STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP330

In re the commitment of David Hager, Jr.:

STATE OF WISCONSIN,

Petitioner-Respondent-Petitioner,

v.

DAVID HAGER, JR.,

Respondent-Appellant.

REVIEW OF DECISION OF THE COURT OF APPEALS, DISTRICT III, REVERSING ORDERS ENTERED IN THE CIRCUIT COURT FOR CHIPPEWA COUNTY, THE HONORABLE JAMES M. ISAACSON, PRESIDING

BRIEF AND APPENDIX OF PETITIONER-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Wisconsin Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Petitioner-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

ISSUE PRESENTED

Wisconsin Stat. § 980.09, as amended by 2013 Wis. Act 84, provides procedures by which courts are to determine when a person who has been committed as sexually violent and who has submitted a petition for discharge is entitled to a new discharge trial. Does the statute direct a court to compare the new facts alleged in the petition with the evidence presented at the most recent commitment or discharge trial to determine whether a trier of fact would likely conclude that the person's condition has sufficiently changed such that the State can no longer prove that the person meets the criteria for commitment?

Neither the circuit court nor the court of appeals considered whether the statute should be interpreted in this way. This Court should answer in the affirmative.

INTRODUCTION

This appeal asks this Court to construe the statute relating to petitions for the discharge of sexually violent persons, Wis. Stat. § 980.09, as amended by 2013 Wis. Act 84. In a published decision, *State v. Hager*, 2017 WI App 8, 373 Wis. 2d 692, 892 N.W.2d 740, the court of appeals held that although the statute was revised to increase the burden a committed person must meet to be entitled to a discharge trial, the way that determination is made remained largely the same. In this brief, the State will show how the several significant revisions in the statute fundamentally changed not just the committed person's burden of production but also the way a court should assess whether that burden has been met.

ORAL ARGUMENT AND PUBLICATION

This Court ordinarily hears oral argument and publishes its opinions.

STATEMENT OF THE CASE

Statutes Involved

A. Statute relating to petitions for discharge of sexually violent persons as it existed prior to 2013 Wis. Act 84

980.09 Petition for discharge. 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 may conclude the person's condition has changed since the date of his or her original commitment order so that the person does not meet the criteria for commitment as a sexually violent person.

(2) The court shall review the petition within 30 days and may hold a hearing to determine if it contains facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. In determining under this subsection whether facts exist that might warrant such a conclusion, the court shall consider any current or past reports filed under section 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 petition does not contain facts from which a court or jury may conclude that the person does not meet the criteria for commitment, the court shall deny the petition. If the court determines that facts exist from which a court or jury could conclude the person does

not meet the criteria for commitment, the court shall set the matter for hearing.

B. Statute relating to petitions for discharge of sexually violent persons as it presently exists with revisions made by 2013 Wis. Act 84

980.09 Petition for discharge. (1) 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.

. . . .

(2) In reviewing the petition, 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. 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 section 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.

Procedural History

CCAP shows that on October 5, 1995, the respondent-appellant, David Hager, Jr., was convicted of three counts of incest with a child, and sentenced to 12 years in prison. By law, incest with a child, in violation of Wis. Stat. § 948.06, is a sexually violent offense. Wis. Stat. § 980.01(6)(a).

On October 1, 2007, as Hager's prison sentence was about to expire, the State filed a petition under Wis. Stat. § 980.02 alleging that Hager was a sexually violent person because he was convicted of a sexually violent offense, had a mental disorder, and was dangerous to others because it was likely that he would engage in additional acts of sexual violence. (R. 1.)

At a trial held on September 16 and 17, 2008, a jury found beyond a reasonable doubt that Hager is a sexually violent person. (R. 32; 35; 162; 163.) An order committing Hager to the custody of the Department of Health Services was entered September 17, 2008. (R. 36.) The order committing Hager was summarily affirmed on appeal a year later. (R. 57.)

Shortly after that, Hager filed his first petition for discharge under Wis. Stat. § 980.09. (R. 64.) This petition was followed by several more petitions over the years. (R. 72; 76; 103; 113.) These petitions were either abandoned, withdrawn or summarily denied. (R. 69; 96; 105; 129.) None of them ever proceeded to an evidentiary hearing on the merits.

The Legislature made significant revisions to Wis. Stat. § 980.09 in 2013 Wis. Act 84, effective December 14, 2013. Hager filed the petition that is the subject of this appeal on February 20, 2014. (R. 119.) The circuit court orally denied the petition on June 20, 2014 (R. 166:16–17, Pet-App. 101–02), followed by a written order entered July 20, 2014 (R. 129).

In denying the petition, the circuit court viewed its task as determining whether there had been a change since the last hearing that would likely convince a trier of fact that Hager was entitled to a discharge. (R 166:16, Pet-App. 101.) Looking at the report of Hollida Wakefield, on which Hager based his petition, the court determined that there did not seem to be any change in Hager's condition, and that he was still the same person he was when he was committed. (R. 166:17, Pet-App. 102.) The court concluded that Hager was not entitled to a discharge trial because it was not likely that a jury would conclude that there had been a change that would result in a discharge. (R. 166:17, Pet-App. 102.)

Hager filed another petition for discharge on October 21, 2014, which the circuit court summarily denied on October 24. (R. 144; 145.)

On November 17, 2014, he then filed a post-commitment motion directed to the order entered on July 20. (R. 146.) The court orally denied that motion on January 22, 2015 (R. 167:9–10, Pet-App. 103–04), and in writing on February 3, 2015 (R. 152).

In denying the motion, the court declined to change its ruling that Hager was not entitled to a fact-finding hearing, but did modify its reasoning. (R. 167:10, Pet-App. 104.) Referring to the most recent expert reports on Hager's condition—the one submitted by Wakefield favoring discharge and another submitted by psychologist Dr.

Bradley Allen opposing it—the court said that "the current reports, Wakefield and Allen, trying to weigh those reports, that in the end, that the 'would likely' [burden of production] does make the burden more difficult and has not been met at this juncture." (R. 167:10, Pet-App. 104.)

Hager filed this appeal on February 13, 2015. (R. 154.) The court of appeals certified this case to this Court on February 2, 2016. Certification was denied on April 4, 2016, and the court of appeals, after hearing oral argument, decided this case in an opinion that has been published.

The decision of the court of appeals asserted two propositions regarding the revisions to Wis. Stat. § 980.09. First, the court concluded that the revisions did not grant to circuit courts the authority to weigh the evidence favorable to a petition for discharge against the evidence unfavorable to the petition. *Hager*, 373 Wis. 2d 692, ¶ 4. (Pet-App. 109.) Second, the court concluded that, although a committed person's burden of production was increased, that burden could still be met by looking exclusively at the facts favorable to the petition to determine whether there was a reasonable likelihood of success at a discharge trial. *Hager*, 373 Wis. 2d 692, ¶ 4. (Pet-App. 109.)

Looking exclusively at the facts favorable to the petition, the court of appeals concluded that Hager's discharge petition stated sufficient facts to warrant a discharge trial. *Hager*, 373 Wis. 2d 692, ¶¶ 40–41. (Pet-App. 119–20.) Accordingly, the court of appeals reversed the orders of the circuit court denying Hager's petition for discharge, and remanded the case for further proceedings, i.e., a trial to determine whether Hager should be discharged. *Hager*, 373 Wis. 2d 692, ¶ 46. (Pet-App. 122.)

The State petitioned for review, which this Court granted.

SUMMARY OF ARGUMENT

Under the previous version of the statute designating the procedures for determining whether a person who has been committed as sexually violent is entitled to a new discharge trial, a person was entitled to a new trial if there was any possibility that he could prevail at the trial. In assessing the possibility of prevailing, a court considered only the evidence favorable to the committed person. Evidence indicating that the person would not prevail was ignored.

In 2013 the Legislature made significant changes to the statute. It increased a committed person's burden of production so that he must now show that it is likely that he would prevail at a new discharge trial. In assessing the likelihood of prevailing, a court is no longer limited to just the evidence favoring the committed person. Rather, a court must consider the evidence presented at the most recent commitment or discharge trial, where the person did not prevail, and compare that evidence to the new evidence presented by the person to support his release to determine whether he would likely prevail at a new trial.

STANDARD OF REVIEW

Construction of a statute presents a question of law which is considered independently by the current court. *Orion Flight Serv. v. Basler Flight Serv.*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421, 714 N.W.2d 130.

ARGUMENT

Wisconsin Stat. § 980.09, as amended, directs a court to compare the new facts alleged in the petition for discharge with the evidence presented at the most recent commitment or discharge trial to determine whether a trier of fact would likely conclude that the person's condition has sufficiently changed such that the State can no longer prove that the person meets the criteria for commitment.

The purpose of statutory construction is to discern the intent of the Legislature. *Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 6, 270 Wis. 2d 318, 677 N.W.2d 612.

The primary source for determining the meaning of a statute is the language used by the Legislature, *J.A.L. v. State*, 162 Wis. 2d 940, 962, 471 N.W.2d 493 (1991), because it is assumed that the intent of the provision is expressed by the words it employs. *Orion*, 290 Wis. 2d 421, ¶ 16. Language of a statute must be interpreted in the context in which it is used, not in isolation, but as part of the whole, in relation to the language of surrounding or closely related statutes, and reasonably to avoid absurd or unreasonable results. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

If the meaning of a provision is plain, the inquiry ends. *Orion*, 290 Wis. 2d 421, ¶ 17. The obvious construction is conclusive, *J.A.L.*, 162 Wis. 2d at 962, and it is impermissible to resort to extrinsic sources to devise an otherwise unapparent ambiguity or alternative interpretation. *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447 (1967). *See State v. Bruckner*, 151 Wis. 2d 833, 844–45, 447 N.W.2d 376 (Ct. App. 1989).

A. The previous version of the statute allowed courts to consider only the evidence favorable to the committed person in assessing whether there was any possibility that he could prevail at a new discharge trial.

The statute relating to petitions for discharge of sexually violent persons which was in effect before 2013 Wis. Act 84, Wis. Stat. § 980.09 (2011–12), provided a two-step process for "weeding out meritless and unsupported petitions, while still protecting a petitioner's access to a discharge hearing." *State v. Arends*, 2010 WI 46, ¶ 22, 325 Wis. 2d 1, 784 N.W.2d 513.

The first step was concerned with whether a court could deny the petition summarily. *Arends*, 325 Wis. 2d 1, ¶ 25. The first paragraph of section 980.09 provided for a paper review of the petition and its attachments by themselves to determine whether a reasonable trier of fact could possibly conclude from the facts alleged that the committed person's condition had changed since he was initially committed so that he did not meet the criteria for commitment as a sexually violent person. *Arends*, 325 Wis. 2d 1, ¶¶ 25–27.

This was a limited review, similar to the determination of whether the pleadings state a claim on which relief can be granted, aimed at ascertaining whether the petition was sufficient on its face to indicate that relief was possible. *Arends*, 325 Wis. 2d 1, ¶¶ 28–29.

If the petition alleged sufficient facts to show that it was not simply frivolous, the court proceeded to a broader review that included several sources of information in addition to the petition, specifically, any current or past reports filed under section 980.07, the State's written response to the petition, arguments of counsel, and any

supporting documentation provided by the committed person or the State. *Arends*, 325 Wis. 2d 1, ¶¶ 31–33. The purpose of the second step of the review under section 980.09(2) was to determine whether the allegations in the petition were supported by facts on which a trier of fact could reasonably rely that could support a decision for the committed person at a discharge trial. *Arends*, 325 Wis. 2d 1, ¶¶ 38–39.

The former version of the statute did not allow the court to weigh evidence favoring the committed person against evidence unfavorable to him. *Arends*, 325 Wis. 2d 1, ¶ 40. This was because the standard for granting a trial did not involve weighing the evidence to assess whether the evidence more heavily favored the committed person, but whether the enumerated items contained facts favorable to the committed person that would allow a factfinder to find in favor of the person. *Arends*, 325 Wis. 2d 1, ¶ 40. This standard was similar to the test applied on a motion to dismiss at the close of the evidence, i.e., whether there is any evidence that would support relief for the plaintiff. *Arends*, 325 Wis. 2d 1, ¶ 42.

Nor was the second step of the procedure concerned with whether the committed person "'no longer meets'" the criteria for commitment. *Arends*, 325 Wis. 2d 1, ¶ 41. There was no need to show evidence of a change in status to get a discharge hearing. *Arends*, 325 Wis. 2d 1, ¶ 41.

Nevertheless, judicial decisions interpreted the statute to require a committed person to "set forth new evidence, not considered by a prior trier of fact, from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person." *State v. Schulpius*, 2012 WI App 134, ¶¶ 31–35, 345 Wis. 2d 351, 825 N.W.2d 311. A new discharge trial could not be based on evidence already determined to be insufficient by a prior trier of fact. *Schulpius*, 345 Wis. 2d 351, ¶ 35. Rather,

a new trial had to be based on "some new fact, new professional knowledge, or new research." *Schulpius*, 345 Wis. 2d 351, ¶ 35.

B. The Legislature has made significant revisions to the statute, changing not only a committed person's burden of production but also the way a court determines whether that increased burden has been met.

The Legislature made several significant revisions to Wis. Stat. § 980.09 in 2013 Wis. Act 84.

First and most obvious, the Legislature increased a committed person's burden of production.

The previous version of the statute provided that a committed person had to allege facts from which a trier of fact "may" conclude that the person no longer met the criteria for commitment. As discussed in *Arends*, use of the word "may" indicated that a committed person had to show only a bare possibility of success at a discharge trial. If there was any chance of success at all, no matter how unlikely, the committed person got a trial.

The revised statute requires a committed person to allege facts from which a trier of fact "would likely" conclude that the person no longer meets the criteria for commitment. "Likely" is statutorily defined to mean more likely than not. Wis. Stat. § 980.01(1m). More likely than not means there is more than a 50 percent chance that the trier of fact would decide in his favor. *See State v. Smalley*, 2007 WI App 219, ¶ 6, 305 Wis. 2d 709, 741 N.W.2d 286 (discussing the meaning of more likely than not). So to get a discharge trial, a committed person has to show that there is a practical reason to give him a discharge trial because he has a realistic chance of succeeding at a discharge trial.

Second, a committed person must now show that there has been a change in his condition. The revision requires the person to show that his condition has sufficiently changed that he no longer meets the criteria for commitment.

Third, the revision shifts the starting point for assessing whether a committed person's condition has changed from a date to an event. Previously, any change was measured from the date of the original commitment. Now, any change is measured from the most recent order either directing commitment or denying discharge from a commitment after a hearing on the merits.

This revision escalates the importance of the most recent evidentiary hearing at which the evidence proved that a person was sexually violent. It makes that hearing, and the evidence of sexual violence presented at that hearing, the starting point for assessing whether there is reason to conclude that the person's condition has changed since that factual determination was made. The shift in the focus of the inquiry from whether the person does not meet to whether the committed person "no longer" meets the criteria for commitment emphasizes the significance of the fact that there has previously been an evidentiary hearing where the person was found to meet the criteria.

Fourth, consistent with the new importance of a previous evidentiary hearing, the revision shifts the court's vision when proceeding under subsection (2) from the petition for discharge and enumerated supplemental sources to the record. Courts are no longer supposed to determine whether the petition contains sufficient facts to warrant a trial, but whether, looking at the petition and supplemental material together with the record, there exist sufficient facts to warrant a trial. As part of the record, courts are expressly authorized to consider the evidence introduced at the original commitment trial or the most recent discharge trial.

Thus, in determining whether a new discharge trial is warranted, courts are supposed to consider the evidence presented at the most recent previous trial. It is also apparent that courts are not artificially confined to considering only the evidence favoring discharge, but may also consider the evidence supporting commitment, which predominated at that trial.

In the absence of any limiting language, a statutory provision applies to all situations fairly included within its terms. *See State v. Badzmierowski*, 171 Wis. 2d 260, 263–64, 490 N.W.2d 784 (Ct. App. 1992); *Hanson v. Eichstaedt*, 69 Wis. 538, 546, 35 N.W. 30 (1887). Other fairly included situations are not excluded even if they may not have been the primary focus of the provision. *State v. Cornelius*, 152 Wis. 2d 272, 277 n.1, 448 N.W.2d 434 (Ct. App. 1989).

There is no language in present section 980.09(2) that limits the word "evidence" to evidence favoring discharge. Nor is there anything in the statute that would reasonably imply such a limitation. It is impermissible to read into a statute things that are simply not there. *State v. Hall*, 207 Wis. 2d 54, 82, 557 N.W.2d 778 (1997). So as a matter of statutory construction, the word "evidence" applies to all evidence introduced at the prior trial, both the evidence favoring discharge and the evidence supporting commitment.

Also, since the revised statute continues the rule that a court must determine whether a committed person has "set forth new evidence, not considered by a prior trier of fact," *Schulpius*, 345 Wis. 2d 351, ¶ 35, a court must consider *all* of the evidence presented at a prior trial. In other words, a court cannot possibly determine whether evidence was previously considered by a prior trier of fact if it looks at only some of the evidence presented at a prior

trial. Rather, a court must look at all of the evidence that was considered previously.

Furthermore, a court cannot determine whether there is reason to conclude that a committed person's condition has changed since the last commitment or discharge trial unless it learns what that condition was, as established by the evidence presented at the previous trial. Since the evidence convincingly established that the committed person was sexually violent, a court must consider the evidence supporting that finding to determine whether a trier of fact could currently find that the person's condition has changed so that he is no longer sexually violent.

Indeed, even the new standard of review—which requires the committed person to show that he would likely succeed at a new discharge trial—contemplates that courts will consider the evidence both for and against discharge. It contemplates that courts will consider record evidence indicating that it is likely that the petitioner would succeed, and record evidence indicating that it is not likely that the petitioner would succeed.

C. The current version of the statute directs a court to compare the new evidence presented by a committed person with the evidence presented at the most recent commitment or discharge trial to assess whether it is likely that the person would prevail at a new discharge trial.

These statutory revisions do not alter the basic framework of section 980.09. That section still provides a two-step process for evaluating petitions for the discharge of sexually violent persons.

The first step is still a facial review of the petition to assess whether it alleges facts that would entitle the

committed person to relief. Wis. Stat. § 980.09(1). The difference between the old version of subsection (1) and the new version lies not in the procedure, but in the facts that the committed person must allege to entitle him to relief. It is no longer sufficient, as it was with the previous version of the statute, for the committed person to allege facts from which a trier of fact could possibly conclude that he does not presently meet the criteria for commitment as a sexually violent person. Now, the committed person must allege that his condition has changed since the most recent evidentiary hearing such that a trier of fact would likely conclude that he no longer meets the criteria for commitment.

Moreover, the significant revisions in the statute supersede the holding in *Arends*, 325 Wis. 2d 1, ¶¶ 38–39, that the purpose of the second step of the review under subsection (2) is simply to determine whether the allegations in the petition are supported by facts on which the trier of fact could reasonably rely that could support a decision for the committed person at a discharge trial.

The text of the statutory changes place new emphasis on new evidence showing a sufficient change in a committed person's condition since the evidence presented at the last evidentiary hearing proved that he was sexually violent. Now, the statute directs a court to compare the new evidence with the evidence presented previously to determine whether the result of a new trial would likely be different from the result of the previous trial. Thus, under the recent revisions in Wis. Stat. § 980.09(2), the matters that a committed person must establish to get a trial on a petition for discharge are substantially similar in at least two ways to the matters an incarcerated person must establish to get a new criminal trial on the basis of newly discovered evidence.

First, in both situations, the evidence must be "new." A criminal defendant who seeks a new trial on the basis of

evidence not presented at the trial resulting in his conviction must show that he has new evidence that was discovered after his conviction. *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Love*, 2005 WI 116, ¶ 43, 284 Wis. 2d 111, 700 N.W.2d 62. Although a committed person seeking a new discharge trial does not have to show that he has evidence that was newly discovered since his previous trial, he has an analogous burden of production. He has to show that he has new evidence that was not introduced at a previous commitment or discharge trial. *Schulpius*, 345 Wis. 2d 351, ¶ 35. This new evidence may be newly discovered evidence or it may be previously known evidence, but it must be "new" in the sense of being newly presented or used.

Second, in both situations, there must be a reasonable probability of a different outcome. A criminal defendant who establishes that he has newly discovered evidence is entitled to a new trial only if he shows that there is a reasonable probability that the result of a new trial would be different from the result of his past trial. *Plude*, 310 Wis. 2d 28, ¶¶ 32–33; *Love*, 284 Wis. 2d 111, ¶¶ 43–44. In other words, it must be reasonably probable that a jury, looking at the evidence available when the defendant was convicted and the new evidence available to the defendant, would find that the new evidence changes the factual picture so significantly that it would now have a reasonable doubt about the defendant's guilt. *Plude*, 310 Wis. 2d 28, ¶¶ 32–33; *Love*, 284 Wis. 2d 111, ¶¶ 43–44.

This test is not concerned with the impact of the new evidence on a reviewing court's view of the case. *See Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 11, ¶ 44. The test focuses, rather, on a jury's assessment of the new evidence. *Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 11, ¶ 44. So in a newly discovered evidence case, the reviewing court is not

permitted to weigh the evidence favoring a different result against evidence indicating that the result would be the same. *State v. Edmunds*, 2008 WI App 33, ¶ 18, 308 Wis. 2d 374, 746 N.W.2d 590. Rather, the court must compare the new evidence with the old evidence to assess how a jury would probably decide a new trial with the new evidence added to the evidence that they heard previously.

Similarly, a committed sexually violent person now must show that a trier of fact, if it heard the new evidence, would likely reach a different result from the one reached at the last trial. The person must show that a trier of fact, looking at the evidence available when the person was committed or not discharged, and the new evidence now available to the person, would find that the new evidence changes the factual picture so significantly that it would have a consequential doubt about whether the person was sexually violent.

Again, the reviewing court does not weigh any competing evidence. Rather, it must compare the new evidence with the previous evidence to assess whether it is likely that a trier of fact would reach a different result at a new trial.

Although section 980.09(2) literally states that the question is whether the trier of fact would likely conclude that the committed person "no longer meets the criteria for commitment," this language must be considered in the context of Wis. Stat. § 980.09(3), which states that at a trial held after a determination that a person "no longer meets the criteria for commitment," the burden is on the State to prove by clear and convincing evidence "that the person meets the criteria for commitment." This language must also be considered with Wis. Stat. § 980.09(4), which states that the committed person shall be discharged if the trier of fact "is satisfied that the state has not met its burden of proof."

It would be unreasonable to require a committed person to show something that he would not have to prove at a trial in order to get a trial. It would make no sense for the committed person to have to show that he could prove that he did not meet the criteria for commitment when he has no such burden at a trial: the burden is on the State to prove the opposite, i.e., that he still does meet the criteria for commitment.

Thus, the statute requires the committed person to show that at a new trial a trier of fact would likely find that the State failed to meet its burden to prove that he is still a sexually violent person. This is akin to the burden in a newly discovered evidence case to show that at a new trial the State would probably fail to meet its burden to prove that the defendant is guilty beyond a reasonable doubt.

Hence, the statute requires the committed person simply to show that the result of a new discharge trial would likely be different from the result of the last one. This burden serves the Legislature's statutory purpose of "weeding out meritless and unsupported petitions, while still protecting a petitioner's access to a discharge hearing." *Arends*, 325 Wis. 2d 1, ¶ 22. A committed person should get a new discharge trial if he shows that there is some practical reason to actually go through the motions of holding a new trial that is not simply going to be a carbon copy of a trial that has already been held.

Although present section 980.09(2) continues to direct courts to consider any current or past reports of periodic examinations, relevant facts in the petition and response, arguments of counsel, and any documentation provided by the parties, this is a verbatim repetition of a provision in the previous statute. In *Arends*, this Court concluded that the enumerated items should be examined for facts that could support relief for the committed person at a discharge

hearing. *Arends*, 325 Wis. 2d 1, ¶ 38. There is nothing in the revised statute that suggests any intent to alter the effect of that ruling. Therefore, these items, to the extent that they qualify as new evidence, could be used to assess the quality of the new evidence presented by the committed person as compared to the evidence presented at the most recent hearing on the merits of the person's commitment.

The situation in Wisconsin is similar, although not identical, to the situation recently considered by the Iowa Supreme Court.

Applying the version of the discharge statute in effect at the time, the court held in *Johnson v. District Court*, 756 N.W.2d 845, 851 (Iowa 2008), that a committed person was entitled to a discharge trial if he presented admissible evidence that could lead a fact finder to find reasonable doubt about whether his mental condition had changed so that he was unlikely to commit sexually violent offenses. Under that standard, a court considered only the evidence presented by the committed person. *See Johnson*, 756 N.W.2d at 850–51.

In response to this ruling, the Iowa Legislature revised the discharge statute to clarify that the court must not limit its inquiry to evidence submitted by the committed person, but should consider all the evidence presented. *Taft v. District Court*, 828 N.W.2d 309, 318 (Iowa 2013). The court held that under the revised statute, a committed person is entitled to a discharge trial if he proves by a preponderance of the evidence that he has more likely than not generated a fact question on the issue of whether his condition has so changed that he is not likely to commit sexually violent offenses. *Taft*, 828 N.W.2d at 318.

Similarly, this Court should conclude that the revisions made by the Wisconsin Legislature to section

980.09 change the procedure for determining whether a discharge trial is warranted, so that a court must consider both the evidence presented at the most recent commitment or discharge trial and the new evidence presented by the committed person in determining whether a trier of fact would now find that the State failed to meet its burden to prove that the person should continue to be committed.

D. The court of appeals was right when it ruled that circuit courts should not weigh evidence favoring discharge against evidence supporting continued commitment, but wrong when it ruled that evidence unfavorable to discharge could not be considered at all.

The decision of the court of appeals asserted two propositions regarding the revisions in Wis. Stat. § 980.09. First, the court concluded that the revisions did not grant to circuit courts the authority to weigh the evidence favorable to a petition for discharge against the evidence unfavorable to the petition. *Hager*, 373 Wis. 2d 692, ¶ 4. (Pet-App. 109.) Second, the court concluded that, although the committed person's burden of production was increased, that burden could still be met by looking exclusively at the facts favorable to the petition to determine whether there was a reasonable likelihood of success at a discharge trial. *Hager*, 373 Wis. 2d 692, ¶ 4. (Pet-App. 109.)

Although the State argued in the court of appeals that circuit courts were allowed to weigh the evidence, the State does not reprise that position in this Court. The State does not contest the conclusion of the court of appeals that circuit courts are not permitted to weigh the evidence for and against discharge.

However, the State disagrees with the conclusion of the court of appeals that circuit courts are forbidden to

consider evidence that is unfavorable to the petition for discharge. The enactment of 2013 Wis. Act 84 changed more than just the committed person's burden of production. That act made several changes in the law that together changed the way a court is supposed to determine whether a committed person has met his increased burden to show that he is entitled to a new discharge trial.

The court of appeals correctly acknowledged each of the changes. It recognized that the burden of production was increased from "may" conclude to "would likely" conclude. *Hager*, 373 Wis. 2d 692, ¶ 28. (Pet-App. 115.) It recognized that the Legislature altered the "lookback period" to the most recent evidentiary hearing on the merits. *Hager*, 373 Wis. 2d 692, ¶ 28. (Pet-App. 115.) It recognized that the focus of the review shifted from the contents of the petition to the contents of the record. *Hager*, 373 Wis. 2d 692, ¶ 29. (Pet-App. 115.) It recognized that the record now includes the evidence at the most recent hearing where the committed person was found to be sexually violent. *Hager*, 373 Wis. 2d 692, ¶ 29. (Pet-App. 116.)

The court of appeals also correctly recognized that the Legislature intended to change the statute in a way that did not change the law by codifying the rule articulated in *Schulpius* and other cases that a petition for discharge must be based on new facts not previously considered in any other evidentiary hearing on the merits. *Hager*, 373 Wis. 2d 692, ¶¶ 40–41. (Pet-App. 119–20.)

But the court of appeals failed to recognize the effect of all these revisions together. The court of appeals seems to have thought that there were just two procedural alternatives at the opposite ends of the spectrum—either weigh the evidence favoring discharge against the evidence supporting commitment or consider only the evidence favoring discharge.

But the middle-ground approach that the State advances here is more in tune with the several revisions to Wis. Stat. § 980.09. The Legislature plainly intended to make it more difficult for committed persons to get discharge trials to weed out those cases where a new trial would involve no more than going through useless motions to inevitably reach the same result as the last trial. But at the same time, the Legislature remained dedicated to providing discharge trials to those who could show that there was a genuine chance that the result of a new trial would be different from the result of the last one.

So to strike a reasonable balance between extremes that would make it too easy or too hard to get a new discharge trial, the statute requires that a committed person must show that he has new evidence not used previously at any other hearing on the merits of his commitment. He must show that it is likely that a trier of fact, looking at the evidence presented when he was most recently found to be sexually violent and the new evidence not presented previously, would find that the new evidence changes the factual picture so significantly that the trier of fact would now conclude that the State failed to meet its burden to prove that he meets the criteria for commitment as a sexually violent person.

Although two courts have previously attempted to determine whether Hager has satisfied his burden of production under the revised statute so as to be entitled to a new discharge trial, neither of those courts assessed his petition under the correct legal standard. The circuit court concluded that Hager was not entitled to a trial under a standard that it too difficult, while the court of appeals concluded that he is entitled to a trial under a standard that is too easy. Moreover, the record before this Court was filed

in March 2015 and does not account for any changes in Hager's condition over the last two years.

Under these circumstances, the most appropriate disposition would be to reverse the decision of the court of appeals, and to remand the case to the circuit court to make a decision in the first instance under the proper standard for determining whether a committed person is entitled to a new discharge trial.

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals should be reversed, and that the case should be remanded to the circuit court to determine under the proper legal standard whether Hager is entitled to a new discharge trial.

Dated this 28th day of June, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Petitioner-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

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 6,584 words.

Dated this 28th day of June, 2017.

_____
THOMAS J. BALISTRERI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 28th day of June, 2017.

_____
THOMAS J. BALISTRERI
Assistant Attorney General