STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP330

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In re the commitment of David Hager, Jr.:

STATE OF WISCONSIN,

Petitioner-Respondent-Petitioner,

v.

DAVID HAGER, JR.,

Respondent-Appellant.

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On Review of a Decision of the Court of Appeals,
District III, Reversing Orders Entered
in the Chippewa County Circuit Court,
the Honorable James M. Isaacson, Presiding

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# BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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## ISSUE PRESENTED

> David Hager filed a petition for discharge from his Wis. Stat. ch. 980 commitment, and the circuit court denied it without trial. The court of appeals reversed that decision, and remanded for a trial. On appeal, the state has made shifting arguments about the appropriate standard governing a petition for discharge. But it has never argued that Hager's petition and the attached expert report do not meet the statutory standard, however defined.

Should this court affirm the court of appeals' conclusion and remand for a discharge trial?

## POSITION ON ORAL ARGUMENT AND PUBLICATION

Both argument and publication are customary for this court. However, given that the state has made no argument that Mr. Hager should not receive a trial, and identified no valid statutory support for its view of the law, summary affirmance of the court of appeals' decision may be appropriate.

## STATEMENT OF THE CASE

The state accurately describes the procedural history of this case. However, it does not present the relevant facts, which are as follows.

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). Barahal applied two actuarial instruments to Mr. Hager: the RRASOR and the Static-99. (19:4-5). The RRASOR gave a recidivism risk estimate of 49% within ten years. (19:4). The Static-99 estimated a 38% ten-year recidivism rate. (19:5).

Mr. Hager filed a discharge petition in 2014, which is the subject of this appeal. It included an expert report by Hollida Wakefield. (119; 117; App. 105-30).

Wakefield's report opines that, while Mr. Hager continues to have a pedophilic disorder, it has decreased in recent years. (Mr. Hager's sexual offenses, which occurred between 1992 and 1995, involved sexual activity with minors). (117:2,5,19; App. 106, 109, 123). It explains that Sand Ridge records show 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 his polygraph results confirm that. (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 also applies two more modern actuarial instruments to Mr. Hager. The first is the Static-99R (an updated version of the instrument used by Barahal in 2008). The report concludes the 99R ten-year recidivism rate for Mr. Hager may be as high as 34% or as low as 15%. (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. (117:18; App. 122).

The report concludes 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 argued that 2013 Wis. Act 84 overruled this court's decision in ***State v. Arends***, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513, and 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 they precluded a trial for Mr. Hager. (123:4-5;App. 134-35).

The circuit court denied Mr. Hager's petition without trial. (129). Its decision did not discuss any of the facts in the Wakefield report (or any report). The court simply said 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 arguing 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 appealed.

The court of appeals certified the case to this court, but the certification was refused. Certification of February 2, 2016; Order of April 6, 2016.

In a published decision, the court of appeals reversed the circuit court and ordered a trial. ***State v. Hager***, 2017 WI App 8, 373 Wis. 2d 692, 892 N.W.2d 740. It rejected, as contrary to the statute, the state's claim that the court should "weigh" the evidence for and against Mr. Hager before giving him a trial. ***Id.***, ¶35. It noted the state had not made any "cogent alternative argument" that the Wakefield report did not satisfy the statutory standard. ***Id.***, ¶45. It also concluded on its own that the report satisfied Mr. Hager's required showing, because it constituted "relevant, probative evidence from which a factfinder 'would likely conclude' that Hager no longer qualifies as a 'sexually violent person.'" ***Id.***, ¶46.

The state petitioned for review.

## SUMMARY OF ARGUMENT

The history of this appeal is a history of the state's campaign to deny Mr. Hager a discharge trial despite the lack of any argument that he's not entitled to one. For three years, the state insisted that Mr. Hager could not have his day in court because the statute directed the circuit court to "weigh" his clear evidence that he is no longer dangerous against other (unspecified) evidence in the record. The state maintained this position despite the plain language of the statute and this court's contrary decision in ***Arends***. And it never attempted to explain just what in the record "outweighed" Mr. Hager's expert report.

Now, finally, the state has conceded what was clear all along: there is no "weighing" test in the statute. What, then, is the test? The state does not say. It is sure that the court of appeals' decision, which granted Mr. Hager a trial, is wrong. But its explanation of *why* that decision is wrong depends on a misrepresentation of what it actually said. The rest of the state's brief is self-contradictory: it attributes great significance to new statutory language, but then admits elsewhere that the language merely codifies pre-existing law.

Given the state's muddled argument, it is hard to say just what it thinks the law is. At times, it seems to be agreeing with the court of appeals (and Mr. Hager) about the standard. Other times, it seems to be trying to repackage its abandoned, unworkable, and unconstitutional "weighing" test under a new name: "newly discovered evidence."

The state's sole argument for its "newly discovered evidence" standard is founded not in the statutory text, but in an inapt and dangerous analogy. As with the state's late "weighing" test, its new standard is wholly undeveloped: Is the circuit court's decision discretionary? Or is the determination one of fact? Or law? If fact, does the circuit court determine credibility? How is this meaningfully different from the "weighing" test the state has now abandoned? And what of the constitutional infirmity of requiring a committed person to carry the burden of proof to show he is not dangerous?

Astonishingly, whatever the state's standard may be, it makes *no argument* that Mr. Hager has not met it. Nowhere in its brief does the state even *suggest* that Mr. Hager's expert report is insufficient to entitle him to a trial, even under its own erroneous view of the law. It goes so far as to decline to present the relevant facts.

Instead, it asks this court to remand to the circuit court for consideration under what it has lately decided is the "correct legal standard." The state even suggests that remand is appropriate because it has dragged this case out for three years insisting on a position it will no longer defend.

This court should decline the state's invitation to muddy the waters with an amorphous new standard. The statute requires Mr. Hager to point to "facts" from which a fact finder "would likely conclude" he is no longer dangerous. As before, whether he has done so is a question of law that this court can, and should, decide. Mr. Hager's new expert report, which relies on new professional knowledge as well as changes in Mr. Hager's behavior, easily meets this standard—as the state has now effectively conceded. This case has gone on long enough; Mr. Hager is entitled to his day in court.

## ARGUMENT

I. This court should affirm the court of appeals' published decision in its entirety.

A. The history of this litigation—the state's shifting positions

In order to understand the implications of the decision before this court, it is important to understand how the state's position has changed. At every previous phase of this litigation, the state has insisted that the 2013 amendment of Wis. Stat. § 980.09(2) overruled the ***Arends*** holding that a circuit court could not "weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner." That was what the appeal was about.

This was, as Mr. Hager has previously explained, not the state's first attempt to convince the courts to invent a "weighing" test, contrary to the statute's clear language. The state previously tried in ***Arends*** itself, arguing that a *prior* revision had introduced this procedure. ***Arends***, Petitioner-Respondent-Petitioner's brief at 19 (claiming that weighing was mandated by 2005 Wis. Act 434). This court disagreed, unanimously rejecting the notion that a circuit court may "weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner." ***Id.***, ¶40. As the majority opinion explained, there was no support for such "weighing" in the statute: it did not contain the phrases "probable cause" or "preponderance of the evidence"—"both … common terms of art that the legislature could have employed." ***Id.***, ¶37. What the statute *did* say was clear: "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." ***Id.***, ¶40 (emphasis added).

The legislature amended the statute in 2013, but the amendment didn't change the language that ***Arends*** relied on to find weighing impermissible. There is still no reference to preponderance of the evidence or any burden of proof. The statute still mandates a trial where the enumerated items "contain[] facts" supporting a grant of relief.

Despite the lack of textual support for its "weighing" theory, the state claimed it was mandated by the legislative history of the 2013 amendment. As this court knows, drafting history 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.

The state could point to no such ambiguity, but nevertheless presented a one-sided view of the drafting history. It relied on a single memo to the Legislative Council from DOJ, which suggests (again, contrary to the actual proposed statutory language) that the amendment would permit weighing. Court of Appeals Respondent's Brief at 10; App. 136-37. The state neglected to mention that all other legislative history—including, importantly, the Joint Legislative Council's report on the bill to the legislature—negated this suggestion. Neither that report nor the Legislative Reference Bureau analysis says anything at all about "weighing"; in fact both describe the amendment as an increase in the petitioner's "pleading requirement." 2013 AB 28 §23 at p. 13; App. 138, 139-40. The state's argument was, in effect, that the preferences of the DOJ trumped the actual language the legislature created.

In its petition to this court, the state abandoned all reference to "weighing"; where it had once said "weigh" it now said "compare." It even went so far as to substitute the word "compare" for the word "weigh" in quoting *other* sources. Petition of February 23, 2017. The point of this tactic was apparently to suggest, falsely, that the court of appeals' decision did not permit a circuit court to examine and consider the record as a whole (as the statute has long mandated) when deciding whether a committed person had presented sufficient evidence to merit a discharge trial. *See* ***id.*** at 5.

Now, in its opening brief to this court, the state finally appears to have dropped its contention that the statute prescribes a "weighing" test—i.e., that a committed person must prove he is not dangerous in order to get a trial where the state must prove he is. It may be that the state only *appears* to have abandoned this position—Mr. Hager will

argue below that it is, in fact, attempting to serve this court old wine from a new bottle.

B. History of this litigation—Mr. Hager's position

Mr. Hager has consistently maintained that the statute means what it says, and that it has changed in only one meaningful way since this court decided ***Arends***. Though the state asserts the 2013 amendment made four (or possibly more) "significant revisions" to the statutory language, this is simply false, as it elsewhere concedes and as Mr. Hager will explain in the next section.

The one meaningful change, which appears in the revised statute twice, is encapsulated in the final section. (The state's brief, though ostensibly a work of statutory construction, steadfastly disregards this straightforward articulation of the standard). Here is the current version:

> 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) (2015-16).

Here is the same sentence at the time this court decided ***Arends***:

> If the court determines that facts exist from which a court or jury could conclude the person does not meet criteria for commitment the court shall set the matter for hearing.

Wis. Stat. § 980.09(2) (2009-10).

As the court can see, the only substantive difference between the two sentences is that the older version uses the

phrase "could conclude" and the newer one "would likely conclude." Though the old version asked whether "facts exist" while the new asks whether the "record contains facts" this is not a substantive change. Obviously, under the previous version, the "facts" that "existed" existed within, i.e. were "contained" by, the record. The change is simply a rewording, aligning the last sentence with the statute's earlier direction that the court may consider the entire record in making its determination.

Here is what this single modification does, according to Mr. Hager, the court of appeals, and now, the state: it changes the pleading requirement for a person seeking discharge. (This is also the view taken by the Legislative Council and Legislative Reference Bureau analyses; App. 138, 139-40). It raises, in the words of the state, the person's "burden of production." State's Brief at 11. That is all it does. Whereas a person was previously required to show that a fact finder "could" conclude in his favor based on his proffer, now he must show that a fact finder "would likely conclude" in his favor based on that same proffer. That is, he must present somewhat stronger favorable evidence than before to get a discharge trial. In the words of the court of appeals:

> Whereas a mere possibility of success was previously sufficient, *see* ***Arends***, 325 Wis. 2d 1, ¶¶28-30, a petitioner now must demonstrate a reasonable likelihood of success to obtain a discharge trial. This change accomplished a material increase in the petitioner's burden of production. However, as we shall explain, the change does not allow, much less require, the circuit court to determine, at this preliminary stage, whether the facts supporting the petitioner are more compelling or credible than evidence unfavorable to the petitioner—at

> least, not to any extent greater than contemplated by ***Arends***.

***Hager***, 373 Wis. 2d 692, ¶32 (additional citations omitted). The court went on to say that evidence of "low probative value" would not entitle the person to a discharge trial. ***Id.***, ¶43.

Mr. Hager agrees with the court of appeals' articulation of the "would likely conclude" standard. He would add, by way of analogy, the United States Supreme Court's gloss on Federal Rule of Civil Procedure (8)(a)(2). That rule governs civil complaints and, similar to the amended statute at issue here, requires that such pleadings "show[] that the pleader is entitled to relief."

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief."

***Ashcroft v. Iqbal***, 556 U.S. 662, 678 (2009) (citations and some internal quotation marks omitted).

The requirement that a committed person point to "facts from which a court or jury would likely conclude" he is no longer dangerous is akin to requiring a civil pleader to "show[]… entitlement" to relief. That is, the person must be able to allege facts showing more than a "sheer possibility"

that he is no longer dangerous—facts that are not "merely consistent" with this conclusion, but that raise a plausible claim that it is true. Just as with Rule 8(a)(2), this is not the same thing as showing the evidence *as a whole* favors the committed person; that comes later, at the discharge trial.

Mr. Hager's new expert report easily clears this bar. Because he has never had a discharge trial, he is entitled to one if he can show a change in either himself or the professional knowledge about recidivism since 2008. ***State v. Ermers***, 2011 WI App 113, ¶¶31, 34, 336 Wis. 2d 451, 802 N.W.2d 540. Applying methods that did not exist at the time of Mr. Hager's 2008 trial, the Wakefield report concludes his risk to reoffend may be as low as 15% or as high as 30%. (117:17; App. 121). This is a substantial 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? Even the state apparently agrees, as it has never, at any point in this appeal, made an argument that Mr. Hager's report is insufficient.

### C. The state's new position, like its old one, is unsupported by statutory language, unconstitutional, and unworkable.

At this point in the litigation, the state appears more or less to agree with Mr. Hager's above interpretation of the statute—at least at times. It characterizes the old statute as requiring the committed person to show only a "bare possibility" of success, while the new one requires a "realistic chance of succeeding." State's Brief at 11.

This is a radical change from the state's prior positions. Indeed, now that the state is admitting Mr. Hager and the court of appeals are correct, and disavowing its "weighing" position, one might reasonably ask why were are here, in this court, at all.

In the state's telling, its issue now is with the court of appeals' "conclusion … that circuit courts are forbidden to consider evidence that is unfavorable to the petition for discharge." That would be a troubling conclusion, as it is directly contrary to the statutory directive that the court "may consider the record," including various enumerated portions. Wis. Stat. § 980.09(2). Fortunately, it is not at all what the court of appeals said.

Here is the fourth paragraph of that court's opinion—the only one the state cites for its claim that the court has "forbidden" consideration of other evidence:

> We disagree and conclude the process set forth in ***Arends*** largely remains good law. The changes to Wis. Stat. § 980.09(2) as a whole do not permit circuit courts to "weigh" the evidence favorable to the petition against the evidence unfavorable to it. Rather, the amendments clarify the statute so as to reflect judicial interpretations

> of the statutory language since the last major revisions in 2006. At the same time, the amendments undisputedly increase the petitioner's burden of production to convince a circuit court that all evidence within the record favorable to the petitioner, including those facts submitted with the petition, establishes a reasonable likelihood of success at a discharge trial.

***Hager***, 373 Wis. 2d 692, ¶4.

As this court can see, nowhere in that paragraph (or elsewhere) does the court of appeals forbid consideration of unfavorable evidence. What it forbids is *weighing*—that is, shifting the burden of persuasion on to the committed person. This is the rule of ***Arends***—the rule that the state now agrees remains the law.

The state suggests a couple of ways (other than weighing) that other, unfavorable evidence could be relevant to whether the "record contains facts" that "would likely" lead to the conclusion that the committed person is no longer dangerous. First, it will be necessary for the trial court to look at what happened at earlier trials to figure out whether the evidence in the discharge petition is really new. State's Brief at 13. Second, the court will have to know about the petitioner's prior condition in order to determine whether it has changed. State's Brief at 14.

Mr. Hager has no quarrel with these examples—in fact, his counsel was the one who first suggested them, at oral argument before the court of appeals. Counsel also added that, as the ***Arends*** court noted, other record items may demonstrate "that the claims in the petition are supported with actual facts"; that is, the petition does not contain inaccuracies. 325 Wis. 2d 1, ¶38. Nothing in the court of

appeals' decision says, or even suggests, that these uses of other record evidence are not permitted.

So the state's complaint about the court of appeals' decision is a red herring. Its dispute with the opinion is manufactured entirely by a mischaracterization of that opinion. So again, one has to ask, what does the state want in this case? In Mr. Hager's view, the state's real agenda is to revive its "weighing" test under a different name. The state now asserts (for the first time) that the legislature intended the 2013 amendment to introduce a test similar to the "newly discovered evidence" standard—without saying so, or using any language associated with that test. State's brief at 15-18.

The state discovers this test in a series of revisions. However, elsewhere in its brief, the state admits that each of these revisions simply codified prior law. State's Brief at 10-12, 18-19, 21.

First, the state asserts that the 2013 amendment added the requirement that "the person's condition has sufficiently changed" so as to merit a discharge trial. But this was already the law. Wis. Stat. § 980.09(1) (2009-10) (court to deny petition unless it shows "the person's condition has changed"); ***Ermers***, 336 Wis. 2d 451, ¶16 (discharge trial requires showing of a change in either the person or the professional knowledge regarding mental disorder or dangerousness). As the court of appeals explained below, the addition of the "person's condition has sufficiently changed" simply codified existing law, and did not change anything.

The state admits as much on pages 10, 11, and 21 of its brief. Yet it nevertheless argues on page 12 that this was a "significant revision" of the statute, and then on page 21, it criticizes the court of appeals for "failing to recognize the effect" of the revision.

The state next proposes that the 2013 amendment "shifts the starting point" for assessing change from the original commitment to the most recent discharge trial. State's Brief at 12. Again, this was already the law. ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. And again, the state acknowledges that this was already the law. State's Brief at 21. Yet again, despite acknowledging this fact, the state asserts that this codification of existing law somehow means the law has been overruled. And then the state faults the court of appeals for failing to appreciate the effect of this non-revision.

The state's final "significant revision" is the same story. The statute now permits the court to consider "the record," including various specifically enumerated items, in deciding whether facts meriting discharge exist. This was already the law. ***Arends***, 325 Wis 2d 1, ¶38. The state admits it. State's Brief at 18-19. But still, the state argues that this non-change changed the law. State's Brief at 21.

To sum up, the state's argument on all the revisions to the statute—other than "could conclude" to "would likely conclude," discussed above—is self-contradictory. The state claims these revisions *overruled* the law as described by this court in ***Arends***, while it simultaneously admits that they actually *codified* that law. Stripped of window dressing, the argument is really nothing at all.

Nor is there any merit in the state's invocation of ***Taft v. Iowa Dist. Court ex rel. Linn Cty.***, 828 N.W.2d 309, 314 (Iowa 2013), for the simple reason that the statute considered by the Iowa court is completely different than Wis. Stat. § 980.09(2). Iowa expressly places a "burden" on the committed person to present "relevant and reliable evidence" sufficient to "rebut the presumption of continued

commitment." (The Iowa court has not considered whether this assignment of the burden is constitutional; Mr. Hager will argue below that it is not).

So, as it did in the court of appeals, the state is asking this court to create a test (and procedure) not based on the statutory language, but in spite of it. That's a good enough reason for this court to decline the state's invitation to reverse the court of appeals. But what is more, the state's proposed test is inappropriate, unconstitutional, and unworkable.

It is inappropriate because the newly discovered evidence test is premised on the need for finality in criminal convictions. ***Strickland v. Washington***, 466 U.S. 668, 693, (1984) ("The standard… reflects the profound importance of finality in criminal proceedings."); ***United States v. Womack***, 24 F. App'x 429, 433 (6th Cir. 2001) ("Because of the interest in preserving the finality of judgments, however, motions for a new trial based upon newly discovered evidence are 'granted with caution.'").

With ch. 980, there is no corresponding finality interest. Quite the opposite: a central feature of all civil commitment systems is that commitments are *temporary*, rather than final. That is what makes them constitutional. ***Kansas v. Hendricks***, 521 U.S. 346, 363, (1997).

Moreover, a challenge to a criminal verdict is necessarily a claim that the verdict was incorrect. A person is either guilty or not guilty of a crime; both cannot be true, so a claim of innocence is a challenge to the jury's verdict. But in the ch. 980 context, the same is not true. A claim that Mr. Hager is not dangerous in 2017 is perfectly consistent with the jury's finding that he was dangerous in 2008. Both can be true. In fact, the requirement that Mr. Hager show a "change" since his last trial implicitly *recognizes* that that

trial's verdict was legitimate. By presenting evidence of a change in condition, Mr. Hager is not asking the courts to overturn his original commitment—he is asking them to recognize that it has successfully served its purpose and is no longer necessary.

For these reasons, the newly discovered evidence standard—which the state calls a "middle ground"—is actually much too stringent a test, and makes little sense in this context. It is also unworkable, for many of the same reasons the state's former "weighing" test was.

For one thing, the newly discovered evidence standard is a discretionary test. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. How can the decision as to whether a committed person has met his burden of production be a discretionary one? (It may go without saying by now, but the statute itself provides absolutely no basis for imposing such a rule.) Such questions are always questions of law. ***City of Pewaukee v. Carter***, 2004 WI 136, ¶35 n.28, 276 Wis. 2d 333, 688 N.W.2d 449.

The larger problem, though, is that despite forswearing "weighing," the state finally gives away the game when it articulates its test, saying the committed person:

> 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.

State's Brief at 16.

It is impossible to read that sentence as anything other than a requirement that the committed person show the evidence in his favor *outweighs* that against him. That is, he must *prove* he is not a sexually violent person. Strangely, in the state's view, the result of proving he should be released is not that he is released—it's that there is a trial, at which the state must prove the very opposite proposition.

Such a system of back-and-forth proof is novel. 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. Yet this nonsensical argument—that the trial that never happens will cure any constitutional infirmity—is the *only one* the state has ever made about the constitutionality of its preferred rule. Court of Appeals Respondent's Brief at 11-15. Its brief to this court does not even contain the word "constitution."

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, then one of ch. 980's principal constitutional safeguards will be rendered meaningless.

The state's proposed standard also suffers from many of the practical problems identified by the court of appeals in its original certification to this court:

> If the statute is construed to allow the circuit court to weigh the evidence when deciding whether to conduct a trial on the issue of continued commitment, questions arise regarding how to implement the statute …. At the hearing in which the paper record is considered, can the court take testimony? Regardless, does the court decide the credibility of the experts? Is the person petitioning for discharge allowed to attack the foundation for and validity of an unfavorable expert's report? Can this attack be accomplished without cross-examination? What factors or standard should the court use to predict the findings a factfinder would make? Is the court to consider the competing experts' prior performance in evaluating likelihood of a sexually violent person's reoffense? How do the evaluations of the experts differ from the determinations made at a ***Daubert*** hearing? If the petition requests a trial to the court, how does a pretrial hearing differ from a trial? Importantly, is the circuit court's determination deemed a finding of fact to which this court would give deference, or a conclusion of law to be reviewed de novo?

Certification of February 2, 2016 at 6-7.

What the state is proposing may well, as the court of appeals suggested, turn into a "trial before the trial." But there is another possibility: a cursory and essentially unreviewable decision like the one in this case. In the circuit court, the state's entire argument was that two other experts took a different view of Mr. Hager than Wakefield. (123:5; App. 135). The court made no findings and provided no clear basis for its decision, other that opining that Mr. Hager should receive more counseling and stating, incorrectly, that there had been no change since 2008 in the professional knowledge about predicting recidivism.

The state has never defended the circuit court's decision, and now it declines even to make an argument that Mr. Hager's petition does not entitle him to a trial. That is reason enough to affirm.

But, on the merits, this court should refuse to adopt the state's vague, undeveloped and unsupported "standard." Instead, it should apply the plain meaning of the statute, confirm the basic validity of ***Arends***, and affirm the court of appeals' thorough and well-reasoned decision.

## 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 18th day of July, 2017.

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 5,705 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 18th day of July, 2017.

Signed:

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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; and (3) 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.

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