STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2015AP000330

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***In re the commitment of David Hager, Jr.:***

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DAVID HAGER, JR.,

Respondent-Appellant.

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

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# REPLY BRIEF OF RESPONDENT-APPELLANT

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### 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.

Here is last sentence of Wis. Stat. § 980.09(2): "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."

Here is Mr. Hager's argument about the meaning of this sentence: it means what it says. The sole question for the court is whether the record "contains facts" which would likely lead a court or jury to find for the committed person. If it does, there is a trial. The court is not licensed to deny a trial simply because other facts may support continued commitment.

And here is the state's argument, in its entirety, about the meaning of this sentence:

> 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.

Respondent's Brief at 15.

How can Mr. Hager's "interpretation" not be "supported by the plain language of the statute" when it is essentially a *quotation* of the statute? The state does not explain.

As for legislative history, as the state notes, it enters the picture only where the language of the statute is ambiguous: susceptible to multiple meanings. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. But the statutory language that the state points to in support of its proposed meaning—language permitting the court to consider the record, arguments of counsel, etc.—is substantially identical to the earlier version, which the supreme court held did *not* permit such weighing. Respondent's Brief at 12-13, ***State v. Arends***, 2010 WI 46, ¶¶40, 59, 325 Wis. 2d 1, 784 N.W.2d 513. The commentary of DOJ's representatives to the Joint Legislative Council is thus not relevant. It is not law. The statutory language passed by the legislature is. And it says nothing about weighing.

Nor does the state attempt to explain how such a "weighing" should proceed absent live testimony, cross examination, and credibility findings. *See* Appellant's Brief at 10-11. It *asserts* that the trial court performed the task correctly, but does not spell out why this is so. Respondent's Brief at 17-18. Why does Allen's report outweigh Wakefield's? The answer to that question is absent both from the circuit court's ruling and from the state's brief. In fact, both the ruling and the brief mostly ignore the actual contents of the Wakefield report—a curious method of

"weighing" it. Appellant's Brief at 2-3; Respondent's Brief at 16.

Nor does the state rebut Mr. Hager's observation that its proposed rule—requiring a committed person to show that his evidence is stronger than that of the state—would force the person to carry a burden of proof in order to have a chance at discharge, in violation of the Constitution. As Mr. Hager previously noted, "it is no answer to say that the burden is properly allocated to the state in the ultimate discharge trial … a petitioner who fails to meet the burden the state advocates would never receive such a trial." Appellant's Brief at 12. Yet this is precisely the "answer" (along with some irrelevant factual distinctions of the controlling cases) that the state urges. Respondent's Brief at 14-15.

The state's only other argument is that Mr. Hager's "interpretation"—perhaps more accurately, "reading"—of the statute will require discharge trials any time an expert opines that a committed person no longer meets the criteria. Respondent's Brief at 12. This is clearly false, as trials were denied under the previous standard despite the presence of a favorable report. *See, e.g.*, ***State v. Schulpius***, 2012 WI App 134, ¶¶4, 16, 345 Wis. 2d 351, 825 N.W.2d 311. As before, a committed person must be able to point to a change, either in himself or in the professional knowledge, supporting a new conclusion. ***State v. Combs***, 2006 WI App 137, ¶25, 295 Wis. 2d 457, 720 N.W.2d 684. Wakefield's report contains ample evidence of both, as Mr. Hager previously explained and as the state concedes by its silence. Appellant's Brief at 2-3, 13-14. 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 his petition and remand with directions that the court hold a discharge trial.

Dated this 3rd day of August, 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 848 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 3rd day of August, 2015.

Signed:

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