

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Risk Level
Determination of Darnell Roberts

**ORDER GRANTING
MOTION FOR SUMMARY
DISPOSITION**

This matter is pending before Administrative Law Judge Suzanne Todnem pursuant to a Notice and Order for Hearing filed with the Office of Administrative Hearings on October 24, 2022.

Ed Stockmeyer, Assistant Attorney General, represents the Minnesota Department of Human Services (DHS) End-of-Confinement Review Committee (ECRC). Darnell Roberts (Petitioner) represents himself without legal counsel.


On November 10, 2022, the ECRC filed a Motion for Summary Disposition (Motion). The ECRC served Petitioner by mail that same day.¹ Petitioner did not file a response to the ECRC's Motion. The record closed on November 30, 2022, the due date for Petitioner's response.²

Based on the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The ECRC's Motion is **GRANTED**.
2. Petitioner's appeal is **DISMISSED**.
3. Petitioner's assignment of Risk Level 3 is **AFFIRMED**.

Dated: February 28, 2023


SUZANNE TODNEM
Administrative Law Judge

¹ See Affidavit of Service (November 10, 2022).

² This due date includes three additional days for service by mail pursuant to Minn. R. 1400.6100, subp. 2 (2021).

NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2022), 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 (2022).

MEMORANDUM

I. Introduction

Petitioner appeals the ECRC's Risk Level 3 assignment under the Minnesota Community Notification Act (Act).³ The ECRC argues that it should be granted summary disposition because no issues of material fact exist, and Petitioner cannot meet his burden to show that the ECRC erred in making his risk level assignment. Based upon a review of the Motion and the record, the Administrative Law Judge affirms Petitioner's risk level assignment.

II. Minnesota Community Notification Act and Predatory Offender Registration

Minnesota law provides for both the registration of predatory offenders with law enforcement and the notification to the community about those offenders.⁴ There are two acts that work together to accomplish the purpose of community awareness and public safety: Minnesota Predatory Offender Registration Act and Minnesota Community Notification Act.⁵

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.⁶ Predatory offenses include, but are not limited to, kidnapping, false imprisonment, criminal sexual conduct, felony indecent exposure, child pornography, and other specific sex-related offenses.⁷ Registration seeks to ensure that law enforcement is able to locate predatory offenders living, working, or found within the state.⁸

The Minnesota Community Notification Act, in turn, provides for the community notification of predatory offenders who are registered in the state of Minnesota.⁹ The purpose of community notification is to ensure that the public "in the area where a predatory offender resides, expects to reside, is employed, or is regularly found" is provided with information "that is relevant and necessary to protect the public and to counteract the offender's dangerousness . . ."¹⁰ The extent of the information disclosed, and the persons to whom the disclosure is made, must relate "to the level of danger posed

³ Minn. Stat. § 244.052 (2022).

⁴ Minn. Stat. §§ 243.166-.167; 244.052 (2022).

⁵ Minn. Stat. §§ 243.166-.167; 244.052.

⁶ Minn. Stat. § 243.166, subd. 1b(a).

⁷ Minn. Stat. § 243.166, subd. 1b.

⁸ See *generally* Minn. Stat. § 243.166.

⁹ Minn. Stat. § 244.052.

¹⁰ Minn. Stat. § 244.052, subd. 4(a).

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."¹¹

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 3.¹² Each risk level is associated with a different degree of community notification.¹³ Risk Level 3 is the highest risk level and requires the broadest degree of notification.¹⁴ In contrast, Risk Level 1 is the lowest risk level and provides for the least extensive notification.¹⁵

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.¹⁶

Risk level assignments are made by an end-of-confinement review committee (ECRC) 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.¹⁷ ECRCs are established by the Minnesota Department of Corrections (DOC) at each state correctional facility or state treatment facility where predatory offenders are confined.¹⁸ The ECRC assesses, 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.¹⁹

When 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 utilize the "risk assessment scale" developed by the Commissioner of the DOC under Minn. Stat. § 244.052, subd. 2.²⁰ The statutory risks factors include, but are not limited to the following: (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 the offender will reoffend if released to the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.²¹

¹¹ Minn. Stat. §§ 244.052, subd. 4(a), 243.166, subd. 1b.

¹² See generally Minn. Stat. § 244.052.

¹³ Minn. Stat. § 244.052, subd. 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Minn. Stat. § 244.052, subd. 3a (a)(1)-(3).

¹⁷ Minn. Stat. § 244.052, subd. 3(b).

¹⁸ Minn. Stat. § 244.052, subd. 3(a).

¹⁹ *Id.*

²⁰ *Id.* at subds. 2, 3(d)(i).

²¹ *Id.* at subd. 3(g).

There are actuarial risk assessment tools used by the DOC and DHS to conduct risk level determinations on males in Minnesota.²² These statistical tools help the ECRC determine which risk level to assign a predatory offender. 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.²³ The Static-99R is one such actuarial risk assessment tool used.²⁴

The ECRC must address any issues raised by the patient or legal counsel, review the risk assessment tool in preparation of the risk assessment recommendation, determine if any special concerns exist, determine if a lower community notification risk level is warranted,²⁵ confirm any facts, determine any residency restrictions, and review the risk assessment recommendation.²⁶

Prior to an ECRC meeting, the professional who scored the risk assessment tool prepares a report and recommendation for the ECRC.²⁷ The report generally contains: (1) a summary of the offense(s) for which the offender is a Registration-Qualified Client²⁸; (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 applicable to the offender; and (5) a recommended risk level assignment and the rationale therefor.²⁹

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

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

²² Minn. Stat. § 244.052, subd. 2; *see also* Exhibit 9 at 3 to 5 (State Operated Services End of Confinement Review Committee Procedure Manual).

²³ Ex. 5 (Static-99R Coding Rules, Revised – 2016); *see also* Ex. 9 at 5.

²⁴ Ex. 9 at 5.

²⁵ *Id.* at Attachment III (Issues to be Addressed in Determining Risk Level).

²⁶ *Id.*

²⁷ Ex. 9 at 6.

²⁸ *See* Ex. 8 at 2 (definition of Registration-Qualified Client, in part, a client who is required to register as a predatory offender under Minn. Stat. § 243.166) (End of Confinement Review Committee and Community Notification Policy, Policy 4070).

²⁹ *See* Ex. 3 (Risk Assessment and Recommendation).

³⁰ *See generally* Minn. Stat. § 244.052; Ex. 5; Ex. 8.

³¹ *See generally* Minn. Stat. § 244.052.

review of the ECRC's risk assessment determination within 14 days of receiving notice of the ECRC's decision.³²

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.³³ 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.³⁴

III. Undisputed Facts

A. Petitioner's Background

Petitioner is a 35-year-old man who is required to register as a predatory offender. According to the criminal complaint, when Petitioner was 17 years old, he was living in Illinois in the home of a family friend and her children. Petitioner went into the room of the 12-year-old daughter, called the daughter into her room, pushed her down on her bed and engaged in digital and penile penetration of her vagina.³⁵ Petitioner was ultimately convicted of predatory criminal sexual assault in Illinois and sentenced to ten years.³⁶ While Petitioner was in custody for the predatory criminal sexual assault charge, it was discovered that previously, when Petitioner was 16 years old, he pulled down the diaper of his two-year-old cousin and rubbed his penis on her buttocks.³⁷ Petitioner was adjudicated delinquent for aggravated criminal sexual abuse of a minor under the age of nine and sentenced to ten years for the second charged offense.³⁸ Petitioner served the two sentences concurrently, for which he was in custody beginning on or about September 2, 2005.³⁹

Petitioner moved to Minnesota from Illinois in 2017. Since moving to Minnesota, Petitioner has been charged twice with indecent exposure.⁴⁰ The first charge was in Hennepin County in 2020 but was dismissed.⁴¹ The second charge was in Ramsey County in 2021 for exposing himself to people in Union Depot in Saint Paul.⁴² Petitioner was also charged with failure to register as a predatory offender in Ramsey County.⁴³ The two Ramsey County charges are pending disposition.⁴⁴ Petitioner was found incompetent to stand trial and committed to the custody of the DHS.⁴⁵

³² Minn. Stat. § 244.052, subd. 6(a).

³³ *Id.* at subd. 6(b).

³⁴ *Id.* at subd. 6(c).

³⁵ Ex. 4 at 518 (Criminal Complaint).

³⁶ *Id.* at 517 (Sentencing Order).

³⁷ *Id.* at 509 (Social Investigation Report).

³⁸ *Id.* 4 at 509-515.

³⁹ *Id.* at 517.

⁴⁰ *Id.* at 500-502 and 508.

⁴¹ *Id.* at 508.

⁴² *Id.* at 500-502.

⁴³ *Id.* at 492 (Register of Actions).

⁴⁴ *Id.* at 492-493.

⁴⁵ Ex. 10 at 2 (Findings of Fact and Order for Commitment).

In addition to the criminal sexual offenses, Petitioner's nonsexual criminal history in Illinois includes juvenile charges for a Knowingly Damage Property offense in 2002 and an Aggravated Assault/Public Place offense in 2003 involving a confrontation with another male in which both Petitioner and the other male had knives.⁴⁶ In 2004, Petitioner was charged with felony criminal damage to property but the disposition and severity is not known.⁴⁷ Petitioner was charged for felony check forgery in January 2018 (charges dismissed-conditions met).⁴⁸ In total, Petitioner has been charged for nine offenses and convicted for three of them, with two charges still pending.

Petitioner has a history of substance abuse and mental health issues.⁴⁹ This includes auditory and visual hallucinations, self-talk, self-laughing to internal stimulation and shadow boxing.⁵⁰ Since 2019, Petitioner has been evaluated multiple times and has had four admissions to Hennepin County Medical Center for mental health conditions.⁵¹ Petitioner had been prescribed various medications to treat mood dysregulation, depression and anxiety.⁵² Petitioner has a history of medication noncompliance.⁵³

Petitioner was civilly committed to the custody of the Commissioner of Human Services as a person who poses risk of harm due to mental illness on March 7, 2022.⁵⁴ He was civilly committed for a six-month period effective March 7, 2022.⁵⁵ Petitioner's civil commitment was extended to February 22, 2023, subject to provisional discharge.⁵⁶ Petitioner currently resides at the Minnesota Specialty Health System in Wadena, Minnesota.⁵⁷

Upon release, Petitioner will have no job, housing, or family supports.⁵⁸ Petitioner has a history of homelessness, nonemployment and little support systems in the way of friends or family in Minnesota.⁵⁹

In August 2022, a Patient Background Check was completed.⁶⁰ On August 30, 2022, Peter Marston, Ph.D., L.P., a licensed psychologist and sex offender treatment professional, prepared a Risk Assessment Recommendation for Petitioner.⁶¹ Dr. Marston recommended the ECRC assign Petitioner to Risk Level 3.⁶²

⁴⁶ Ex. 4 at 510 (Social Investigation Report).

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 3 (Patient Background Check) and 27 (Criminal Record Report); *see also* Ex. 4 at 468 and 478, indication Petitioner was convicted of the check forgery charge in 2019.

⁴⁹ Ex. 4 at 448 and 478.

⁵⁰ *Id.* at 383-384, 462-463 and 470.

⁵¹ *Id.* at 464.

⁵² *Id.*; *see also* Ex. 4 at 384, 412 and 487-491.

⁵³ Ex. 4 at 464.

⁵⁴ Ex. 10.

⁵⁵ *Id.* at 3.

⁵⁶ Ex. 11 at 3 (Findings of Fact and Order for Continued Commitment).

⁵⁷ Ex. 4 at 26.

⁵⁸ Ex. 12 (Audio Recording of ECRC meeting, September 21, 2022).

⁵⁹ Ex. 12; *see also* Ex. 4 at 511.

⁶⁰ Ex. 4 at 1-6 (Patient Background Check).

⁶¹ Ex. 3; Ex. 7 (Marston CV).

⁶² Ex. 3 at 4.

B. Static-99R and Recommendation to ECRC

The Static-99R is an actuarial assessment “intended to position offenders in terms of their relative degree of risk for sexual recidivism based on commonly available demographic and criminal history information that has been found to correlate with sexual recidivism in adult male sex offenders.”⁶³ The Static-99R characterizes the individual’s relative risk for sexual recidivism in terms of how unusual it is (using percentiles) and in terms of how it compares to the risk presented by the typical sex offender (using risk ratios).⁶⁴ According to the Coding Rules for the Static-99R, the assessment “demonstrates only moderate predictive accuracy” and does not include all of the factors that might be included in a comprehensive risk assessment.⁶⁵ The Static-99R is suitable for use for adult males who have been charged with, or convicted of, at least one sex offense against a child or a non-consenting adult.⁶⁶ It is recognized for use by the DHS’s State Operated Services for evaluating civilly committed sex offenders prior to their release from a state operated treatment facility.⁶⁷

The Static-99R is used on both contact and non-contact sexual offenders, including offenders whose crimes include exhibitionism or indecent exposure.⁶⁸ The Static-99R uses 10 items to estimate the probability of recidivism: (1) the individual’s age at release from the index sex offense; (2) whether the individual ever lived with a lover; (3) whether the index offense included a non-sexual violence conviction; (4) whether the offender has any prior non-sexual violence convictions; (5) the number of prior sex offense charges or convictions; (6) whether the individual has four or more “prior sentencing dates” before the index offense; (7) whether the individual has any convictions for non-contact sex offenses; (8) whether the individual’s sex offenses involved any victims unrelated to the offender; (9) whether the individual’s sex offenses involved any stranger victims; and (10) whether the individual’s sex offenses involved any male victims.⁶⁹

Using all available documents and information on an offender, the evaluator conducting the Static-99R assigns a score for each of the ten scoring factors and tallies the results.⁷⁰ The resulting tally or score results in a “nominal risk level” ranging from I (very low risk) to IV (well above average risk).⁷¹

The score on the Static-99R is then translated into a presumptive risk level corresponding to the three risk levels established in Minn. Stat. § 244.052 (Risk Level 1, 2, or 3).⁷² According to DHS’s State Operated Services End of Confinement Review Committee Procedure Manual (SOS ECRC Manual), Static-99R scores lower than

⁶³ Ex 5 at 6.

⁶⁴ *Id.*

⁶⁵ *Id.* at 7.

⁶⁶ *Id.* at 12.

⁶⁷ Ex. 9 at 5.

⁶⁸ *Id.* at 7-8.

⁶⁹ Ex. 5 at 8-9; *see also* 45-84.

⁷⁰ *Id.* at 45-84.

⁷¹ Ex. 5.

⁷² Ex. 9.

3 correspond to a presumptive Risk Level 1; Static-99R scores of 4 or 5 correspond to a presumptive Risk Level 2; and Static-99R scores of six or more correspond to a presumptive Risk Level 3.⁷³

To supplement the results of the Static-99R, the ECRC may look to “special concerns,” which are aggravating factors, for an upward departure in the presumptive risk level indicated by the Static-99R.⁷⁴ The SOS ECRC Manual identifies 15 special concerns that an ECRC can consider along with an offender’s Static-99R score.⁷⁵

As part of the risk assessment, Dr. Marston conducted a Static-99R for Petitioner on August 30, 2022.⁷⁶ Dr. Marston scored Petitioner’s Static-99R as follows:⁷⁷

| Risk Factor | Scoring Code | Result | Score |
|--|--|-----------------------------------|-------|
| 1. Age at Release from Index Offense | Age 18 to 34.9 = 1 Age 35-39.9 = 0 Age 40-59.9 = -1 Age 60 or older = -2 | Age at “release” used: 18-34.9 | 1 |
| 2. Ever lived with a lover for at least two years? | Yes = 0 No = 1 | No | 1 |
| 3. Any index offense convictions for non-sexual violence? | Yes = 1 No = 0 | No | 0 |
| 4. Any prior convictions for non-sexual violence? | Yes = 1 No = 0 | Yes | 1 |
| 5. Number of prior sex offenses (charges or convictions) | <u># Charges = score</u> 0 = 0 1-2 = 1 3-5 = 2 6+ = 3 <u># Convictions = score</u> 0 = 0 1 = 1 2-3 = 2 4+ = 3 | 3-5 charges; 2 convictions | 2 |
| 6. Four or more prior sentencing dates (excluding index offense) | 3 or less = 0 4 or more = 1 | 4 or more | 1 |

⁷³ *Id.* at Attachment V (Guidelines for Assigning Risk Levels).

⁷⁴ *Id.* at attachments IV (Special Concerns) and V.

⁷⁵ *Id.* at Attachment IV (Special Concerns).

⁷⁶ *Id.*; *see also* Ex. 3a (Static-99R Scoring Sheet).

⁷⁷ Ex. 3a.

| Risk Factor | Scoring Code | Result | Score |
|--|---------------------|---------------|--------------|
| 7. Any convictions for non-contact sex offenses? | No = 0 Yes = 1 | No | 0 |
| 8. Any unrelated victims? | No = 0 Yes = 1 | Yes | 1 |
| 9. Any stranger victims? | No = 0 Yes = 1 | Yes | 1 |
| 10. Any male victims? | No = 0 Yes = 1 | No | 0 |
| Total Score | | | +8 |

The “index offense” used to score the Static-99R by Dr. Marston is Petitioner’s charge dated August 23, 2021, in Ramsey County for Gross Misdemeanor Indecent Exposure/Lewdness.⁷⁸

C. ECRC Meeting and Petitioner’s Appeal

The ECRC met for a meeting on September 21, 2022, to address Petitioner’s risk level assignment.⁷⁹ Petitioner appeared and spoke at the meeting.⁸⁰ Petitioner had difficulty following the proceeding and asked why they were all meeting.⁸¹ Petitioner denied the indecent exposure happened despite video evidence and declared he is no longer a sex offender.⁸² At the conclusion of the meeting, the ECRC voted by unanimous decision to assign Petitioner a Risk Level 3, consistent with Dr. Marston’s recommendation.⁸³

On October 5, 2022, Petitioner submitted his appeal of the ECRC’s risk level determination.⁸⁴

IV. Summary Disposition Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.⁸⁵ A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of

⁷⁸ Ex. 3 at 3.

⁷⁹ Ex. 12.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*; see also Ex. 1.

⁸³ Ex. 12; Ex. 2 (ECRC Report).

⁸⁴ Ex. 1.

⁸⁵ *Pietsch v. Minn. Bd. of Chiropractic Exam’rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2021).

law.⁸⁶ The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.⁸⁷

The function of the administrative law judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine factual issues exist.⁸⁸ In other words, the administrative law judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.⁸⁹

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.⁹⁰ A fact is material if its resolution will affect the outcome of the case.⁹¹ If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.⁹² A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.⁹³ Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.⁹⁴

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.⁹⁵ Thus, summary disposition is only proper when no factual issues need to be resolved.⁹⁶

V. Analysis

The ECRC argues that Petitioner does not raise any issues of material fact, and that the ECRC is entitled to judgment as a matter of law that Risk Level 3 is appropriate. Petitioner did not reply to the ECRC's Motion for Summary Disposition, so his arguments are drawn from his Notice of Appeal and statements at the ECRC meeting. Petitioner's arguments are twofold: (1) that he was not on his medications when the incident happened while also denying the incident happened; and (2) he is no longer a sex offender.⁹⁷

⁸⁶ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).

⁸⁷ Minn. R. 1400.6600 (2021).

⁸⁸ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

⁸⁹ *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁹⁰ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁹¹ *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

⁹² *Thiele*, 425 N.W.2d at 583.

⁹³ *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

⁹⁴ See Minn. R. Civ. P. 56.05.

⁹⁵ *Sauter*, 70 N.W.2d at 353.

⁹⁶ *Id.*

⁹⁷ Ex. 1 (Notice of Appeal).

A. Scoring of Petitioner's Static-99R

Although Petitioner does not assert that Dr. Marston erred in the scoring of the Static-99R, the Administrative Law Judge has carefully reviewed the scoring, and found errors as described below.

Dr. Marston correctly scored Petitioner's age at anticipated release.⁹⁸ At the time of Dr. Marston's risk assessment and recommendation, Petitioner's anticipated release date was September 21, 2022.⁹⁹

Risk factor 2 is correctly scored "1" as there is no evidence in the record that Petitioner has resided with a lover for two years or more.

Dr. Marston correctly scored risk factor 3 at "0" because Petitioner's index offense did not include a non-sexual violent offense.¹⁰⁰

Dr. Marston incorrectly scored risk factor 4 "1," indicating Petitioner has non-sexual violence convictions. While Petitioner has been charged with non-sexual violence offenses, there is nothing in the record indicating he has been convicted of them.¹⁰¹ Therefore, the correct scoring is "0."

Risk factor 5 is correctly scored "2" because Petitioner has been charged for four sex offenses and two convictions. Petitioner was charged with the 2004 Aggravated Criminal Sex offense, the 2005 Predatory Criminal Sexual Assault, and the two charges for indecent exposure in Hennepin County and Ramsey County.¹⁰² Petitioner was convicted for the 2004 Aggravated Criminal Sex offense and the 2005 Predatory Criminal Sexual Assault.¹⁰³

Risk factor 6 is incorrectly scored. Petitioner's record indicates three sentencing dates prior to the index offense for the 2007 conviction of predatory criminal sexual assault, the 2006 conviction for aggravated criminal sexual abuse of a minor, and check forgery conviction in 2018. Because there are less than four sentencing dates, the correct score is "0."

Risk factor 7 is correctly scored "0" because Petitioner was never convicted for any non-contact sexual behavior.

Risk factors 8 and 9 are each correctly scored "1" because of the victims involved in the indecent exposure offenses. Although the Hennepin County charge for indecent

⁹⁸ Ex. 3a; *see also* Ex. 3.

⁹⁹ Ex. 3a.

¹⁰⁰ Ex. 3a; Ex. 3 at 3.

¹⁰¹ Petitioner was charged on two occasions for damage to property in 2002 and 2004 and aggravated assault in 2003 but there is no evidence that any of the charges resulted in convictions. All three charges were in Illinois while Petitioner was a juvenile.

¹⁰² Ex. 4 at 500, 508, 509 and 517.

¹⁰³ *Id.* at 515 and 517.

exposure was dismissed and the Ramsey County charge is still pending, there is credible support for the charges, including video evidence.¹⁰⁴ Therefore, the correct score is “1.”

Lastly, Factor 10 is correctly scored as “0” because neither of Petitioner’s victims from his convicted offenses were male.

Petitioner’s corrected score of +6 on the Static-99R places him in the same Risk Level IVb – Well Above Average Risk on the Static-99R table as Dr. Marston’s scoring, Petitioner remains a statutory presumptive Risk Level 3.¹⁰⁵ While there is some adjustment to the scoring, Dr. Marston’s recommendation narrative contains accurate descriptions of Petitioner’s juvenile charges that were not adjudicated.¹⁰⁶ There are no material facts in dispute that require a hearing to determine and Petitioner’s presumptive Risk Level 3 is accurate.

B. Application of Mitigating Factors and Special Concerns to Petitioner’s Risk Level Analysis

Petitioner essentially argues that the ECRC erred by not considering that Petitioner was off his prescribed medications when the indecent exposure incident (the index offense) occurred.¹⁰⁷ The Administrative Law Judge has carefully reviewed the record as it relates to special concerns and mitigating factors.

Pursuant to the State Operated Services End of Confinement Review Committee Procedure Manual, the ECRC may apply mitigating factors to reduce a risk level assignment from the presumptive risk level indicated by the Static-99R.¹⁰⁸ Dr. Marston did not find any mitigating factors present. Petitioner’s argument that he was not on his prescribed medications is not persuasive because the ECRC was aware of his history of medication noncompliance. The ECRC did not err by finding no mitigating factors apply to reduce Petitioner’s risk level assignment.

There are 15 special considerations applicable to the Static-99R.¹⁰⁹ Dr. Marston determined that no special concerns apply to Petitioner.¹¹⁰

The ECRC considered the statutory risk factors set forth in Minn. Stat. § 244.052, subd. 3(g).¹¹¹ In addition to considering Dr. Marston’s analysis of the statutory risk factors, the ECRC noted the ages and vulnerability of Petitioner’s victims involved in the index registration requirement offenses, which goes to the seriousness of the offense should the offender reoffend.¹¹² The ECRC noted Petitioner’s mental illness history, including four admissions to Hennepin County Medical Center for mental health since 2019, that he was found incompetent in Ramsey County District Court on February 16, 2022, and

¹⁰⁴ *Id.* at 502; *see also* Ex. 5 at 79 and 82.

¹⁰⁵ Ex. 3a; Ex. 9 at Attachment V.

¹⁰⁶ Ex. 3 at 3-4.

¹⁰⁷ Exs. 1 and 12.

¹⁰⁸ Ex. 9 at Attachment V.

¹⁰⁹ *Id.* at Attachment IV (Special Concerns).

¹¹⁰ Ex. 3; *see also* Ex. 9 at Attachment IV.

¹¹¹ Ex. 2 (ECRC Report).

¹¹² *Id.*; Ex. 12; *see* Minn. Stat. § 244.052, subd. 3(g)(1).

his diagnoses such as Unspecified Schizophrenia Spectrum or other Psychotic Disorder.¹¹³ The ECRC inquired about Petitioner's current community supports but Petitioner was not able to specify anyone in the community; rather, he referenced "friends" but could not provide any descriptions or names.¹¹⁴

Petitioner's corrected score on the Static-99R places him at the Risk Level IVb – Well Above Average Risk range, putting him in a presumptive Risk Level 3. The Administrative Law Judge concludes that the ECRC did not err when it assigned Petitioner to a Risk Level 3. Given the absence of any genuine issue of material fact, summary disposition in favor of the ECRC is warranted.

VI. Conclusion

In conclusion, Petitioner has not established that a genuine issue of material fact exists related to the ECRC's risk level assignment. The ECRC has demonstrated that it is entitled to judgment as a matter of law. Accordingly, the ECRC's Motion for Summary Disposition is **GRANTED**. Petitioner's appeal of his risk level determination is **DISMISSED**, and the ECRC's assignment of Risk Level 3 is **AFFIRMED**.

S. T.

¹¹³ Ex. 2.

¹¹⁴ Ex. 12; see Minn. Stat. § 244.052, subd. 3(g)(4).