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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP950

IN RE THE COMMITMENT OF THORNON F. TALLEY

STATE OF WISCONSIN,

Petitioner-Respondent,

vs.

THORNON F. TALLEY,

Respondent-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING A CIRCUIT COURT ORDER DENYING DISCHARGE FROM A CHAPTER 980 COMMITMENT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, HONORABLE SARAH B. O'BRIEN, PRESIDING

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT-PETITIONER

DAVID R. KARPE
State Bar No. 01005501
448 W. Washington Avenue
Madison, Wisconsin 53703
(608) 255-2773

ATTORNEY FOR RESPONDENT-APPELLANT-PETITIONER

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BRIEF OF RESPONDENT-APPELLANT-PETITIONER

ISSUES PRESENTED

1. Was the Petitioner entitled to an evidentiary hearing on his petition for discharge from Chapter 980 commitment where the examining Sand Ridge psychologist reported improvement in an important area of functioning?

What the circuit court found: The circuit court found that the petition did not meet the requirements of § 980.09(2) (2011-2012), and so denied Mr. Talley a hearing.

What the court of appeals held: The court of appeals held that the petition presented no significant change from the facts in a previous petition.

Why the Wisconsin Supreme Court should reverse: The Court should reverse the court of appeals because Mr. Talley's behavior changes warranted letting him have his day in court.

2. Should this case be remanded to the circuit court for a review that meets the requirements of § 980.09(2) (2011-2012) namely, that the circuit court review all previous evaluations of a Chapter 980 Respondent?

What the circuit court found: The circuit court implicitly found that the requirements of a Wis. Stat. § 980.09(2) review

were met by the court's comparison of just three evaluations done by a single evaluator.

What the court of appeals held: Rather than order a remand, the court of appeals chose to conduct its own *de novo* review of the record, without explicitly stating what the court reviewed or how the expanded review affected the outcome.

Why the Wisconsin Supreme Court should reverse: The Court should determine that the record is sufficient so that Mr. Talley should get a discharge trial, but, in the alternative, the Court could use its discretion to remand this case to the circuit court for a review of record that would comply with Wis. Stat. § 980.09(2) (2011-2012). *See In re Commitment of Arends*, 2010 WI 46, ¶¶ 6, 48, 325 Wis. 2d 1, 784 N.W.2d 513.

Position on Oral Argument And Publication

The Court's granting review implies that this case merits both oral argument and publication.

Relevant Statutory Sections

Wisconsin Stat. § 980.01(7) (2011-2012):

> "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 (2011-2012)

> **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.

Wisconsin Stat. § 980.09(2) (2013-2014) (as amended by 2013 Wis. Act 84 §§ 21, 23(with changes to previous version noted, stricken language marked, and new language italicized):

(2) *In reviewing the petition t*he court ~~shall review the~~

~~petition within 30 days and~~ may hold a hearing to determine if *the person's condition has sufficiently changed such that* ~~it contains facts from which the~~ *a* court or jury ~~may~~ *would likely* conclude ~~that~~ the person ~~does not~~ *no longer* meet*s* the criteria for commitment as a sexually violent person. In determining under this subsection whether ~~facts exist that might warrant such a conclusion,~~ *the person's condition has sufficiently changed such that a court or jury would likely conclude that the person no longer meets the criteria for commitment as a sexually violent person,* the court ~~shall~~ *may* consider *the record including evidence introduced at the initial commitment trial or the most trial on a petition for discharge,* 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~~ *record* does not contain facts from which a court or jury ~~may~~ *would likely* conclude that the person ~~does not~~ *no longer* meet*s* the criteria for commitment, the court shall deny the petition. If the court determines that *the record contains facts* from which a court or jury *would likely* conclude *that* the person *no longer meets* the criteria for commitment, the court shall set the matter for *trial***.**

Statement of the Case

This is a review of a direct appeal of a circuit court's denial without trial of a petition for discharge from a Chapter 980 commitment.

Statement of Facts

The Respondent-Appellant-Petitioner, 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 filing the petition for discharge that is the subject of the instant appeal, Mr. Talley petitioned for discharge several times: he petitioned in 2005 and 2006, but withdrew both those petitions in 2006. R100. He filed another petition in 2008, which petition was denied after a trial to the

[1]R61 refers to document #61 in the clerk's index. In this brief, when I want to designate a particular page of a document in the record, I will use a colon. Thus, for example, R61:2 would indicate the second page in the sixty-first document. R61:2, R62:1 would indicate the second page in document #61 and the first page in document #62.

court on August 12, 2008. R127. He filed another petition for discharge on September 2, 2008, which was denied without a hearing on October 14, 2008. R132, 137. Mr. Talley then filed a petition for discharge on December 18, 2008, which was denied after a court trial on May 11, 2009. R142, 166. That order was appealed, but his attorney filed a no merit appeal. R168, 187. *See In re commitment of Talley*, 2010AP185-NM. The court of appeals accepted the appellate attorney's no merit report, and summarily affirmed the judgment of the circuit court on December 8, 2010. R187.

On October 12, 2010, Mr. Talley filed a petition for discharge, 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 the appellate attorney'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*, 2015 WI App 4, 359 Wis.2d 522, 859 N.W.2d 155, *petition for review denied* (*see* table at 2015 WI

24, ___ Wis.2d ___, 862 N.W.2d 602). In that appeal, the court of appeals held that it did not violate principles of due process to continue the commitment upon "clear and convincing evidence" (rather an evidence beyond a reasonable doubt) that Mr. Talley remained a sexually violent person *Talley*, 2015 WI App 4 at ¶¶ 2, 18-35.

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, a psychologist employed as an evaluator at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin R242, 244; App. 7,14. As a new and crucial piece of information, Dr. Elwood's report, dated July 3, 2012, offered the opinion, *inter alia*, that Mr. Talley had made "recent progress" to reduce his risk in the area of social and emotional functioning. 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." R203, R242.

The previous report that Dr. Elwood had filed, dated June 23, 2011, had opined that at that time Mr. Talley had *not* made progress in the area of social and emotional functioning.

R203:5; App. 26.

At the 2012 trial (on the earlier petition), 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 report did not merit a trial because Dr. Elwood's conclusion that Mr. Talley was not a sexually violent person was the same conclusion he had made in his 2011 report. Id.

The circuit court judge 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."[2 R242:6]

Id.

Mr. Talley appealed the circuit court's decision. On October 19, 2015, the court of appeals filed a summary decision affirming the circuit court. *In re commitment of Talley*, 2013AP950 (unpublished slip op.). In that opinion, the court of appeals held that "Talley's self-reporting that he has begun socializing with more peers and joined the fitness group, and that he continues to correspond with some unknown number of family members, does not constitute a significant change from the facts that the jury rejected in the 2011 petition." *Id.* at 3-4.

The court of appeals also rejected Mr. Talley's argument that his institutional conduct had undergone a significant transformation in that he was no longer offending sexually:

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[2]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).

"We reject Talley's argument that the absence of sexual misconduct in the 2012 report constitutes a significant change." *Id.* at 3. With regard to Mr. Talley's complaint that the circuit court had not complied with the requirement to review all past reports, the court of appeals also stated in a footnote, "This court has access to the entire record and we conclude that, as a matter of law, Talley's petition and supporting report do not raise sufficient facts to distinguish his present condition from the condition described in the 2011 petition." *Id.* at 2 n. 3.

Mr. Talley filed a timely petition for review on November 18, 2015. The State responded with a letter filed December 1, 2015, indicating opposition to the petition for review and denying that the petition presented any reasons to grant review that satisfied Wis. Stat. § (Rule) 809.62(1r). This Honorable Court entered an order on March 7, 2016, that the State file a formal response to Mr. Talley's petition addressing, "*inter alia*, whether there is legal authority for requiring that a new historical fact in a discharge petition or in a supporting expert report qualify as a 'significant change' from the facts considered at a prior commitment hearing or discharge hearing." *In re Commitment of Talley,* 2013AP950

(unpublished order March 7, 2016). The State filed a response on March 21, 2016, asserting that *In re Commitment of Arends*, 2010 WI 46, ¶¶ 30, 39 n. 21, 325 Wis. 2d 1, 784 N.W.2d 513, provided such authority. On June 15, 2016, this Honorable Court entered an order granting the petition for review.

ARGUMENT

I. Mr. Talley Was Entitled to a Trial on His 2012 Petition for Discharge.

At the time of these circuit court proceedings, Wis. Stat. § 980.09 (2011-2012) controlled the procedure circuit courts must follow in deciding petitions for discharge for persons previously committed under Chapter 980.[3]

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[3]The statute has been amended. *See* 2013 Wis. Act 84 §§21-25 (published December 13, 2013). The former version of § 980.09 was in effect at the time of the petition and at the time of the proceedings in the circuit court leading to the order being appealed, at the time the notice of appeal was filed, and at the time that Mr. Talley filed his initial brief in the court of appeals. On November 7, 2013, the State filed a motion to stay the briefing schedule pending a decision in a prior appeal, *In re Commitment of Talley*, 2013AP492, which the court of appeals granted. Mr. Talley objected, requesting the court to re-

The interpretation and application of a statute is a question of law that the Court reviews *de novo,* while nonetheless benefitting from the analysis of the lower courts. *In re Commitment of Arends,* 2010 WI 46, ¶ 13, 325 Wis. 2d 1, 784 N.W.2d 513.

> We conclude that § 980.09 requires the circuit court to follow a two-step process in determining whether to hold a discharge hearing.
>
> Under § 980.09(1), the 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. If the petition does allege sufficient facts, the circuit court proceeds to a review under § 980.09(2).
>
> Wisconsin Stat. § 980.09(2) requires the circuit court to review specific items enumerated in that subsection, including all past and current reports filed under § 980.07. 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

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consider the stay on November 25, 2013, but the court of appeals denied that request on November 27, 2013. The State filed its response brief on March 25, 2015.

> 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. at ¶ 3-5 (footnote omitted).

Arends does *not* require that a new historical fact in a discharge petition or in a supporting expert report qualify as a "significant change" from the facts considered at a prior commitment hearing or discharge hearing. *Id.* at ¶¶ 30, 39 n. 21.

In *Arends,* the Court rejected

> the State's argument that the circuit court may weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner. This is impermissible because the standard is not whether the evidence more heavily favors the petitioner, but whether the enumerated items contain facts that would allow a factfinder to grant relief for the petitioner. If the enumerated items do contain such facts, the presence of evidence unfavorable to the petitioner — a re-examination report reaching a conclusion that the petitioner was still more likely than not to sexually reoffend, for example — does not negate the favorable facts upon which a trier of fact might reasonably rely.
>
> We also reject the notion that the burden shifts to

> the petitioner to prove he or she "no longer meets" the criteria for commitment. The statute focuses on whether a trier of fact could conclude that the petitioner "does not meet the criteria for commitment." The petitioner does not need to prove a change in status in order to be entitled to a discharge hearing; the petitioner need only provide evidence that he or she does not meet the requirements for commitment.

Id. at ¶¶ 40-41.

Here, what occurred in the circuit court violated this principle because the circuit court weighed evidence favoring the petitioner directly against evidence disfavoring the petitioner. The circuit court reasoned that Dr. Elwood's basic conclusion had not changed, that is, Dr. Elwood did not find that Mr. Talley had re-become a sexually violent person since the 2011 assessment. R248. That is why Dr. Elwood found, "The dynamic factors [*e.g.*, the positive changes in social and emotional functioning] do not alter the low risk of Mr. Talley committing sexually violent acts." The risk of new sexually violent crimes was too low to make the charts, with or without the dynamic factors. Dr. Elwood stated in the same report, "I concluded that Mr. Talley has made recent progress to reduce his risk on this factor." R242:5. Certainly, at trial, the State could

challenge what the State thinks is a contradiction between these statements, and give Dr. Elwood the opportunity to explain the meaning of the statements, which are under separate headings in his report. It was not the task of the circuit court to determine prior to trial, and without a hearing, that these were conflicting statements that invalidated the conclusion that Mr. Talley had made progress.

As discussed above, under *Arends*, a petitioner for discharge does not need to prove a change in status. *Id.* at ¶ 41. Here, the circuit court unfairly required Mr. Talley to do so, which was particularly unfair because the "lack of change" was based on Dr. Elwood's maintaining his previous finding that Mr. Talley was not a sexually violent person.

However, even if the Court should find that it was incumbent on Mr. Talley to show significant change, he submits that the changes in behavior that are noted in the record constitute such a significant change.

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 early 2012, 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 a finding that there was "no new conclusion," when in fact the more recent observations appear to have permitted Dr. Elwood to re-affirm his view that Mr. Talley was not a sexually violent person.

On appeal, Mr. Talley argued that the circuit court was unreasonable in finding that Dr. Elwood's conclusion concerning Mr. Talley's progress in social and emotional functioning could be ignored. The circuit court found it significant that Dr. Elwood held the position 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. Mr. Talley argued on appeal that the circuit court acted unreasonably by 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 a person's ultimate opinion remains unchanged in the face of new data does not invalidate either the opinion or the data.

The court of appeals did not rely on the circuit court's logic that there had been no change because Dr. Elwood's ultimate conclusion was unchanged. Rather, the analysis of the court of appeals differed in that the court of appeals instead rejected the argument that Mr. Talley made recent progress to reduce his risk based on a change to his social and emotional functioning: the court of appeals held that Talley's claim of progress was "self-reporting" that did not constitute "a significant change from the facts that the jury rejected in the 2011 petition." *In re the Commitment of Talley*, 2014AP950,

slip op. 3-4. The court of appeals considered the information that Mr. Talley had begun socializing with more peers, joined a fitness group, and engaged in correspondence with family members, taken together as a whole did not constitute a significant change. *Id.* at 3-4.

> Talley relies substantially on Dr. Elwood's statement that Talley "made recent progress to reduce his risk" based on a change to his social and emotional functioning. In the 2011 report, Dr. Elwood noted: "Mr. Talley told me he tends to isolate at [Wisconsin Resource Center] but socializes with two friends and regularly corresponds with his family ...." In the 2012 report, Dr. Elwood reported: "Mr. Talley told me he tends to isolate at [Sand Ridge Secure Treatment Center] but has begun to socialize more with peers in his treatment group and joined a fitness group .... He has not had a family member visit him in the last three years ... but he said his [sic] more members of his family have recently began communicating with him ...." Although Dr. Elwood described these changes as "progress to reduce his risk on this factor," we conclude that Talley's self-reporting that he has begun socializing with more peers and joined the fitness group, and that he continues to correspond with some unknown number of family members, does not constitute a significant change from the facts that the jury rejected in the 2011 petition.

Id.

Is this information any less significant because it is something Mr. Talley told Dr. Elwood? No, first, because the fact that Mr. Talley is talking about this kind of interaction itself shows that he is "getting better." Second, "self-reporting" is not necessarily suspect. Social science depends in part on self-reporting, and in the area of emotional abilities and social functioning, self-reporting is crucial. *See, e.g.*, Marc Beckett, Susan Rivers & Susan Shiffman, " Relating Emotional Abilities to Social Functioning: A Comparison of Self-Report and Performance Measures of Emotional Intelligence," 91 Journal of Personality and Social Psychology 4 (2006) at 780. Beckett *et al.* relate that social scientists have two primary approaches to measuring "emotional intelligence," performance-based tests and self-report inventories. Their conclusion seems to be that although performance-based tests are stronger, depending on the metrics used, particularly for female subjects, self-report inventories have some value.

Does the fact that Dr. Elwood did not check collateral sources make this information inherently unreliable? No. As a Sand Ridge evaluator, he cannot personally observe the conduct of every detainee. The changes Mr. Talley was going through

might be reflected in other documentation.[4]

The fact that Mr. Talley is increasing what may be seem as more positive social interactions might not sound like a big deal to some, but for an institutionalized person, these steps are highly significant. And the Court ought not to belittle the significance of social/emotional functioning in the treatment of sex offenders. It has long been discussed about sex offenders in general and rapists in particular that deficits in their social skills are part of their make-up and contribute to their tendencies to obtain sex by force rather than by more social means. *See, e.g.,* Lana Stermac & Vernon Quinsey, "Social Competence Among Rapists," 8 Behavioral Assessment 171 (1986). Social and emotional functioning relate to traits and abilities involving positive and negative aspects of social and emotional life such as empathy for others, interpreting emotions, the speed and intensity of emotion generation, and the efficacy of dealing with

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[4]On August 11, 2016, I examined the appellate record in the clerk's office, but I was unable to locate any copy of a Treatment Progress Report from Sand Ridge Secure Treatment Center later than June 1, 2011. There may be one sealed along with Dr. Elwood's 2013 report, but I did not have time to seek to have the envelope unsealed.

negative emotions. If these areas are not significant in the progress of sex offenders, then we are wasting a lot of taxpayer money by treating them.

The court of appeals and the circuit court both overstepped their bounds by finding that Mr. Talley's discussions with Dr. Elwood did not raise a question sufficient to require a trial on Mr. Talley's discharge petition.

A jury, of course, does not need to accept an expert's declaration of a change at face value. Chapter 980 juries are typically instructed, "Opinion evidence was received to help you reach a conclusion. However, you are not bound by any expert's opinion." *See* R277:15, Wis. J.I. — Crim. 200, 2500 (2016).

The level of change need not be as significant as both the circuit court and the court of appeals would have it. If the information Mr. Talley presented to the circuit court was true, then he was entitled to a hearing on his petition. The courts ought not to abuse their gate-keeper function by deriding an area of functioning that a qualified expert deems significant.

Under the former statute, Mr. Talley satisfied the level of showing a detainee needed to make at the time that Mr. Talley made it. For a new petition, the level to show is higher, but even

under the higher standard, he would have been entitled to a trial.

The court of appeals has held that a circuit court can deny a discharge petition based on a new expert opinion if the expert simply disagrees with the diagnoses or conclusions that led to the original commitment, but a court must grant a hearing if the petition alleges any change in either the person, or in the professional knowledge or research used to evaluate a person's mental disorder or dangerousness, from which fact-finder could determine that the person does not meet the current criteria for commitment. *See State v. Ermers*, 2011 WI App 113, ¶ 31, 336 Wis.2d 451, 802 N.W.2d 540. 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 jury in January, 2012, had not heard about Mr. Talley's "recent progress to reduce his risk" in the "Social & Emotional Functioning" area of Dynamic Risk Factors, because Mr. Talley had undertaken these changes after that trial. R242:5; App. 18.

These changes were significant differences that weighed in favor of Mr. Talley's discharge. These factors constitute allegations of a "change in ... the person himself." The circuit court should have granted an evidentiary hearing on the petition.

II. The Record as a Whole Demonstrates That Mr. Talley Had Undergone Changes Sufficient to Merit a Discharge Trial.

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.* Wisconsin Stat. § 980.09 (2011-2012) required the circuit court, *inter alia*,

to consider any current or past reports filed under Wis. Stat.§980.07. 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.*[5]

> 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

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[5]Wisconsin Stat. § 980.09(2)(2011-2012), reads, "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."

The amended version reads, "The court *may* consider the record including evidence introduced at the initial commitment trial or the most trial on a petition for discharge, 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." (emphasis added).

Mr. Talley notes that the court of appeals certified four issues in *In re Commitment of Hager*, 2015AP330, and *In re Commitment of Carter*, 2015AP1311, both cases turning on the interpretation of the new version of Wis. Stat. § 980.09(2). The Court denied the Certification on February 2, 2016. The court of appeals held oral argument on *Hager* and *Carter* on August 3, 2016.

> 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.

Whether the review of the record by the lower courts satisfied Wis. Stat. § 980.09(2) (2011-2012), appears to be a question of statutory interpretation: in *Arends*, the Court noted,

> Some confusion arose at oral argument as to how the circuit court can fulfill its obligation to consider all these items when some of them may not be available or otherwise within the record before the court. The most reasonable reading of this statute is that the court must review all the items enumerated in § 980.09(2) that are in the record at the time of review. The circuit court need not, therefore, seek out evidence not currently before it. It may, however, order the production of any of the enumerated items not in the record, but is not required to do so. The statute supports this interpretation in granting the court the discretion at this stage to hold a separate hearing, distinct from and prior to any discharge hearing. Thus, review under § 980.09(2) is of the specific items listed in the statute, if available or so requested by the court.

Id. at ¶ 33.

The Court went on to state regarding this problem,

> To conclude, Wis. Stat. § 980.09(2) establishes a limited review of the sufficiency of the evidence. The court is required to review the items specifically enumerated if available, and may order those items to be produced and/or conduct a hearing at its discretion. The circuit court must determine whether the enumerated items 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. If any facts support a finding in favor of the petitioner, the court must order a discharge hearing on the petition; if no such facts exist, the court must deny the petition.

Id. at ¶ 43.

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 (or trial) 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).

The court of appeals has held that a Chapter 980 detainee

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 may be informed by the lower courts' reasoning. *See Arends*, 2010 WI 46 at ¶13.

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. 4. The judge 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 the judge 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. "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 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).

As the Court did in *Arends,* the Court could 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 order a trial on Mr. Talley's petition for discharge, but if the Court 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).

Lastly, if the Court is concerned (as the court of appeals was) about the allegedly "self-reported" nature of Mr. Talley's increase in institutional social activities, the Court can order a remand so the circuit court may compare other institutional records with Dr. Elwood's account of the Mr. Talley's self-reporting. *See* supra at 22, n. 4. A fuller review of the reports of institutional observations of Mr. Talley's activities may either corroborate or contradict the reports of Mr. Talley's improved functioning in social and emotional areas.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the Wisconsin Court of Appeals, or, in the alternative, the Court should exercise its discretion to remand this matter for a circuit court review of the record that would comply with the requirements of Wis. Stat. § 980.09(2) (2011-2012).

Respectfully submitted this 11th day of August, 2016.

/s/David R. Karpe

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David R. Karpe
State Bar No. 01005501
448 West Washington Avenue
Madison, Wisconsin 53703
(608) 255-2773

ATTORNEY FOR RESPONDENT-APPELLANT-PETITIONER

SECTION 809.19 (2) CERTIFICATE

I hereby certify that filed with this brief, 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 7,002 words.

Signed,
/s/David R. Karpe

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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