they were reliable. (70:38-39).

The state's response? It says only that Jones "takes issue with Dr. Jurek's explanation of the results of the tests"

and his "testimony regarding the instruments' error rates" and asserts, in a conclusory way, that any such disputes are for the jury. State's Brief at 32, 35. It offers no explanation of how, without any testimony that the recidivism rates are aligned with reality, a court could nevertheless conclude that they are "reliable."

The state does the same thing with respect to the 10-year rates given by the RRASOR. As Jones has argued throughout this case, neither the original paper nor any other research support the assumption the 10-year rate can be reliably said to be 1.5 times the 5-year rate. The state acknowledges this argument, State's Brief at 14, but then ignores it, again simply offering generic proclamations that disputes between qualified experts are for the jury to resolve.

If it is really true that "disputes between qualified experts" are always for the jury, there is no ***Daubert*** standard. By definition, any opinion, if offered by a qualified expert, would be admissible. But, as Jones noted below, that's the old Wisconsin standard, not ***Daubert***. A court can't decide if an expert's approach is reliable without asking whether the opinions offered make sense. And it can't decide whether the opinions make sense without seeing whether there is evidence for them. And it can't do that if it doesn't engage with the instruments themselves, and the criticisms of them.

But that is what happened here: the court concluded that Jurek, and others, used (and argued about the usefulness of) the instruments, and from this concluded that any question about whether they are useful or reliable was for the jury. The state's brief takes the same approach: the reader will search in vain for any argument about whether or how the RRASOR and MnSOST-R give reliable re-offense rates.

The state takes issue with Jones's citation of an affidavit published by the creator of the RRASOR, as well as a journal article showing that the MnSOST-R and the RRASOR are little used by professionals in the field today. State's Brief at 36. The state is of course correct that neither were submitted to the circuit court; they could not have been as they were released quite recently. As Jones argued in his opening brief and in this one, the circuit court failed to properly exercise its discretion *on the record before it*, because it failed to meaningfully examine the reliability of the MnSOST-R and the RRASOR. Jones is not asking this court to declare those instruments unreliable; he is asking for a new hearing. The point of citing these documents was not to argue that the circuit court erred in not considering them; it was to illustrate to *this* court the changing nature of the field of sex-offender research—to show that though the MnSOST-R or RRASOR *have been* among "the most widely used sex offender risk-assessment tools," State's Brief at 13, this is not the same as saying, like the circuit court did, that they "*are* widely used in predicting recidivism." (Emphasis added).

For similar reasons, the fact that appellate cases from eight, thirteen, fifteen and sixteen years ago approved of the MnSOST-R or the RRASOR does not mean they remain reliable in the face of decreasing recidivism rates and advancements in the field. State's Brief at 3. Many practices that were once the gold standard in diverse fields have fallen by the wayside over time. It's clear that the MnSOST-R and RRASOR were once commonly used—they were once state of the art. That does not establish that they are forever reliable. Knowledge advances. The court's task at a ***Daubert*** hearing is to do more than see whether some experts use, or have used, a particular method—or, once again, it is simply deferring to the expert rather than determining reliability.

As for the state's application of the ***Daubert*** factors, it once again declines to address the actual problems Jones pointed out about the instruments, instead speaking generally in a discussion that amounts to the claim that the instruments have been around, and used, and studied for a while. State's Brief at 31-36. If this is the standard—if a court is simply to ask whether there is a discussion or debate about a particular methodology—then again, virtually any testimony by a "qualified expert" will be admissible, since there will be at least one expert who supports it. This *ipse dixit* approach is certainly simple, but it is not ***Daubert***.

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 15th day of December, 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 1,049 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 15th day of December, 2017.

Signed:

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