COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2133 **Cir. Ct. No. 1997CI1**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE COMMITMENT OF KERBY G. DENMAN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KERBY G. DENMAN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Reversed and cause remanded for further proceedings*.

Before Blanchard P.J., Lundsten, and Higginbotham, JJ.

¶1 BLANCHARD, P.J. Kerby Denman appeals a circuit court order denying without a hearing his 2013 petition for discharge from his commitment as a sexually violent person under WIS. STAT. ch. 980 (2011-12).[1] The court concluded that the psychological report that Denman submitted in support of his 2013 petition did not allege, as required at the time under WIS. STAT. § 980.09(1), "facts from which the court or jury may conclude" that Denman "has changed since the date of his … initial commitment order so that [he] does not meet the criteria for commitment as a sexually violent person."[2] More specifically, the court concluded that the psychological report contains no new facts or psychological research that could not have been considered at the 2012 discharge hearing at which a prior petition for discharge filed by Denman was denied. In support of his 2013 petition, Denman argues that the 2013 psychological report reflects use of a new risk assessment scale that no expert relied on at the 2012 discharge hearing, and that use of the new risk assessment scale constitutes a change that could persuade a fact finder that his condition has improved since commitment such that he no longer meets the criteria for commitment.

¶2 We agree with Denman that a fact finder at a new discharge hearing could conclude, based on an expert opinion accompanying his 2013 petition, that the new risk assessment scale yields a more accurate, and reduced, prediction of Denman's lifetime risk to reoffend if discharged, and thus could make a difference

[1] All references to the Wisconsin Statutes are to the 2011-12 version, not the 2013-14 version, unless otherwise noted. *See infra* note 5.

[2] The statute has since been amended to impose a "would likely conclude" standard. *See infra* note 5.

in determining whether he still meets the standard of dangerousness required for continued commitment. Accordingly, we reverse.

BACKGROUND

¶3 While the substance of our prior opinion is not pertinent to any issue presented in this appeal, this court has previously provided the following history in this ongoing Chapter 980 case:

> Denman was convicted of two counts of first-degree sexual assault of a child in 1988 and 1989 and was sentenced to fourteen years' imprisonment on each count, to be served concurrently in the Wisconsin State Prison. Prior to his release, the State filed … a petition under WIS. STAT. ch. 980 alleging [that] Denman was a sexually violent person. The court found probable cause to believe [that] Denman was a sexually violent person as defined in WIS. STAT. § 980.01(7), and the matter was … tried to the court [in April 1999]….
>
> ….
>
> After the trial to the court, the court found Denman was a sexually violent person and ordered him committed under ch. 980.

See ***State v. Denman***, 2001 WI App 96, ¶3, 243 Wis. 2d 14, 626 N.W.2d 296.

¶4 In December 2011, Denman filed a petition for discharge. The 2011 petition was supported by an evaluation report prepared by psychologist Lakshmi Subramanian. Denman called Subramanian as a witness at the subsequent April 2012 discharge hearing. The parties do not dispute that Subramanian's testimony at the 2012 discharge hearing was consistent in all pertinent aspects with her 2011 evaluation report. Therefore, for ease of reference we use the phrase "Subramanian's 2011-12 evaluation" to refer to information or opinions reflected

in her 2011 report, in her corresponding testimony at the 2012 discharge hearing, or in both.

¶5 Subramanian's 2011-12 evaluation diagnosed Denman with a mental disorder, pedophilia, which she concluded predisposed Denman to commit sexually violent acts as defined in Chapter 980. However, Subramanian also concluded in her 2011-12 evaluation that, "to a reasonable degree of psychological certainty," "Denman's degree of risk does not exceed the legal threshold of 'more likely than not' that he will commit another sexually violent offense should he be discharged."

¶6 Subramanian's conclusion in her 2011-12 evaluation about the risk that Denman would be convicted of another sexually violent offense during his lifetime if discharged rested in part on her use of the Static-99 Revised test, or Static-99R. The Static-99R test is an actuarial instrument used by mental health professionals to estimate the expected likelihood of recidivism by sex offenders. In this context, actuarial instruments are "statistical research-based instruments that are created using data obtained by studying various factors associated with recidivism in groups of people who were convicted for sexual offenses, released, and followed over time." ***State v. Combs***, 2006 WI App 137, ¶4, 295 Wis. 2d 457, 720 N.W.2d 684. As the name "Static" implies, psychologists who rely on the Static-99R have traditionally used it to predict recidivism rates based on static or unchanging factors, such as age at first sex offense and prior sex offenses.

¶7 In Subramanian's 2011-12 evaluation, she scored Denman as a "5" on the Static-99R, which Subramanian described as "a moderate to high score," corresponding to "sexual recidivism rates of 25 percent in five years and 36 percent in 10 years." Subramanian explained that this risk prediction of 36 percent

over the course of 10 years was based on her categorization of Denman as belonging in a particular "reference" group, namely, the "High Risk/Need" reference group. The logic of this approach, as we explained in ***State v. Richard***, 2014 WI App 28, ¶4 n.4, 353 Wis. 2d 219, 844 N.W.2d 370,[3] is that "if an offender can be matched on relevant factors to a subsample composed of offenders most like him or her, the psychologist can give a more accurate risk assessment."

¶8 In considering the ultimate question, namely, whether Denman was more likely than not over his lifetime to be convicted of another crime of sexual violence if discharged, Subramanian based her 2011-12 evaluation on his Static-99R score and interpreted that score in light of "dynamic risk factors," such as psychopathy, sexual deviance, impulsivity, and treatment completion. Subramanian opined, for example, that Denman's participation in "extensive and comprehensive sex offender treatment" while he had been committed "serves as a protective factor, which alters his static risk."

¶9 In contrast, the State during the 2011-12 proceedings relied on a November 2011 evaluation report by psychologist William Merrick and Merrick's testimony at the discharge hearing. Like Subramanian, Merrick diagnosed Denman with pedophilia that predisposes him to commit sexually violent acts, but, unlike Subramanian, Merrick concluded that Denman was "more likely than not to commit another sexually violent offense should he be discharged from his commitment." Merrick did not rely on the Static-99R, but instead used what he called the Static-99 Update test, or Static-99U, and did not place Denman in one of

[3] ***State v. Richard***, 2014 WI App 28, 353 Wis. 2d 219, 844 N.W.2d 370, is hereafter referred to as ***Richard II***, in order to distinguish it from ***State v. Richard***, 2011 WI App 66, 333 Wis. 2d 708, 799 N.W.2d 509 (***Richard I***).

the Static-99R reference groups, as Subramanian had. Merrick testified that Denman presented a recidivism risk of 22 percent within 5 years and 32 percent within 10 years (which was 4 percent points lower than Subramanian's estimate for the 10 year period).

¶10 At the close of the 2012 discharge hearing, the circuit court denied the petition on the grounds that, based on all evidence in the record, Denman had a mental disorder that predisposed him to, and made it more likely than not that he would, commit additional sexually violent offenses if discharged from commitment.

¶11 At issue in this appeal is Denman's new petition for discharge, filed in November 2013 and supported by a September 2013 report from Subramanian.[4] In this 2013 evaluation report, Subramanian explained that she had again diagnosed Denman with pedophilia, which still "predisposes him to commit sexually violent acts as defined by Chapter 980." Subramanian concluded in the 2013 report, as she had during the 2011-12 proceedings, "to a reasonable degree of psychological certainty," that "Denman's degree of risk does not exceed the legal threshold of 'more likely than not' that he will commit another sexually violent offense should he be discharged." However, in reaching this conclusion, Subramanian used a new risk assessment scale that she had not used during the 2011-12 proceedings, which she opines lowers his predicted risk of reoffending.

[4] Denman points out that his attorney filed a petition for discharge at around the same time in 2013 that Denman separately submitted a pro se petition for discharge. Denman invites us to treat the two petitions as merged and disposed of by the circuit court in the single order that Denman now appeals. The State does not oppose this invitation, which we accept.

We now briefly describe the new risk assessment scale used by Subramanian in 2013, reserving for the Discussion section below some additional pertinent details.

¶12 The new risk assessment scale is called the Violence Risk Scale-Sex Offender version. While Subramanian in 2013 used the Static-99R statistical test, as she had in 2011-12, and again scored Denman as a "5" on that test, in 2013, for the first time she relied on this new risk assessment scale to determine which "reference group," or subgroup of sex offenders, Denman should be placed in. The subject groups were now defined as: "Routine" (11 percent risk over 5 years); "Nonroutine," (20 percent risk over 5 years and 28 percent over 10 years); "Treatment Need" (16 percent over 5 years and 23 percent over 10 years); and "High Risk/High Need" (25 percent over 5 years and 36 percent over 10 years). Based on her use of the new risk assessment scale, Subramanian determined that Denman belonged in the "Nonroutine" reference group, which would lower Denman's predicted recidivism rate from 36 percent to 28 percent over 10 years.

¶13 The State moved for denial of the 2013 petition for discharge, on the grounds that the 2013 petition was based solely on the same evidence that had been considered, and found lacking, during the 2011-12 proceedings. The State acknowledged that Subramanian was expressly relying on the new risk assessment scale. However, the State argued that the result was still a "rehash" of her 2011-12 conclusions because she could have used the new risk assessment scale in her 2011-12 evaluation, but did not do so. Denman responded that an expert opinion "need only be based in part on new information," and Subramanian has a "new actuarial understanding" based on the new risk assessment scale, as well as "an additional year of data to rely upon."

¶14 Based on a review of the record that included the 2012 discharge hearing, the 2013 petition for discharge, and the 2013 report from Subramanian, the circuit court denied the 2013 petition for discharge without a hearing "because the current report of Dr. Subramanian is not based upon new facts or professional information or research that was not previously considered." The court agreed with the State that the new risk assessment scale had been available to Subramanian in 2011-12, and concluded that the 2013 report "essentially followed the same evaluative process using the same instruments as was done in 2011." Denman appeals.

DISCUSSION

¶15 On appeal, Denman renews his argument that he is entitled to a discharge hearing under WIS. STAT. § 980.09(1) and (2). During the pertinent time period, a person in Denman's position was not entitled to a discharge hearing unless he or she "alleges facts from which" a fact finder at a discharge hearing "may conclude [that] 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."[5] Section 980.09(1).

[5] In 2013 Wis. Act 84, §§ 21, 23, the legislature amended WIS. STAT. § 980.09 to set a more demanding standard for the review of petitions. Effective December 14, 2013, it is no longer a question of whether a petition alleges facts from which a fact finder "may" conclude that the person no longer meets the commitment criteria, but instead whether the fact finder "would likely" reach this conclusion. Denman presents multiple arguments that we should follow the circuit court and the parties before the circuit court in applying the less demanding standard. The State briefly suggests that we "could apply Act 84 retroactively," but does not provide a fully developed argument on the topic and does not explicitly base any argument on that suggestion, thereby effectively conceding the issue. Therefore, we apply the less demanding standard found in the 2011-12 version of the statutes.

On a related note, neither party argues that the earlier change made to WIS. STAT. § 980.09 in 2003 Wis. Act 187, § 2, effective in 2004, after Denman was originally committed, (continued)

¶16 "In order to resolve the parties' dispute, we must interpret and apply WIS. STAT. § 980.09 in light of existing case law. This presents a question of law, which we review de novo." ***State v. Ermers***, 2011 WI App 113, ¶15, 336 Wis. 2d 451, 802 N.W.2d 540 (citing ***State v. Arends***, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513).

¶17 As summarized by this court, under ***Arends*** and the terms of WIS. STAT. § 908.09, courts use a two-step process to identify insufficiently supported petitions and to protect petitioners' access to discharge hearings:

> [T]he court first engages in an initial, or "paper," review of the discharge petition and its attachments. [***Arends***, 325 Wis. 2d 1, ¶25] (citing WIS. STAT. § 980.09(1)). The court must determine whether "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.***, ¶27; *see also* WIS. STAT. § 980.09(1). Typically, the petition will allege that the committed person does not have a mental disorder that predisposes him or her to acts of sexual violence, and/or the committed person is not more likely than not to commit a sexual offense. ***Arends***, 325 Wis. 2d 1, ¶25, 784 N.W.2d 513.
>
> If the petition is facially sufficient, the court proceeds to a review under WIS. STAT. § 980.09(2), which is a second level of review before the petitioner is entitled to a discharge hearing. ***Arends***, 325 Wis. 2d 1, ¶¶30, 32, 784 N.W.2d 513. In this step, the court must examine the record *in toto*, including any current or past examination reports or treatment progress reports, the petition and any written response, the arguments of counsel, and any other documentation filed by either party. ***Id.***, ¶38. The standard is the same as the facial review under § 980.09(1); that is, the court must determine whether there are facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment. *See*

---

changing the standard for gauging the likelihood of future acts of sexual violence from "substantial probability" to "more likely than not" has any bearing on this appeal.

> Wis. Stat. § 980.09(2). The court may hold a hearing at this stage, or order the production of any enumerated items not in the record. ***Arends***, 325 Wis.2d 1, ¶33, 784 N.W.2d 513. "Essentially, review under § 980.09(2) ensures that the claims in the petition are supported with actual facts." ***Id.***, ¶38.

Richard II, 353 Wis. 2d 219, ¶¶12-13.

¶18 The State acknowledges that the circuit court implicitly resolved step one by concluding that Subramanian's 2013 report alleged facts from which a reasonable fact finder could conclude that Denman no longer meets the criteria for commitment under WIS. STAT. § 980.09(1). The State does not contest that implicit conclusion, and we agree that Denman provided facially sufficient allegations in connection with his 2013 petition to proceed to the second step of review.

¶19 Turning to the standards under WIS. STAT. § 980.09(2), we conclude that the rule explained in ***Richard II*** applies here:

> 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.

See ***Richard II***, 353 Wis. 2d 219, ¶20 (citing ***Richard I***, 2011 WI App 66, ¶¶13-14, 333 Wis. 2d 708, 799 N.W.2d 509; ***State v. Combs***, 295 Wis. 2d 457, ¶¶25, 27, 32; ***State v. Pocan***, 2003 WI App 233, ¶¶4, 12-14, 267 Wis. 2d 953, 671 N.W.2d 860) (examinee entitled to a "probable cause" hearing based on new actuarial tables));[6] *see also* ***Ermers***, 336 Wis. 2d 451, ¶31 (a "change in the professional

[6] We are mindful in citing ***State v. Combs***, 2006 WI App 137, 295 Wis. 2d 457, 720 N.W.2d 684, and ***State v. Pocan***, 2003 WI App 233, 267 Wis. 2d 953, 671 N.W.2d 860, that WIS. (continued)

knowledge or research used to evaluate" an examinee's risk of recidivism is sufficient to warrant a discharge hearing "if the change is such that a fact finder could conclude the person does not meet the criteria for commitment."). Our conclusion in ***Richard II***, that a discharge hearing is merited "when a psychologist reports that significant amendments to one of the actuarial instruments used at trial reduce the petitioner's risk to reoffend below the legal threshold," applies here. *See* ***Richard II***, 353 Wis. 2d 219, ¶25.[7]

¶20 As summarized above, Subramanian explained in her 2013 report that the new risk assessment scale was a research-based tool that she had not used in the 2011-12 proceedings, but it had caused her in 2013 to categorize Denman as falling into the "nonroutine sample" group, as opposed to the "high risk/high need sample" group, which lowered his predicted risk of recidivism from the 2011-12 proceedings. We now elaborate further on the explanation Subramanian provided in her 2013 report.

¶21 According to Subramanian's 2013 report, the new risk assessment scale is one of several relatively new instruments that take into account "dynamic factors external to Static-99R." More specifically, Subramanian explains, the new risk assessment scale addresses "recidivism probabilities differed for nineteen samples based on dynamic factors external to Static-99R." "In addition, this scale

---

STAT. § 980.09 was amended in 2005 Wis. Act 434, § 123. However, both parties here cite to ***Combs*** and ***Pocan*** and neither party argues that any changes in statutory language under Act 434 matter to any statement in ***Combs*** or ***Pocan*** that is pertinent here.

[7] As noted above, Denman argued before the circuit court that "an additional year of data to rely upon" should be considered. However, on appeal Denman does not argue that any new facts that transpired between the 2011-12 proceedings and Subramanian's 2013 report are pertinent. Instead, Denman focuses entirely on Subramanian's use of the new risk assessment scale.

also measures changes in the dynamic factors following treatment completion." Subramanian explained that she put together the static and the dynamic risk factors in order to reach her new predicted 10-year recidivism rate of 28 percent. In sum, Subramanian opined in her 2013 report that she was able to demonstrate with a new, enhanced actuarial method that Denman should be assigned a recidivism rate matching a sample of offenders suggesting a lower risk level than that suggested by the methods used in her 2011-12 evaluation.

¶22 There is no question that a petition for discharge has to be based on new material. As we explained in ***Richards II***,

> an expert opinion based solely on facts or professional knowledge or research considered by the experts who testified at the commitment trial is insufficient to warrant a discharge hearing. A petition supported by such an opinion would be meritless, and may be properly dismissed upon second-level review.

Id., ¶16 (quoted sources omitted). A meaningful change in this context does not include a new expert merely applying his or her individual professional judgment to the same facts that were previously relied on by other experts, using the same research tools as were used by other experts. *See* ***id***., ¶19. However, here the circuit court did not find that Subramanian or any other expert had applied the new risk assessment scale during the 2011-12 proceedings, and the State does not dispute the point now.

¶23 Instead, the circuit court granted the State's motion to deny the 2013 petition because, although Subramanian had "placed considerable weight" on the new risk assessment scale in her 2013 report, this evaluative tool had been available for Subramanian's use during the 2011-12 proceedings. The court stated: "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." We now address this "previously available" basis for the court's decision.

¶24 Denman raises thoughtful questions about *when* a psychological research tool, developed through empirical research over time and about which experts disagree, should be deemed "available" for use.

¶25 In addition, Denman raises substantial questions about the following premise behind the circuit court's decision: If the new risk assessment scale was a tool that was "available" to Denman during the 2011-12 proceedings, but was not used by either Subramanian or any other expert in those proceedings, then Denman was prohibited from relying on the new risk assessment scale in 2013 as a basis to obtain a discharge hearing.

¶26 However, we need not address these questions, because we agree with Denman that the State effectively concedes that the new risk assessment scale was not available to Subramanian during the 2011-12 proceedings. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (respondent's failure to dispute proposition in appellant's brief may be taken as concession on that point). The State ignores the detailed argument that Denman makes on this point, including Denman's contention that one study involving the new risk assessment scale that Subramanian cited in her 2013 report involved a significant professional presentation that occurred well after the 2012 discharge hearing. The State offers only a conclusory assertion that the risk assessment scale "was available prior" to the 2012 discharge hearing because it was a topic of professional publication in 2007. This is merely a conclusion, and we reject it if it is intended as an argument. *See* ***State v. Pettit***,

171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court need not address arguments supported only by general statements). In sum, we reject the circuit court's "availability" reasoning as a basis to deny discharge without a hearing on the ground that the State effectively concedes that the new assessment scale was not available to Subramanian at the time she conducted the 2011-12 evaluation. The State's concession means that we need not resolve the questions regarding the "availability" concept that Denman raises.

¶27 In contrast, the State does attempt to defend on appeal a second rationale that was at least suggested by the circuit court in denying the 2013 petition. The second rationale is that the new risk assessment scale did not add significant information. That is, even if the new risk assessment scale was not previously available, the substance of Subramanian's 2013 evaluation "essentially followed the same evaluative process" as her 2011-12 evaluation, in the words of the court, and therefore makes no difference.

¶28 In making this argument, the State does not contest that the new risk assessment scale incorporates dynamic risk factors in a manner that the evaluation process used in 2011-12 did not. The State's argument is that the facts that inform those dynamic risk factors "were considered by past examiners and by the court at Denman's 2012 discharge trial," and therefore the new risk assessment scale adds no new facts to consider. It is true, as summarized in the background section above, that Subramanian apparently based her 2011-12 evaluation of Denman's lifetime risk if discharged on Denman's Static-99R score, when considered in light of dynamic risk factors that involve the same facts that come into play in using the new risk assessment scale as part of the 2013 evaluation. However, we have consistently rejected variations on the argument that new psychological research alone, as opposed to new facts, cannot constitute a change justifying a discharge

hearing. *See* ***Richard II***, 353 Wis. 2d 219, ¶¶9, 15, 20; ***Ermers***, 336 Wis. 2d 451, ¶34; ***State v. Pocan***, 267 Wis. 2d 953, ¶¶12-14. As we stated in ***Ermers***:

> [W]e interpret the phrase "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" in Wis. Stat. § 980.09(1) as follows: the phrase 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.

Ermers, 336 Wis. 2d 451, ¶34 (emphasis added). Here, the 2013 evaluation relied on a new risk assessment scale that was not relied upon when Subramanian conducted her 2011-12 evaluation. It does not matter that the facts evaluated through use of the risk assessment scale were not significantly changed.

¶29 The State may intend to offer a related argument, although it is difficult to track. The State appears to suggest that the 2013 evaluation adds nothing new of value for a fact finder to consider because Subramanian reached the same conclusion in the 2013 evaluation as she had in her 2011-12 evaluation about Denman's lifetime risk of sexually violent recidivism if discharged, namely, that the risk does not exceed the legal threshold of more likely than not. This argument, to the extent the State intends to make it, goes nowhere. The question at issue is not whether Subramanian in 2013 reached the same conclusion as she had in 2011-12 that Denman was not more likely than not to reoffend, but whether a fact finder at a new hearing would be presented with new information that might make a difference in the result.

¶30 The argument suggested by the State would have merit if the facts here resembled those in ***Richard I***. In that case, Richard pointed only to a recent

research paper reflecting professional concern that the Static-99 should be revised to take into account more accurately the decreasing risks associated with adult sex offenders as they age. ***Richard I***, 333 Wis. 2d 708, ¶8. However, we noted that this general concern regarding actuarial accuracy was not applied on an individualized basis to Richard in the form of a diagnosis, and thus Richard failed to present a new diagnosis based on new actuarial data. ***Id.***, ¶¶1, 13-17. Here, in contrast, there is a new diagnosis of Denman based on new actuarial data.

¶31 Neither the circuit court in its decision, nor the State on appeal, identify any apparent flaw or inconsistency in the new risk assessment scale. That is, neither the court's decision nor the State's arguments on appeal provide us with a reason to conclude that the new risk assessment scale is not, as Subramanian opines, relevant to the issues properly considered at a new discharge hearing. It will be for the fact finder at the discharge hearing to determine weight and credibility issues, including those surrounding the new risk assessment scale.[8]

¶32 The State relies heavily on ***State v. Schulpius***, 2012 WI App 134, 345 Wis. 2d 351, 825 N.W.2d 311, in arguing that Subramanian's 2013 evaluation does not warrant a new discharge hearing. However, ***Schulpius*** is readily

[8] The State makes a meritless argument to the effect that the new risk assessment scale does not constitute a significant change in professional knowledge and research because it is not generally accepted and reliable. As Denman points out, the premise of this argument is false, because the original petition in this case was filed in 1997, and therefore the circuit court was to apply Wisconsin's traditional relevancy test, not the general acceptance or reliability tests. *See* ***State v. Alger***, 2015 WI 3, ¶¶2-4, 360 Wis. 2d 193, 858 N.W.2d 346 (evidentiary standard under ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 597 (1993), that expert testimony must be reliable and relevant to be admissible, as codified at WIS. STAT. § 907.02(1), does not apply to expert testimony in WIS. STAT. ch. 980 discharge petition trials when discharge petitions did not commence on or after February 1, 2011); *see also* ***State v. Peters***, 192 Wis. 2d 674, 687-88, 534 N.W.2d 867 (Ct. App. 1995) (detailing Wisconsin's traditional approach to the admission of scientific testimony or evidence).

distinguishable here, for the same reasons we distinguished ***Schulpius*** from the facts in ***Richard II***. *See* ***Schulpius***, 345 Wis. 2d 351, ¶¶10-11, 14-19, 40-41; ***Richard II***, 353 Wis. 2d 219, ¶20 n.11. As we explained in ***Richard II,*** in ***Schulpius***, an expert changed his opinion about the examinee's dangerousness simply as a result of the expert's ongoing reflections regarding scoring criteria in the Static-99, and did not purport to offer a different opinion based on "changes in professional research." *See* ***Schulpius***, 345 Wis. 2d 351, ¶¶10-11, 14-19, 40-41; ***Richard II***, 353 Wis. 2d 219, ¶20 n.11. Here, as in ***Richard II***, changes in professional research led to a change in an expert's conclusions. We acknowledge that a Wisconsin court may one day be presented with a case in which the line between changing professional opinions based on "reflections" and changing professional opinions based on "professional research" is difficult for a court to discern, but that is not the situation here. This is a case of changing research, applied specifically to Denman.

CONCLUSION

¶33 For these reasons, we conclude that Denman is entitled to a discharge hearing under WIS. STAT. § 980.09(2). Accordingly, we reverse the court's order denying the petition for discharge, and remand for a discharge hearing.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.