OAH 65-1100-36636

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Shawn M. Tillman	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

This matter came before Administrative Law Judge Ann C. O'Reilly for an evidentiary hearing at the Office of Administrative Hearings in St. Paul, Minnesota, on October 8, 2020. The record closed that day at the conclusion of the hearing.

Karen McGillic, Assistant Attorney General, appeared on behalf of the Minnesota Department of Corrections (Department) End-of-Confinement Review Committee (ECRC) for the Minnesota Correctional Facility at Stillwater (MCF-Stillwater). Shawn M. Tillman (Petitioner) appeared on his own behalf and without counsel.

STATEMENT OF THE ISSUE

1. Did the ECRC err in assigning Petitioner to a Risk Level 3?

2. If the ECRC did err, does a preponderance of the evidence support assignment of a different risk level to Petitioner?

SUMMARY OF CONCLUSION

Petitioner has failed to prove by a preponderance of the evidence that the ECRC committed a material err in conducting its risk level determination. Accordingly, the ECRC's risk level assignment is **AFFIRMED**. Petitioner shall remain assigned to a Risk Level 3.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Minnesota Community Notification Act and Predatory Offender Registration

1. Minnesota law provides for both the registration of predatory offenders and the community notification of those offenders.[1] Two acts work together to accomplish this purpose.

2. The Minnesota Predatory Offender Registration Act requires that offenders who are charged with certain predatory offenses, or who are later convicted of other criminal offenses arising out of the same set of circumstances as the predatory offense, register with state law enforcement.[2] In turn, the Minnesota Community Notification Act provides for the community notification of predatory offenders who are registered in the state of Minnesota.[3]

3. Under the Community Notification Act, a law enforcement agency in the area where a predatory offender resides, expects to reside, is employed, or is regularly found, must disclose to the public any information about the offender that is "relevant and necessary to protect the public and to counteract the offender's dangerousness."[4]

4. The extent of the information disclosed, and the persons to whom the disclosure is made, must relate "to the level of danger posed by the offender, to the offender's pattern of offending behavior, and to the need of community members for information to enhance their individual and collective safety."[5]

5. The scope of community notification required is related to the risk level assigned to a predatory offender. There are three risk level assignments under Minnesota law: Risk Level 1, Risk Level 2, and Risk Level 3.[6] Each risk level is associated with a different degree of community notification.[7] Risk Level 3 is the highest risk level and requires the broadest degree of notification.[8] In contrast, Risk Level 1 is the lowest risk level and provides for the least extensive notification.[9]

6. The law requires the assignment of a risk level to "predatory offenders" before they are released from a Minnesota prison or treatment facility, or upon their release from a federal correctional facility in another state if the offender intends to reside in Minnesota.[10]

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[1] Minn. Stat. §§ 243.166-.167; 244.052 (2020).
[2] Minn. Stat. § 243.166, subd. 1b(a).
[3] Minn. Stat. § 244.052.
[4] *Id.* at subd. 4(a).
[5] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).
[6] *See generally* Minn. Stat. § 244.052.
[7] Minn. Stat. § 244.052, subd. 4.
[8] *Id.*
[9] *Id.*
[10] *See* Minn. Stat. § 244.052, subd. 3(a)(1)-(3).

7. Risk level assignments are made by end-of-confinement review committees (ECRCs) composed of five individuals with varied sex offender experience, including the head of the correctional or treatment facility where the offender is confined, a law enforcement officer, a treatment professional trained in the assessment of sex offenders, a caseworker experienced in supervising sex offenders, and a victim's services professional.[11]

8. ECRCs are established by the Department of Corrections (DOC) at each state correctional facility or state treatment facility where predatory offenders are confined.[12] The ECRCs assess, on a case-by-case basis, the public risk posed by predatory offenders who are about to be released from confinement, and determine the risk level assignment for those offenders.[13]

II. ECRC Process and Risk Level Assignment

9. In assigning a risk level to an offender, the ECRC is required to apply the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g), as well as a "risk assessment scale" developed by the Commissioner of the DOC under Minn. Stat. § 244.052, subd. 2.[14]

10. One of the risk assessment tools developed by the Commissioner pursuant to Minn. Stat. § 244.052, subd. 2, is the Minnesota Sex Offender Screening Tool-4.0 (MnSOST-4.0).[15] The MnSOST-4.0 is explained and accepted for use by the Commissioner in DOC Policy 205.220.[16]

11. The MnSOST-4.0 is a computerized actuarial matrix or statistical tool that estimates or "predicts" the likelihood of recidivism for adult male sex offenders within four years of release and an offender's percentile rank relative to individuals who have been convicted of a sex offense in Minnesota.[17] The predicted probability of recidivism (articulated in a percentage format and percentile ranking) is then translated into a presumptive risk level and used as guidance for the ECRC in making its risk level assignment.[18]

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[11] Minn. Stat. § 244.052, subd. 3(a).
[12] *Id.*
[13] *Id.*
[14] *Id.* at subds. 2, 3(d)(i).
[15] Testimony (Test.) of Terrell Backes, Psy.D.
[16] *See* Department of Corrections Policy 205.220 (Apr. 28, 2020), *available at* http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=205.220.htm (DOC Policy 205.220).
[17] Ex. 2 at 3 (MnSOST-4.0 Coding Rules). The MnSOST-4.0 predicts the probability of reconviction, not necessarily reoffending, which may not result in conviction. Accordingly, the MnSOST-4.0 predicts recidivism, not necessarily re-offense. Test. of T. Backes.
[18] *See* Ex. 2 (MnSOST-4.0 Coding Rules).

12. The application of the risk assessment tool is conducted by a professional, generally a licensed psychologist, who has been specifically trained on the proper scoring method.[19]

13. The MnSOST-4.0 inventory uses 16 items to estimate the probability of recidivism: (1) the number of "violent offense sentences" that the offender has received; (2) the number of "felony sentences" that the offender has received; (3) the number of sentences the offender has received for stalking, harassment, and violations of orders for protection, no-contact orders, or restraining orders; (4) the number of "predatory offense sentences" that the offender has received; (5) the number of "stranger victims" the offender has; (6) the number of sexual predatory offense sentences in which the victim was a male; (7) whether the offender was charged or convicted of any sex or sex-related offense that occurred in a public place; (8) the age groups of the offender's victims; (9) whether there are any suicidal concerns pertaining to the offender; (10) the offender's employment status following release; (11) the offender's marital status; (12) the offender's education achievement; (13) whether the offender completed both sex offender and chemical dependency treatment while incarcerated; (14) whether the offender is incarcerated as a release violator; (15) the current age and date of release for the offender; and (16) whether the offender's release is supervised or unsupervised.[20]

14. Using all available documents and information on an offender, the professional conducting the MnSOST-4.0 assigns a score for each of the 16 scoring factors.[21] The scoring data is then inserted into the MnSOST-4.0 computerized actuarial program and the tool calculates a presumptive risk level.[22]

15. Although no statistical tool can determine with 100 percent accuracy the likelihood of recidivism for any predatory offender, the MnSOST-4.0 is the actuarial tool developed and adopted by the DOC for estimating an offender's likelihood of recidivism.[23] It is, therefore, accepted by law for use by ECRCs in determining risk level assignments for predatory offenders.[24]

16. The ECRC, in its discretion, can deviate from the presumptive risk level identified by the offender's score on the MnSOST-4.0. The ECRC may apply mitigating factors for a downward departure, or special concerns, which are aggravating factors, for an upward departure.[25] DOC Policy 205.220 identifies eight special concerns and six

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[19] DOC Policy 205.220.
[20] Ex. 2 (MnSOST-4.0 Coding Rules).
[21] *Id.*
[22] *Id*.
[23] *Id.*; *see also* Minn. Stat. § 244.052, subd. 2.
[24] *See* Minn. Stat. § 244.052, subd. 2.
[25] DOC Policy 205.220; *see also In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351 at 356-57 (Minn. Ct. App. 2002) (holding that an ECRC did not err by applying special concerns to assign an offender to Risk Level 3 when the presumptive risk level was Risk Level 1).

mitigating factors[26] that an ECRC can consider along with an offender's MnSOST-4.0 score.[27]

17. Prior to an ECRC meeting, the professional who scored the risk assessment tool prepares a report and recommendation for the ECRC.[28] The report generally contains: (1) a summary of the offense(s) for which the offender is currently incarcerated; (2) the offender's score on the risk assessment scale and the resulting presumptive risk level; (3) an evaluation of the six statutory risk factors applied to the offender's specific circumstances; (4) an analysis of any mitigating factors or special circumstances applying to the offender; and (5) a recommended risk level assignment and the rationale therefor.[29]

18. The professional's report and recommendation are instructive for the ECRC but not dispositive. Using the information provided in the report and recommendation, the ECRC can either: (1) follow the professional's recommendation and assign the recommended risk level; or (2) use its own discretion and assign a different risk level based upon its application of the statutory risk factors, its consideration of special concerns or mitigating factors, and the offender's score on the risk assessment scale.[30]

19. Based on the report and recommendation, the offender's score on the risk assessment tool, the application of mitigating factors or special concerns, and the analysis of the statutory risk factors, the ECRC then assigns the predatory offender to a risk level.[31] An offender who is assigned to Risk Level 2 or 3 may seek administrative review of the ECRC's risk assessment determination.[32]

III. Background and Procedural History

A. Petitioner's Criminal History

20. Petitioner is a 32-year-old male subject to predatory offender registration and the requirements of the Minnesota Community Notification Act due to a felony-level indecent exposure conviction from 2018.[33]

21. Petitioner has a history of indecent exposure spanning nearly a decade. He also has a history of other felony-level violent offenses.

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[26] While DOC Policy 205.220 lists seven mitigating factors, only six are applicable to the MnSOST-4.0. *See* DOC Policy 205.220 at 3-4.
[27] DOC Policy 205.220; Ex. 3 (Special Concerns for MnSOST-4.0); Ex. 4 (Mitigating Factors for MnSOST-4.0).
[28] Ex. 1 at 6-22 (ECRC Risk Assessment Report and Recommendation).
[29] *Id.*
[30] *See generally* Minn. Stat. § 244.052; DOC Policy 205.220; Ex. 2 (MnSOST-4.0 Coding Rules).
[31] *See generally* Minn. Stat. § 244.052.
[32] Minn. Stat. § 244.052, subd. 6(a).
[33] Minn. Stat. § 243.166, subd. 1b; Ex. 1 at 210-13; *State v. Tillman*, No. A19-0151, 2020 WL 6013062 (Minn. Ct. App. Oct. 12, 2020).

22. As a juvenile in 2005, Petitioner was adjudicated delinquent of felony third-degree burglary.[34] The felony offense rendered him ineligible to possess a firearm.[35]

23. Shortly after being adjudicated delinquent on the burglary charge, and while still a juvenile, Petitioner was charged with first-degree aggravated robbery and felony possession of a pistol or assault weapon.[36] According to the criminal complaint, Petitioner entered into the garage of a St. Paul residence, came up behind a male victim, put a gun to his neck, and demanded the victim's wallet and money.[37] Petitioner pleaded guilty to the gun possession charge and received an adult felony sentence that included a stayed prison term of 60 months.[38]

24. In 2009, Petitioner exposed his genitals to two adult women in Minneapolis while they were gardening.[39] Petitioner pleaded guilty to one count of misdemeanor indecent exposure.[40]

25. Three years later, in 2012, Petitioner was cited for violating a St. Paul City Ordinance for urinating in the entry way of a residential building.[41] Petitioner pleaded guilty and was convicted of a misdemeanor indecency offense.[42]

26. As a result of probation violations, Petitioner's 60-month stayed sentence on the felony weapons conviction was revoked and he was incarcerated.[43]

27. In 2015, while incarcerated at the Minnesota Correctional Facility (MCF) – Lino Lakes, Petitioner intentionally threw feces and urine at a correctional officer,

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[34] Ex. 1 at 645 (criminal complaint).
[35] *Id.*
[36] *See* Register of Actions delineating Petitioner's Minnesota criminal history at http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=672290372 (Ramsey County District Court File No. 62-K3-06-002256). Because the ECRC does not provide criminal histories as part of its ECRC packets, the Administrative Law Judge takes judicial notice of the Minnesota District Courts Register of Actions, which is a public document, readily available on the internet, detailing criminal offenses for which a person is both charged and convicted, including the dates of appearances, case dispositions, and sentences.
[37] Ex. 1 at 644-48 (Criminal Complaint).
[38] *See* Register of Actions at http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=672290372 (Ramsey County District Court File No. 62-K3-06-002256). Petitioner's conviction was originally deemed a misdemeanor but, due to several subsequent probation violations, was converted to a felony in 2012. *Id.*
[39] Ex. 1 at 628-30 (presentence investigation), 631-36 (case report).
[40] *See* Register of Actions at http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1613336337 (Hennepin County District Court File No. 27-CR-3004).
[41] Ex. 1 at 627 (criminal complaint), 372 (presentence investigation).
[42] *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1623771116 (Ramsey County District Court File No. 62-CR-12-7477).
[43] *See* Register of Actions at http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=672290372 (Ramsey County District Court File No. 62-K3-06-002256).

which hit the officer in the face and mouth.[44] Petitioner was charged with, and convicted of, felony fourth-degree assault.[45] He was sentenced to a year-and-a-day in prison.[46]

28. Thereafter, between 2015 and 2016, while incarcerated at the MCF – Oak Park Heights, Petitioner engaged in repeated and persistent indecent exposure violations, whereby he exposed his penis and/or masturbated in view of female corrections officers on over 70 different occasions.[47] Petitioner was charged with multiple misdemeanor offenses of indecent exposure and disorderly conduct while in prison,[48] but ultimately pleaded guilty to only two misdemeanor indecent exposure charges.[49]

29. After being released from prison in 2016, Petitioner continued to re-offend by exposing himself to others, including young children.[50]

30. On August 2, 2016, a 14-year-old boy and his 12-year-old brother observed Petitioner masturbating near their garage.[51] Petitioner was charged with two counts of indecent exposure in the presence of a minor under 16 years old, both gross misdemeanor offenses.[52] He pleaded guilty to one gross misdemeanor charge.[53]

31. On August 10, 2016, a 17-year-old girl and a 15-year-old girl observed Petitioner masturbating in an alley.[54] Again, Petitioner was charged with two counts of gross misdemeanor exposure in the presence of a minor under 16 years old.[55] He pleaded guilty and was convicted of one gross misdemeanor offense.[56]

32. Then, while incarcerated at the Anoka County Jail, Petitioner was observed openly masturbating in his cell on numerous occasions.[57] He was issued seven different

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[44] Ex. 1 at 467-70 (Criminal Complaint).
[45] *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1623170624 (Anoka County District Court File No. 02-CR-16-3326).
[46] *Id.*
[47] *See* Ex. 1 at 448-70; 481-85 (criminal complaints).
[48] Ex. 1 at 448-52; 453-57; 460-64; 457-70; 481-84 (criminal complaints).
[49] *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1623418543 (Washington County District Court File No. 82-CR-16-3044); http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1623457301 (Washington County District Court File No. 82-CR-16-3240).
[50] *See* Ex. 1 at 425-428; 444-447 (criminal complaints).
[51] Ex. 1 at 425-428 (criminal complaint).
[52] *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1623671226 (Ramsey County District Court File No. 62-CR-7129).
[53] *Id.*
[54] Ex. 1 at 444-47(criminal complaint).
[55]. *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1623482219 (Ramsey County District Court File No. 62-CR-16-5874).
[56] *Id.*
[57] Ex. 1 at 387-89; 392-94; 397-99; 402-05; 408-11; 414-17; 420-42 (various citations).

criminal citations.[58] The citations were combined for disposition and he was ultimately convicted of one count of misdemeanor indecent exposure in 2016.[59]

33. After being release from jail, Petitioner continued to expose himself to others within the community. In July 2017, Petitioner entered a St. Paul apartment building.[60] An adult female was standing outside the glass door with her infant son.[61] Petitioner approached the glass door and began masturbating.[62] The woman picked up her son and left the area.[63] Petitioner opened the door and looked in the direction of the fleeing woman.[64]

34. As a result of the 2016 prior gross misdemeanor indecent exposure convictions, Petitioner was charged with felony indecent exposure in the presence of a minor in violation of Minn. Stat. § 617.23, subd. 3(1) (2016),[65] an offense requiring predatory offender registration under Minn. Stat. § 243.166, subd. 1b.

35. Petitioner pleaded guilty to the felony indecent exposure charge on October 17, 2017.[66] He was not sentenced on the offense, however, until November 2018.[67]

36. While awaiting sentencing on the felony indecent exposure offense, Petitioner was charged with two more gross misdemeanor indecent exposure violations.[68] Both of these offenses involved adult victims and would not qualify as felony offenses.[69] Petitioner has not been convicted of either of these offenses.

37. In November 2018, Petitioner was sentenced to 39 months in prison for the felony indecent exposure offense.[70] Petitioner was incarcerated at MCF – Stillwater.[71] While there, Petitioner continued to receive multiple disciplinary actions for indecent exposure and masturbation violations.[72]

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[58] Ex. 1 at 387-89; 392-94; 397-39; 402-05; 408-11; 414-17; 420-42 (various citations).
[59] *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1623771116 (Anoka County District Court File No. 02-CR-16-7084).
[60] Ex. 1 at 210-13 (criminal complaint).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1624767892 (Ramsey County District Court File No. 62-CR-17-5830).
[66] *Id.*
[67] *Id.*
[68] Ex. 1 at 191-94; 197-200 (criminal complaints).
[69] *Id.*
[70] *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1624767892 (Ramsey County District Court File No. 62-CR-17-5830). Petitioner appealed his sentence, but the sentence was recently affirmed by the Minnesota Court of Appeals. *See State v. Tillman*, No. A19-0151, 2020 WL 6013062 (Minn. Ct. App. Oct. 12, 2020).
[71] *See* Ex 1 at 1 (Notice of Appeal).
[72] *See, e.g.*, Ex. 1 at 54 (incident report); 55 (incident report); 56 (notice of violation); 58 (incident report); 77 (notice of violation).

38. Petitioner was scheduled for release on April 2, 2020.[73]

B. MnSOST-4.0 and Recommendation to ECRC

39. In preparation for Petitioner's release from prison, Terrel Backes, Psy.D., a licensed psychologist and sex offender treatment professional with the DOC, undertook a risk assessment of Petitioner and prepared a risk level recommendation for the MCF-Stillwater ECRC.[74] A memorandum, dated November 21, 2019, was provided to the ECRC, detailing Dr. Backes's assessment and recommendation.[75]

40. As part of the risk assessment, Dr. Backes conducted a MnSOST-4.0 on Petitioner.[76] Dr. Backes has been specifically trained on the MnSOST-4.0 and its scoring rules.[77]

41. Dr. Backes scored Petitioner's MnSOST-4.0 as follows:[78]

MnSOST-4.0 Inventory Item	Score
Total Violent Offense Sentences	1
Total Felony Sentences	2
Harassment, Stalking, VOFP, Restraining Order Offenses	0
Predatory Offense Sentences	7
Stranger Victims (0 = no; 1 = yes)	1
# of Predatory Offense Sentences Involving Male Victims	2
Public Place (0 = no; 1 = yes)	1
Multiple Victim Age Groups (0 = no; 1 = yes)	1
Suicidal Concerns (0 = no; 1 = yes)	1
History of Stable of Employment (0 = no; 1 = yes)	0
Marital Status (0 = unmarried; 1 = married)	0
Post-Secondary Educational Achievement (0 = no; 1 = yes)	0

[73] Ex. 1 at 4 (ECRC Risk Assessment Report).
[74] Ex. 1 at 6-22 (Risk Assessment Recommendation).
[75] *Id.*
[76] Ex. 1 at 23 (MnSOST-4.0 scoring sheet).
[77] Test. of T. Backes.
[78] Ex. 1 at 23 (MnSOST-4.0 scoring sheet).

MnSOST-4.0 Inventory Item	Score
Sex Offender and Chemical Dependency Treatment (0 = not completed; 1 = completed)	0
Release Violator (0 = no; 1 = yes)	0
Age at Release	31
Unsupervised Release (0 = no; 1= yes)	0

42. Dr. Backes correctly calculated the total number of violent offense sentences as one.[79] Petitioner has only one "violent offense," as those offenses are delineated in the MnSOST-4.0 Coding Rules (the 2015 fourth-degree assault conviction).[80]

43. Dr. Backes, however, undercalculated the total number of felony sentences as two.[81] Petitioner has at least three felony sentences: the 2007 felony weapons offense; the 2015 fourth-degree assault conviction; and the 2017 felony indecent exposure conviction.[82] In addition, pursuant to the criminal complaint in the 2007 weapons offense, Petitioner has a 2005 felony burglary delinquency adjudication as a juvenile.[83] This adjudication must have occurred for Petitioner to be convicted of the subsequent weapons offense, which required a prior violent offense.[84]

44. Including one or two additional felony offense sentences in the MnSOST-4.0 scoring would have increased Petitioner's predicted probability of sexual recidivism and percentile rank, placing him higher in the presumptive Risk Level 3 category.[85]

45. Dr. Backes correctly scored "0" as the number of prior sentences for violations of orders for protection, harassment or stalking, restraining orders, and no-contact orders.[86]

46. Dr. Backes also correctly scored the number of prior predatory offense convictions that Petitioner has received as seven.[87] A "predatory offense" is defined in the MnSOST-4.0 Coding Rules to include all indecent exposure offenses, even those

[79] Ex. 1 at 23 (MnSOST-4.0 scoring sheet).
[80] *See* Register of Actions at: http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1623170624 (Anoka County District Court File No. 02-CR-16-3326).
[81] Ex. 1 at 23.
[82] *See* Register of Actions delineating Petitioner's Minnesota criminal history at: http://pa.courts.state.mn.us/Search.aspx?ID=100.
[83] Ex. 1 at 645 (Criminal Complaint).
[84] *See* Minn. Stat. § 624.713, subd. 1(b) (2005). Note that juvenile offenses are counted as felony sentences pursuant to the MnSOST-4.0 Coding Rules. *See* Ex. 2 at 11.
[85] Test. of T. Backes.
[86] Ex. 1 at 23.
[87] *Id.*

indecent exposure offenses that do not require registration under Minn. Stat. § 243.166, subd. 1b (i.e., misdemeanor and gross misdemeanor offenses).[88] Petitioner was sentenced for indecent exposure a total of seven times: once in 2011, twice in 2016, once in 2017, and three times in 2018.[89]

47. Pursuant to the MnSOST-4.0 Coding Rules, Dr. Backes correctly scored the "stranger victims" item as "1," indicating that Petitioner has offended against at least one stranger victim.[90] Petitioner admits that he did not know most of his victims.[91]

48. Dr. Backes correctly scored, as two, the number of sexual predatory offense sentences in which the victim was a male.[92] Petitioner's August 2, 2016, offense involved two minor boys who witnessed Petitioner masturbating.[93] Petitioner's July 25, 2017, felony indecent exposure offense involved a mother and her infant son.[94] Pursuant to the MnSOST-4.0 Coding Rules, the age of the victim, and whether the male was the intended victim, are not relevant to the scoring of this item.[95] All that is scored is the number of sentences in which a victim was a male.[96] Here, Petitioner has at least two criminal sentences in which the victim was a male.

49. Dr. Backes correctly scored whether Petitioner's offenses occurred in public places.[97] It is undisputed that many of Petitioner's indecent exposure offenses occurred in public places.[98]

50. Dr. Backes correctly scored a "1" for multiple age groups of victims.[99] Petitioner's victims have included adult women, teenage girls, young boys, and an infant.[100]

51. Dr. Backes correctly scored a "1" for suicidal concerns because Petitioner's Corrections Operations Management System (COMS) indicated that Petitioner had a "history of suicide concern."[101] Petitioner does not challenge the scoring of this factor.[102]

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[88] Ex. 2 at 6.
[89] *See* Register of Actions delineating Petitioner's Minnesota criminal history at: http://pa.courts.state.mn.us/Search.aspx?ID=100.
[90] Ex. 1 at 23.
[91] Test. of Shawn Tillman.
[92] Ex. 1 at 23.
[93] Ex. 1 at 444-45 (criminal complaint).
[94] Ex. 1 at 211 (criminal complaint).
[95] Ex. 1 at 17 (Mn-SOST-4.0 Coding Rules).
[96] *Id.*
[97] Ex. 1 at 23.
[98] Test. of T. Backes.
[99] Ex. 1 at 23.
[100] *See, e.g.*, Ex. 1 at 211, 426, 444-45, 628-30, 631-36.
[101] Ex. 1 at 167 (Initial PRT Report).
[102] *See* Test. of Shawn Tillman.

52. Dr. Backes also correctly scored a "0" on the items of employment, marital status, educational achievement, release violations, and supervised release.[103] Petitioner has not had stable employment for at least one year prior to arrest; he is not married; he has not completed any post-secondary degree or certificate; he was most recently incarcerated for a new offense (not a release violation); and he was released from prison under probationary supervision.[104]

53. Dr. Backes correctly scored a "0" on the item of completion of sex offense and chemical dependency treatment, meaning that Petitioner has not completed both chemical dependency and sex offender treatment while in custody on the index offense.[105] Petitioner did not complete both chemical dependency treatment and sex offender treatment while in prison on the index offense.[106] Petitioner was never offered sex offender treatment due to prison disciplines that prevented him from qualifying for such treatment.[107] (An inmate must be free of disciplinary actions for six months to qualify for sex offender treatment.)[108]

54. Dr. Backes correctly calculated Petitioner's age upon release as 31 years old.[109]

55. Based upon Dr. Backes' scoring of Petitioner's MnSOST-4.0, Petitioner's predicted probability of sexual recidivism within four years of release from prison is 5.41 percent, which places him in the 93.7 percentile of registered sex offenders for risk of re-offense.[110] Pursuant to the MnSOST-4.0 Coding Rules, offenders who have a predicted probability of sexual recidivism of 4.3 percent or higher (88 percentile or higher) fall into the presumptive Risk Level 3 category.[111]

56. Because Petitioner's score on the MnSOST-4.0 placed him into the Risk Level 3 category, Dr. Backes did not recommend the application of any special concerns.[112] Dr. Backes did not find that any mitigating factors, as identified in DOC Policy 205.220, applied to Petitioner.[113]

57. In addition to utilizing the MnSOST-4.0, Dr. Backes also applied the risk factors identified in Minn. Stat. § 244.052, subd. 3(g).[114] Dr. Backes determined that the statutory risk factors were consistent with an assignment to a Risk Level 3.[115]

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[103] Ex. 1 at 23.
[104] Test. of T. Backes.
[105] Ex. 1 at 23.
[106] *Id.*
[107] *Id.*
[108] Test. of T. Backes.
[109] Ex. 1 at 23.
[110] Ex. 1 at 10 (Risk Assessment Recommendation); Ex. 2 at 4 (MnSOST-4.0 Coding Rules).
[111] Ex. 2 at 4 (Mn SOST-4.0 Coding Rules).
[112] Test. of T. Backes.
[113] *Id.*
[114] Ex. 1 at 6-22 (Risk Assessment Recommendation).
[115] *Id.*; Test. of T. Backes.

58. In applying the statutory risk factors, Dr. Backes applied two other risk assessment tools: the Sexual Violence Risk-20, Version 2 (SVR-20, V2) and the Structured Assessment of Protective Factors (SAPROF).[116] These assessment tools, while not adopted for use by the DOC, supported Dr. Backes' recommendation for a Risk Level 3 assignment.[117]

59. Based upon his use of these assessment tools and an application of the statutory risk factors, Dr. Backes concluded that the presumptive risk level indicated by Petitioner's score on the MnSOST-4.0 was correct.[118] As a result, Dr. Backes recommended that the ECRC assign Petitioner to a Risk Level 3.[119]

C. ECRC Meeting and Petitioner's Appeal

60. The ECRC at MCF-Stillwater convened on December 4, 2019, to determine Petitioner's risk level.[120]

61. Petitioner attended the meeting and was given an opportunity to be heard by the ECRC prior to their vote.[121]

62. Petitioner explained that he has obsessive compulsive disorder and that masturbating is a compulsive response to his anxiety.[122] Petitioner further stated that he was not allowed to take medication for his mental illness while in prison and, although he reached out to mental health professionals while incarcerated, he was not provided any programming or treatment.[123]

63. At the conclusion of the meeting, the ECRC voted unanimously to assign Petitioner to a Risk Level 3.[124] The committee did not apply any special concerns or mitigating factors in making its determination.[125]

D. Petitioner's Appeal of the Risk Assessment

64. On December 9, 2019, Petitioner filed a Notice of Appeal of the ECRC's risk level determination.[126] As a result, on January 30, 2020, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings, thereby initiating this contested case proceeding.[127]

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[116] Ex. 1 at 10-12 (Risk Assessment Recommendation).
[117] Test. of T. Backes.
[118] *Id.* at 20.
[119] *Id.*
[120] Ex. 1 at 4-5 (ECRC Risk Assessment Report).
[121] Ex. 6 (audio recording of ECRC meeting).
[122] *Id.*
[123] *Id.*
[124] Ex. 1 at 5 (ECRC Risk Assessment Report).
[125] *Id.*
[126] Ex. 1 at 1 (Notice of Appeal).
[127] Notice and Order for Review of Risk Level Assignment (Jan. 29, 2020).

65. On February 11, 2020, the ECRC brought a Motion for Summary Disposition.[128] The Motion was denied on April 16, 2020.[129] The case proceeded to an evidentiary hearing on October 8, 2020.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge is authorized to review the risk assessment of the ECRC pursuant to Minn. Stat. §§ 14.50 and 244.052, subd. 6 (2020).

2. The ECRC has complied with all relevant substantive and procedural requirements of rule and law for this proceeding.

I. Predatory Offender Registration

3. Persons who are charged with certain "predatory offenses" delineated in Minn. Stat. § 243.166, subd. 1b, and who are either: (1) convicted of a predatory offense; or (2) convicted of other offenses arising out of the same set of circumstances as the charged predatory offense, are considered "predatory offenders" subject to registration with law enforcement.[130]

4. Felony indecent exposure in violation of Minn. Stat. § 617.23, subd. 3, is an offense requiring predatory offender registration under Minn. Stat. § 243.166, subd. 1b(a)(1)(iv).[131]

5. Petitioner was convicted of felony indecent exposure under Minn. Stat. § 617.23, subd. 3, on November 29, 2018. As a result, Petitioner is required to register as a predatory offender under Minn. Stat. § 243.166.

II. Community Notification and Risk Assessment

6. The Community Notification Act provides for the community notification of predatory offenders who are required to register with law enforcement under Minn. Stat. § 243.166.[132] The amount of community notification required is related to the risk level assigned to a predatory offender.[133]

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[128] ECRC Notice of Motion and Motion for Summary Disposition and Memorandum in Support of Motion (Feb. 11, 2020).
[129] Order Denying Summary Disposition (Apr. 16, 2020).
[130] Minn. Stat. § 244.052, subd. 1(5).
[131] Minn. Stat. § 243.166, subd. 1b.
[132] Minn. Stat. § 244.052.
[133] *See generally* Minn. Stat. § 244.052.

7. ECRCs are charged with authority to assign predatory offenders a Risk Level 1, 2, or 3, depending on the risk posed to the public by the predatory offender.[134]

8. An ECRC shall assign a Risk Level 1 to a predatory offender whose risk assessment score indicates a low risk of re-offense; a Risk Level 2 to an offender whose risk assessment score indicates a moderate risk of re-offense; and a Risk Level 3 to an offender whose risk assessment score indicates a high risk of re-offense.[135]

9. In making a risk level determination, an ECRC must assess, on a case-by-case basis, the public risk posed by predatory offenders who are about to be released from confinement.[136] In this analysis, the ECRC must consider the statutory risk factors set forth in Minn. Stat. § 244.052, subd. 3(g), and the risk assessment scale adopted by the DOC, pursuant to Minn. Stat. § 244.052, subd. 2.[137]

10. The MnSOST-4.0 has been adopted by the DOC as a risk assessment scale to be used to conduct risk level determinations pursuant to Minn. Stat. § 244.052, subd. 2.

11. The risk factors set forth in Minn. Stat. § 244.052, subd. 3(g) include, but are not limited to: (1) the seriousness of the offense should the offender reoffend; (2) the offender's prior offense history; (3) the offender's characteristics; (4) the availability of community supports to the offender; (5) whether the offender has indicated or credible evidence in the record indicates that he will reoffend if released to the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[138]

12. The predatory offender has the right to be present and to be heard at the ECRC meeting before a risk level assignment is made.[139] In this case, Petitioner was present and granted an opportunity to be heard at the ECRC meeting on December 4, 2019.

13. As part of the risk level assignment, the ECRC must prepare a report that "specifies the risk level to which the offender has been assigned and the reasons underlying the committee's risk assessment decision."[140] The ECRC properly prepared a report specifying Petitioner's risk level and the reasons underlying the Committee's decision.[141]

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[134] *Id.*
[135] Minn. Stat. § 244.052, subd. 3(e).
[136] *Id.* at subd. 3(a).
[137] *Id.* at subd. 3(d)(i).
[138] *Id.*at subd. 3(g).
[139] *Id.* at subd. 3(d)(i).
[140] *Id.*at subd. 3(f).
[141] Ex. 1 at 2-5.

14. An offender assigned to a Risk Level 2 or Risk Level 3 has the right to seek administrative review of an ECRC's risk level determination.[142] Petitioner timely appealed the ECRC's risk level determination.

III. Burden of Proof on Appeal

15. In an appeal of a risk level assignment, the offender has the burden of proving by a preponderance of the evidence that the ECRC's risk assessment determination is erroneous.[143] If the offender meets his burden, the Administrative Law Judge has the authority to make a de novo determination of the appropriate risk level to be assigned to the offender.[144]

16. Petitioner has failed to prove by a preponderance of the evidence that the ECRC made a material error in arriving at his risk level assignment. While Dr. Backes failed to include one (and possibly two) additional felony sentences when scoring Petitioner's MnSOST-4.0, such an error did not affect the presumptive risk level indicated by the MnSOST-4.0 score. Indeed, Dr. Backes' error resulted in a score that was lower from what Petitioner would have scored had Dr. Backes included the additional felony sentences. Accordingly, Dr. Backes' error was not material and did not affect the final risk level assignment. With or without these additional felony sentences, Petitioner's MnSOST-4.0 score falls squarely within the Risk Level 3 category.[145]

17. Petitioner has failed to establish any other material or immaterial errors in the scoring of the MnSOST-4.0. The evidence establishes that the ECRC properly relied upon the MnSOST-4.0, which suggested a presumptive Risk Level 3.

18. The evidence further demonstrates that the ECRC properly considered and applied the statutory risk factors set forth in Minn. Stat. § 244.052, subd. 3(g) in rendering its Risk Level 3 assignment. Petitioner has failed to establish any error in the application of the statutory risk factors or the risk level assignment.

19. Petitioner has, therefore, failed to satisfy his burden of proof in this case. Accordingly, the risk level assignment made by the ECRC is **AFFIRMED**.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The risk assessment determination made by the ECRC is **AFFIRMED**.

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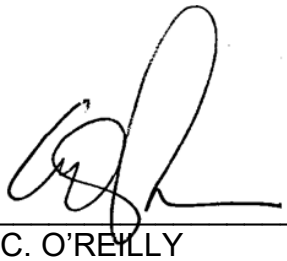
[142] Minn. Stat. § 244.052, subd. 6(a).
[143] *Id.* at subd. 6(b).
[144] *Id.*at subd. 6(c).
[145] Ex. 2 (MnSOST-4.0 Coding Rules).

2. Petitioner shall continue to be assigned to a Risk Level 3.

Dated: November 3, 2020



ANN C. O'REILLY
Administrative Law Judge

Reported: Digitally Recorded
No Transcript Prepared

NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c), this Order is the final decision in this case. Any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. § 14.63 -.69 (2020).

MEMORANDUM

In an appeal of a risk level assignment, the petitioner has the burden of proving, by a preponderance of the evidence, that the ECRC's risk assessment determination is erroneous.[146] Absent a showing of error, the Administrative Law Judge shall affirm the ECRC's risk level determination.

Petitioner challenges his risk level assignment on the following grounds:

(1) that Dr. Backes improperly utilized the MnSOST-4.0, the Sexual Violence Risk 20, Version 2 (SVR-20, V2), and the Structured Assessment of Protective Factors (SAPROF) – risk assessment tools that had not been adopted for use by the DOC – to recommend a Risk Level 3;

(2) that Dr. Backes incorrectly scored the MnSOST-4.0 by calculating seven "predatory offense sentences" instead of one;

(3) that Petitioner's offending behavior is the result of his obsessive-compulsive disorder and not based upon a predatory intent;

(4) that Petitioner was denied the opportunity to receive mental health care, including sex offender treatment, and, thus, his lack of treatment should not be used against him in the MnSOST-4.0 scoring;

[146] Minn. Stat. § 244.052, subd. 6(b).

(5) that, as a first-time predatory offense registrant, he should not be assigned to a Risk Level 3; and

(6) that assignment to a Risk Level 3 will make it more difficult for him to obtain mental health treatment and stable housing.

Each of these arguments are addressed below.

A. Use of the MnSOST-4.0, SVR-20, V2 and SAPROF

In making his risk level recommendation to the ECRC in this case, Dr. Backes relied upon Petitioner's score on the MnSOST-4.0, as well as the statutory risk factors set forth in Minn. Stat. § 244.052.[147] Petitioner's score on the MnSOST-4.0 placed Petitioner solidly within the Risk Level 3 category without the application of any special concerns.[148]

To evaluate whether the presumptive risk level indicated by Petitioner's MnSOST-4.0 score was appropriate, Dr. Backes considered the statutory risk factors set forth in Minn. Stat. § 244.052, subd. 3(g), as well as the risk factors and protective indicators identified in two other risk assessment tools, not adopted by the DOC: the SVR-20, V2, and the SAPROF.

The DOC has adopted the MnSOST-4.0 as a risk assessment tool to be utilized in making risk level assessments under Minn. Stat. § 244.052. DOC Policy 205.220 was amended in April 2020 to specifically recognize and authorize the use of the MnSOST-4.0 for use in ECRC risk level determinations.

At the time of Petitioner's ECRC meeting in December 2019, the DOC had not yet updated DOC Policy 205.220 to recognize the MnSOST-4.0, despite the fact that the DOC was directing its sex offender treatment professionals to utilize the updated tool.[149] While the DOC had not yet updated its Policy 205.220 to recognize the use of the MnSOST-4.0, the DOC had formally accepted its use. Accordingly, there was no error for the ECRC to use the MnSOST-4.0 in reaching its risk level determination in this case.

In contrast, the DOC has not formally recognized nor adopted the use of the SVR-20, V2 or the SAPROF as risk assessment tools. Dr. Backes testified that he utilized the SVR-20, V2 and the SAPROF as additional methods to analyze the statutory risk factors set forth in Minn. Stat. § 244.052, subd. 3(g). Therefore, while he invoked the frameworks of these two risk assessment tools, he did not rely on them to reach his risk level recommendation. Instead, he complied with Minn. Stat. § 244.052 by applying both the DOC's recognized assessment tool (the MnSOST-4.0) and the statutory risk factors to arrive at his final recommendation. His use of the SVR-20, V2 and the SAPROF assessment tools simply confirmed the reasonableness of the presumptive risk level indicated by the MnSOST-4.0.

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[147] Test. of T. Backes.
[148] *Id.*; Ex. 1 at 23 (MnSOST-4.0 Scoring Sheet); Ex. 2 at 4 (MnSOST-4.0 Coding Rules).
[149] Test. of T. Backes.

Because Dr. Backes properly utilized the MnSOST-4.0, a risk assessment tool accepted for use by the DOC, and properly applied the statutory risk factors in reaching his risk level recommendation, the ECRC did not err in relying on Dr. Backes' recommendation. Accordingly, the ECRC's risk level assignment is supported by the record.

B. Counting of "Predatory Offenses"

One of the 16 items scored on the MnSOST-4.0 is the number of "predatory offenses" for which an individual has been sentenced.[150] The term "predatory offense" is defined in the MnSOST-4.0 Coding Rules by specifically identifying the crimes that are considered "predatory offenses" for purposes of scoring the assessment tool.[151] These crimes include indecent exposure under Minn. Stat. § 617.23.[152] The Coding Rules do not differentiate between misdemeanor, gross misdemeanor, or felony indecent exposure.[153] All indecent exposure offenses are counted as "predatory offenses" for purposes of the MnSOST-4.0 scoring.[154]

Unlike the MnSOST-4.0 Coding Rules, Minnesota law does differentiate between the level of indecent exposure offenses when determining what is a "predatory offense" for purposes of registration. Under the Minnesota Predatory Offender Registration Act, misdemeanor and gross misdemeanor indecent exposure offenses are not considered predatory offenses requiring registration.[155] Only felony-level offenses require registration and, thus, subject an offender to community notification.[156]

The actuarial purpose of the MnSOST-4.0 is to predict recidivism, not to establish policy as to which offenders should be required to register with law enforcement for community notification purposes.[157] The Minnesota legislature made a policy determination when it limited predatory offender registration to felony-level indecent exposure offenses. Whereas, the developers of the MnSOST-4.0 have determined that all levels of indecent exposure represent a risk of future sexual re-offense. Accordingly, for purposes of scoring prior "predatory offense sentences" on the MnSOST-4.0, all indecent exposure sentences are counted, including misdemeanor and gross misdemeanor sentences.

Dr. Backes, therefore, did not err when he counted seven prior predatory offenses for Petitioner when scoring the MnSOST-4.0. The unrefuted facts establish that Petitioner received seven sentences for indecent exposure (misdemeanor, gross misdemeanor, and felony-level offenses). Accordingly, Petitioner failed to establish an error in the scoring of his MnSOST-4.0 with respect to predatory offense sentences.

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[150] Ex. 1 at 13 (MnSOST-4.0 Coding Rules).
[151] *Id.* at 6, 13.
[152] *Id.* at 6.
[153] *Id.*
[154] *Id.*; Test. of T. Backes.
[155] Minn. Stat. § 243.166, subd. 1b(a)(1)(iv).
[156] *Id.*
[157] Test. of T. Backes.

C. Lack of Predatory Intent

Petitioner next argues that the ECRC erred by failing to consider, as a mitigating factor, his mental illness; specifically, his obsessive-compulsive disorder, which Petitioner contends causes him to offend. According to Petitioner, as a result of his mental illness, he compulsively masturbates when he is confronted with stress or anxiety, irrespective of bystanders or observers nearby.[158] Because his actions are "compulsions," Petitioner asserts that he does not have intended "targets" or victims, and his offenses lack any predatory intent.[159]

While Dr. Backes confirms that Petitioner suffers from severe, untreated mental illness,[160] the fact that Petitioner does not specifically select his victims does not render his offenses less serious or less dangerous to the public. Petitioner has been convicted of seven indecent exposure offenses arising out of over 80 separate incidents alleged in various criminal complaints. The victims of Petitioner's offenses include both males and females, spanning a broad range of ages (adults, children, and infants). All these victims were negatively impacted by what they witnessed. Thus, while Petitioner may not have specifically "chosen" his victims, his victims were nonetheless harmed by Petitioner's actions. In this way, Petitioner's asserted lack of predatory intent does not negate his risk to the public.

DOC Policy 205.220 identifies the mitigating factors that the ECRC may consider in rendering risk level determinations. Lack of predatory intent is not a mitigating factor that the ECRC can properly consider. Accordingly, the ECRC did not err in failing to reduce his risk level assignment based upon Petitioner's asserted lack of predatory intent.

D. Lack of Opportunity to Attend Sex Offender Treatment

Petitioner argues that it was error to score Petitioner with a "0" on the MnSOST-4.0 treatment factor when Petitioner was not permitted the opportunity to attend sex offender treatment while in custody. Petitioner asserts that he has completed chemical dependency treatment in the past, but that he was denied an opportunity to attend sex offender treatment while in custody due to his mental illness. Petitioner, therefore, contends that considering treatment completion as a factor on the MnSOST-4.0 was both unfair and an error.

Dr. Backes acknowledged that Petitioner was not permitted to attend a sex offender treatment program while in prison because of his repeated and frequent disciplinary actions arising out of, among other things, his indecent exposure and masturbation in front of prison staff (particularly female staff members).[161] Specifically,

[158] Test. of S. Tillman.
[159] *Id.*
[160] Test. of T. Backes.
[161] *Id.*

Petitioner would act out in front of prison staff when they would bring him medications or give him medical or other attention.[162]

According to Dr. Backes, Petitioner had significant difficulty adjusting to the isolation and stressors of prison, which exacerbated his compulsive sexual behaviors.[163] The compulsive sexual behaviors then resulted in disciplinary infractions and prevented Petitioner from regularly receiving the medications needed to treat his mental illness.[164] The disciplinary infractions, in turn, disqualified Petitioner from qualifying for any in-prison treatment programs.[165]

Completion of both chemical dependency and sex offender treatment while in custody on the index offense is one of the 16 factors that the MnSOST-4.0 takes into account in its actuarial calculation.[166] Completion of treatment is a "protective factor," indicating less statistical risk of recidivism; whereas, failure to complete treatment is a risk factor, indicating more statistical risk of re-offense.[167] Individuals who complete both chemical dependence and sex offender treatment in custody are scored with a "1." Individuals who do not complete both types of treatment while in custody are scored with a "0," even if one type of treatment is completed.[168]

The MnSOST-4.0 Coding Rules do not consider or differentiate among the reasons why an individual does not complete both types of treatment. The MnSOST-4.0 only looks at whether both types of treatment were completed.

The MnSOST-4.0 was developed by measuring the increased risk individuals pose who do not complete – for whatever reason – both chemical dependency and sex offender treatment while in prison.[169] In this way, completion of treatment is a data point in an actuarial equation, not a subjective factor to be weighed or considered.[170]

Here, it is undisputed that Petitioner did not complete sex offender treatment while in prison on the index offense – or at any other time. Therefore, Dr. Backes correctly scored the MnSOST-4.0 by giving Petitioner a "0" on this factor. The fact that Petitioner was not offered sex offender treatment does not affect the validity of the MnSOST-4.0 results. Accordingly, there is no error.

The Administrative Law Judge is sympathetic to Petitioner's dilemma. Petitioner has expressed a desire to receive treatment – both mental health treatment and sex offender treatment – to address his troubling behaviors.[171] As Dr. Backes notes, if

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[162] *Id.*
[163] *Id.*
[164] *Id.* Prison staff were not bringing Petitioner his medications because Petitioner repeatedly exposed his penis and masturbated when staff came to bring him medication. *Id.*
[165] *Id.*
[166] Ex. 2 at 31.
[167] Test. of T. Backes.
[168] Ex. 2 at 31.
[169] Test. of T. Backes.
[170] *Id.*
[171] Test. of S. Tillman.

Petitioner can procure stable housing and stay violation-free, there are treatment options available to Petitioner in the community.[172] The Administrative Law Judge hopes Petitioner will pursue these options as soon as possible. Without medication and appropriate mental health treatment, Petitioner's risk of re-offense is significant.[173] The onus is on Petitioner, however, to seek assistance and remain law abiding.

E. First Predatory Offense

Petitioner points out that his 2018 felony indecent exposure offense is his first and only criminal conviction requiring registration under the Predatory Offender Registration Act. Petitioner asserts that, because this is his first offense subjecting him to registration and his first risk level assignment, he should not be subject to the highest level of community notification: Risk Level 3.

The Community Notification Act does not assign a risk level based solely upon the number of registerable predatory offense convictions that an offender has received or the number of times an offender is subject to a risk assessment. Instead, the law conveys to the ECRC discretion to decide, on a case-by-case basis, the risk that each offender poses at the time of the risk level assessment.[174] As set forth above, the DOC's accepted risk assessment tool, the MnSOST-4.0, considers not only registerable predatory offenses, but many other types of criminal offenses, including: non-registerable (misdemeanor and gross misdemeanor) indecent exposure convictions; all felony sentences (of any type or kind); and all stalking or harassment-type offenses (including misdemeanor and gross misdemeanor offenses).[175]

The ECRC was aware that Petitioner's 2018 felony indecent exposure conviction was his first registerable predatory offense and that this was Petitioner's risk level determination.[176] The Community Notification Act does not direct the ECRC to assign risk based simply on the number of registerable predatory convictions that an individual has received.

Here, Petitioner's score on the MnSOST-4.0 presumes an assignment to a Risk Level 3, and an application of the statutory risk factors support that presumptive risk level. The evidence establishes that the ECRC properly considered the presumptive risk level indicated by Petitioner's score on the MnSOST-4.0 and properly applied the statutory risk factors, as required by Minn. Stat. § 244.052. Accordingly, Petitioner has established no error in his risk level assignment.

F. Negative Impacts of a Risk Level 3 Assignment

Finally, Petitioner asserts that an assignment to a Risk Level 3 will have negative impacts on his ability to procure housing and will limit his treatment options. Petitioner

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[172] Test. of T. Backes.
[173] *Id.*
[174] Minn. Stat. § 244.052, subd. 3.
[175] *See* Ex. 2 (MnSOST-4.0 Coding Rules).
[176] Ex. 1 at 6-11 (Risk Assessment Recommendation).

contends that the ECRC failed to consider these negative effects when reaching its decision.

Again, Petitioner has failed to identify an error in the ECRC's decision. While collateral effects of a Risk Level 3 assignment certainly exist, they are not grounds for an ECRC to deviate from assigning a risk level indicated by the assessment tool and statutory risk factors. Here, Dr. Backes properly scored the MnSOST-4.0 and the ECRC properly assigned a risk level based upon the results of that assessment tool and the application of the statutory risk factors.

Absent an error by the ECRC, the Administrative Law Judge is without authority or reason to substitute her discretion for that of the ECRC. Accordingly, the ECRC's risk level assignment is **AFFIRMED**. Petitioner shall remain assigned to a Risk Level 3. Petitioner may seek review of his risk level assignment after three years have elapsed since the ECRC's risk assessment. Hopefully Petitioner will obtain the mental health treatment he needs and remain law abiding going forward. This will better position Petitioner to seek a lower risk level assignment in three years.

A. C. O.