STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000330

In re the commitment of David Hager, Jr.:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DAVID HAGER, JR.,

Respondent-Appellant.

On Notice of Appeal from an Order
Entered in the Chippewa County Circuit Court,
the Honorable James M. Isaacson, Presiding

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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ISSUE PRESENTED

> Mr. Hager, who is committed under Wis. Stat. ch. 980, seeks a discharge trial. He has the right to one if he can show "facts from which a jury would likely conclude" that he is not more likely than not to reoffend. Does a new expert report noting improvements in his condition and citing new statistical evidence of a lowered risk to reoffend—perhaps as low as 15%—provide such "facts"?

The circuit court denied Mr. Hager a jury trial and dismissed his petition.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

At this writing, no appellate court has interpreted the amended statutory standard for a discharge trial. This case may therefore merit publication. Briefing should be adequate to present the issue for this court's decision, but Mr. Hager would welcome oral argument should the court deem it desirable.

STATEMENT OF THE CASE AND FACTS

Mr. Hager was committed on September 17, 2008, after a jury trial. (35; 36). He has never had a discharge trial. (123:1-2; App. 131-32).

The only expert report in the record from the time of Mr. Hager's commitment trial is that of Robert Barahal. (19; 24). He applied two actuarial instruments to Mr. Hager: the RRASOR and the Static-99. (19:4-5). The RRASOR gave

a recidivism risk estimate of 33% within five years and 49% within ten years. (19:4). The Static-99 estimated 33% within five years, 38% within 10 years, and 40% within 15 years. (19:5).

Mr. Hager filed a request for counsel and a request for a court-appointed examiner on August 30, 2013. (110A). Counsel was appointed, but Mr. Hager then filed a pro se petition for discharge using the standard form and alleging both a change in his mental disorder and that he was no longer more likely than not to reoffend. (116:2; 113).

The state filed a letter requesting dismissal of Mr. Hager's petition on the grounds that he was represented by counsel and that the petition was insufficient. (114). The court did not act on the state's request. Mr. Hager's counsel then filed an amended petition for discharge along with a January 26, 2014, report by Hollida Wakefield. (119; 117; App. 105-30).

Wakefield's report opines that, while Mr. Hager continues to have pedophilic disorder, it has decreased in recent years. (117:2, 19; App. 106, 123). It explains that Sand Ridge records show that Mr. Hager is doing a good job of suppressing deviant arousal, as measured by penile plethysmograph testing. (117:7; App. 111). (At the time of Mr. Hager's original commitment trial, no PPG tests had been performed. (163:358; 19:3)). Mr. Hager denies sexual fantasies of children, and has passed a polygraph test on this issue. (117:19; App. 123). He has also repudiated his past distorted attitudes of sexual entitlement and the belief that children enjoy sexual contact with adults. (117:19; App. 123).

Wakefield's report applies two actuarial instruments to Mr. Hager. The first is the Static-99R. This instrument was released in 2009, after Mr. Hager's commitment trial.

(117:15; App. 119). The report notes that the authors of the 99R recommend placing a subject within one of several subgroups, but that this approach has drawn scholarly criticism. (117:15; App. 119). The report opines that the use of the subgroups is based upon "little more than conjecture." (117:15; App. 119). For this reason, while it notes that applying the high risk/high needs subgroup figures to Mr. Hager results in a recidivism rate of 31% over five years and 42% over ten years, it ultimately concludes that the most accurate application of the 99R to Mr. Hager is to use the aggregate group or the routine group recidivism estimates: 26% over five years and 34% over 10 years, or 15% over both five and 10 years, respectively. (117:17; App. 121).

The report also applies the MATS-1 tool, first published in 2010. (117:17-18; App. 121-22). This instrument generates a risk estimate of 25.5% over eight years with a 95% confidence interval of 19% to 34%. (117:18; App. 122).

The report concludes that Mr. Hager does not meet the criteria for commitment because he is not more likely than not to reoffend. (117:26; App. 130).

The state opposed Mr. Hager's request for a discharge trial. (123; App. 131-35). It noted that the discharge statute has been amended from requiring "facts … from which a court or jury *could conclude* the person does not meet the criteria" to requiring that the person show "facts from which a court or jury *would likely conclude* the person no longer meets the criteria." It argued that this change required the circuit court to "weigh" the Wakefield report against other documents in the record to determine whether Mr. Hager should get a trial. (123:3-4; App. 133-34). The state cited two other examiners' reports—which reached different conclusions from Wakefield's—and argued that they

precluded Mr. Hager from receiving a trial. (123:4-5; App. 134-35).

The circuit court denied Mr. Hager's petition without a trial. (129). The court stated that:

> but for his aging … there doesn't seem to be any change. Mr. Hager is still the same person he was. He needs to participate more in his counseling sessions, are some of the things he hasn't done differently. The Static-99 versus 99R apparently is no argument at all…. Again, I am not satisfied there has been any change in the expert's knowledge of Mr. Hager or his offense. So that based on those things, I am going to find that he is not entitled to a discharge hearing, because I don't think a jury would likely conclude that, in fact, there has been a change that would result in that discharge.

(166:17; App. 102).

Mr. Hager filed a postcommitment motion asserting that his petition was sufficient and requesting that the court reverse its denial. (146). The court held a hearing and orally denied the motion. (167:10; App. 104). Mr. Hager appeals this order. (154).

ARGUMENT

The Evidence of Changes in Mr. Hager, as well as Changes in the Professional Knowledge in How to Predict Dangerousness, are Facts from Which a Jury Would Likely Conclude He No Longer Meets the Criteria for Commitment.

A. *Standard of review and summary of argument*.

This case requires the court to interpret and apply Wis. Stat. § 980.09(2). It thus presents questions of law for de novo review. ***State v. Arends***, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513.

As ***Arends*** and related cases establish, a court considering a discharge petition must hold a trial if the record contains "any facts support[ing] a finding in favor of the petitioner." ***Id.***, ¶43. A court may *not* weigh the evidence for and against the petitioner; it may only determine whether any favorable facts exist. ***Id.***, ¶40.

Mr. Hager's petition easily meets the ***Arends*** standard. The incorporated report details improvements in Mr. Hager's condition. It also applies new actuarial instruments to conclude that his risk to reoffend is approximately half that assessed in 2008. Facts showing a change in the person *or* a change in professional knowledge entitle the petitioner to a discharge trial, ***State v. Ermers***, and Mr. Hager has shown both. 2011 WI App 113, ¶16, 336 Wis. 2d 451, 802 N.W.2d 540. The state does not seem to dispute that Mr. Hager is entitled to a trial under ***Arends***. (123:2; App. 132).

Instead, it posits that ***Arends*** is now obsolete with the passage of 2013 Wis. Act 84. Before the passage of that law,

Wis. Stat. § 980.09(2) required a trial if there were "facts … from which a court or jury *could* conclude" that a person was no longer dangerous. It now requires a trial if there are "facts from which a court or jury *would likely* conclude" the person is no longer dangerous.

In the state's view, the change from "could" to "would likely" permits the circuit court, contra ***Arends***, to weigh the facts supporting Mr. Hager's petition against other facts in the record.

This view has no textual basis. The statute requires a trial where "the record *contains facts* from which a court or jury could likely conclude" that the person does not meet the criteria for commitment." The plain meaning of this passage is clear. It cannot reasonably be read to set out a weighing or balancing process. In fact this statutory phrasing is essentially identical to the language the supreme court used in ***Arends*** to *reject* such weighing.

Nor does the state's proposed "weighing" inquiry fit reasonably within the broader context of Wis. Stat. ch. 980 discharge proceedings. It would create a "trial before the trial" by requiring fact finding and credibility assessments. Paradoxically, it would require the petitioner to prove that he is *not* dangerous in order to receive a trial where the state would have to prove that he *is* dangerous.

Finally, the state's odd reading of Wis. Stat. § 980.09(2) would render the provision unconstitutional. A committed person has a due process right to be released when he is no longer dangerous. ***Foucha v. Louisiana***, 504 U.S. 71, 77 (1992). Due process also requires that the state have the burden to prove him so. ***Addington v. Texas***, 441 U.S. 418, 431 (1979). Because the state's construction of the statute would require a petitioner to meet a burden of proof in order

to even be *considered* for discharge, it violates due process and must be rejected.

B. *The pre-2013 law*.

A person committed under Wis. Stat. ch. 980 has the right to petition for discharge at any time. Wis. Stat. § 980.09(1). The court reviews the petition and other portions of the record to determine whether to hold a trial.[1]

Our supreme court has explained that the court's review "is a limited one" which simply "tests whether the *record in toto*, including all reports, the petition and any written response, arguments of counsel, and any other documents submitted, contain[s] facts that could support relief for the petitioner at a discharge hearing. Essentially, review under § 980.09(2) ensures that the claims in the petition are supported with actual facts." ***State v. Arends***, 2010 WI 46, ¶38, 325 Wis. 2d 1, 784 N.W.2d 513. Though the trial court may deny a petition if it relies on a report prepared by an expert "not qualified to make a psychological determination" or one "based on a misunderstanding or misapplication of the proper definition of a sexually violent person," ***id.***, ¶39, it may *not* "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

[1] This review is frequently described as consisting of two steps: the first considering only the petition and attachments, and the second taking into account the entire record. ***Arends***, 325 Wis. 2d 1, ¶¶51-53. The state's opposition to Mr. Hager's petition appears to arise at the second step, as it involves consideration of other evidence in the record. This brief will likewise focus on the dispositive second step.

> 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.

Id., ¶40 (emphasis added).

The supreme court also rejected the notion that the petitioner bears the burden to prove he no longer meets the criteria for commitment. ***Id.***, ¶41. "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.***

The court held the standard for the discharge petitioner to be "similar to that used in a civil action to decide a motion to dismiss at the close of evidence," testing only "whether the record contains any evidence that would support relief." ***Id.***, ¶42.

A petition may not be founded solely on "facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding." ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. However, either a change in the person or a new expert opinion "based at least in part on new professional knowledge about how to predict dangerousness" is enough for a discharge trial. ***Id.***; ***Ermers***, 336 Wis. 2d 451, ¶¶31, 34.

This court has held that an expert report applying the new Static-99R instrument and its lower recidivism estimates is sufficient to require a discharge trial. ***State v. Richard***, 2014 WI App 28, ¶25, 353 Wis. 2d 219, 844 N.W.2d 370. In

fact, ***Richard*** granted a trial based upon a report from Wakefield which, from the opinion, appears quite similar in methodology and conclusions to the one in this case. ***Id.***, ¶¶6-7.

C. *The new statutory language*.

2013 Wis. Act 84 altered the standard a petitioner must meet for a discharge trial. While the previous version required the court to grant a discharge trial if facts existed from which a jury or court "could conclude" that the person no longer met the criteria, it now requires a discharge trial where there are facts from which a jury or court "would likely conclude" that the person no longer met the criteria. *Compare* Wis. Stat. § 980.09(2) (2009-10) *with* Wis. Stat. § 980.09(2) (2013-14), (updated 4/14/2015), *available at* http://docs.legis.wisconsin.gov/statutes/statutes/980.pdf.

In the state's view, this simple amendment upended the case law discussed above. The state posits that, pursuant to the change from "could" to "would likely"; the circuit court must now, in direct contradiction to ***Arends***, "weigh the evidence in support and in opposition to the petition." (123:3; App. 133); 325 Wis. 2d 1, ¶40. It further suggests that the petitioner is not entitled to a discharge trial unless he first carries a burden to show that "the evidence in support of the petition is greater than the evidence offered in opposition." (123:2, 4; App. 134).

The statute's new text is clear and unambiguous, and it does not support the state's claims. As before, the court must order a discharge trial if "the record *contains facts* from which a court or jury would likely conclude the person no longer meets the criteria." (Emphasis added). Rather than prescribing the "weighing" the state advocates, this provision plainly addresses only the evidence *supporting* the petition. If

such evidence exists, a trial is required. There is no mention of balancing favorable evidence against unfavorable. In fact, the statute uses the precise language that the ***Arends*** court used in rejecting such a "weighing":

> 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.

325 Wis. 2d 1, ¶40 (emphasis added).

Still less does the change from "could" to "would likely" impose a burden on the petitioner to show that a preponderance of the evidence favors discharge—the apparent gist of the state's "weighing" test. (123:4; App. 134). In addition to again ignoring the phrase "contains facts," the state's argument on this point reads words into the statute. The legislature unquestionably knows how to impose a burden of proof if it wishes to do so. *See, e.g.*, Wis. Stat. §§ 440.20(3), 895.09(5), 941.20(3)(c), 948.05(3) (all imposing "burden" of "preponderance of the evidence"). It did not put such language, or anything like it, in Wis. Stat. § 980.09(2).

Moreover, what sort of inquiry is this "weighing"? Is the sufficiency of the petition still a question of law? How could it be, if it necessarily involves resolving conflicting expert opinions? Such a weighing process inherently involves credibility determinations and the drawing of inferences: in short, fact finding. How are such determinations to be made?

The statute directs the court to consider various documents along with "arguments of counsel." Wis. Stat. § 980.09(2). What it does *not* mention is live testimony. But this would seem to be required if the court is to judge the credibility of experts. If the petitioner is required to show that his evidence "outweighs" that of the state, he must certainly be allowed to explore and attack the validity of any unfavorable reports (with the state, presumably, doing the same for the favorable ones). How can this be done, if not by cross-examination? What the state proposes would amount to a trial before the trial—all because of a phrasing change from "could conclude" to "would likely conclude."

Further, the state's burden-shifting regime would be nonsensical within the larger scheme of the discharge procedure. ***Arends*** (and the previous and revised statutes) place a burden of *production* on the petitioner—he must produce some new evidence in his favor to receive a trial. What the state would impose—the "weighing" of the petitioner's proffer against other evidence—is clearly a burden of *proof*. But it remains the case that at the discharge trial (if one is granted), the state bears the burden to show the criteria for commitment by clear and convincing evidence. Wis. Stat. 980.09(3). In the state's view, then, the petitioner must prove he does *not* meet the criteria in order to have a trial at which the state must prove that he *does*.

Such a system of back-and-forth proving is surely novel, if self-contradictory. It is also unconstitutional. In ***Addington v. Texas***, the Supreme Court held that due process requires the *state* to carry a burden of at least clear and convincing evidence in order to commit a person civilly. 441 U.S. 418, 431-32. (1979); *see also* ***Foucha v. Louisiana***, 504 U.S. 71, 81-82 (1992) (striking down civil commitment statute requiring detainee to show lack of dangerousness for

discharge). Under the state's reading, however, it is the petitioner who must show that the evidence in his favor outweighs that against him. It is no answer to say that the burden is properly allocated to the state in the ultimate discharge trial, Wis. Stat. § 980.09(3); a petitioner who fails to meet the burden the state advocates would never *receive* such a trial.

As this court has recognized, the availability of discharge proceedings plays "a significant role … in assuring the constitutionality of Wis. Stat. ch. 980." ***Ermers***, 336 Wis. 2d 451, ¶32. The commitment regime "passes constitutional muster because confinement is linked to the dangerousness of the committed person and there are procedures for ending confinement when the person is no longer dangerous." *Id.* (citations omitted); ***Foucha***, 504 U.S. at 77 (committed person "may be held as long as he is both mentally ill and dangerous, but no longer"). The state's interpretation of the new statutory language would deny these procedures to many confined persons despite the existence of new evidence supporting release. The state will always (as here) be able to point to *some* evidence in the record supporting commitment. If this is enough to deny a discharge trial, one of ch. 980's principle constitutional safeguards will be rendered meaningless.

The proceedings below illustrate the danger. The state's entire argument on the substance of Mr. Hager's petition was that two other experts take a different view of Mr. Hager than the one Mr. Hager relies on. (123:5; App. 135). The court made no findings and provided no clear basis for its denial of the petition, other that opining that Mr. Hager should receive more counseling and stating, incorrectly, that there had not been any change since 2008 in the professional knowledge about predicting recidivism.

(166:17; App. 102). This sort of arbitrary denial of the right to trial is the necessary result of the state's murky "weighing" scheme.

A straightforward examination of the statute reveals a simpler, and constitutionally sound, test. A discharge petitioner must simply show, within the record, "facts" which, examined on their own merits, "would likely" lead a fact finder to conclude that the person does not meet the criteria for commitment. Whereas the previous "could conclude" language was analogous to the "any evidence" sufficiency standard in civil cases, ***Arends***, 325 Wis. 2d 1, ¶42, the "would likely" language simply requires that the proffered evidence, considered on its own merits, clearly favor the petitioner. While the old "could conclude" language might have permitted a trial based on evidence that was ambiguous or barely probative, the new language requires evidence that unambiguously points to the conclusion that the petitioner no longer meets the criteria.

D. *Mr. Hager's petition satisfies Wis. Stat. § 980.09(2)*.

The Wakefield report easily meets this standard. Because Mr. Hager has never had a discharge trial, he is entitled to one on a showing of a change in either himself or the professional knowledge about recidivism since 2008. ***Ermers***, 336 Wis. 2d 451, ¶¶31, 34. Applying methods that did not exist at the time of Mr. Hager's 2008 trial, it concludes that his risk to reoffend may be as low as 15% or as high as 30%. (117:17; App. 121). This is a significant reduction from the risk numbers given by the 2008 Barahal report, which ranged from a low of 33% to a high of 49%. (19:4-5).

The report also points to changes in Mr. Hager, including a reduction in the severity of his pedophilic disorder, a reformed attitude toward sexual behavior with children, and the ability to suppress deviant arousal. (117:2, 7, 19; App. 106, 111, 123). Based on these new methods and changes in Mr. Hager's condition, the report unambiguously concludes that he is not more likely than not to reoffend. (117:26; App. 130). If such a report does not merit a discharge trial, what does?

Considered on its own merits, the report is evidence from which a court or jury would likely find that Mr. Hager no longer meets the criteria for commitment. Mr. Hager is entitled to a trial.

CONCLUSION

For the foregoing reasons, Mr. Hager respectfully requests that this court reverse the circuit court's order denying Mr. Hager's petition and remand with directions that the court hold a discharge trial.

Dated this 4th day of May, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,592 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated this 4th day of May, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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.

Dated this 4th day of May, 2015.

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