STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2013AP950

IN RE THE COMMITMENT OF THORNON F. TALLEY

STATE OF WISCONSIN,

Petitioner-Respondent,

vs.

THORNON F. TALLEY,

Respondent-Appellant.

ON APPEAL FROM AN ORDER ENTERED IN DANE COUNTY CIRCUIT COURT DENYING A PETITION FOR DISCHARGE FROM A CHAPTER 980 COMMITMENT, THE HONORABLE SARAH B. O'BRIEN PRESIDING

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

David R. Karpe
Attorney No. 1005501
Karpe Law Office
448 West Washington Avenue
Madison, Wisconsin 53703
Tel. (608) 255-2773

ATTORNEY FOR RESPONDENT-APPELLANT

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BRIEF OF RESPONDENT-APPELLANT

Questions Presented

I. Was the Respondent-Appellant entitled to an evidentiary hearing on his petition for discharge?

What the circuit court found: The circuit court implicitly found that the petition did not meet the requirements of §980.09(2).

What the Court of Appeals should hold: The Court of Appeals should hold that there are facts in Mr. Talley's petition from which a factfinder might conclude that Mr. Talley does not meet the criteria for commitment and these facts demonstrate that Mr. Talley's condition has changed since his initial commitment.

2. Did the circuit court's review of the petition for discharge meet the requirements of §980.09(2)?

What the circuit court found: The circuit court implicitly found that the requirements of a §980.09(2) review were met by the court's comparison of three evaluations done by a single evaluator.

What the Court of Appeals should hold: The Court of Appeals should hold that the circuit court did not conduct the required review of all current and past evaluations as required by Wis. Stat. §980.09(2) and *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513.

Statement on Oral Argument And Publication

Mr. Talley requests neither publication nor oral argument.

Relevant Statutory Sections

Wisconsin Stat. § 980.01(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.

Wisconsin Stat. § 980.09:

> **Petition for discharge.** (1) A committed person may petition the committing court for discharge at any time. The court shall deny the petition under this section without a hearing unless the petition alleges facts from which the court or jury may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person.
> (2) The court shall review the petition within 30 days and may hold a hearing to determine if it contains facts from

which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. In determining under this subsection whether facts exist that might warrant such a conclusion, the court shall consider any current or past reports filed under s. 980.07, relevant facts in the petition and in the state's written response, arguments of counsel, and any supporting documentation provided by the person or the state. If the court determines that the petition does not contain facts from which a court or jury may conclude that the person does not meet the criteria for commitment, the court shall deny the petition. If the court determines that facts exist from which a court or jury could conclude the person does not meet criteria for commitment the court shall set the matter for hearing.

(3) The court shall hold a hearing within 90 days of the determination that the petition contains facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. The state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person.

(4) If the court or jury is satisfied that the state has not met its burden of proof under sub. (3), the petitioner shall be discharged from the custody of the department. If the court or jury is satisfied that the state has met its burden of proof under sub. (3), the court may proceed under s. 980.08 (4) to determine whether to modify the petitioner's existing commitment order by authorizing supervised release.

Statement of the Case

The Respondent-Appellant, Thornon F. Talley, was committed in 2005 as a sexually violent person under Chapter 980, in Dane County Circuit Court Case 2004CI1. R61.[1] He initiated an appeal from that commitment but dismissed the appeal. R68, 78. *See In re commitment of Talley*, 2005AP869.

Prior to the petition for discharge on which the instant appeal turns, Mr. Talley petitioned for discharge in 2005 and 2006, but ended up withdrawing those petitions in 2006. R100. He filed another petition in 2008, which petition was denied after a trial to the court on August 12, 2008. R127. He filed another petition for discharge on September 2, 2008, which was

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[1]R61 refers to document #61 per the enumeration of the record by the circuit court clerk. Documents numbered lower than 200 were in the record for *In re commitment of Talley*, 2011AP1287-NM, and have been returned to the circuit court. Documents with numbers between 201 and 278 are filed with the Court of Appeals under record number 2012AP492. The undersigned has moved to supplement the record in the case at bar with documents #1-277. *See* Appellant's Motion to Supplement Record filed October 15, 2013. *In re commitment of Talley*, 2013AP950. The Court of Appeals denied Mr. Talley's motion to consolidate the instant appeal with 2012AP492 on May 16, 2013.

denied without a hearing on October 14, 2008. R132, 137. Mr. Talley filed a petition for discharge on December 18, 2008, which was denied after a court trial on May 11, 2009. R142, 166. His attorney filed a no merit appeal. R168, 187. *See In re commitment of Talley*, 2010AP185-NM. The Court of Appeals accepted Attorney Patrick Donnelly's no merit report, and summarily affirmed the judgment of the circuit court on December 8, 2010. R187.

On October 12, 2010, Attorney Reed Cornia filed a petition for discharge for Mr. Talley, which was denied without a hearing on January 11, 2011. R183, 190. Mr. Talley appealed. R199, 265. *See In re commitment of Talley*, 2011AP1287-NM. On February 20, 2013, the Court of Appeals accepted Attorney Jeffren Olsen's no merit report, and summarily affirmed the judgment of the circuit court. *Id.*

Mr. Talley again petitioned for discharge on June 30, 2011, which led to a 2012 jury trial. R205. *See In re commitment of Talley*, No. 2013AP492 (briefing currently on hold pending decision of Wisconsin Supreme Court in *In re commitment of Mary F.-R.,* 2012AP958.

On July 12, 2012, Mr. Talley filed the instant petition for

discharge *pro se*, which petition he supported with a report by Dr. Richard Elwood. R242,[2] 244; App. 7,14. Dr. Elwood's report, dated July 23, 2011, offered the opinion, *inter alia*, that Mr. Talley had made "recent progress" to reduce his risk in the area of social and emotional functioning is a new and crucial piece of information. R242:5; App. 18. The report also noted that Mr. Talley's behavior in the institution had changed in that his recent misconduct reports consisted of five "failure to follow directions" and four "disruptive conducts." Unlike Dr. Elwood's previous report, there was no allegation in the 2012 report that Mr. Talley had been acting out sexually since the date of the last evaluation.

The previous report that Dr. Elwood had filed, dated June 23, 2011, prior to the jury trial which 2013AP492 addresses, had opined that at that time Mr. Talley had *not* made progress in the area of social and emotional functioning. R203:5; App. 26.

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[2]The undersigned attorney notes that this report is sealed, according to the circuit court clerk's index. The 2011 report by Dr. Elwood, on the other hand, is not noted in the indexing as being sealed. *See* R203. Trial counsel attached a copy of both reports to his reply to the State's memorandum opposing the instant petition. R247:8-24; App. 14-29.

The 2011 report also stated that Mr. Talley had received a behavior disposition report for sexual contact on May 16, 2011. Id.

It is noted that at the 2011 trial, Dr. Elwood had testified that Mr. Talley tended to isolate himself at Sand Ridge Secure Treatment Center:

> Mr. Talley tends to isolate. He didn't isolate at [the Wisconsin Resource Center]. He seems to socialize or correspond with members of his family. But it's not clear that he's reduced his risk on that factor either.

R272:45; App. 45.

The State filed a memorandum opposing Mr. Talley's 2012 petition on July 26, 2012. R246. The State argued that Dr. Elwood's finding that Mr. Talley was not a sexually violent person was the same finding he had made before. Id.

Mr. Talley replied on August 1, 2012, though appointed counsel Anthony Rios. R247. Attorney Rios argued in his reply that Dr. Elwood had pointed to Mr. Talley's improvement in the social and emotional functioning area, and also, significantly, that at the 2011 trial, the State had called a witness from Sand Ridge Secure Treatment Center to

> describe every single instance of Mr. Talley exposing, rubbing, or masturbating himself in the open and making inappropriate sexual remarks from January 26, 2009 to October 11, 2011. [R276: 66-77]. According to [this witness, Lloyd] Sinclair, "[t]he fact that we continue to see sexual misbehavior alarms for us [sic]." [R276:80]. Arguably a significant moment in the trial occurred when, a couple of minutes later, Mr. Sinclair explained "[s]o our concern is that since Mr. Talley continues to engage in these behaviors that it may foreshadow behaviors that he could engage in if he were released to reside in the community." [Id.]. The fact that Mr. Talley has ceased to exhibit these types of behaviors is certainly new information that a court or jury could consider to conclude that he is no longer a sexually violent person.

R247:5; App. 50.

Judge O'Brien accepted the State's argument and entered an order on August 22, 2012, denying the petition without a hearing. R248, App. 4. In that order, she stated, "The conclusions reached by Dr. Elwood in his latest report are the same as in his two previous reports." R248:2, App. 5. She went on to find,

> In regard to the fact that Mr. Talley is engaging in more social behavior, Dr. Elwood comments "I concluded that Mr. Talley has made recent progress to reduce his risk on this factor." However when summarizing the entire section

> on Dynamic Risk Factors, Dr. Elwood says "The dynamic factors do not alter the low risk of Mr. Talley committing sexually violent acts."[3] Report, p. 6.

Id.

Mr. Talley filed a notice of appeal on April 22, 2013. R279; App. 1.

Argument

I. The Circuit Court Erred as a Matter of Law in Denying Mr. Talley an Evidentiary Hearing on his Petition for Discharge.

A. Mr. Talley's petition met the requirements of § 980.09(2) because it contains new facts from which a factfinder might conclude that Mr. Talley does not meet the criteria for commitment and these facts demonstrate that Mr. Talley's condition has changed since his initial commitment.

1. Specifically, Dr. Elwood's opinion that Mr. Talley had made "recent progress" to reduce his risk in the important area of "social and emotional functioning" is a new and crucial piece of information

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[3]Dr. Elwood had stated in his previous reports that he did not believe that Mr. Talley fit the definition of "sexually violent person," even without considering the dynamic factors. R203,210. (footnote not in Judge O'Brien's order).

Wisconsin Stat. § 980.09 controls the procedure circuit courts must follow in deciding petitions for discharge for persons who have been previously committed under Chapter 980.

Before holding an evidentiary hearing on the petition for discharge, the circuit court must engage in a "two-step process." *State v. Arends*, 2010 WI 46, ¶¶3-5, 325 Wis. 2d 1, 784 N.W.2d 513.

The first step is a paper review under § 980.09(1):

> [T]he circuit court engages in a paper review of the petition only, including its attachments, to determine whether it alleges facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person. This review is a limited one aimed at assessing the sufficiency of the allegations in the petition.

Arends, 2010 WI 46 at ¶4.

"If the petition does allege sufficient facts, the circuit court proceeds to a review under § 980.09(2)." *Id.* This "requires the circuit court to review specific items enumerated in that subsection." *Id.* at ¶5. This includes "all past and current reports filed under § 980.07." *Id.*

> The circuit court need not, however, seek out these items if they are not already within the record. Nevertheless, it may request additional enumerated items not previously submitted, and also has the discretion to conduct a hearing to aid in its determination. The circuit court's task is to determine whether the petition and the additional supporting materials before the court contain any facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person.

Id.

If the circuit court completes this process and finds that "the petition contains facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person," the court must hold a hearing at which "[t]he State has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." Wis. Stat. §980.09(2),(3).

A Chapter 980 committee is not entitled to such an evidentiary hearing unless she or he "has set forth new evidence, not considered by a prior trier of fact, from which a reasonable trier of fact could conclude that the petitioner does

not meet the criteria for commitment as a sexually violent person." *See State v. Schulpius,* 2012 WI App 134, ¶35, 345 Wis. 2d 351, 825 N.W.2d 311.

A petitioner must offer some new fact, new professional knowledge, or new research not considered by a prior trier of fact in order to entitled to a discharge hearing. *Id*. at ¶36.

It also follows that the circuit court may not deny a petition without a hearing if the petition alleges facts from which a fact-finder could determine that as a result of either changes in the person, or changes in professional knowledge or research, the petitioner does not meet the criteria for commitment as a sexually violent person. *State v. Ermers*, 2011 WI App 113, ¶1, 336 Wis.2d 451, 802 N.W.2d 540.

These issues present questions of law which appellate courts review *de novo,* although the Court of Appeals may be informed by the circuit court's reasoning. *See Arends*, 2010 WI 46 at ¶13.

Whether a doctor's report is sufficient to establish probable cause to believe that a Chapter 980 petitioner is no longer sexually violent requires a construction of Wis. Stat. §980.09(2). The Court of Appeals reviews this question *de*

novo. *See State v. Combs,* 2006 WI App 137, ¶ 21, 295 Wis.2d 457, 720 N.W.2d 684, *citing State v. Pocan,* 2003 WI App 233, ¶ 5, 267 Wis.2d 953, 671 N.W.2d 860.

The circuit court in the case at bar implicitly found that Mr. Talley's petition met the first step in the pre-trial screening process. R248; App. 1. Judge O'Brien went on to find that Mr. Talley was not entitled to an evidentiary hearing because "[t]he conclusions reached by Dr. Elwood in his latest report are the same as in his two previous reports." R248:2; App. 2.

In that Judge O'Brien referred to Dr. Elwood's previous reports, she was implicitly applying the analysis for step two of the screening process. This "requires the circuit court to review specific items enumerated in that subsection." *Arends* at ¶5. It is required that the circuit court review "all past and current reports filed under § 980.07." *Id.*

In this case, the circuit court clearly reviewed the last three reports by Dr. Elwood and portions of the 2011 trial testimony. Contrary to the circuit court's finding, Dr. Elwood's 2012 report contains a factual basis that was not considered at his commitment trial in 2011, that is, the recent progress in "social and emotional functioning." R242:5; App. 18. This

was a new fact from which a factfinder might conclude (a) that Mr. Talley did not meet the criteria for commitment and (b) that Mr. Talley's condition has changed since his initial commitment

The trial court erroneously found that "[t]he conclusions reached by Dr. Elwood in his latest report are the same as in his two previous reports." R248:2; App. 2. This is not so, particularly in the area of Dr. Elwood's findings concerning social and emotional functioning.

While the circuit court was technically correct that Dr. Elwood had been consistent in his ultimate conclusion in his past three reports, *i.e.*, the conclusion that Mr. Talley did not fit the definition of "sexually violent person," this does not support the conclusion that there was "no new conclusion." The circuit court was unreasonable in making the finding that the Dr. Elwood's conclusion concerning Mr. Talley's progress in social and emotional functioning could be ignored. Dr. Elwood's position was that Mr. Talley would not have been a sexually violent person even if he had not lowered his risk on this factor. R242:5; App. 18. The circuit court acted unreasonably because it was penalizing Dr. Elwood for being consistent on his main conclusion, that is, his opinion that Mr. Talley was not a

sexually violent person. Had Dr. Elwood previously held that Mr. Talley was a sexually violent person in 2011, but changed his opinion in 2012, there would be no question but that Mr. Talley should get a trial. Just because Dr. Elwood's ultimate opinion remained "not a sexually violent person, does that invalidate the opinion?

Intellectual consistency is not necessarily a bad thing. It is well-known that Francois Englebert and Peter Higgs developed the theory of the Higgs boson years before the existence of the Higgs boson was proved. Does that mean that the opinion of Drs. Englebert and Higgs about the Higgs boson is invalid because they did not change their belief about the existence of the Higgs boson after it was proved to exist? To ask the question another way, should we believe only the opinion of those skeptics who denied the existence of the Higgs boson prior 2013? *See*, *e.g.,* news.nationalgeographic.com/news /2013/13/130315-higgs-boson-lhc-particle-physics-science (viewed October 15, 2013). Under the logic of the circuit court's decision in this matter, only those scientists who had previously denied the existence of the Higgs boson, and who subsequently changed their ultimate opinion, deciding finally

that there was a Higgs boson, would have the right to cite the new evidence of existence of the Higgs boson as proof of the theory of Drs. Englebert and Higgs.

A circuit court can deny a discharge petition based upon a new expert opinion if the expert simply disagrees with the diagnoses or conclusions that led to the original commitment, but the court must grant a hearing if the petition alleges any change in either the person herself or himself, or in the professional knowledge or research used to evaluate a person's mental disorder or dangerousness, from which a fact finder could determine that the person does not meet the current criteria for commitment. *Ermers*, 2011 WI App 113 at ¶31. A report favorable to a petitioner may be insufficient if it is "based *solely* on evidence that had already formed the basis for the denial of a previous discharge petition." *See Arends*, 2010 WI 46 at ¶39 n. 21. (emphasis added). Dr. Elwood's July 3, 2012 report was not based solely on evidence that had already formed the basis for the denial of a previous discharge petition. The trier of fact in 2012 had not heard about Mr. Talley's "*recent* progress to reduce his risk" in the "Social & Emotional Functioning" area of Dynamic Risk Factors, or about the

changes in the types of conduct for which Mr. Talley was receiving disciplinary reports. R242:5; App. 18. Mr. Talley's behavior in the institution had changed.

These changes were significant differences that entitled Mr. Talley to a trial. These factors constitute allegations of a "change in ... the person himself," and therefore the circuit court should have granted an evidentiary hearing on the petition.

II. In the Alternative, the Court of Appeals Should Remand Because the Circuit Court's Order Does Not Reflect That the Circuit Court Considered All Current and Past Reports.

In the event that the Court of Appeals declines to reverse the circuit court's order denying Mr. Talley's petition for discharge without an evidentiary hearing, the Court should remand this case to the circuit court in order for the circuit court to consider all the items it must consider under Wis. Stat. §980.09(2). The circuit court's written order reflects that it considered only three reports filed by Dr. Elwood. "The court, therefore, did not consider all current or past reports filed under § 980.07 as required by § 980.09(2)." *Arends*, 2010 WI 46 at ¶45. The Wisconsin Supreme Court interprets this language to

mean that the circuit court must review "*all* past *and* current reports filed under § 980.07." *Arends*, 2010 WI 46 at ¶45 (emphasis added). Although the circuit court reviewed one current report and two past reports by Dr. Elwood, the court's order does not reflect that the judge reviewed "*all* past *and* current reports filed under § 980.07." *Id.*

As the supreme court did in *Arends,* the Court of Appeals should remand this case:

> On remand, the circuit court must consider all the items enumerated in § 980.09(2), including all the § 980.07 reports (Re-examination Reports and Treatment Progress Reports) that have been filed since the beginning of Arends' commitment. The court may order additional enumerated items to be produced, and may hold a hearing to aid its determination.

Id. at ¶49.

It would be preferable that the Court of Appeals order a remand for trial on Mr. Talley's petition for discharge, but if the Court of Appeals does not do so, then the Court should order a remand for the circuit court to conduct the complete review required by Wis. Stat. §980.09(2).

Conclusion

For the reasons stated above, the Court of Appeals should reverse the order denying Mr. Talley's petition for discharge without an evidentiary hearing, and remand this case to the circuit court for trial. In the alternative, the Court should remand the circuit court to conduct a review under § 980.09(2).

Respectfully submitted this 16th day of October, 2013.

/s/David R. Karpe

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David R. Karpe
Wisconsin Bar No. 1005501
448 West Washington Avenue
Madison, Wisconsin 53703
Tel. (608) 255-2773

ATTORNEY FOR RESPONDENT-APPELLANT

SECTION 809.19 (2) CERTIFICATE

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed,

/s/David R. Karpe

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David R. Karpe

SECTION 809.19(8) CERTIFICATE

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,273 words.

Signed,

/s/David R. Karpe

_____

David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,

/s/David R. Karpe

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David R. Karpe