COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2070 **Cir. Ct. No. 2007CI1**

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

IN RE THE COMMITMENT OF CHRISTOPHER MELENDREZ:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER MELENDREZ,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

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

¶1 VERGERONT, P.J. Christopher Melendrez appeals the judgment entered upon a jury verdict finding that he was a sexually violent person under

WIS. STAT. ch. 980 (2007-08).[1] He also appeals the circuit court's order denying his motion for postcommitment relief.

¶2 Melendrez makes two primary arguments on appeal. First, he contends that he is entitled to dismissal of the petition because an amendment to WIS. STAT. ch. 980 had a retroactive effect on him that violated his right to due process. The amendment, enacted by 2005 Wis. Act 434, added third-degree sexual assault to the list of "sexually violent offense[s]" under § 980.01(6)(a), and this occurred after he had pleaded guilty to that offense. Relying on the same due process claim, he asserts he is entitled to relief from his stipulation that third-degree sexual assault was a sexually violent offense under § 980.01(6)(a). Based on Melendrez's arguments and the case law he provides, we conclude that 2005 Wis. Act 434 does not have a retroactive effect on Melendrez and therefore does not violate due process. This conclusion resolves against him his claim for relief from the stipulation.

¶3 Second, Melendrez contends that he is entitled to a new trial based on newly discovered evidence—an article published after the trial—that an actuarial risk assessment tool used by the State's experts overstated the risk of recidivism for sex offenders. In the alternative, Melendrez seeks an evidentiary hearing on his motion on this ground. We conclude the circuit court properly denied the motion without an evidentiary hearing.

¶4 Accordingly, we affirm the judgment that Melendrez is a sexually violent person and the denial of Melendrez's motion for postcommitment relief.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶5 Melendrez was convicted in 2001 of one count of third-degree sexual assault under WIS. STAT. § 940.225(3) and one count of resisting or obstructing an officer under § 946.41(1), based on his no contest pleas. He was originally charged with second-degree sexual assault for the incident, in which a woman reported that he had forcibly raped her late at night in a parking lot. However, as part of the plea agreement the charge was reduced to third-degree sexual assault.[2] His sentence was withheld and he was placed on six years of probation, which was revoked six months later. He was then sentenced to four years of confinement and four years of extended supervision. In 2006 Melendrez was released from prison, but within five hours he was back in custody due to an incident with the corrections officer transporting him from prison, which led to a disorderly conduct charge, revocation of his extended supervision, and return to prison to serve the rest of his confinement.

¶6 While Melendrez was in prison, the legislature enacted 2005 Wis. Act 434, which added third-degree sexual assault to the list of sexually violent offenses under WIS. STAT. § 980.01(6)(a).[3] 2005 Wis. Act 434, § 65. Prior to the passage of this amendment, first- and second-degree sexual assault, sexual assault of a child, incest, and child enticement were sexually violent offenses under § 980.01(6)(a). The amendment became effective on August 1, 2006, and was

[2] As pertinent here, having sexual intercourse with a person without consent constitutes third-degree sexual assault, WIS. STAT. § 940.225(3), and second-degree sexual assault has the added element of "by use or threat of force or violence," § 940.225(2)(a).

[3] WISCONSIN STAT. § 980.01(6)(a) now provides: "'Sexually violent offense' means any of the following: (a) Any crime specified in s. 940.225(1), (2), or (3) [third-degree sexual assault], 948.02(1) or (2), 948.025, 948.06, 948.07, or 948.085."

applicable to cases in which the ch. 980 petition was filed on or after that date. 2005 Wis. Act 434, §§131-32.[4]

¶7 In January 2007, just before Melendrez's scheduled release, the State filed a petition alleging that Melendrez is a sexually violent person under WIS. STAT. § 980.01(7)[5] and should be committed to the custody of the Department of Health and Family Services upon his release from prison. The petition alleged that Melendrez had been convicted of third-degree sexual assault—now a sexually

[4] WISCONSIN STAT. § 980.02(2) provides:

> (2) A petition filed under this section shall allege that all of the following apply to the person alleged to be a sexually violent person:
>
> (a) The person satisfied any of the following criteria:
>
> 1. The person has been convicted of a sexually violent offense.
>
> 2. The person has been found delinquent for a sexually violent offense.
>
> 3. The person has been found not guilty of a sexually violent offense by reason of mental disease or defect.
>
> (b) The person has a mental disorder.
>
> (c) The person is dangerous to others because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence.

[5] WISCONSIN STAT. § 980.01(7) provides:

> (7) "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.

violent offense under § 980.01(6)(a)—and that he suffers from a mental disorder that makes it likely that he will engage in acts of sexual violence. *See* § 980.02(2).

¶8 At the trial on the petition, Melendrez and the State agreed to stipulate that the charge for which Melendrez was convicted, third-degree sexual assault, was "a sexually violent offense as defined by Wis. Stat. § 980.01(6)(a)." The State presented two expert witnesses to testify to the petition's allegations that Melendrez has a mental disorder that makes it likely that he will engage in acts of sexual violence. Dr. Anthony Jurek opined that Melendrez has paraphilia—meaning that he shows a deviant pattern of sexual behavior, urges, and impulses—and that he has a psychotic disorder. Both of these disorders, Dr. Jurek opined, make it more likely than not that Melendrez will reoffend. The second expert, Dr. Robert Barahal, opined that Melendrez has antisocial personality disorder and psychosis, with very high levels of psychopathy, as well as substance abuse problems. As a result, in Dr. Barahal's opinion, it is more likely than not that Melendrez will reoffend. In arriving at their opinions, both experts considered, among other information, the results of actuarial risk assessment tools. Specifically, both used the Static-99 and the RRASOR, and Dr. Jurek also used the MnSOST-R.

¶9 The defense expert, Dr. Luis Rosell, presented his opinion that the ability of the actuarial instruments, including the Static-99, to predict future offending is in question, due in part to decreased rates of sexual offending since the instruments were created, and this could have caused an overestimation of Melendrez's future risk. Dr. Rosell did not perform an evaluation on Melendrez and did not offer an opinion on whether or not Melendrez is a sexually violent person.

¶10 The jury found that Melendrez is a sexually violent person under WIS. STAT. § 980.01(7). The circuit court entered a judgment and commitment order based on the verdict.

¶11 Melendrez filed a motion for postcommitment relief on several grounds and requested an evidentiary hearing. As relevant to this appeal, he contended that application of 2005 Wis. Act 434 to him has a retroactive effect on him that violated his right to due process. He also contended that an article published after his trial discussing new research on the Static-99 constitutes newly discovered evidence that is material to his risk of reoffending.

¶12 The circuit court denied the motion. The court concluded that, because Melendrez was committed based on his *current* mental condition and the jury's ability to predict what his future risk of reoffending would be, the amendment to WIS. STAT. § 980.01(6)(a) is not retroactively applied to him. The court observed that Melendrez's situation is similar to that of those who were convicted of first- or second-degree sexual assault before ch. 980 was enacted but were nevertheless committed under that new statute after serving their sentences. Finally, the court decided that Melendrez is not entitled to a new trial based on newly published research on the Static-99. The court concluded that the information contained in the article is cumulative and that, even if it were to be admitted, there is not a reasonable probability of a different result.

DISCUSSION

¶13 On appeal, Melendrez raises two primary issues: (1) whether the application of 2005 Wis. Act 434 to him has a retroactive effect on him that violates his right to due process; and (2) whether the article containing recent

research on the Static-99 constitutes newly discovered evidence warranting a new trial or, in the alternative, an evidentiary hearing.[6]

I. Application of 2005 Wis. Act 434 to Melendrez

¶14 2005 Wis. Act 434 provides that it "first applies to … trials … that are based on a petition … filed on [August 1, 2006]."[7] 2005 Wis. Act 434, §§ 131(1) and 132. There is no dispute that the petition in this case was filed after August 1, 2006.

¶15 Melendrez contends that the application of the amendment to him has a retroactive application, and therefore violates his right to due process under the federal and state constitutions. U.S. CONST. amend. XIV, § 1; WIS. CONST.

[6] The State contends on appeal that Melendrez's postconviction motion for a new trial was untimely because, since proceedings under WIS. STAT. ch. 980 are civil actions, such a motion could be made only under § 806.07. Under §§ 806.07(1)(b) and (2) and 805.16(4), motions based on newly discovered evidence must be brought within one year of the verdict. The jury's verdict here was rendered on September 20, 2007, and Melendrez filed his motion on March 23, 2009.

Melendrez makes a number of responses. First, he asserts that §§ 980.038(4) and 809.30(2)(h) define the postcommitment procedure for ch. 980, not §§ 806.07 and 805.16(4). Second, he asserts that, based on his motion, this court entered an order extending his time to file a postcommitment motion to March 23, 2009, and the State did not object at that time. Third, he asserts the State has forfeited its untimeliness objection because it did not raise it in the circuit court. Finally, he asserts that he could not have brought this motion within one year of the verdict because the figures on which he relies were not published until October 2008.

We decline to address the State's argument on untimeliness because it was not raised in the circuit court. ***State v. Champion***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889 ("We generally do not review an issue raised for the first time on appeal.").

[7] 2005 Wis. Act 434, § 132 provides: "Effective date. This act takes effect on the first day of the 2nd month beginning after publication." The date of publication was June 5, 2006.

art. I, § 1.[8] Application of the amendment to him, he asserts, retroactively negates his vested right not to be committed under WIS. STAT. ch. 980 after completing his sentence for third-degree sexual assault. This is so, he asserts, because at the time he pled to that offense, he had no reason to expect that it would later become a sexually violent offense under § 980.01(6)(a) and subject him to possible civil commitment.

¶16 In a related argument, Melendrez contends that he should be relieved from his stipulation that third-degree sexual assault is a sexually violent offense. He asserts that the unconstitutionality of the application of the amendment to him requires this result. In the alternative, he asserts, given that unconstitutionality, counsel's advice regarding the stipulation constituted ineffective assistance of counsel.

¶17 The State responds that the application of the amendment to Melendrez does not violate his right to due process because it does not have a retroactive effect, and, even if it does, its application to him comports with due process.

¶18 The constitutionality of a statute is a question of law, which this court reviews de novo. ***State v. Post***, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). Because Melendrez is making an "as applied" challenge to the

[8] The Fourteenth Amendment to the United States Constitution states in relevant part that "[n]o State shall … deprive any person of life, liberty, or property, without due process of law…."

Article 1, section 1 of the Wisconsin Constitution provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

constitutionality of 2005 Wis. Act 434, not a facial challenge, he must prove that, as applied to him, the act is unconstitutional beyond a reasonable doubt. ***State v. Smith***, 2010 WI 16, ¶9, 323 Wis. 2d 377, 780 N.W.2d 90.[9]

¶19 We first discuss some background case law on retroactivity and due process and then discuss Melendrez's arguments. As we explain, the first inquiry is whether 2005 Wis. Act 434 has a retroactive effect; if it does, we then inquire whether retroactivity comports with due process. For the reasons we discuss below, we conclude this legislation does not have a retroactive effect on Melendrez, and on that basis we conclude its application to Melendrez does not violate his right to due process.

¶20 As Melendrez correctly recognizes, in ***State v. Carpenter***, 197 Wis. 2d 252, 273-74, 541 N.W.2d 105 (1995), the supreme court held that WIS. STAT. ch. 980 does not violate the ex post facto clauses in the United States Constitution and the Wisconsin Constitution.[10] These clauses prohibit any law that punishes as a crime an act previously committed that was innocent when done, or makes more burdensome the punishment for a crime after its commission, or deprives one charged with a crime of a defense available when the crime was committed. In ***Carpenter*** the court held that ch. 980 creates a civil commitment

[9] Melendrez states in his brief that 2005 Wis. Act 434 is "valid overall" and that he does not make a facial challenge to its constitutionality. We therefore do not address the conclusory assertions in his brief that the legislature lacked a compelling interest in expanding the list of offenses in WIS. STAT. § 980.01(6)(a) to include third-degree sexual assault.

[10] Article I, Section 9, Clause 3 of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." Article I, section 12 of the Wisconsin Constitution provides: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate."

procedure intended to protect the public and provide concentrated treatment, not to punish the sexual offender. ***Id.*** at 274.

¶21 Recognizing that an ex post facto challenge is not available, Melendrez relies on ***Landgraf v. USI Film Products***, 511 U.S. 244 (1994), which discusses retroactivity in a civil context. In ***Landgraf***, the Court noted that, in addition to the Ex Post Facto Clause and other specifically focused constitutional provisions that expressed "an antiretroactivity principle," "[t]he Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation…." ***Id.*** at 266. A statute is retroactive, or retrospective, the Court explained, when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past…." ***Id.*** at 269.

¶22 Melendrez appears to be of the view that, if legislation is retroactive under this definition, it necessarily violates due process. However, in ***Landgraf*** the Court makes clear that retroactive legislation is not necessarily unconstitutional. ***Id.*** at 267-68. The Court did not need to reach the issue of whether the challenged statutory provisions violated the Due Process Clause because the Court construed them not to be retroactive. ***Id.*** at 286. The Court arrived at this construction by first concluding that the amendment did not contain express language making these provisions retroactive and then concluding that the provisions were appropriately subject to the presumption against retroactivity in the absence of an express statement. ***Id.*** at 280-86.

¶23 Wisconsin case law also establishes that retroactive legislation does not necessarily violate the due process clause. In ***Barbara B. v. Dorian H.***, 2005

WI 6, ¶¶19-20, 277 Wis. 2d 378, 690 N.W.2d 849, the court explains that a court is first to determine if a statute actually has a retroactive effect, which turns on whether it affects a substantive right that vested or accrued before the enactment. If the court concludes that it does have a retroactive effect, the court then determines whether the retroactive effect comports with due process.[11]

¶24 Accordingly, we begin by analyzing whether the application of 2005 Wis. Act 434 has a retroactive effect on Melendrez. Melendrez contends that, as applied to him, 2005 Wis. Act 434 is retroactive in all four ways identified in ***Landgraf.*** *See* paragraph 21 above. He asserts:

> Act 434, as applied to [him], took away and impaired a right under Chapter 980 as it existed on February 21, 2001, that is, the right not to be committed after completion of a sentence for Third Degree Sexual Assault. Likewise, Act 434 created a new obligation, that is, the obligation to serve a 980 commitment. The Act also obviously imposed a new duty, that is, the duty to answer to a Chapter 980 petition,

[11] We recognize that ***Barbara B. v. Dorian H.***, 2005 WI 6, 277 Wis. 2d 378, 690 N.W.2d 849, concerns legislation (child support) that allegedly created a vested economic interest. Therefore, the balancing test the court used to determine whether the retroactivity of that statute would comport with due process may not be applicable where the vested interest alleged involves liberty. The balancing test applied in ***Barbara B.*** weighs "the public interest served by the retroactive statute against the private interests that are overturned by it." ***Barbara B.***, 277 Wis. 2d 378, ¶19. Melendrez asserts that, because the application of 2005 Wis. Act 434 restricts his liberty, we must use strict scrutiny in deciding whether its application to him violates his right to due process. Strict scrutiny requires that the challenged statute furthers a compelling interest and is narrowly tailored to serve that interest. ***State v. Ransdell***, 2001 WI App 202, ¶5, 247 Wis. 2d 613, 634 N.W.2d 871 (applying strict scrutiny to a substantive due process facial challenge to a WIS. STAT. ch. 980 amendment making commitment to a secure facility automatic rather than discretionary).

Because we conclude that 2005 Wis. Act 434 does not have a retroactive effect on Melendrez, we need not decide what standard to apply in deciding whether retroactive legislation affecting a liberty interest violates due process. For the same reason, we need not decide whether Melendrez's due process claim is one of procedural due process or substantive due process. Because Melendrez relies on ***Ransdell*** and argues for a strict scrutiny standard, he apparently views his claim as one of substantive due process, although he simply uses the term "due process." We do the same, since there is no need for more specificity in this opinion.

> and it attached a new disability, because 980 patients lack most of the rights that ordinary citizens possess, particularly freedom of movement and association.

¶25 The underpinning of these four assertions of retroactive effect is the same: because third-degree sexual assault was not one of the WIS. STAT. ch. 980 sexually violent offenses when Melendrez entered a plea to this charge, he was "entitled to believe," or had a "legitimate sense," that he would not be subject to ch. 980.

¶26 We reject this argument because it is inconsistent with the case law. In ***Hendricks v. Kansas***, 521 U.S. 346 (1997), in concluding that a Kansas statute similar to WIS. STAT. ch. 980 was not an ex post facto law, the Supreme Court stated:

> As we have previously determined, the Act does not impose punishment; thus, its application does not raise ex post facto concerns. *Moreover, the Act clearly does not have retroactive effect. Rather, the Act permits involuntary confinement based upon a determination that the person currently both suffers from a "mental abnormality" or "personality disorder" and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes.* Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the Ex Post Facto Clause.

Id. at 370-71 (emphasis added).

¶27 Melendrez attempts to distinguish his situation by asserting that the third-degree sexual assault conviction was not used solely for evidentiary purposes but formed a "jurisdictional basis of the commitment … [because] [t]he state needs a *conviction* and *proof of a conviction*, not just an out-of-court allegation of behavior…" (emphasis in Melendrez's brief). However, the Kansas statute,

similar to Wisconsin's statute, uses a conviction of a sexually violent crime (or a charge—unlike Wisconsin) as part of the definition of a "sexually violent predator." ***Id.*** at 352.[12] The Kansas statute does not authorize a commitment based on an out-of-court allegation of behavior. What the Court meant by "solely for evidentiary purposes" is that under the Kansas statute the prior conviction (or charge) is used solely as evidence that the person fulfilled the definitional elements of a "sexually violent predator." ***Id.*** at 370. The same is true of Melendrez's conviction for third-degree sexual assault: it fulfills one of the definitional elements of a "sexually violent person." *See* WIS. STAT. §§ 980.01(7) and 980.01(6)(a).

¶28 Melendrez also attempts to distinguish his situation from the persons who became subject to the Kansas statute—or to WIS. STAT. ch. 980—when it was first enacted.[13] He recognizes that those persons would not have known about the statute when they engaged in conduct and entered into pleas subsequently defined as sexually violent offenses. His situation is different, he asserts, because the existence of ch. 980 when he committed the offense and entered into the plea to third-degree sexual assault made it reasonable to rely on the terms of the statute at that time.[14] Rephrasing this argument reveals its flaw: Melendrez is asserting that

[12] The Kansas statute defines a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." ***Hendricks v. Kansas***, 521 U.S. 346, 352 (1997).

[13] WISCONSIN STAT. § 980.13 provides that "[t]his chapter applies to sexually violent persons regardless of whether the person engaged in acts of sexual violence before, on, or after June 2, 1994," which was the effective date of Chapter 980.

[14] Implicit in Melendrez's argument is the factual assertion that he entered the plea with an awareness that third-degree sexual assault was not then included in WIS. STAT. ch. 980, whereas the crime with which he was charged—second degree sexual assault—was. We accept this as true for purposes of this appeal.

he had a reasonable expectation that the statute would not be amended even though persons subject to ch. 980 when it was first enacted did not have a reasonable expectation that no such statue would be enacted in the first instance. Beyond asserting that there is a difference, Melendrez does not explain why his situation creates a vested interest in the version of the statute in effect when he pled—and, thus, makes the amendment retroactive as to him—when the original enactment did not have a retroactive effect on the persons first subject to ch. 980. Moreover, Melendrez's attempt to distinguish on this ground is inconsistent with ***State v. Tabor***, 2005 WI App 107, 282 Wis. 2d 768, 699 N.W.2d 663.

¶29 In ***Tabor*** the respondents challenged a 2003 amendment to WIS. STAT. ch. 980 that modified the definition of "sexually violent person" and "dangerous to others" by substituting "likely … will engage in acts of sexual violence" for "substantial probability [of engaging] in acts of sexual violence." *Compare* §§ 980.01(7) *and* 980.02(2)(c) *with* §§ 980.01(7) *and* 980.02(2)(c) (2001-02). The amendment "first appl[ied] to hearings, trials, and proceedings that are commenced on the effective date of [the amendment]." 2003 Wis. Act 187, § 8. Among other arguments, the respondents contended that applying the amendment to their trials, which were to be held after the effective date of the amendment, would "violate[] their rights to due process by retroactively negating what they contend[ed] were their vested rights in the definitions extant when the petitions against them were filed and served." ***Tabor***, 282 Wis. 2d 768, ¶6. We rejected this argument, stating:

> [U]nlike the situations in the vested-rights cases upon which they rely, where the causes of action accrued before the legislative action, ***Martin v. Richards***, 192 Wis. 2d 156, 531 N.W.2d 70 (1995) (reduction of damage caps in tort cases), and ***Neiman v. American National Property and Casualty Co.***, 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160 (increase of damage caps in tort cases), the

> dangerousness of persons for whom commitment is sought is determined, as we have already seen, at the time of the trial and not at some earlier time. *See* ***Carpenter***, 197 Wis. 2d at 274, 541 N.W.2d at 113; [***State v.***] ***Williams***, 2001 WI App 263, ¶¶21-23, 249 Wis. 2d 1, 637 N.W.2d 791.[15] Thus, just as those sex offenders who committed their crimes and were convicted and sentenced before the enactment of WIS. STAT. ch. 980 were nevertheless subject to its provisions, ***Carpenter***, 197 Wis. 2d at 262-274, 541 N.W.2d at 109-114 (double-jeopardy and ex-post-facto challenges), Tabor and Ryan are constitutionally subject to the legislature's modification of what constitutes dangerousness under ch. 980. *Further, their claim that the legislature unfairly "unsettle[d] expectations that they reasonably relied upon in setting up their defenses to the petitions," does not assert the deprivation of any recognized right. See* ***State v. Burks***, 2004 WI App 14, ¶16, 268 Wis. 2d 747, 760, 674 N.W.2d 640, 647 (trial court may require defendant to be tried by a jury even though defendant prefers a bench trial for strategic reasons).

Tabor, 282 Wis. 2d 768, ¶6 (footnote added) (emphasis added).

¶30 Thus, in ***Tabor*** we reject the argument Melendrez makes in an attempt to distinguish his situation from ***Hendricks***: that, from the standpoint of a retroactivity analysis, the application of the original WIS. STAT. ch. 980 is different than an amendment. While Melendrez also attempts to distinguish ***Tabor***, these arguments simply highlight the similarity between his situation and those persons who were subject to the original ch. 980.

¶31 First, Melendrez contends that the amendments at issue in ***Tabor*** apply to every person against whom the State filed a petition after the effective

[15] In ***State v. Williams***, 2001 WI App 263, ¶22, 249 Wis. 2d 1, 637 N.W.2d 791, we held that, "as with Chapter 980 generally," two amendments to WIS. STAT. ch. 980—one making commitment to a secure facility automatic rather than discretionary and a second lengthening the required time of initial commitment—were not retroactive.

date of the amendment, whereas "[his] claim … probably applies only to him." We assume that "claim" in this context means Melendrez's assertion that he entered the plea believing that third-degree sexual assault was not included in the definition of sexually violent crimes under WIS. STAT. ch. 980. For purposes of argument we accept as true that this fact situation may be unique to him, or, at most, to a few people. However, as we have already explained, among the persons subject to ch. 980 when it was initially passed were many who entered pleas to first- and second-degree sexual assault—and to other offenses—believing that, when their sentence was completed, they would not be subject to subsequent commitment. Moreover, Melendrez does not explain why the *number* of persons affected by legislation has any role in a retroactivity analysis.

¶32 Second, Melendrez asserts that the ***Tabor*** respondents were in a different situation because the WIS. STAT. ch. 980 petitions had already been filed against them when that amendment took effect. According to Melendrez, that amendment simply deprived them of the advantage of a lower standard for dangerousness at trial. In contrast, he asserts, the amendment in 2005 Wis. Act 434 establishes "subject matter jurisdiction" over him. However, for all the persons subject to WIS. STAT. ch. 980 when it was initially passed, the inclusion in "sexually violent offenses" of the crimes for which they had previously been convicted established "subject matter jurisdiction" over them in exactly the same way.

¶33 Fundamentally, Melendrez believes his situation is like neither those persons subject to the original WIS. STAT. ch. 980 nor the ***Tabor*** respondents because he pled to a third-degree sexual assault knowing about ch. 980 and believing he would avoid it by his plea. However, while this is a factual distinction, he has not persuaded us that these facts make the reasoning of

Hendricks and ***Tabor*** on retroactivity inapplicable to him. Melendrez points out that the State has not provided a case supporting the proposition that it is permissible to add to the "predicate" offenses of ch. 980 and have persons committed for convictions that occurred prior to having any knowledge of the amendments. However, it is Melendrez's burden to persuade us that the amendment is unconstitutional as applied to him. It is not the States' burden to persuade us that the amendment is constitutional.

¶34 Because we conclude that the application of 2005 Wis. Act 434 to Melendrez does not have a retroactive effect and because a retroactive effect is the basis for Melendrez's due process claim, we conclude that Melendrez has not met his burden of showing that the amendment's application to him violates his right to due process. The relief he requests with respect to his stipulation that third-degree sexual assault is a sexually violent offense is premised on a violation of due process. Accordingly, we conclude he is not entitled to be relieved from the stipulation nor is he entitled to a ***Machner***[16] hearing on his claim that counsel was ineffective because of the advice counsel gave him regarding the stipulation.

II. Newly Discovered Evidence

¶35 Melendrez contends that new research on the Static-99, contained in an article published after the trial, is newly discovered evidence under WIS. STAT. § 805.15(3) and entitles him to a new trial, or, at a minimum, an evidentiary hearing to determine if he is entitled to a new trial. The article, published in a professional newsletter in 2009, is titled "Reporting Static-99 in Light of New

[16] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Research on Recidivism Norms," and is authored by Leslie Helmus, R. Karl Hanson, and David Thornton. The article explains that the original Static-99 recidivism estimates were based on a sample of 1086 offenders, most of whom were released from prison in the 1960s, 70s, and 80s. In contrast, the data the article's authors analyzed is based on a sample of 6406 offenders, 90% of whom were released in the 1990s or later. The authors conclude that "[s]exual and violent recidivism rates per Static-99 score are significantly lower in our data than they were in the samples used to develop the original Static-99 norms." The authors recommend that the new norms replace the original norms because "the new norms are based on more offenders, more complete data, and more recent, representative samples."

¶36 In order to be entitled to a new trial based on newly discovered evidence, Melendrez must prove by clear and convincing evidence that (1) the evidence is, in fact, new; (2) his failure to discover the new evidence earlier was not due to his lack of diligence; (3) the evidence is material to an important issue in the case; and (4) the evidence is not cumulative. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant proves these four elements by clear and convincing evidence, the circuit court decides whether a reasonable probability exists that a different result would be reached in a new trial. ***Id.*** A circuit court's decision whether to grant a new trial based on newly discovered evidence is committed to the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. We affirm a discretionary decision if the court applied the correct law to the facts of record and reached a

reasonable result. *See* ***State v. Williams***, 2001 WI App 155, ¶9, 246 Wis. 2d 722, 631 N.W.2d 623 (citation omitted).[17]

¶37 The circuit court here first decided that an evidentiary hearing was not needed in order to decide Melendrez's motion. At an evidentiary hearing, Melendrez states, Dr. Rosell would explain the significance of the article as undercutting the value of the Static-99 as a predictive tool. The circuit court viewed the article as "largely self explanatory" and concluded that the article and the trial record were sufficient to decide Melendrez's motion. Nothing in Melendrez's brief persuades us that he is entitled to an evidentiary hearing on his motion.

¶38 Turning to the merits of Melendrez's claim of newly discovered evidence, the circuit court concluded that the information contained in the article was cumulative and that, even if it were admitted, there was not a reasonable probability there would be a different result.

[17] While the court in ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42, stated the established rule that the decision whether to grant or deny a new trial based on newly discovered evidence is committed to the circuit court's discretion, it also stated that whether there is a reasonable probability of a different result presents a question of law. ***Id.***, ¶33. Questions of law are generally subject to de novo review. *See* ***Ball v. District No. 4, Area Bd. of Vocational, Technical and Adult Educ.***, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984) ("This court must decide questions of law independently without deference to the decisions of the trial court…."). We are uncertain whether the ***Plude*** court is suggesting a de novo standard of review for the question whether there is a reasonable probability that a new trial would have a different outcome. We resolve this uncertainty by applying the standard of review for discretionary decisions to this question, because the ***Plude*** court expressly states that a circuit court's decision whether to grant a new trial based on newly discovered evidence is committed to the circuit court's discretion. ***Plude***, 310 Wis. 2d 28, ¶31. However, we note that in this case the outcome is the same whether we review the circuit court's ruling on this question de novo or under the more deferential standard of review for discretionary decisions.

¶39 With respect to cumulativeness, the circuit court reasoned as follows:

> [T]he defense expert [Dr.] Rosell testified at some length regarding the shortcomings of the Static-99, including its small sample size particularly with respect to high risk individuals, the sample's questionable applicability given its origins (Canada and the United Kingdom, not the United States) and, most importantly, that more recent cross-validated studies show a significant decrease in the risk percentages for those with Melendrez's score of six (13% over five years instead of 39%).[18] Dr. Rosell specifically testified that probability estimates in the Static-99 had to be re-examined as part of cross validation, and this would result in lower estimates of recidivism risk because there has been a decrease in sexual offending over the last 15 years as compared to when the norms were developed in the samples applied to Melendrez. Dr. Rosell referred specifically to the then-unpublished research study (now the "newly discovered evidence") demonstrating the "significant decrease" in recidivism probability estimates, as well as two additional studies demonstrating decrease in sexual offending. Within this context, the Helmus article can only be seen as cumulative. This is all the more true when one considers the concessions made by the State's experts regarding the Static-99's limitations as a predictive tool. [Footnote added.]

¶40 Although Melendrez acknowledges Dr. Rosell's testimony on the Static-99, he asserts that the article contains a more detailed analysis by the creators of the Static-99 of the more recent and larger samples and a resulting "recalculation" of the resulting risk figures. According to Melendrez, his Static-99 score of six, based on the original sample of offenders, indicated to the jury that "his risk to reoffend within 5 years was 36%," and based on the article, he should

[18] Our understanding of Dr. Rosell's testimony is that 13% is not the recalculated recidivism rate for a score of six on the Static-99 but is the result of one of the studies that attempted to cross-validate the original recidivism rate. Using 39% as the recidivism rate over five years for a score of six on the original Static-99, Dr. Rosell testified that one of the cross-validation studies showed 13% and another showed 17% instead of 39%.

be able to argue in a new trial that "the new figures show that his risk was really 21.3%."[19]

¶41 We first observe that Melendrez's premise—that the Static-99 score shows "his risk to reoffend"—is not an accurate way to describe the significance of the score under either the original samples or the newer samples. Both Dr. Rosell and the State's expert, Dr. Jurek, explained that the actuarial instruments do not tell anything about a particular offender's risk of reoffending. Rather, as Dr. Rosell explained, "[a]ll these instruments can do is say that this individual has the same score as this group of individuals [in the sample] … and then those individuals with that certain number reoffended at a certain time." Similarly, Dr. Jurek clarified that the risk percentage associated with Melendrez's Static-99 score is *not* Melendrez's likelihood of reoffending, but rather "it is the rate of reoffense in the sample for people who had a score similar to the one Mr. Melendrez got on that instrument." With this correction, Melendrez's claim remains that the article is not cumulative to Dr. Rosell's testimony because the article contains the lower recalibrated figures by the creators of the Static-99 and this would necessarily affect the scoring of this instrument by the State's experts.

¶42 We will assume without deciding that the recalibrated recidivism risks and the other specific information in the article that Melendrez identifies are not cumulative of Dr. Rosell's testimony. We nonetheless conclude the circuit

[19] The source of this "new figure"—21.3%—is from a table presented by the authors of the article at a conference in October 2008 and attached to Melendrez's brief in the circuit court. The relationship between this table and the article is not clear to us but is immaterial to our analysis. We note that Melendrez uses 36% as the recidivism rate for five years on the original Static-99 for a score of six, while Dr. Rosell used 39%. *See* paragraph 38. The difference is immaterial to our analysis.

court properly exercised its discretion in deciding that it is not reasonably probable that the article would have changed the jury's verdict.

¶43 First, as the circuit court explained, Dr. Rosell's testimony criticized the Static-99 on the same grounds set forth in the article, although in a less detailed and comprehensive way. The jury was informed that the original Static-99 overstated the risk of recidivism, although they did not learn by how much.

¶44 Second, the State's experts used actuarial instruments, besides the Static-99, which the article does not address. The jury heard Dr. Rosell's criticism of those instruments.

¶45 Third, the State's experts acknowledged the limitations of all the actuarial tools in determining the risk of a particular person reoffending and both experts relied on much other information in forming their opinions. Specifically, one or both relied on Melendrez's testimony of sexual offenses, his reoffending after treatment, his poor adjustment to supervision, and his lack of insight into the gravity of his offenses.

¶46 The circuit court summarized the other evidence in this way:

> [T]he three actuarial scales were … just a small portion of the substantial and damning evidence presented to the jury … regarding [Melendrez's] chilling, ongoing sexually assaultive history fueled by a mental disorder alternately diagnosed as paraphilia, antisocial personality disorder, psychotic disorder not otherwise specified, and psychopathy…. The experts relied upon his poor impulse control and hypersexuality caused by his mental disorders, his other serious criminal activity, his resistance to any kind of treatment for his sexual deviancy and assaultive behavior, his poor adherence to the rules while incarcerated, [and] his frequent sexual acting-out even in a confined setting … to reach the conclusion … that Melendrez was a sexually violent person who would likely reoffend. To suggest that a more vigorous, concrete attack

> on the already impeached Static-99 would probably change the jury verdict, given this mountain of other evidence, is highly unrealistic.

¶47 The circuit court's decision-making on this point demonstrates the application of the correct legal standard to the facts of record to arrive at a reasonable result. Accordingly, the court properly exercised its discretion in deciding the article is not newly discovered evidence that entitles Melendrez to a new commitment trial under WIS. STAT. § 805.15(3).

CONCLUSION

¶48 We affirm the circuit court's judgment that Melendrez is a sexually violent person and its order denying Melendrez's motion for postcommitment relief.

By the Court.—Judgment and order affirmed.

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