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

REPLY BRIEF OF PETITIONER-RESPONDENT-PETITIONER

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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.

1. Contrary to Hager's complaint (Hager's Br. 4), the State has not mounted a campaign to deny him a discharge trial. Hager filed this appeal because there has been a simmering question about the proper test for assessing whether a committed person is entitled to a discharge trial under the revisions made to Wis. Stat. § 980.09 by 2013 Wis. Act 84. The State's purpose in responding to this appeal is to have that question answered correctly. Without taking a position on whether Hager should or should not get a discharge trial under the proper standard, the State suggests that this case should be remanded to the circuit court for the purpose of making that determination. (State's Br. 23.) Remand is appropriate, not because the State has "dragged this case out" as Hager, who filed this appeal in 2015, charges (Hager's Br. 6), but because the proper standard has not yet been determined, and Hager's discharge petition has not yet been assessed under the proper standard by the court in the best position to do that.

Besides, this appeal does not prevent the circuit court from acting on any new petition for discharge. Wis. Stat. §§ 808.075(4)(h), 980.07(1), (6). CCAP shows that Hager filed another petition for discharge on October 20, 2015, while this appeal was pending. New annual evaluations could prompt additional petitions.

2. Hager suspects that the change in the State's position is only apparent rather than real. (Hager's Br. 8.) However, profiting from the opinion of the court of appeals, the State now realizes that it did not previously give sufficient attention to the several changes made to Wis. Stat. § 980.09 by 2013 Wis. Act 84. So while the State continues to believe that evidence favorable to the committed person should not be the only evidence that a court considers in determining whether to hold a discharge trial, it understands that the court should not weigh favorable evidence against unfavorable evidence, as the court of appeals determined. Rather, a more thorough analysis of all the changes made to the discharge statute has led the State to conclude that something between these extremes is what the Legislature actually intended.

3. The State has not disregarded the statutory change in a committed person's burden of production (Hager's Br. 9), but regards the increase in the burden of production as just the first of several changes to the statute that alter both the burden a committed person must meet to get a discharge trial and the way a court determines whether that burden has been met (State's Br. 11).

4. Hager asserts that the increased burden of production requires him to make a "plausible claim" "that he is no longer dangerous." (Hager's Br. 11–12.) But the statute requires a showing of more than mere plausibility, which is not even a probability. It requires a showing of a likelihood of success. A committed person has to show it is likely that the State will not be able to meet its burden to persuade the trier of fact that he still meets the standard for commitment. (State's Br. 18.)

5. The State's declination to argue in this Court that Hager should not get a discharge trial does not signal any agreement that he should get a trial, as Hager might like to

think. (Hager's Br. 12.) The State has been silent on this issue because it believes that the supreme court should declare the law, while the circuit court should apply that law in the first instance to determine whether Hager is entitled to a trial. Besides, Hager has not demonstrated in this Court that he is entitled to a trial under the standard set by the revised statute.

6. Hager thinks it would be "troubling" if the court of appeals concluded that circuit courts are forbidden to consider evidence unfavorable to a petition for discharge since the discharge statute allows circuit courts to consider the record. (Hager's Br. 13.)

The court of appeals concluded that a circuit court is allowed to consider the record, but only for the purpose of determining whether it contains "facts that could support relief for the petitioner during a discharge hearing." *State v. Hager*, 2017 WI App 8, ¶ 25, 373 Wis. 2d 692, 892 N.W.2d 740 (quoting *State v. Arends*, 2010 WI 46, ¶ 38, 325 Wis. 2d 1, 784 N.W.2d 513). (Pet-App. 114.) The court of appeals stated that "the petitioner's burden of production [is] to convince a circuit court that all evidence within the record favorable to the petitioner . . . establishes a reasonable likelihood of success at a discharge trial," and that the circuit court "must determine whether the facts in the record favorable to the petitioner . . . establish a reasonable likelihood of success at an ensuing discharge trial." *Hager*, 373 Wis. 2d 692, ¶¶ 4, 37. (Pet-App. 109, 119.)

Besides, if the court of appeals did not forbid consideration of unfavorable evidence, then the only question would be how a circuit court should consider the unfavorable evidence. It cannot weigh the unfavorable evidence. But it can compare the unfavorable evidence presented at the most recent commitment or discharge trial with the new evidence presented by the committed person to

determine whether there would be a reasonable likelihood of a different result at a new trial.

7. Hager asserts that the State has admitted that each of the recent revisions in the discharge statute simply codified prior law. (Hager's Br. 15.) The State acknowledged that the revised statute codified prior case law requiring a petition for discharge to be based on new facts not considered in any previous evidentiary hearing. (State's Br. 21.) But the State plainly insisted, and continues to insist, that all the other revisions it identified created a significant change in the law.

8. Hager asserts that it was already the law that a committed person had to show that his condition had changed. (Hager's Br. 15.) But the revised statute alters the law by requiring a committed person to show that his condition has "sufficiently changed." Wis. Stat. § 980.09(2). The revised statute increases not only a committed person's burden of production, but also the degree of change in the committed person's condition that will be sufficient to meet that burden. The person must now show that there has been, not just some change as before, but enough of a change that a trier of fact would likely conclude that he no longer meets the criteria for commitment.

Moreover, the law has been altered so that the change in a committed person's condition is no longer measured from the original determination that he should be committed but from the most recent determination that he should be committed, although in some cases the original commitment order may in fact be the most recent determination.

9. Hager claims that the revised statute does not really change the starting point for assessing a change in a committed person's condition from the original commitment to the most recent trial because the court of appeals already did that in *State v. Combs*, 2006 WI App 137, ¶ 32, 295

Wis. 2d 457, 720 N.W.2d 684. (Hager's Br. 16.) But even assuming that a court could amend a statute in that way, *Combs* did not do it. *Combs* is just one of several cases that held that a petition for discharge cannot be based on information considered at a prior proceeding. *Combs*, 295 Wis. 2d 457, ¶ 32. Measuring a change in information from the time of a prior proceeding is not the same as measuring a change in condition from a prior proceeding.

10. Hager claims it was already the law that circuit courts could consider the "record" in deciding whether to grant a discharge trial. (Hager's Br. 16). But the older version of the statute did not allow a court to consider the "record" as Hager describes. Previously, a circuit court could consider only several enumerated items apart from the petition. Wis. Stat. § 980.09(2) (2011–12). When this Court said in *Arends* that the circuit court could consider the "*record in toto,*" it was simply distinguishing the statutorily enumerated items outside the petition from the allegations in the petition. *Arends*, 325 Wis. 2d 1, ¶ 38. The revision changed the law from what it had been before to allow circuit courts to consider the entire record including, but not limited to, the previously enumerated items, as well as, for the first time, the evidence introduced at a prior commitment or discharge trial.

11. The State does not claim that the Legislature "overruled" *Arends* by revising section 980.09. (Hager's Br. 16.) The Legislature cannot overrule a decision of this Court. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). The statutory revisions supersede the holding in *Arends*, which was based on a different version of the law. (State's Br. 15.)

12. Hager asserts that a test for determining whether to grant a discharge trial that is analogous to the test for determining whether to grant a new trial on the basis of

newly discovered evidence is inappropriate because the newly discovered evidence test is premised on the need for finality. (Hager's Br. 17.)

But as the State argued more extensively in the companion case of *State v. Carter*, Case No. 2015AP1311, it has an interest in the finality of the commitment of sexually violent persons to the extent that they continue to remain violent. *See State v. Rachel*, 2002 WI 81, ¶ 64, 254 Wis. 2d 215, 647 N.W.2d 762. The State also has an interest in the finality of previous litigation to determine whether a committed person should be released *See State v. Alger*, 2015 WI 3, ¶ 55, 360 Wis. 2d 193, 858 N.W.2d 346 (the State has an interest in efficient judicial administration). The State has a considerable interest in ensuring that scarce judicial resources will not be wasted on trials that are merely remakes of older courtroom dramas with different actors playing the same roles with only inconsequential changes in the script. *See State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999) (scarce judicial resources are conserved by requiring a showing that the relief sought may be warranted).

13. The newly discovered evidence test is not based on a claim that the verdict was incorrect, as Hager asserts. Rather, it presupposes that all the elements of a presumptively accurate proceeding were present at the original trial. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A request for a new trial on the basis of newly discovered evidence alleges that there will probably be a different result because new evidence not presented at the original trial would cause a trier of fact to rethink its decision. This is the essence of a request for a new discharge trial, which alleges that the result of a new trial will probably be different from the result of previous commitment or discharge trials because new evidence, often based on new evaluations, will be presented.

14. Hager asserts that a test analogous to the test for newly discovered evidence is unworkable because the decision whether to grant a new trial because of newly discovered evidence is discretionary. (Hager's Br. 18.) But the analogous part of the test, which asks whether there is a reasonable probability of a different result, presents an issue of law. *State v. Vollbrecht*, 2012 WI App 90, ¶¶ 18, 34 & n.19, 344 Wis. 2d 69, 820 N.W.2d 443; *State v. Plude*, 2008 WI 58, ¶ 33, 310 Wis. 2d 28, 750 N.W.2d 42. Although the overall standard of review is erroneous exercise of discretion, making an error of law in the course of deciding a motion based on newly discovered evidence is an erroneous exercise of discretion. *See State v. Sugden*, 2010 WI App 166, ¶ 16, 330 Wis. 2d 628, 795 N.W.2d 456. *Sugden* involved the claim of a committed person that he should get a new trial because of newly discovered evidence. *Sugden*, 330 Wis. 2d 628, ¶ 12 et seq.

15. Hager says that the test for determining whether the result of a trial would probably be different because of newly discovered evidence necessarily involves weighing the evidence. (Hager's Br. 18–19.) *State v. Edmunds*, 2008 WI App 33, ¶ 18, 308 Wis. 2d 374, 746 N.W.2d 590, says it does not. The test involves a comparison of the new evidence with the evidence presented at the trial to assess whether the result of a new trial would probably be different. *Plude*, 310 Wis. 2d 28, ¶¶ 32–33.

16. Hager suggests that a test analogous to the test for newly discovered evidence would be unconstitutional because it would shift the burden of persuasion to a committed person who would have to show that the evidence in his favor outweighs the evidence against him. (Hager's Br. 19–20.) But as the State made clear in its opening brief, the committed person has only a burden to produce evidence showing that a trier of fact would likely find that the State

failed to meet its ultimate burden to prove that he is still a sexually violent person. (State's Br. 22.) Imposing a burden of production does not violate due process. *State v. Pettit*, 171 Wis. 2d 627, 640, 492 N.W.2d 633 (Ct. App. 1992). *See Hager*, 373 Wis. 2d 692, ¶ 44 (there is no need to address the question of a shift in the burden of proof where the statute does not require weighing evidence). (Pet-App. 121.) *Cf. Arends*, 325 Wis. 2d 1, ¶ 41 (to get a discharge hearing, the committed person need only provide evidence that he does not meet the requirements for commitment).

17. Hager claims that the State's position does not address or resolve any of the problems listed in the certification by the court of appeals. (Hager's Br. 20.) But the certification was based on a hypothetical construction of the statute that would allow a circuit court to weigh evidence. Hager does not explain why any of those hypothetical problems would persist when no weighing is allowed under a procedure that is analogous to the well-established test for newly discovered evidence. This argument may be ignored. *Pettit*, 171 Wis. 2d at 646-47.

CONCLUSION

This case need not be seen as a clash of the Titans. This Court does not have to decide between a procedure that allows a circuit court to consider only evidence favorable to a committed person and a procedure that allows a court to weigh evidence favorable to a committed person against the evidence that is unfavorable to him. Rather, a careful consideration of all the changes made by the Legislature to section 980.09 reasonably leads to the conclusion that the Legislature intended to adapt an established procedure that allows a court to compare rather than weigh evidence to make it harder, but not unreasonably so, to get a discharge trial.

The decision of the court of appeals should be reversed, and the case should be remanded to the circuit court to decide whether Hager is entitled to a discharge trial under the correct statutory standard.

Dated this 2nd day of August, 2017.

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 2,597 words.

Dated this 2nd day of August, 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 2nd day of August, 2017.

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