

**Attachment 2 –
OAH Order**

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level
Determination of Damain Allen Kingbird

**ORDER DENYING
MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Kimberly Middendorf pursuant to a Notice and Order for Review of Risk Level Assignment filed with the Office of Administrative Hearings on May 15, 2020.

John D. Gross, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC) of the Department of Corrections (DOC). Damain Allen Kingbird (Petitioner) represents himself without legal counsel.

On May 26, 2020, the ECRC filed and served a Motion for Summary Disposition. Petitioner was served with the motion by U.S. Mail on May 26, 2020. On June 9, 2020, a response was filed on Petitioner's behalf, and the record closed that same day.

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 for Summary Disposition is **DENIED**.
2. A prehearing conference is scheduled for **September 21, 2020**, at **10:30 a.m.** At that time, the parties are directed to call **888-742-5095** and, when prompted, enter conference code **929 609 1686#**.
3. Failure by any party to appear at a prehearing conference or hearing may result in the Administrative Law Judge disposing of the matter by default. If the Petitioner defaults, the ECRC's risk level assignment may be upheld.

Dated: August 27, 2020


KIMBERLY MIDDENDORF
Administrative Law Judge

MEMORANDUM

I. Petitioner's Background

Petitioner is a 37-year-old male, who is currently subject to a dual commitment as Mentally Ill and Dangerous and for second-degree and fourth-degree assault convictions. Petitioner was placed under civil commitment on May 9, 2016.¹

Petitioner has a history of violent or criminal behavior prior to the 2016 assaults. In 1999, Petitioner was adjudicated delinquent for third-degree criminal sexual conduct for sexually abusing a 13-year-old female.² Petitioner has been convicted of several domestic assaults, making terroristic threats, and many alcohol-related offenses.³

On the night of May 2, 2016, law enforcement responded to a report of sexual assault at a residence in Bemidji.⁴ Officers found an adult female lying on the floor, screaming that she had been raped and stabbed by Petitioner.⁵ The victim was observed to be bleeding from a stab wound to her lower back.⁶ An adult male witness was present when police arrived. He informed police that he had left his apartment to buy cigarettes, and when he returned, he heard the victim screaming for help.⁷ The witness found Petitioner on top of the victim, and pulled Petitioner off of her.⁸ Petitioner then fled from the witness's residence.⁹

The victim also gave a statement to police.¹⁰ She told police that when the witness left his apartment, Petitioner grabbed her by the hair and dragged her into the bathroom. Petitioner hit her several times until she began to lose consciousness, pulled her pants down, and penetrated her vagina with his fingers and penis.¹¹ She saw Petitioner grab an object, and then felt a stab to her lower back.¹²

Law enforcement located Petitioner in a nearby parking lot.¹³ When officers approached him, Petitioner repeatedly told them to shoot him.¹⁴ After Petitioner was eventually handcuffed, he thrashed and kicked at the officers, attempting to bite one's knee.¹⁵ Petitioner also spit on an officer twice.¹⁶ Petitioner had been using

¹ Exhibit (Ex) 1 at 49.

² *Id.* at 318-9.

³ *Id.* at 76-82.

⁴ *Id.* at 176.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

methamphetamines and consuming alcohol before he committed these assaults.¹⁷ Less than a week before committing the offenses, Petitioner had been released from a civil commitment as mentally ill and chemically dependent.¹⁸

Petitioner was charged with first-degree criminal sexual conduct and fourth-degree assault, on May 4, 2016. Petitioner was civilly committed as mentally ill and dangerous on May 9, 2016. On September 11, 2017, Petitioner pleaded guilty to second-degree assault, involving use of a dangerous weapon, and fourth-degree assault, pertaining to the assault of police during his arrest.¹⁹ Petitioner was given a sentence of 45 months, to be served at the secured hospital due to his civil commitment.²⁰ As a result of these convictions, Petitioner is required to register as a predatory offender.²¹

Petitioner remains in the Minnesota State Hospital at St. Peter. Petitioner does not have an expected release date but, per Department policy, will not have another risk assessment prior to his eventual release into the community.²²

II. Procedural History

A. Petitioner's First ECRC

On December 5, 2019, Peter D. Marston, Ph.D., L.P., prepared a risk assessment recommendation for Petitioner, using the Static-99R risk assessment of Petitioner.²³ Dr. Marston scored Petitioner's risk assessment as +5, placing him in the moderate high risk category.²⁴

Dr. Marston noted Petitioner's recent history of sexual violence and a pattern of generally increasing violence.²⁵ Among Dr. Marston's concerns were Petitioner's "significant history of polysubstance abuse including methamphetamine and alcohol," and a series of relapses following inpatient chemical dependency programs. Petitioner's mental health diagnoses, including "schizophrenia, bipolar disorder, schizoaffective disorder, borderline personality disorder, antisocial personality disorder, varied substance use disorders, and cognitive impairments," were also of significant concern.²⁶ Dr. Marston concluded that four special concerns were applicable, namely: unsuccessful treatment interventions; a history of gratuitous violence; a recurring pattern of failure or refusal to comply with mental health treatment regimens; and a documented pattern of impaired judgment and behavioral controls related to low

¹⁷ *Id.*

¹⁸ *Id.* at 183, 188.

¹⁹ *Id.* at 118-9.

²⁰ *Id.* at 107.

²¹ *Id.* at 106.

²² ECRC's Memorandum on Whether the ECRC's Risk Assignment is Moot (August 10, 2020).

²³ Ex. 1 at 39.

²⁴ *Id.*

²⁵ *Id.* at 40.

²⁶ *Id.* at 43.

intellectual functioning, history of traumatic brain injury, or major mental illness that is unresponsive to treatment.²⁷ Dr. Marston recommended Petitioner be assigned to a Risk Level III.²⁸

The ECRC met on December 18, 2019. Petitioner attended the meeting and denied sexually assaulting his victim in 2016.²⁹ Petitioner presented a BCA report that failed to find his DNA in the victim's vagina in support of his claim.³⁰ The ECRC acknowledged that Petitioner's Static-99R score of +5 placed him in the moderate high risk category.³¹ The ECRC also documented four special concerns, related to Petitioner's risk of reoffending: Special Concern #2, two or more unsuccessful chemical dependency treatment interventions; Special Concern #5, a history of gratuitous violence; Special Concern #8, a recurring pattern of failure or refusal to comply with mental health treatment regimens; and Special Concern #10, a documented pattern of impaired judgment and behavioral controls.³² The ECRC unanimously voted to assign Petitioner to Risk Level I.³³ The basis for the ECRC's downward departure from the recommended risk level is unclear from the motion record. It is likewise unclear what information pertaining to the DNA evidence of the 2016 assault the ECRC had when it made its decision.

Upon receipt of the ECRC's report, the Bemidji Police Department (BPD) requested that the ECRC reconvene and reassess Petitioner's risk level assignment.³⁴ BPD noted that Petitioner continued to refuse to take responsibility for committing sexual assault in 2016, although the victim's DNA was found on Petitioner's fingers, corroborating her statement that Petitioner sexually assaulted her. BPD claimed that Petitioner would lack community-based and familial support upon release. BPD expressed "grave concerns" about Petitioner's history of gratuitous violence, recurring pattern of failure to comply with mental health treatment directives, and documented pattern of impaired judgment and behavior controls.³⁵ The BPD described Petitioner as "exceptionally violent" and noted that his involvement in the Bemidji community included "assaults on police officers, domestic assaults, assaults involving weapons, thefts, driving offenses, criminal sexual conduct, terroristic threats, and alcohol offenses."³⁶

Mark Bliven, Director of Risk Assessment/Community Notification at DOC, granted BPD's request. Mr. Bliven concluded that a reassessment was warranted because "the ECRC did not have important information or was unclear about important information that should have been considered by the ECRC committee."³⁷

²⁷ *Id.* at 44.

²⁸ *Id.* at 35.

²⁹ *Id.* at 32.

³⁰ *Id.* at 33.

³¹ *Id.* at 32.

³² *Id.* at 33.

³³ *Id.*

³⁴ *Id.* at 29-30.

³⁵ *Id.* at 30.

³⁶ *Id.*

³⁷ *Id.* at 25.

B. Petitioner's Second ECRC

Following the grant of BPD's request to reassess Petitioner, Dr. Terrel Backes, a licensed psychologist with the DOC, prepared a second risk assessment of Petitioner.³⁸ Dr. Backes conducted his assessment of Petitioner using the Minnesota Sex Offender Screening Tool (MnSOST)-4.0. Petitioner's MnSOST-4.0 score predicted a probability of sexual recidivism of 9.10%, which is higher than 98.90% of his peers.³⁹ Dr. Backes noted, as Dr. Marston had, the 2016 sexual assault, Petitioner's history of gratuitous and increasing violence, his pattern of relapses following chemical dependency treatment, and his unsuccessful management of his many mental health diagnoses.⁴⁰ Like Dr. Marston, Dr. Backes recommended assigning Petitioner to Risk Level III.⁴¹

A second ECRC meeting was convened on April 28, 2020.⁴² The ECRC considered Dr. Backes' recommendation and heard from Petitioner.⁴³ Petitioner argued that he did not sexually assault his victim in 2016.⁴⁴ By split decision, the ECRC voted to assign Petitioner to Risk Level III.

On May 6, 2020, Petitioner submitted an appeal of the ECRC's risk level determination.⁴⁵ On May 15, 2020, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings. This motion followed.

III. Legal Background

Persons who are charged with certain "predatory offenses" delineated in Minn. Stat. § 243.166, subd. 1b (2020), 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 a predatory offense, are considered "predatory offenders" subject to registration with law enforcement.⁴⁶ Predatory offenses include, but are not limited to, kidnapping, false imprisonment, criminal sexual conduct, felony indecent exposure, child pornography, and other specific offenses.⁴⁷ Registration seeks to ensure that law enforcement is able to locate predatory offenders living, working, or found within the state.

In addition to registration, predatory offenders in Minnesota are subject to the provisions of the Minnesota Community Notification Act (Act).⁴⁸ The Act provides that a law enforcement agency in the area where a predatory offender resides, expects to reside, is employed, or is regularly found, shall disclose to the public any information about the offender that is "relevant and necessary to protect the public and to

³⁸ *Id.* at 11-21.

³⁹ *Id.* at 11, 22.

⁴⁰ *Id.* at 19-20.

⁴¹ *Id.* at 19.

⁴² *Id.* at 2.

⁴³ Ex. 6.

⁴⁴ *Id.*

⁴⁵ Ex. 1 at 1.

⁴⁶ Minn. Stat. §§ 243.166, 244.052, subd. 1(5) (2020).

⁴⁷ Minn. Stat. § 243.166, subd. 1b.

⁴⁸ See *generally* Minn. Stat. § 244.052 (2020).

counteract the offender's dangerousness."⁴⁹ 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."⁵⁰

The scope of community notification related to a predatory offender is determined by the "risk level" assigned to the offender. There are three risk levels under Minnesota law: Risk Level I; Risk Level II; and Risk Level III.⁵¹ Each risk level is associated with a different degree of community notification.⁵² Risk Level III is the highest risk level and requires the broadest degree of community notification by law enforcement.⁵³ In contrast, Risk Level I is the lowest risk level and requires the least extensive community notification.⁵⁴

Every predatory offender confined in a Minnesota state prison or treatment facility is subject to an end-of-confinement review prior to release from incarceration to determine the offender's risk level for community notification.⁵⁵ Predatory offenders released from federal facilities or who move to Minnesota from other states may also be subject to an end-of-confinement review and risk level determination.⁵⁶

Risk level assignments are made by ECRCs established at each facility and at the central office of the DOC.⁵⁷ ECRCs are comprised of five individuals, 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.⁵⁸ 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.⁵⁹

When assessing risk and assigning a risk level, the ECRC is required to apply the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g).⁶⁰ These 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

⁴⁹ *Id.* at subd. 4(a).

⁵⁰ *Id.*

⁵¹ *Id.* at subd. 4(b).

⁵² *Id.* at subd. 4.

⁵³ *Id.* at subd. 4(b)(3).

⁵⁴ *Id.* at subd. 4(b)(1).

⁵⁵ *Id.* at subd. 3(a).

⁵⁶ *Id.* at subd. 3a.

⁵⁷ *Id.* at subd. 3(a).

⁵⁸ *Id.* at subd. 3(b).

⁵⁹ *Id.*

⁶⁰ *Id.* at subd. 3(d)(i).

will reoffend if released to the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.⁶¹

In addition to the statutory risk factors, ECRCs are required to apply a risk assessment scale when assigning a risk level to a predatory offender.⁶² The application of the risk assessment tool is generally conducted by a professional who has been specifically trained on the proper scoring method.⁶³ As part of the end-of-confinement review process, the Commissioner employs a trained professional, generally a licensed psychologist, to evaluate the offender's risk to the community using the statutory risk factors and to conduct the risk assessment tool on the offender.⁶⁴

The DOC utilizes the MnSOST-4.0, a screening tool explained and accepted for use by the Commissioner of DOC (Commissioner) in DOC Policy 205.220.⁶⁵ 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.⁶⁶ 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.⁶⁷

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 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.⁶⁸

⁶¹ *Id.* at subd. 3(g).

⁶² *Id.* at subs. 2, 3(d)(i).

⁶³ 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).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Ex. 1 at 22 (MnSOST-4.0 scoring sheet); Ex. 2 (MnSOST-4.0 Coding Rules).

⁶⁷ See Ex. 2 (MnSOST-4.0 Coding Rules).

⁶⁸ Ex. 1 at 22 (MnSOST-4.0 scoring sheet); Ex. 2 (MnSOST-4.0 Coding Rules).

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.⁶⁹ The scoring data is then inserted into the MnSOST-4.0 computerized actuarial program and the tool calculates a presumptive risk level.⁷⁰

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.⁷¹ The MnSOST-4.0 identifies eight special concerns and seven mitigating factors that an ECRC can consider along with an offender's MnSOST-4.0 score.⁷²

Prior to an ECRC meeting, the professional who scored the risk assessment tool prepares a report and recommendation for the ECRC.⁷³ 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.⁷⁴

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.⁷⁵

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.⁷⁶ An offender who is assigned to Risk Level II or III may seek administrative review of the ECRC's risk assessment determination within 14 days of receiving notice of the ECRC's decision.⁷⁷ The hearing is subject to the contested case provisions of chapter 14 of the Minnesota Statutes.⁷⁸

⁶⁹ Ex. 2 (Coding Rules).

⁷⁰ *Id.*

⁷¹ Minn. Stat. § 244.052, subds. 2, 3; see also *In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351 (Minn. Ct. App. 2002).

⁷² Ex. 3 (Special Concerns for MnSOST-4.0); Ex. 4 (Mitigating Factors for MnSOST-4.0).

⁷³ Ex. 1 at 10-21 (ECRC Risk Assessment Recommendation).

⁷⁴ *See id.*

⁷⁵ *See* Minn. Stat. § 244.052.

⁷⁶ *See id.*

⁷⁷ *Id.* at subd. 6(a).

⁷⁸ *Id.* at subd. 6(d).

An offender must register as a predatory offender and maintain his or her registration for a minimum of ten years.⁷⁹ Throughout that time, the appropriate level of notice must be given every time the offender changes residences.⁸⁰ The offender may request that the ECRC reassess the offender's assigned risk level after three years have elapsed since the initial risk assessment, and may renew the request once every two years following subsequent denials.⁸¹

IV. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.⁸² 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 law.⁸³ The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

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, material factual issues exist.⁸⁴ 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.⁸⁵

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.⁸⁶ A fact is material if its resolution will affect the outcome of the case.⁸⁷ If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.⁸⁸ A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.⁸⁹ Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.⁹⁰

⁷⁹ Minn. Stat. § 243.166, subds. 1b, 3, 5a.

⁸⁰ *Id.* at subd. 3.

⁸¹ Minn. Stat. § 244.052, subd. 3(i)

⁸² *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K).

⁸³ *See 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).

⁸⁴ *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

⁸⁵ *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁸⁶ *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁸⁷ *See O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).

⁸⁸ *See Thiele*, 425 N.W.2d at 583.

⁸⁹ *See Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).

⁹⁰ *See* Minn. R. Civ. P. 56.05.

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.⁹¹ Thus, summary disposition is only proper when no fact issues need to be resolved.⁹²

V. Arguments

The ECRC seeks summary disposition of this case.⁹³ The ECRC argues that Petitioner does not allege any material error that affects his risk level assignment, and therefore it is entitled to summary disposition.⁹⁴ In opposing his risk level assignment, Petitioner denies that he sexually assaulted his victim in 2016. Petitioner also argues that no evidence was presented by BPD to reassess his risk level and elevate his risk level from I to III at the April 28, 2020, ECRC meeting.

VI. Analysis

Upon review of the ECRC's Motion and Petitioner's claims, the Administrative Law Judge concludes that the ECRC's Motion must be denied.

The ECRC argues it is entitled to summary disposition because it correctly scored the MnSOST-4.0. The Administrative Law Judge agrees that the MnSOST-4.0 appears to have been scored correctly. However, the plain language of the Act does not limit a petitioner to raising scoring errors. Rather, it permits a petitioner to challenge any error in assigning risk, not just scoring errors as the ECRC argues. Because the ECRC is the moving party, the Administrative Law Judge cannot draw inferences in its favor and must infer, consistent with Petitioner's argument, that the ECRC lacked a basis to conduct a reassessment as requested by BPD.

Petitioner argues first that the ECRC erred because he did not sexually assault or stab his victim in 2016. In support of this argument, Petitioner contends that he was cleared of the sexual assault charge after his DNA was not found in the victim's vagina. Assuming that is true, there is no dispute that the victim's DNA was found on Petitioner's fingers, supporting the victim's statement that he digitally penetrated her. Further, Petitioner's argument that he did not sexually assault his victim is not material because there is no dispute of fact that he was charged with an offense requiring registration and convicted of charges stemming from the incident. It is further undisputed in the record that the first-degree criminal sexual conduct charge was amended to second-degree assault because the victim could not be located for trial. The ECRC's argument that Petitioner lacks a basis to relitigate the 2016 sexual conduct charge is correct.

Petitioner next argues that the second ECRC was improperly convened. Minn. Stat. § 244.052, subd. 3(h) states:

⁹¹ See *Sauter*, 70 N.W.2d at 353.

⁹² See *id.*

⁹³ ECRC Memorandum in Support of Summary Disposition (ECRC Mem.) at 4 (March 25, 2020).

⁹⁴ *Id.*

Upon the request of the law enforcement agency or the offender's corrections agent, the commissioner may reconvene the end-of-confinement review committee for the purpose of reassessing the risk level to which an offender has been assigned under paragraph (e). In a request for a reassessment, the law enforcement agency which was responsible for the charge resulting in confinement or agent shall list the facts and circumstances arising after the initial assignment or facts and circumstances known to law enforcement or the agent but not considered by the committee under paragraph (e) which support the request for a reassessment.

The record of the ECRC's consideration of Petitioner's December 19, 2019, risk level assessment is sparse. BPD presented no facts or circumstances that arose after the 2019 assessment. The other basis that affords the ECRC with discretion to reassess Petitioner's risk level is the existence of "facts and circumstances known to law enforcement . . . but not considered by the committee[.]"⁹⁵ Thus, the inquiry is whether BPD presented facts and circumstances that had not been considered by the first ECRC.

Mark Bliven, Director Risk Assessment/Community Notification for DOC, granted BPD's request to reconvene. His reasoning was that "the [2019] ECRC did not have important information or was unclear about important information that should have been considered[.]"⁹⁶ This information is not described in Mr. Bliven's decision to grant BPD's request.

BPD's request for reassessment relied upon Petitioner's significant and violent criminal history.⁹⁷ BPD argued that Petitioner's 2016 sexual assault and assault of a police officer warranted a higher risk level.⁹⁸ There is, however, no dispute that the first ECRC had all of this information, which was thoroughly outlined in Dr. Marston's recommendation. It cannot be determined on this record whether the ECRC had the BCA report showing that the victim's DNA was on his fingers, consistent with her statement that Petitioner digitally penetrated her, or whether it had only the supplemental report indicating that Petitioner's DNA was not found in the victim's vagina. It further appears that Petitioner's claim to have been fully cleared of the criminal sexual conduct charge by DNA evidence may have been a significant factor in the 2019 ECRC's assignment of Risk Level I to Petitioner. This is a material dispute. If there was no basis to reassess Petitioner, his assignment to Risk Level III would be erroneous.

As the moving party, the ECRC has the initial burden to show the absence of any genuine issue regarding any material fact. It failed to do so with respect to the basis to reassess Petitioner's risk level at the April 28, 2020, ECRC meeting.

⁹⁵ Minn. Stat. § 244.052, subd. 3(h).

⁹⁶ Ex. 1 at 25.

⁹⁷ *Id.* at 29-30.

⁹⁸ *Id.*

VII. Conclusion

Because there is a disputed issue of material fact regarding the assignment of Risk Level III to Petitioner, the ECRC's Motion for Summary Disposition is denied. This matter will proceed to an evidentiary hearing in which Petitioner will have the burden of proof to show, by a preponderance of the evidence, that the ECRC erred and if so, what risk level is appropriate.

K. J. M.