STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP950

IN RE THE COMMITMENT OF THORNON F. TALLEY

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

THORNON F. TALLEY,

Respondent-Appellant-Petitioner.

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

BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court err when it held that Talley's 2012 discharge petition was not sufficient to merit a discharge trial under Wis. Stat. § 980.09?

The trial court denied Talley's 2012 discharge petition without an evidentiary hearing, as required by Wis. Stat. § 980.09(1), because the 2012 petition relied on essentially the same facts and professional knowledge as did his unsuccessful 2011 petition.

The court of appeals summarily affirmed on de novo review. It agreed that Talley's 2012 discharge petition revealed no significant change in his condition from the unsuccessful 2011 petition.

2. Should this Court remand for an evidentiary hearing under Wis. Stat. § 980.09(2)?

The trial court denied the petition as insufficient to require a hearing under Wis. Stat. § 980.09(1).

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State assumes that in granting review this Court has deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE

Thornon F. Talley was committed as a "sexually violent person" pursuant to Wis. Stat. § 980.06 January 3, 2005. (61.)[1] Talley filed a petition for discharge pursuant to

[1] This is a citation to a document in the appeal record for Appeal No. 2013AP492, which has been incorporated into the appeal

Wis. Stat. § 980.09 on October 12, 2010. (183.) Talley alleged in his petition that an annual evaluation prepared by Dr. Richard Elwood pursuant to Wis. Stat. § 980.07 supported his position that he was no longer a "sexually violent person" and was thereby entitled to discharge. The Dane County Circuit Court, the Honorable Sarah B. O'Brien, presiding, denied the discharge petition without a hearing. (190.)

Appointed counsel for Talley filed a "no-merit" brief on appeal and the court of appeals summarily affirmed. *In re the Commitment of Thornon F. Talley*, No. 2011AP1287-NM (Wis. Ct. App. Feb. 20, 2013). (R-App. 101-05.) The court agreed with Judge O'Brien that Dr. Elwood's opinion that Talley posed a high risk to commit another sex act, but not a high risk to commit another act of sexual violence, was similar to an opinion from another doctor presented at a hearing on Talley's 2009 discharge petition, which Judge O'Brien "had not found persuasive." (R-App. 104.) The court

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record for this case, as has the appeal record for Appeal No. 2011AP1287-NM. In an order issued May 16, 2013, the court of appeals denied Talley's motion to consolidate this appeal with Appeal No. 2013AP492. In an order issued November 22, 2013, the court of appeals denied Talley's motion to "supplement" the record in this appeal with the record in Appeal Nos. 2013AP492 and 2011AP1287-NM. Although the court denied that motion, it acknowledged that "the record materials are sequentially numbered as if they were one record." (R-App. 107.) The court held that it was "not necessary" to supplement this record with the records in those other two appeals, "because our clerk has already retained the record from 2011AP1287 for 2013AP492." The court then ordered that the clerk of the court of appeals "shall cross-reference and retain the records from 2011AP1287 and 2013AP492 until this appeal has been decided." (R-App. 107.) Because most of the documents cited in this brief are from the record in Appeal No. 2013AP492, all record citations will be to documents in Appeal No. 2013AP492 unless otherwise specifically indicated.

of appeals also agreed with Judge O'Brien that Dr. Elwood's conclusion about Talley's low risk of sexual violence was not "based upon new professional knowledge, but rather upon a professional disagreement with the expert opinions of a number of the other prior evaluators." (R-App. 104-05.) The court agreed that Elwood's analysis "did not provide any basis for a fact finder to conclude that there had been any change in Talley himself." (R-App. 105.) And, because Dr. Elwood's opinion about Talley's risk of sexual violence had already been addressed at a previous evidentiary hearing, "the court was not obligated to hold another hearing on those same issues." (R-App. 105.)

Talley filed a second discharge petition in Dane County Circuit Court on June 30, 2011, relying almost exclusively on yet another evaluation and report by Dr. Elwood on June 23, 2011. (203, Pet-App. 22-29; 205.)[2] This time, a jury trial was held on the petition on January 9 to 12, 2012, before Dane County Circuit Court Judge Sarah O'Brien. The jury found that Talley was still a "sexually violent person." (235; 277:47.) Based on that verdict, Judge O'Brien issued an order on April 23, 2012, denying the discharge petition and also concluding that Talley was not a proper candidate for supervised release. (238.)

Talley filed a Motion for Postcommitment Relief on December 10, 2012. (255.) Dane County Circuit Court Judge William Foust denied the motion in an order issued on February 15, 2013. (264.) Judge Foust rejected Talley's claim that the statutory "'clear and convincing evidence'" standard

[2] This is a citation to a document in the appendix to Talley's brief on this appeal. All citations to documents in his appendix will be in this form.

of proof at a trial on a petition for discharge is unconstitutional. (*Id.*)

Talley appealed. (266.) He argued that Wis. Stat. § 980.09(3) is unconstitutional on its face because it imposes the lower "clear and convincing evidence" standard of proof on the State at a discharge hearing rather than the "beyond a reasonable doubt" standard imposed on the State for initial commitment as a "sexually violent person." The State argued that Talley forfeited his constitutional challenge on appeal by not raising the issue before or at his discharge trial. The State argued in the alternative that the "clear and convincing evidence" standard of proof imposed on it at a discharge trial satisfies due process.

The court of appeals affirmed in a published decision issued on December 4, 2014. *In re the Commitment of Talley,* 2015 WI App 4, 359 Wis. 2d 522, 859 N.W.2d 155. It rejected the State's argument that Talley forfeited his right to raise a constitutional challenge to § 980.09(3). *Id.* ¶¶ 8-17. It agreed with the State on the merits, however, holding that the "clear and convincing evidence" standard of proof at a discharge trial does not violate due process. *Id.* ¶¶ 18-35. This Court denied Talley's petition for review on February 10, 2015.

Talley filed his third discharge petition pro se in Dane County Circuit Court on July 12, 2012. (244, Pet-App. 7.) That third petition is the subject of this appeal.[3] Talley's

[3] Talley filed yet another unsuccessful discharge petition in 2013, and has now appealed that order. That case, Appeal No. 2014AP1806, was stayed by the court of appeals pending the outcome of the now-concluded Appeal No. 2013AP492. In another order issued February 4, 2015, the court of appeals continued the

2012 petition relied entirely on a July 3, 2012 report prepared by Dr. Elwood, which practically mirrored Elwood's two preceding reports setting forth his diagnoses and findings regarding Talley's disorders and his potential for sexual violence if discharged. (*Compare* Pet-App. 14-21 *with* Pet-App. 22-29; R-App. 103-05.) Judge O'Brien denied this latest discharge petition without a hearing on August 22, 2012. (248, Pet-App. 4-6.) Judge O'Brien held: "The conclusions reached by Dr. Elwood in his latest report are the same as in his two previous reports" (Pet-App. 5); the new information offered by Talley did not present "significant factors reducing the risk of re-offense" (*id.*); and "[t]he opinions given in that report are the same opinions testified to at two prior discharge trials" (*id.* at 6). Talley appealed from that order on April 22, 2013. (279.)[4]

The court of appeals summarily affirmed in a per curiam opinion issued on October 19, 2015. (Pet-App. 1-4.) Applying the old statutory standard applicable when it reviewed Talley's petition in 2012, Wis. Stat. § 980.09(1) (2011-12), the court of appeals held that the trial court was required to deny the petition because it did not present any significant new information from which a court or jury "may conclude" that Talley's condition had changed since the trial court's order denying his 2011 discharge petition.[5]

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stay in Appeal No. 2014AP1806 pending the outcome of this appeal.

[4] This appeal was stayed after Talley filed his brief in the court of appeals pending resolution of Talley's petition for Wisconsin Supreme Court review in Case No. 2013AP492. The stay was lifted by the court of appeals February 24, 2015, after this Court denied review.

[5] The new standard is tougher for Talley. He must now convince the trial court on its "paper review" that his discharge petition

The court of appeals explained that Dr. Elwood's 2012 report "is nearly identical to Dr. Elwood's 2011 report." *State v. Talley,* No. 2013AP950 (Wis. Ct. App. Oct. 19, 2015.) (Pet-App. 2.) Regarding "'Dynamic Risk Factors,'" the court noted that Elwood's 2011 report referenced Talley's four behavior disposition reports in the preceding six months for "failure to follow the rules, disrespect and sexual contact, disruptive behavior and failure to follow staff directives," along with "six warnings for minor incidents." (Pet-App. 2-3.) Elwood's 2012 report referenced Talley's nine behavior disposition reports in the preceding twelve months, "five for failing to follow directions and four for disruptive conduct." (Pet-App. 3.)

The court rejected Talley's argument in his reply brief that "the absence of sexual misconduct in the 2012 report constitutes a significant change," especially given Dr. Elwood's conclusion that "'Talley has not reduced his risk on this factor.'" (*Id.*) The court chose to address this issue even though it scolded Talley for waiting until his reply brief to develop the argument. Despite Talley's improper argument,

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"alleges facts from which the court or jury *would likely conclude* the person's condition has changed . . . so that the person no longer meets the criteria for commitment as a sexually violent person." Wis. Stat. § 980.09(1) (2013-14) (emphasis added). This means "more likely than not." Wis. Stat. § 980.01(1m). The standard was changed from the relatively permissive "may conclude" to the stricter "would likely conclude" by 2013 Wis. Act 84, §§ 21-25, effective December 14, 2013. Under the old standard, this Court held that § 980.09 did not allow a court to "weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner." *In re the Commitment of Arends*, 2010 WI 46, ¶ 40, 325 Wis. 2d 1, 784 N.W.2d 513. In 2013, the Legislature abrogated that holding by amending the statutory language to "would likely conclude." *See* 2013 Wis. Act 84, §§ 21, 23.

the court chose to reach the merits because the argument "is meritless." (Pet-App. 3 n.4.)

The court next held to be insignificant Talley's purported social and emotional progress since the 2011 report, given that it was solely on, "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." (Pet-App. 3-4.)

Talley petitioned this Court for review. This Court issued an order directing the State to address the following issue: "[W]hether 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." (R-App. 108.) The State filed a response addressing that issue and opposing review. This Court granted review.

Additional relevant facts will be developed and discussed in the argument to follow.

ARGUMENT

I. The trial court properly denied Talley's 2012 discharge petition without an evidentiary hearing because it was deficient on its face. The petition presented no new information beyond what was presented in Talley's two previously rejected petitions as to whether he remained a sexually violent person.

A. The applicable law and standard for review.

This case involves the trial court's application of Wis. Stat. § 980.09 to the facts. The trial court's decision to deny a discharge petition without a trial is subject to independent review in this Court. *In re the Commitment of Ermers*, 2011

WI App 113, ¶ 15, 336 Wis. 2d 451, 802 N.W.2d 540 (citation omitted); *In re the Commitment of Arends,* 2010 WI 46, ¶ 13, 325 Wis. 2d 1, 784 N.W.2d 513.

Applicable to Talley's 2011 and 2012 petitions, Wis. Stat. § 980.09(1) (2011-12) provided that the trial court "shall deny" a discharge petition without an evidentiary 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 [no longer] meet[s] the criteria for commitment as a sexually violent person." *Arends*, 325 Wis. 2d 1, ¶ 23 (emphasis added). This is a "paper review" of the petition and any supporting documents filed along with it. *Id*. ¶ 25 (emphasis added).

> The statute further specifies that the petition must allege *facts*, not just legal conclusions. A petition which merely states "I am no longer a sexually violent person" without any supporting facts must fail. Conclusory allegations alone are not enough.

Id. (emphasis in original).

Even when the petition is supported by a report favorable to the petitioner, as here, it must still be summarily denied if it only repeats the same evidence presented in support of previously unsuccessful discharge petitions. *State v. Schulpius,* 2012 WI App 134, ¶¶ 29-35, 345 Wis. 2d 351, 825 N.W.2d 311.

An allegation that the petitioner'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," is deficient if not supported by new information pertinent to the issues

whether: (a) the person has changed; or (b) there has been a change in professional knowledge and research used to evaluate the person's disorder or dangerousness, if either change is such that the finder of fact could conclude the person is no longer sexually violent. *Ermers,* 336 Wis. 2d 451, ¶ 34. *See State v. Richard,* 2014 WI App 28, ¶ 1, 353 Wis. 2d 219, 844 N.W.2d 370 ("We conclude that when a petitioner alleges that he or she is no longer a sexually violent person, and supports his or her petition with a recent psychological evaluation applying new professional research to conclude that the petitioner is no longer likely to commit acts of sexual violence, the petitioner is entitled to a discharge hearing under Wis. Stat. § 980.09.").

> We emphasize that the "change" referred to in Wis. Stat. § 980.09(1) does not include an expert opinion that depends only on facts or professional knowledge or research that was considered by the experts testifying at the commitment trial. *Combs,* 295 Wis. 2d 457, ¶ 1, 720 N.W.2d 684. In *Combs,* we concluded that such an expert opinion was inadequate to establish probable cause that the committed person was no longer a sexually violent person under § 980.09 (2003-04). *Id.* The court in *Arends* stated that *State v. Kruse,* 2006 WI App 179, 296 Wis. 2d 130, 722 N.W.2d 742, which relied on *Combs* for this proposition, was still applicable under the current § 980.09. *Arends,* 325 Wis. 2d 1, ¶ 39 n.21, 784 N.W.2d 513. Although the *Arends* court was at that point specifically addressing § 980.09(2), we understand the court to mean that such a report would also be inadequate to meet the pleading requirements in § 980.09(1).

Ermers, 336 Wis. 2d 451, ¶ 35.

B. Talley's 2012 petition failed to satisfy Wis. Stat. § 980.09(1) because it presented no new information.

Talley's 2012 discharge petition makes the conclusory allegation that he is no longer a sexually violent person. (244, Pet-App. 7.) The only factual support Talley provided was the July 3, 2012 report by Dr. Elwood. His 2012 report was virtually identical to the report prepared by Elwood on June 23, 2011, and rejected by the jury in 2012, and was virtually identical to Elwood's 2010 report that was rejected by Judge O'Brien. Talley insists there is a material difference; that being Talley's "recent progress in 'social and emotional functioning.'" (Talley's Br. 17.) By negative inference, Talley found no other differences in those reports.

Here is what Dr. Elwood had to say about Talley's social and emotional "progress" in his July 2012 report upon which this appeal is based:

> Mr. Talley said he started MAP (Motivational Assessment Program) in early April and individual treatment for PTSD (Posttraumatic Stress Disorder) a month ago. He said he is now less impulsive, has started to care about the effect of his behavior on other people, and has accepted treatment. He acknowledged having received nine BDRs (Behavior Disposition Reports) in the last 12 months but said he now has had fewer verbal outbursts and his last BDR was seven weeks ago. Mr. Talley said he still tends to stay to himself but has tried to socialize more and joined a fitness group. He told me in the last few months he began corresponding with his siblings, an uncle, and his cousins.

(Pet-App. 15.) In that same report Dr. Elwood found: "In the past 12 months Mr. Talley received nine BDRs . . ., five for failing to follow a directive and four BDRs for disruptive conduct." (Pet-App. 18.) Dr. Elwood also found that Talley,

"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 [sic] communicating with him." (*Id.*)

Here is what Dr. Elwood had to say about Talley's "progress" in June 2011:

> Mr. Talley told me he has since regained his focus. He said he [sic] his treatment team removed him from MRT (Moral Reconation [sic] Therapy) because he was stressed in the large group and was not receptive to feedback. He said he completed individual therapy and is now in MAP (Motivational Assessment Program). Mr. Talley has two friends at WRC with whom he socializes, exercises, and plays game [sic] and regularly phones and writes members of his family.

(Pet-App. 23.)

In that June 2011 report, Dr Elwood revealed that Talley, "received four BDRs . . . in the last six months: failure to follow rules (12/17/2010), disrespect and sexual conduct (05/16/2011), and disruptive and fail[ure] to follow staff directive (05/18/2011 & 05/20/2011). He was also warned six times for minor incidents." (Pet-App. 26.) The June 2011 report also indicated that Talley told Dr. Elwood "he tends to isolate at WRC but socializes with two friends and regularly corresponds with his family (980 interview, 6/22/2011)." (*Id.*)

The emotional and social "progress" reported in Dr. Elwood's two reports over a year apart was minimal and, for all intents and purposes, inconsequential. Talley had multiple behavior discipline reports on both occasions; they actually *increased* from four in 2010-11 to nine in 2011-12. Talley continues to isolate himself in the institution, but claimed on both occasions to have made minimal contacts

with fellow inmates and family members during both time frames. No family member has, however, visited him in three years. Also, Dr. Elwood does not explain his contradictory findings that Talley "is now in MAP" as of June 23, 2011, yet he "*started* MAP . . . in early April [2012]." (*Compare* Pet-App. 15 *with* Pet-App. 23 (emphasis added).)

Any slight differences one might perceive did not cause Dr. Elwood to change his ultimate conclusions in both reports. Talley suffers from antisocial personality disorder "that affects Mr. Talley's emotional and volitional capacity, [and] predisposes him to commit sexually violent acts." (Pet-App. 16, 24.) Talley suffers from borderline personality disorder "that affects Mr. Talley's emotional and volitional capacity, [and] predisposes him to commit sexually violent acts." (Pet-App. 17, 25.) Both reports concluded that Talley remains a high risk to commit another sex offense, but not a sexually violent offense. (Pet-App. 18, 26.) Due to the number of behavior discipline reports in both time frames, Dr. Elwood concluded in both reports that "Talley has not reduced his risk on this factor" ("Self-Regulation/Lifestyle Instability"). (*Id.*) In short, what little emotional and social progress Talley may have made was not enough to cause Dr. Elwood to change his opinion regarding the significant risk of releasing him.

It is true that Talley's self-reported minimal social progress caused Dr. Elwood to find in 2012 that "Talley has made recent progress to reduce his risk on this factor" ("Social & Emotional Functioning") (Pet-App. 18), after having found in his 2011 report that "Talley has not reduced his risk on this factor" (Pet-App. 26). But, as Judge O'Brien observed, this did not cause Elwood to change his ultimate (and previously rejected) conclusion in both reports that

Talley remains a "low risk of . . . committing *sexually violent* acts" if released. (Pet-App. 5, 19, 27.)[6]

Of far greater significance is Elwood's finding in both reports that Talley "has not completed treatment and therefore has not reduced his risk on this factor." (Pet-App. 19, 27.) With respect to his participation in MAP, Dr. Elwood found in both reports that Talley "has not shown that he understands or has changed the thoughts, attitudes, emotions, behaviors and sexual arousal linked to his sexual offending," thus "Mr. Talley has *not* made significant progress in treatment." (Pet-App. 19, 27 (emphasis in original).) Both reports found further, "that because Mr. Talley has *not* made significant progress in treatment he does not meet the § 980.08 criteria for supervised release." (Pet-App. 20, 28 (emphasis in original).)

Both reports found "to a reasonable degree of psychological certainty that Talley is *not* a sexually violent person and therefore meets the criteria for discharge." (Pet-App. 20, 29 (emphasis in original).) Both reports also found, however, that "Talley *would* more likely than not commit another sex offense but would *not* more likely than not commit another *sexually violent* offense." (Pet-App. 19, 28 (emphasis in original).)

The jury at Talley's 2012 discharge trial flatly rejected Dr. Elwood's last finding from the June 2011 report with regard to Talley's likelihood of committing another sexually

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[6] Both of Elwood's reports found there was a "very high risk" that Talley would be charged with a sex offense within ten years if released (around 68%), but there was a lower risk that he would commit a *violent* sex offense if released (between 0 and 31%). (Pet-App. 17, 25.) Reasonable people could debate whether 31% is correctly labeled a "low" risk of sexual violence.

violent offense. The trial court correctly determined in this case that Talley cannot now get another trial to present the identical findings from the same doctor based on the same facts as in his two prior reports. Talley still suffers from the same mental disorders, still routinely violates institutional rules, still isolates himself from others at the institution, still has not seen family members, still has not completed treatment, remains a high risk to commit another sex offense if released, and is not even a good risk for *supervised* release. The only thing Talley has going for him is Elwood's thrice-rejected opinion that he is a low risk to commit a sexually violent offense if released (0-31%). That opinion cannot entitle him to relief. *See Richard*, 353 Wis. 2d 219, ¶ 16 (citing *State v. Combs*, 2006 WI App 137, ¶ 35, 295 Wis. 2d 457, 720 N.W.2d 684) ("[T]he rule is that an expert opinion based solely on facts or professional knowledge or research considered by the experts who testified at the commitment trial is insufficient to warrant a discharge hearing."); *Schulpius*, 345 Wis. 2d 351, ¶ 39 (quoting *Combs*, 295 Wis. 2d 457, ¶ 32) (evidence is not new if it "was considered by an expert testifying in a prior proceeding").

In all, nothing much changed between June 2011 and July 2012 in Talley's world. The trial court properly determined that the minor social and emotional adjustments self-reported by Talley did not in Dr. Elwood's opinion "change[ ] the degree of risk posed by Mr. Talley." (Pet-App. 6.) *See Schulpius*, 345 Wis. 2d 351, ¶ 42 (holding that a psychologist's report was not new evidence partly because it did not base its conclusion on treatment progress, although the report mentioned treatment progress).

Moreover, Dr. Elwood did not present any new psychological information or scientific advances in his 2012 report to support the conclusion that Talley is no longer dangerous. *See Ermers,* 336 Wis. 2d 451, ¶ 31. The trial

court was, accordingly, required by § 980.09(1) to summarily deny without a trial Talley's 2012 discharge petition because it relied on the same opinions of the same doctor based on essentially the same facts and the same science as did his two previously-rejected discharge petitions. *Arends,* 325 Wis. 2d 1, ¶ 30.

C. There was no "significant change" in Talley's condition between his 2011 and 2012 petitions.

Before it granted Talley's petition for review, this Court directed the State to address in its response the following issue: "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." (R-App. 108.)

There is plenty of legal authority for that proposition. *Arends,* 325 Wis. 2d 1, ¶¶ 30, 39 n.21; *Schulpius,* 345 Wis. 2d 351, ¶¶ 29-35; *Ermers,* 336 Wis. 2d 451, ¶¶ 34-35; *State v. Kruse,* 2006 WI App 179, ¶¶ 34-35, 296 Wis. 2d 130, 722 N.W.2d 742; *Combs,* 295 Wis. 2d 457, ¶¶ 32-35.

> [I]n order to be entitled to a discharge hearing, the petition materials must show new evidence—new fact, new professional knowledge, or new research—not considered by a prior trier of fact, upon which a reasonable trier of fact [would likely] conclude that the petitioner currently does not qualify for commitment under Wis. Stat. ch. 980.

Schulpius, 345 Wis. 2d 351, ¶ 36. "An expert's opinion that is not based on some new fact, new professional knowledge, or new research is not sufficient for a new discharge hearing under § 980.09(2)." *Id.* ¶ 35 (citing *Combs*, 295 Wis. 2d 457, ¶ 32).

Such a change "includes not only a change in the person himself or herself, but also a change in the professional knowledge and research used to evaluate a person's mental disorder or dangerousness, if the change is such that a fact finder [would likely] conclude the person does not meet the criteria for a sexually violent person." *Ermers*, 336 Wis. 2d 451, ¶ 16. Stated differently, the requisite change "may be established by a method professionals use to evaluate whether a person is sexually violent that was not available at the time of the prior examination, as well as by a change in the person himself or herself." *Combs*, 295 Wis. 2d 457, ¶ 25. *See also Richard,* 353 Wis. 2d 219, ¶ 1 ("We conclude that when a petitioner alleges that he or she is no longer a sexually violent person, and supports his or her petition with a recent psychological evaluation applying new professional research to conclude that the petitioner is no longer likely to commit acts of sexual violence, the petitioner is entitled to a discharge hearing under Wis. Stat. § 980.09.").

Talley's position – that *any* change no matter how insignificant requires a discharge trial – runs headlong into these cases. If adopted, his position would encourage an endless stream of discharge petitions and trials under Wis. Stat. § 980.09. A common sense reading of the statute's plain language leads inexorably to the conclusion that any change in the petitioner's condition, in his behavior, in science or in professional knowledge offered to support each successive discharge petition must be significant. *See State v. Schaefer*, 2008 WI 25, ¶ 55, 308 Wis. 2d 279, 746 N.W.2d 457; *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutes should be interpreted to avoid unreasonable or absurd results). To side with Talley, this Court would have to unreasonably interpret Wis. Stat. § 980.09(1)'s requirement that the petitioner demonstrate that his "*condition* has changed" since his

previous discharge proceeding. The focus is on significant change in his "condition," not on insignificant new facts, since the last report.

As the court of appeals has succinctly put it: "Permitting a new discharge hearing on evidence already determined insufficient by a prior trier of fact violates essential principles of judicial administration and efficiency. We are to avoid absurd or unreasonable results in statutory construction." *Schulpius,* 345 Wis. 2d 351, ¶ 35, citing *State v. Delaney,* 2003 WI 9, ¶ 15, 259 Wis. 2d 77, 658 N.W.2d 416.

There was no significant change in Talley's condition between the 2011 and 2012 reports. As shown above, his minor emotional and behavioral changes were not significant.[7]

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[7] Although he does not argue the point in his opening brief, Talley might do as he did in the court of appeals and argue in his reply brief that the absence of a sexual misconduct report among his nine behavior disposition reports in the 2012 report was a significant change from 2011. That claim lacks merit for the following reasons:

This issue was not joined in the court of appeals, as Talley did not bother to argue the point until his reply brief. (Pet-App. 3 n.4.) If Talley tries this tactic again, this Court should reject the argument for that reason alone.

More important, the lack of a sexual misconduct report between 2011 and 2012 did not change Dr. Ellwood's ultimate conclusions in both reports that Talley remained a high risk to commit acts of sexual misconduct, and a lower risk -- but still perhaps as high as a 31 percent risk -- to commit acts of sexual violence if discharged. Simply put, the absence of a sexual misconduct report among the nine reports of misconduct between 2011 and 2012 was not a "significant change" in his condition because, when it came time for Dr. Elwood to assess Talley's risk factors, they remained unchanged. This fact was not significant in

II. There is no reason for this Court to remand for a hearing under Wis. Stat. § 980.09(2).

A. Talley's petition is deficient whether review is under Wis. Stat. § 980.09(1) or (2).

Talley argues at "II" of his brief that because the trial court applied Wis. Stat. § 980.09(2), this appeal should be reviewed under that section, not § 980.09(1), and Judge O'Brien erred because she did not consider enough documents to satisfy it. Talley wants a remand for the trial court to consider more documents. (Talley's Br. 25-31.) This argument lacks merit for several reasons:

(1) This case need not be decided under Wis. Stat. § 980.09(2). Talley's petition, with the attached 2012 report by Dr. Elwood, is so deficient on its face that it does not cross the § 980.09(1) paper review threshold. *See Richard,* 353 Wis. 2d 219, ¶¶ 12-13. That is essentially what Judge O'Brien held when she denied the petition without a hearing. Even assuming she decided the case under § 980.09(2), this Court may affirm because (a) its review is independent, and (b) the trial court's decision was correct. *See State v. Alles*, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982); *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (trial court can be correct for the wrong reason);

(2) Judge O'Brien was not required to consider every document in the record. What documents a judge reviews is now a matter of discretion. Wis. Stat. § 980.09(2) (2013-14) ("[T]he court *may* consider the record, including evidence introduced at the initial commitment trial or the most recent

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the eyes of the trial court and the court of appeals because it was not significant to Dr. Elwood.

trial on a petition for discharge.").[8] When interpreting a statute, the Legislature's use of the word "may" is generally construed as permissive and implies discretionary authority. *Liberty Grove Town Bd. v. Door County Bd. of Supervisors*, 2005 WI App 166, ¶ 10, 284 Wis. 2d 814, 702 N.W.2d 33. If Talley wanted Judge O'Brien to consider more documents under § 980.09(2), it behooved him to place those documents before her. *See Arends,* 325 Wis. 2d 1, ¶ 33 ("The circuit court need not, therefore, seek out evidence not currently before it"); *id*. ¶ 52 ("The circuit court need not, however, seek out these items if they are not already within the record."). Talley does not explain why Judge O'Brien erroneously exercised her discretion in reviewing the documents that she did, or why her review of additional documents would have made any difference;

(3) Judge O'Brien's record review was sufficient to satisfy § 980.09(2). She considered Elwood's 2010, 2011 and 2012 reports; Talley's discharge petitions; the written arguments of counsel; and the evidence adduced at the January 2012 jury trial over which she presided, and at which Dr. Elwood testified. (Pet-App. 4, 12.) Judge O'Brien did not erroneously exercise her discretion in summarily denying discharge based on this thorough record review;

(4) the court of appeals also independently performed that record review and determined that the 2012 petition did "not raise sufficient facts to distinguish his present condition from the condition described in the 2011 petition." (Pet-App. 2 n.3);

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[8] Prior versions of Wis. Stat. § 980.09(2) stated that the circuit court "shall consider" those listed record items. *E.g.,* Wis. Stat. § 980.09(2) (2011-12). If this Court were to remand for a record review under § 980.09(2), it would be under the current "may consider" provision effective as it was December 14, 2013.

(5) review under § 980.09(2) would go nowhere under the now-applicable "would likely conclude" standard even assuming it would have gained traction under the former "may conclude" standard. *See* "B," below.

Talley has not shown any valid reason for a remand four years later to perform a needless record review under a far more difficult standard of proof. The record review performed by Judge O'Brien and by the court of appeals more than sufficed.

B. Any "new" information in Dr. Elwood's report is insufficient to satisfy the now-applicable "would likely conclude" standard.

If this Court agrees with Talley that any factual change -- no matter how trivial -- will do, it should not remand either for a discharge trial or for a record review under § 980.09(2). This record shows conclusively that a judge or jury would not "likely conclude" that Talley's condition had changed to such a degree between 2011 and 2012 that he was no longer a sexually violent person.

As discussed at footnote 5 above, Talley does not get a discharge trial unless he convinces the court reviewing his petition that the fact-finder "would likely conclude" from new information that has come to light since his last discharge proceeding that his condition has changed to such a degree that he is no longer sexually violent. Wis. Stat. § 980.09(2) (2013-14). *See* 2013 Wis. Act 84, §§ 21-25, effective December 14, 2013. As the trial court and the court of appeals correctly determined, Elwood's 2011 and 2012 reports were "nearly identical." (Pet-App. 2.) "Dr. Elwood's diagnosis, actuarial risk assessment, and conclusions were the same." (*Id.*) Talley continued to engage in repeated acts of disruptive misconduct in the institution and he had not

adjusted much emotionally or socially. (Pet-App. 2-4.) Dr. Elwood continued to believe that Talley posed a high risk of engaging in sexual misconduct and posed some risk, perhaps as high as 31 percent, of engaging in acts of sexual violence if discharged.

This Court's independent review of the record will show that nothing much changed between 2011 and 2012. Indeed, nothing much changed since 2010, when Dr. Elwood initially opined that Talley posed a high risk of engaging in sexual misconduct, but a lower risk of committing an act of sexual violence. Dr. Elwood based his 2012 report on essentially the same facts, the same research, the same professional knowledge and the same thrice-rejected opinion that Talley will likely engage in sexual misconduct, but is less likely to engage in sexual violence if released.

CONCLUSION

The decision of the court of appeals should be affirmed.

Dated: August 31, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,862 words.

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Dated: August 31, 2016.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

SUPPLEMENTAL APPENDIX

INDEX TO SUPPLEMENTAL APPENDIX

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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DANIEL J. O'BRIEN
Assistant Attorney General

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