STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP330

In re the Commitment of David Hager, Jr.,
STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DAVID HAGER, JR.,

Respondent-Appellant.

APPEAL FROM AN ORDER DENYING A DISCHARGE HEARING AND MOTION FOR POST-COMMITMENT RELIEF, ENTERED IN CHIPPEWA COUNTY CIRCUIT COURT, THE HONORABLE JAMES M. ISAACSON, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER-RESPONDENT

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ISSUE PRESENTED

Effective December 14, 2013, a circuit court must grant a patient a discharge hearing if the patient's petition alleges facts from which a fact finder "would likely conclude" that the patient's condition has changed so that he no longer

meets the criteria for commitment as a sexually violent person. Wis. Stat. § 980.09(2) (2013-14). In this case, the circuit court determined that David Hager, Jr.'s petition did not meet the "would likely conclude" standard. Where Hager presented facts that included an examiner's report concluding that he was not more likely than not to reoffend, and the State presented an examiner's report that reached the adverse conclusion, did the circuit court err?

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Because no appellate court has addressed the constitutionality of the new statutory language of 2013 Wisconsin Act 84, the State believes that this case merits publication. Additionally, in *In re the Commitment of Richard*, 2014 WI App 28, 353 Wis.2d 219, 844 N.W.2d 370, this court held that the change from Static-99 to the Static-99R is sufficient in some circumstances to meet the pre-Act 84 standard in Wis. Stat. § 980.09 (2011-12). This court did not decide if that change would meet the criteria under Wis. Stat. § 980.09 (2013-14) as amended by Act 84. *See id.* ¶ 12 n.9.

While both Hager and the State agree that this issue is adequately addressed in the briefs, the State welcomes oral argument should this court deem it necessary.

SUPPLEMENTAL STATEMENT OF FACTS

On September 17, 2008, a jury determined that Hager was a sexually violent person (35; 36; 37). Hager has filed a discharge petition, and the State opposes it (119; 123; A-App. 131-35).

In its brief addressing the sufficiency of Hager's petition at the circuit court, the State noted that Chapter 980's discharge statute had been amended, with an effective date of December 14, 2013 (123:1; A-Ap. 131). The State argued that under the new change, the circuit court could consider a court-appointed examiner's report against other

documents (123:3-4; A-App. 133-34). The documents included the annual re-examination report prepared by Department of Health Services (DHS) psychologist, Dr. Bradley Allen (111A).

Allen reached different conclusions from the psychologist appointed at Hager's request, Hollida Wakefield[1] (111A; 117; 123:4-5, A-Ap. 105-30, 134-35). While Wakefield agreed with Dr. Allen that Hager suffered from a mental disorder, she conversely determined that Hager is not more likely than not to reoffend (117:26; A-Ap. 130; 166:4). Hollida largely based her argument on a change in knowledge and the research, specifically from the Static-99 to the Static-99R (166:5). The State responded that this change did not constitute a change that would likely lead a fact finder to reach a different conclusion (166:5-6).

The question before the circuit court was whether Hager's petition was factually sufficient to show that a fact finder "would likely conclude" that he is no longer a sexually violent person (166:4; 123:3-4; A-Ap. 133-34). At a hearing the State argued that any change in Hager since his commitment in 2008 was insufficient for him to be entitled to a discharge (166:15-16). In its argument, the State addressed the scoring methods used on both the Static-99 and the Static-99R:

> They used the same scoring method for the Static-99 and the Static-99R except for one thing. All the other things are scored exactly the same except age. On the Static-99, age was just whether or not the person was under 25 or 25 or over. That was the only age difference. The Static-99 changes that. Now it's whether or not the person is under 35, whether they're between 35 and 40, 40 to 59.9, and then above 60. And they score them differently depending on which age they are in that category.

[1] Hollida Wakefield, M.A., a licensed psychologist, filed her report on January 30, 2014 (117; A-Ap. 105-30).

> Based on [Hager's] age at 42, he ends up with the same Static-99 and Static-99R score[.] . . .
>
> The Static-99R, however, then divides samples, and they found that there were certain samples that are of individuals that were categorized as high risk and high need . . . . If someone has a lot of risk, and it makes sense, they're probably going to reoffend at a higher rate.

(166:10-11).

> So Mr. Hager is being compared to the high risk kind of need group because of his situation, his record, his work and treatment, how he has done in treatment, and his status. And based on that, the evaluators have determined that, or at least Dr. Allen and all the previous evaluators who evaluated him by the State have determined that he fits more closely in the high risk/high needs group. And therefore, his actual, the re-offense rates that relate to that score of 6 on the Static-99R and the high risk/high needs are very similar to the old rates that there were on the Static-99.

(166:11).

Applying the new "would likely conclude" standard, the circuit court denied Hager's petition, thereby denying his request for a discharge hearing (129; 166:17; A-Ap. 102). The court determined that "it is not likely that a fact finder would conclude that [Hager's] condition has changed since the time of his initial commitment" (129). At the hearing on this matter, the court explained that, but for Hager's age:

> [T]here 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 argument apparently is no argument at all . . . . 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; A-Ap. 102).

Hager filed a post-commitment motion, again requesting a discharge trial (146). Hager argued that the State's interpretation of the amended statute renders it unconstitutional (146:7).

The circuit court held a hearing and denied the motion (167:10; A-Ap. 104; R-Ap. 110). It agreed with the State that the change of the statute's language from "may conclude" to "would likely conclude" makes the new burden "more severe for the [patient]" (167:10; A-Ap. 104; R-Ap. 110). Applying that new burden, as it did previously, the court held that after reviewing both the supporting evidence (Wakefield's report) and opposing evidence (which included Allen's report), Hager did not meet that burden.

Hager appeals.

STANDARD OF REVIEW

This case requires the court to interpret and apply the newly amended Wis. Stat. § 980.09(2) (2013-14). This is a question of law that this court reviews de novo. *In re the Commitment of Arends*, 2010 WI 46, ¶ 13, 325 Wis. 2d 1, 784 N.W. 2d 513. This case also requires the court to determine whether the newly amended Wis. Stat. § 980.09(2) is constitutional. The constitutionality of a statute similarly requires a de novo review. *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328. "Statutes are presumed to be constitutional, and a party challenging a statute's constitutionality must demonstrate that it is unconstitutional beyond a reasonable doubt." *State v. McGuire,* 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227.

If a statute is ambiguous, this court may turn to extrinsic sources. *Bank Mut. v. S.J. Boyer Const., Inc.*, 2010 WI 74, ¶ 25, 326 Wis. 2d 521, 785 N.W.2d 462. "Extrinsic sources are sources outside the statute itself, including the legislative history of the statute." As the Supreme Court

stated in *Bank Mutual*, "We sometimes use legislative history to confirm the plain meaning of an unambiguous statute, but we will not use legislative history to create ambiguity where none exists." *Id*.

ARGUMENT

The circuit court did not err when it determined that Hager was not entitled to a discharge hearing. Hager failed to show facts from which a fact finder "would likely conclude" that his condition has changed so that he no longer meets the criteria for commitment as a sexually violent person.

A. By its plain language, the new "would likely conclude" standard is a higher standard for assessing whether a discharge petition warrants a discharge hearing.

Wisconsin Act 84 transformed the standard for granting a discharge hearing from "may conclude" to "would likely conclude." Wis. Stat. § 980.09(2) (2013-14). *See* 2013 Wisconsin Act 84, sec. 21. The Act establishes a higher threshold: the prior "may conclude" standard was a relatively low threshold, and it provided that a court should grant discharge if a patient's petition contains sufficient facts from which one could reasonably conclude that the patient was no longer a sexually violent person.[2] Under this "may conclude" standard, a court could not weigh evidence offered in support of or opposition to a discharge petition. As provided in *Arends*, "[T]he standard is not whether the evidence more heavily favors the [patient], but whether the enumerated items contain facts that would allow a factfinder to grant relief for the [patient]." 325 Wis. 2d 1, ¶ 40. Under

[2] "'Sexually violent person' means a person who has been convicted of a sexually violent offense . . . 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." Wis. Stat. § 980.01(7) (2013-14).

the prior statute, there was no requirement that a patient "convince the court that the evidence supporting the [patient's] position is stronger than the evidence against it." *State v. Ermers*, 2011 WI App 113, ¶ 24 & n.11, 336 Wis. 2d 451, 802 N.W.2d 540.

Wisconsin Act 84 changed that. It provides a higher standard for assessing a discharge petition's sufficiency:

> 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 *would likely conclude* the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment order if the person has never received a hearing on the merits of a discharge petition, 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).

The phrase "would likely conclude" means "more likely than not" to conclude. Instead of demonstrating a *possibility* of success, a patient must demonstrate a *likelihood* of success in his petition in order to receive a discharge trial. The "would likely conclude" standard presents itself in two ways: First, when the court assesses a discharge petition's facial sufficiency, it must determine whether a fact finder "would likely conclude the [patient's] condition has changed . . . [since the commitment trial or last discharge trial] so that the [patient] no longer meets the criteria for commitment as a sexually violent person." Wis. Stat. § 980.09(1) (2013-14). The court "shall deny the petition," if the petition does not allege facts that from which the fact finder would likely conclude the patient has changed. *Id.* In this context, "would likely conclude" requires a circuit court to assess the relative strength of the petition to determine if a reasonable likelihood exists that a fact finder would conclude that the patient is suitable for discharge. If the

court determines the allegations to be sufficiently weak and that discharge is unlikely, the court must deny the petition.

If the petition passes the screen the legislature established in Wis. Stat. § 980.09(1) (2013-14), the circuit court proceeds to a second level of review. At this step, "the court may hold a hearing to determine if the person's condition has sufficiently changed such that a court or jury *would likely conclude* the person no longer meets the criteria for commitment as a sexually violent person." Wis. Stat. § 980.09(2) (2013-14) (emphasis added). Again, the "would likely conclude" language is a change from the "may conclude" language in Wis. Stat. § 980.09(2) (2011-12).

> In determining under this subsection whether 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, the court may consider the record, including evidence introduced at the initial commitment trial or the most recent 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 record does not contain facts from which a court or jury *would likely conclude* that the person no longer meets 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* the person no longer meets the criteria for commitment, the court shall set the matter for trial.

Wis. Stat. § 980.09(2) (2013-14) (emphasis added). The amended statute allows a circuit court to determine the "would likely conclude" standard by evaluating the new evidence against the entire record, as opposed to in a vacuum. *Id.* This second layer requires the circuit judge to make a judgment about whether the evidence would more likely than not convince a fact finder that the patient should be discharged.

Wisconsin Act 84 also changed another aspect of this second layer of review. Under Wis. Stat. § 980.09(2) (2011-12), a circuit court was required to examine specific items in the record when it reviewed a discharge petition. *Id.* (". . . the court shall consider. . .); and *Arends*, 325 Wis. 2d 1, ¶ 53. Under Wis. Stat. § 980.09(2) (2013-14), a circuit court "may," but is not required, to consider the listed items when it reviews a discharge petition.

B. The legislature intended to implement a higher standard with 2013 Wis. Act 84

The "would likely conclude" standard requires more proof than "may conclude" or "could conclude." The legislative history of 2013 Wis. Act 84 supports this plain language interpretation.[3]

In 2012, the legislature created a Special Committee on Supervised Release and Discharge of Sexually Violent Persons with the goal of determining whether an imbalance exists between supervised release and discharge, and if such an imbalance exists, to recommend changes. Wisconsin Legislative Council, *Joint Legislative Council's Report of the Special Committee on Supervised Release and Discharge of Sexually Violent Persons*, at 5 (Feb. 19, 2013) (hereinafter Report) (R-Ap. 116).[4] The committee drafted proposed changes, introduced as 2013 Assembly Bill 28. *Id.* (R-Ap. 112-28).

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[3] This interpretation of "would likely conclude" is also consistent with prior court decisions defining "likely" in the context of ch. 980 proceedings. In *State v. Smalley*, 2007 WI App 219, ¶¶ 3, 10, 305 Wis. 2d 709, 741 N.W.2d 286, the court of appeals defined "likely" as it appears in Wis. Stat. § 980.01(1m) to mean "more likely than not," which means that the patient is more than 50 percent likely to commit another sexually violent offense.

[4] This legislative report can be found at http://lc.legis.wisconsin.gov/media/1179/jlcr_2013_03.pdf (last visited July 15, 2015).

In creating that bill, the Committee considered a memo from the Wisconsin Department of Justice. *See* Report at 7 (R-Ap. 118), referencing Wisconsin Department of Justice, *Potential Modifications to Ch. 980* (hereinafter DOJ) (R-Ap. 129-43). The DOJ memo articulated the *Arends* standard: that circuit courts must order a discharge hearing if a jury could conclude that the commitment criteria are not met even if the court believes that it is highly unlikely that a reasonable jury would so conclude. DOJ at 9-10 (R-Ap. 137-38). The memo stated that the intention for Wis. Stat. § 980.09(2) to weed out insufficient petitions could not happen because the "may conclude" or "could conclude" standard did not allow courts to perform a "gate-keeping" function. *Id.*

The DOJ position's was this: the statutory change to the "would likely conclude" standard would allow a circuit court to "weigh evidence when it is determining whether there are sufficient facts from which a reasonable court or jury would likely conclude that the person's condition has sufficiently changed" without "unduly restrict[ing] a committed person's access to the discharge process." *Id.*

The committee ultimately requested that the DOJ proposals be drafted for consideration. Report at 7 (R-Ap. 107). The proposed legislation contained the "would likely conclude" standard as recommended by the DOJ. 2013 Assembly Bill 28.

The current version of Wis. Stat. § 980.09 contains the same language. *See* Wis. Stat. § 980.09(2) (2013-14). Under the amended statute, a circuit court must decide, after its review of the petition and relevant documents, if a fact finder would more likely than not conclude that the patient no longer meets commitment criteria. Wis. Stat. §§ 980.01(1m), 980.09(2) (2013-14). If the court answers "no" to this question, "the court shall deny the petition." Wis. Stat. § 980.09(2) (2013-14). If the court answers "yes," then "the court shall set the matter for trial." *Id.*

While Hager relies upon *Arends* and other pre-Act 84 decisions to argue that the circuit court erred when it denied his petition without a hearing, this Court should not rely upon those cases. Under the *new* standard, a circuit court must grant a discharge trial only if a fact finder "would likely conclude" that the patient no longer meets the criteria for commitment. Wis. Stat. §§ 980.09(1) & (2) (2013-14). In light of Act 84's changes to the process for reviewing a discharge petition, prior cases interpreting Wis. Stat. §§ 980.09(1) & (2) (2011-12) may be consulted for guidance, but should not be relied upon to determine whether the petition meets the current standard for a trial on discharge. *See Arends*, 325 Wis. 2d 1; *Richard*, 353 Wis. 2d 219; *In re the Commitment of Schulpius*, 2012 WI App 134, 345 Wis. 2d 351, 825 N.W.2d 344; *Ermers*, 336 Wis. 2d 451; and *In re the Commitment of Combs*, 2006 WI App 137, 295 Wis. 2d 457, 720 N.W.2d 684. As indicated above, the legislative history indicates that the legislature intended to change the standard that was applied in *Arends*.

C. Hager has suffered no due process violation. Act 84, as interpreted by the State, is constitutional because the State continues to carry the burden of proof at a discharge hearing.

Hager argues that the State's interpretation of the amended statute is unconstitutional (Hager Brief at 11). The constitutionality of a statute presents a question of law that this court reviews de novo. *Cole*, 264 Wis. 2d 520, ¶ 10. As provided in *Cole*:

> Generally, legislative enactments are entitled to a presumption of constitutionality. This court has repeatedly held that it "indulges every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, we must resolve that doubt in favor of constitutionality." A petitioner seeking to prove a statute unconstitutional faces a heavy burden. In the face of a strong presumption, it falls to the party challenging the constitutionality of a statute

> to prove that the statute is unconstitutional beyond a reasonable doubt. This court has noted: "It is insufficient to merely establish doubt as to an act's constitutionality nor is it sufficient to establish the act is probably constitutional." If any doubt remains, this court must uphold the statute as constitutional.

Id. ¶ 11 (internal citations omitted).

First, Hager argues that the amended statute does not allow a court to consider evidence opposing the petition (Hager Brief at 6, 10-11). Rather, he argues that the new statute directs the court to review only the evidence *supporting* the petition (Hager Brief at 9-10). And, under that interpretation, Hager argues that Wakefield's report – the only evidence Hager offered in support of his petition – meets this standard entitling him to a discharge hearing. If Hager's interpretation is correct, how can a judge ever find *against* a patient's request for a discharge hearing if there is any expert evaluation claiming he no longer meets the criteria for commitment? If a court can *only* consider *supporting* evidence, that is the result. This cannot be what the legislature intended when they amended the statute.

Rather, under the amended statute, a court must do some balancing of the reports to determine if a discharge hearing is warranted. Hager's argument that the circuit court can only look at the evidence *supporting* the petition conflicts with the plain language of the statute:

> In determining . . . whether 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, the court *may consider the record*, including evidence introduced at the initial commitment trial or the most recent 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*.

Wis. Stat. 980.09(2) (2013-14) (emphasis added). Nothing in the plain language of the statute suggests that a court can only look at evidence *supporting* a patient's petition. Had the legislature intended the meaning of the amended statute to limit circuit courts to review only evidence *supporting* discharge, it could have easily said so. It did not. "The legislature is presumed to know the law, and to know the legal effect of its actions." *In re the Commitment of W.*, 2011 WI 83, ¶ 61, 336 Wis. 2d 578, 800 N.W.2d 929. Here, the plain language of the statue indicates that the legislature intended for a circuit court to now be able to review evidence in favor of, *and* in opposition to, a petition for discharge.

Second, Hager argues that State's interpretation of amended Wis. Stat. § 980.09(2) would render the statute unconstitutional because it places the burden of proof on the patient to prove he is no longer a sexually violent person (Hager Brief at 6, 10, 11, citing *Foucha v. Louisiana*, 504 U.S. 71 (1992) and *Addington v. Texas*, 441 U.S. 418 (1979)). Because the State still carries the burden at a discharge hearing, the State respectfully disagrees.

The Supreme Court has established that to satisfy due process guarantees, the State must be held to a burden of proof of at least "clear and convincing" evidence when it pursues civil commitment. *Addington,* 441 U.S. at 433. In *Foucha,* the Louisiana statute placed the burden on a patient to prove at a discharge trial, by a preponderance of the evidence, that he was no longer dangerous. 504 U.S. at 73, 77-78. If the court found that a patient failed to carry this burden, the patient could be returned to the mental institution "whether or not he is then mentally ill." *Id.* at 73. A review panel recommended that Foucha be released because he had recovered from his psychosis. *Id.* at 74. Louisiana did not dispute the panel's finding. Foucha, however, was unable to prove that he was no longer dangerous, and so the court denied his petition for release. *Id.* at 75.

The United States Supreme Court reversed, holding that Foucha's due process rights were violated. 504 U.S. at 84-86. The Court explained that it had held in *Addington* that in order to civilly commit a person, the *State* must prove two things by clear and convincing evidence: first, that the person is mentally ill, and next, that he requires hospitalization for the protection of himself and others. *Id.* at 76 (citing *Addington,* 441 U.S. 418).

Both *Foucha* and *Addington* are distinguishable. First, neither of these cases concerns pleadings or other measures that *precede* a discharge trial on the merits. Rather, *Addington* involves the proper burden at initial commitment, and *Foucha* concerns the proper burden on the merits at a discharge trial. *See Addington*, 441 U.S. at 443; *Foucha*, 504 U.S. at 77-78. Second, *Foucha* involves a patient who was no longer mentally ill. There, the State conceded that the patient was no longer mentally ill, yet it still wanted to hold him committed, and it wanted to do so even without assuming the burden of showing he is dangerous by clear and convincing evidence. *Foucha,* 504 U.S. at 86. The State of Wisconsin does not concede that Hager no longer suffers from a mental disorder that predisposes him to engage in acts of sexual violence. Hager's *own* expert has concluded this.

Third, *Addington* only requires the State to assume the burden at the initial commitment determination, and it only requires the State to assume a burden of proof standard of clear and convincing evidence. 441 U.S. at 432-33. That is the same burden that Wisconsin requires the State to assume at the discharge hearing. So even if *Addington* applies to discharge proceedings, the Wisconsin statutory scheme complies. And unlike the Louisiana statute in *Foucha*, Wisconsin requires that at a discharge hearing, the

State prove by clear and convincing evidence[5] that the patient meets the criteria for continued commitment.

In sum, under the amended statute, the patient only carries the burden to prove that he is entitled to a discharge *hearing*. Wis. Stat. § 980.09(3) (2013-14). The patient does *not* carry the burden at the actual discharge hearing. There, the *State* carries the burden of proof. *Id.* And even under the prior statute, a patient filing a petition for discharge still carried the initial burden of alleging facts that would allow a reasonable trier of fact to conclude that he does not meet the criteria for commitment as a sexually violent person. *Arends,* 325 Wis. 2d 1, ¶¶ 5, 27; *see also* Hager Brief at 11). Under the amended statute, the patient continues the carry the burden, only now that burden has changed to require a patient to file a petition that "alleges facts from which the court or jury would likely conclude the person's condition has changed." Wis. Stat. § 980.09(1) (2013-14).

Hager next argues that under the amended statute, the circuit court *must* order a discharge hearing if the record "contains facts" from which a fact finder would likely conclude that the patient no longer meets commitment criteria (citing Wis. Stat. § 980.09(2) (2013-14)). But his interpretation of the statute ignores the latter part of the statute that requires a patient to show that the contained facts "would likely" lead a fact finder to conclude that he no longer meets the criteria as a sexually violent person. Wis. Stat. § 980.09(2). Hager's interpretation is not supported by the plain language of the statute or the legislative history.

Finally, Hager argues that the State will always have *"some* evidence" in the record to support continued commitment, and therefore a patient could never be granted

[5] Wisconsin has set the State's burden of proof at a § 980.09(3) discharge trial as a showing by clear and convincing evidence, while the State's burden of proof at the initial commitment hearing is proof beyond a reasonable doubt. *See* Wis. Stat. § 980.05(3)(a).

a discharge hearing under the State's interpretation of Act 84 (Hager Brief at 12). But the State is not arguing that "some evidence" in the record is enough to bar patient's petition for a discharge trial. Rather, as Act 84 unambiguously states, the test for the circuit court is to determine whether the record contains some evidence in which a fact finder *would likely conclude* that the patient no longer meets the criteria for commitment.

D. The circuit court's application of the new standard was proper because, after reviewing the evidence submitted in favor of and in opposition to Hager's petition, it determined that insufficient facts existed from which a fact finder would likely conclude that Hager no longer meets the criteria for commitment as a sexually violent person.

In assessing whether a fact finder would likely conclude that Hager is no longer a sexually violent person, the circuit court reviewed Hager's petition. And in his petition, Hager incorporated Wakefield's report.

Under Chapter 980, there are two parts to being a sexually violent person. First, the patient must have a mental disorder. Wakefield concurred Hager does have a mental disorder (117:1; A-Ap. 105). The second part is whether the patient is likely to commit another sexually violent offense. Wakefield concluded that "the most accurate comparison group is the routine group or the aggregate Static-99R group," and that with these comparison groups used, Hager "is similar to sex offenders in which between 15% to 30% sexually recidivated" (117:17; A-Ap. 121). Wakefield ultimately determined that Hager "is not more likely than not" to reoffend (117:26; A-Ap. 130). The State's expert, Dr. Allen, disagreed.

Dr. Allen scored Hager as a 7 on the Static-99, a scale that ranges from 0 to 12, with 12 representing the highest risk (111A:5). He also concluded that the high risk sample was the most appropriate representation of Hager's risk (111A:6). According to Allen, "Hager's score corresponds to a rate of future charge for a sexual offense of 33% in 5 years and 43% within 10 years" (111A:6). Allen scored Hager as a 6 on the Static-99R, and this corresponds to a reconviction rate of 31% in 5 years and 42% in 10 years (111A:7). Allen noted in his report that these figures "potentially underestimate an individual's likelihood for engaging in sexual offending which is undetected or unreported," and that these estimates "are limited to 10 years of follow up" (111A:7).[6]

As the State argued at the hearing:

> So Mr. Hager is being compared to the high risk kind of need group because of his situation, his record, his work and treatment, how he has done in treatment, and his status. And based on that, the evaluators have determined that, or at least Dr. Allen and all the previous evaluators who evaluated him by the State have determined that he fits more closely in the high risk/high needs group. And therefore, his actual, the re-offense rates that relate to that score of 6 on the Static-99R and the high risk/high needs are very similar to the old rates that there were on the Static-99.

(166:11).

Allen also noted in his report that Hager's participation in treatment is "varied throughout the reporting period. He typically does not contribute spontaneously," and that staff often has to prompt Hager to participate (111A:15). Allen further noted that Hager is "in an early phase of treatment and has several important

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[6] Under Chapter 980 commitment, the State must prove that a patient would commit a future sexual act of violence in his lifetime. Wis. Stat. §§ 980.02(2)(c) and 980.05(3)(a).

treatment goals to complete" (111A:16). Allen ultimately determined "to a reasonable degree of psychological certainty, that Mr. Hager's degree of risk is in a category that exceeds the legal threshold of 'more likely than not' that he will commit another sexually violent offense should he be discharged" (111A:19).

Based upon its review of both Allen's and Wakefield's reports, the circuit court correctly determined that it was "not satisfied there has been any change in the expert's knowledge of Mr. Hager or his offense" (166:17; A-Ap. 102). Hager did not meet Act 84's new standard. He failed to show facts from which a jury would likely conclude that his condition has changed so that he no longer meets the criteria as a sexually violent person. The circuit court weighed the quality of the evidence that Hager offered in support of his discharge petition against the evidence opposing Hager's discharge. The circuit court properly denied his petition because the record did not contain facts from which a fact finder "would likely conclude" that Hager no longer meets the criteria for commitment.

CONCLUSION

The circuit court determined that Hager's petition for discharge failed to show that a fact finder "would likely conclude" that he is no longer a sexually violent person. Pursuant to the prescriptions of Act 84, the circuit court reached this decision after reviewing evidence in support of, and in opposition to, his petition. Because Act 84 allowed the circuit court to do this, and because Act 84 is constitutional, the State respectfully requests that this court affirm the circuit court's decision denying Hager's motion for post-commitment relief.

Dated this 17th day of July, 2015.

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) and (c) for a brief produced with a proportional serif font. The length of this brief is 5151 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this 17th day of July, 2015.

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