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

REPLY BRIEF 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Wisconsin Statutes (2011-2012) unless noted otherwise)

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ARGUMENT

I. While "Any" Change in an Individual May Not Suffice to Warrant a Circuit Court's Ordering a Discharge Trial, Given the Timing of These Circuit Court Proceedings, the Petition Averring a Change in Mr. Talley Was Certainly Sufficient.

The State claims that any change that a Chapter 980 detainee submits in favor of a petition for discharge must be deemed a "significant change." State br. 15-17. The State asks the Court to adopt this position, and repeats its claim (which it originally made opposing the petition for review) that *In re Commitment of Arends*, 2010 WI 46, ¶¶ 30, 39 n. 21, 325 Wis. 2d 1, 784 N.W.2d 513, supports such proposition.

Arends does not support the State's argument. Here are the portions of *Arends* cited by the State:

> In sum, § 980.09(1) establishes a limited review of the sufficiency of the petition. It requires the circuit court to engage in a paper review of only the petition and its attachments to determine whether the petition alleges facts from which a reasonable trier of fact could conclude the petitioner is no longer a sexually violent person. If it does not allege such facts, the court must deny the petition. If such facts are alleged, the court then proceeds to a review under § 980.09(2).

Arends, 2010 WI 46 at ¶30. The standard cited is "facts from which a reasonable trier of fact could conclude the petitioner is no longer a sexually violent person." *Id.*

> This is not to say that the court must take every document a party submits at face value. The court's determination that a court or jury could conclude in the petitioner's favor must be based on facts upon which a trier of fact could reasonably rely. For example, if the evidence shows the expert is not qualified to make a psychological determination, or that the expert's report was based on a misunderstanding or misapplication of the proper definition of a sexually violent person, the court must deny the petition without a discharge hearing despite the report's stated conclusions.

Id. at ¶ 39. The principle stated here is "facts upon which a trier of fact could reasonably rely."

> Other examples can be found in prior case law. Although these cases all applied the old "probable cause" standard, their results would be the same under the new standard. *See State v. Kruse,* 2006 WI App 179, 296 Wis.2d 130, 722 N.W.2d 742 (holding that a report favorable to the petitioner was insufficient because it was based solely on evidence that had already formed the basis for the denial of a previous discharge petition); *State v. Fowler,* 2005 WI App 41, 279 Wis.2d 459, 694 N.W.2d 446 (holding that a report favorable to the petitioner was insufficient because, although it stated that the petitioner had

> improved, it still concluded he was a sexually violent person); *State v. Thiel,* 2004 WI App 140, 275 Wis.2d 421, 685 N.W.2d 890 (holding that a report favorable to the petitioner was insufficient because, although it concluded he would be safe to place on supervised release, it also concluded he was still a sexually violent person).

Id. at ¶ 39 n. 21.

This footnote from *Arends* does not say that every change need be "significant." And, while the Court cited *Thiel*, *Fowler* and *Kruse* with approval, the Court is of course not bound by them, nor is it bound by *In re Commitment of Schulpius*, 2012 WI App 134, 345 Wis.2d 351, 825 N.W.2d 311, *In re Commitment of Ermers,* 2011 WI App 113, 336 Wis.2d 451, 802 N.W.2d 540, nor by *In re Commitment of Combs,* 2006 WI App 137, 295 Wis.2d 457, 720 N.W.2d 684. *See* State Br. 15.

In any case, the *Arends* footnote is interesting because it refers to cases decided under the prior "probable cause" standard, and indicates that the analyses in those cases was helpful. The standard for a detainee to obtain a trial is getting progressively stricter, but Mr. Talley's petition was decided

during the era of an intermediate level of strictness. Contrary to the State's argument, Mr. Talley is not asking his case to be decided under the "probable cause" standard. He is simply requesting a very narrow application of the former version of the statute.

The standards stated in *Arends* assist Mr. Talley. If the *Kruse* standard were imported into the post-probable cause era, Mr. Talley would be entitled to a hearing because his petition was not "based solely on evidence that had already formed the basis for the denial of a previous discharge petition." The progress Mr. Talley referred to in his petition occurred after the denial of the previous petition for discharge. Similarly, if *Fowler* and *Thiel* were imported, Mr. Talley would be entitled to a hearing because the supporting report said that Mr. Talley was no longer a sexually violent person.

The State seems to argue that *Ermers* means that the change *must* be based on a change in the professional knowledge and research used to evaluate that person's mental disorder or dangerousness. State Br. 16. On the contrary, *Ermers* does not hold that to be sufficient a petition for discharge *must* cite a change in the professional knowledge and

research. It simply indicates that a professional opinion *may* be based on a change in the professional knowledge and research.

A recital of change in professional knowledge and research, *see, e.g.*, *In re Commitment of Richard*, 2014 WI App 28, ¶ 1, 353 Wis.2d 219, 844 N.W.2d 370*; In re Commitment of Pocan,* 2003 WI App 233, ¶ 4, 267 Wis.2d 953, 671 N.W.2d 860 (new actuarial tables), is one way that a petition reaches the sufficiency threshold. A new diagnosis is another way. *Pocan,* 2003 WI App 233 at ¶12. Progress in treatment is yet another. *Id.* And what has Mr. Talley shown but progress in treatment and a behavior change in the area of emotional and social functioning? Emotional and social functioning is a very important part of the make-up of the individual, and is certainly related to the person's "condition."

This means there need not be a sea-change in professional knowledge to reach the threshold justifying a trial. A professional's noting a progressive behavior change suffices. Mr. Talley does not argue that "any change" counts. A detainee who starts wearing eyeglasses is experiencing a change, but it alone is not the sort of change related to status as a sexually violent person. If, however, getting the glasses means the

detainee starts reading books that help him or her gain insight, that could indeed be a sufficient change.

As Mr. Talley argued in his first brief, he believes the change in him was significant. Even, however, if the Court concludes that the change was not significant, the change was at least nontrivial and consequential, particularly in view of the fact that Mr. Talley was just claiming eligibility for a discharge hearing. Wisconsin Stat. § 980.09(1) (2011-2012) required him only to show "facts from which a court or jury may conclude that" he did not meet the criteria for commitment.

If a circuit court were reviewing Mr. Talley's petition for discharge today, under the new statute, it could be argued that Mr. Talley might have a tougher time showing that his condition had "sufficiently changed such that a court or jury *would* conclude that Mr. Talley no longer met the criteria for commitment as a sexually violent person." *See* Wis. Stat. §980.09(2) (2013-2014) (emphasis added). However, Mr. Talley filed his petition while the old law was still in operation. No parade of horribles would ensue if this Court were to grant Mr. Talley relief. A favorable decision would not result in a flood of litigation; such decision from the Court would benefit

Mr. Talley, and possibly no other detainee. The undersigned attorney has discussed this case with members of the Wisconsin State Public Defender's Appellate Division who practice in this area, and they are of the belief that there are no other pending appeals turning on the unquestioned application of the former version of § 980.09 (2011-2012). Mr. Talley is the only runner in this race.

Which is not to say that other litigants lack an interest in the outcome of this case. As of this writing, for example, *In re Commitment of Hager*, 2015AP330, and *In re Commitment of Carter*, 2015AP1311, are still pending, but those turn on different questions, *inter alia*, the question of which statute, the 2011-2012 version or the 2013-2014 version, applies to petitions for discharge that were filed before the statutory change took effect, but which were still pending in the circuit court at the time of the change.[1] The Court may choose to

[1]The oral argument took place on September 7, 2016, and not as counsel believed, on August 3, 2016. I believe the argument may have been re-scheduled. *See* Petitioner's Br. 26 n. 5. One of the issues before the court of appeals is whether the new statute is constitutional, and whether it violates the *Arends* prohibition against a circuit court's weighing evidence

fashion a decision in this case that will give some guidance to the court of appeals in *Hager* and *Carter,* as well as guidance to trial courts examining fresh petitions filed after the statute change. Mr. Talley may be the last person under the wire as far as the more relaxed standard goes, and the Court may want to consider that in terms of the statewide consequences of the decision in this matter.

II. The Circuit Court's Referral to Other Parts of the Record Implicitly Demonstrates That the Court Found the Petition Facially Sufficient.

The State is simply wrong in arguing that the circuit court correctly made the decision to deny Mr. Talley a trial based on a facial review of the petition. The circuit court referred to other parts of the record, so there should be no doubt that the judge was proceeding under Wis. Stat.§ 980.09(2), and not sub. (1). How could the judge have possibly concluded, in essence, "this is nothing new" unless she was looking outside the four corners of the petition? If the Court finds it is not

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in determining whether a petition is sufficient.

appropriate to reverse and order a trial, than the Court could have the circuit court perform the review under the standard that applied at the time the review was conducted. The State assumes, without presenting supporting authority, that such review on remand would necessarily be conducted according to the new standard (*i.e.*, "would likely conclude"). Mr. Talley disagrees. A remand does not necessarily re-set the statutory clock. Statutes are generally applied prospectively. *Trinity Petroleum v. Scott Oil,* 2007 WI 88, ¶ 79, 302 Wis.2d 799, 735 N.W.2d 1. "Deciding when a statute applies retroactively is not always easy; it is not a mechanical task." *Lands End v. City of Dodgeville*, 2016 WI 64, ¶ 39, ___ Wis.2d ___, 881 N.W.2d 702. In any case, this is not something the Court need decide in this case, because Mr. Talley believes that the Court should order a trial. The issue of which standard would apply in the trial court need not be decided, consistent with the goal of deciding this case on the narrowest grounds.

This case, unlike *Hager* and *Carter*, does not involve a petition for discharge that was pending when the law changed. The new statute just says the court "may" consider the record, but the applicable statute said "shall." The circuit court here

may thus have failed to comply with the requirement to review all relevant and available reports, so Mr. Talley's right to a fair consideration of the record may have been denied.

As this Court stated in *Arends*, Wis. 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." *Arends*, 2010 WI 46 at ¶5. This includes "all past and current reports filed under § 980.07." *Id.* There was of course the caveat that,

> 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.

This State proposes that a remand would be futile, and seems to imply that Mr. Talley waived or forfeited the fuller

review by not presenting or specifying documents that he wanted the circuit court to consider. State br. 12 n. 6.

Mr. Talley understands the difficulties attached to remanding the case for a § 980.09(2) review, and he made clear in his main brief that he does not prefer the remedy of a remand for a § 980.09(2) review to the remedy of the Court's ordering the circuit court to grant him a trial on the petition for discharge under § 980.09(3),(4). However, the Court ordered a remand for such review in *Arends,* and there may be some utility in developing the law to ordering such a remand. However, the issue of circuit court's not reviewing "all past reports" was not one that the Court brought up in ordering the State to reply to Mr. Talley's petition for review, so it may that the Court has less interest in this issue than the other questions in this case. This case nonetheless provides an opportunity for the Court to express how the 2013 statutory revision affected the holding of *Arends*, if the Court cares to proceed in that fashion.

CONCLUSION

For the reasons set forth above, as well as those reasons in the Petitioner's brief-in-chief, the Court should reverse the decision of the Wisconsin Court of Appeals, or, in the alternative, the Court could 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 23rd day of September, 2016.

/s/David R. Karpe

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(8) CERTIFICATE

I hereby certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this reply brief is 2,991 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