STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP5

In re the Commitment of Kenneth William Jaworski:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KENNETH WILLIAM JAWORSKI,

Respondent-Appellant.

ON APPEAL FROM A JUDGMENT OF COMMITMENT AND AN ORDER DENYING POSTJUDGMENT RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, BEFORE THE HONORABLE TIMOTHY WITKOWIAK, PRESIDING

PETITIONER-RESPONDENT'S BRIEF

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ISSUES PRESENTED

Wisconsin Stat. § 980.02(1m) requires the State to file a Wis. Stat. ch. 980 petition before a person is released or discharged from his sentence for a sexually violent offense. Jaworski alleged that the DOC deliberately miscalculated his release date to facilitate the filing of a ch. 980 petition against him before his release. He contends that DOC's conduct violated his due process rights and that the ch. 980 petition against him should be dismissed.

Did the circuit court err when it denied Jaworski's postcommitment motion challenging the timeliness of the filing of the ch. 980 petition against him without a hearing?

The circuit court answered: No. (167:1.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS RELEVANT TO JAWORSKI'S APPEAL

Jaworski's sexually violent offense convictions and sentences. A jury found Jaworski guilty of five counts of second-degree sexual assault in a Racine County case. The offenses occurred in November, 1983. On June 18, 1984, the circuit court sentenced Jaworski to a sixteen-year term of imprisonment on count one and a seven-year term of imprisonment each on counts two through five. It ordered

Jaworski to serve those sentences consecutively to each other, for a total of 44 years, with credit for 20 days. (3:1, 5, 6.)

Jaworski also pled guilty to one count of second-degree sexual assault in Milwaukee County Case No. K-6785. On October 23, 1984, the circuit court imposed a seven-year term of imprisonment. It ordered Jaworski to serve this sentence concurrently with his other sentences, with credit for 438 days. (3:1, 9.)

The Wis. Stat. ch. 980 petition. On March 24, 2006, the State filed a petition in the Milwaukee County Circuit Court to commit Kenneth Jaworski as a sexually violent person under Wis. Stat. ch. 980. (1:1; 3.) The petition identified Jaworski's Racine County and Milwaukee County convictions as offenses that would constitute sexually violent offenses. (3:1.) The petition also alleged that Jaworski's mandatory release ("MR") date was April 1, 2006, and that his anticipated release date was March 28, 2006. (3:2.) The petition includes a document titled Notice of Sentence Data (DOC-192) that reflects the April 1, 2006 MR date. (3:16.)

At an April 5, 2006 probable cause hearing, Jaworski asserted that the State failed to present sufficient evidence establishing that it had timely filed its petition. (122:49.) The circuit court denied the motion. (122:50.)

Jaworski's 2008 challenge to his sentence calculation. In May 2008, Jaworski moved through counsel to dismiss the petition on the ground that the State did not timely file it. He argued that the State "must file a petition for commitment in state court prior to the time the person is released or discharged. [Wis. Stat.] § 980.02(1m)." (21:1.) Jaworski asserted that had DOC properly calculated his good time credit, he would have released him from prison

before the State had actually filed its petition. Under the circumstances, the petition was untimely filed. (21:1-2.)

The State responded to Jaworski's motion. Relying on *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995) and *In re Commitment of Virlee*, 2003 WI App 4, 259 Wis. 2d 718, 657 N.W.2d 106, the State asserted that a subsequent recalculation that shows that a respondent would have been released when the State filed its petition does not deprive the court of jurisdiction. (22:3.)

On June 5, 2008, the circuit court found that Jaworski's release date was April 1, 2006, that his anticipated release date was March 28, 2006, and that the petition was filed on March 24, 2006. It relied on a DOC form attached to the petition for the calculation. (123:3.) Relying on *Carpenter* and *Virlee*, the circuit court found that the State had the right to rely on the release and discharge dates as DOC calculated them. (123:3.) Further, the circuit court held that even if Jaworski successfully obtained reinstatement of forfeited good time or his mandatory release date were recalculated, the petition was still timely filed based on the DOC information. (123:4.)

DOC's recalculation of Jaworski's MR date. On June 23, 2008, the State informed the circuit court that one of its witnesses, DOC employee Carol Briones, informed the State about a miscalculation of the mandatory and actual release date. (185:3.) Briones subsequently prepared a memorandum dated August 20, 2008. The memorandum reflects that she reviewed Jaworski's legal file for proper

sentence calculation of his release in March 2006. Briones provided the following explanation:

> One source of the errors was from what appears to be a complete review of the file information and compared with the security face card (C-120.) The security face card is supposed to maintain all movements of an offender, e.g., from general population/specific assignment to segregation. The security card and the file information did not match; the person completing the computation relied on the C-120 (See DOC-192 dated 10-20-2005.) The C-120 is not typically compared with the file information to update release dates.
>
> A second source of the errors was extending the mandatory release (MR) date for time that Mr. Jaworski was in unassigned status. Under the old good time law, there was a provision for extending the release date (or not granting good time) when an offender was not diligent in labor or study, see s. 53.12 Wis. Stats (1981-82). When the Department of Corrections (DOC) did not have enough jobs or room for students because of a larger population in the prisons, the practice of extending the MR (or not granting good time) for the period an offender was in unassigned status was discontinued.

(48:14.) Attached to the memorandum are several pages of calculations. The notations reflect that Jaworski would have been released on January 31, 2006 or February 1, 2006, a difference of 55 days from his actual release date of March 28, 2006. Further, if he were entitled to an additional 20 days, he would have been released on January 10, 2006 or January 11, 2006, a difference of 75 days from his actual release date of March 28, 2006. (48:17.)

Jaworski's 2009 motion challenging the timeliness of the State's petition. In a motion filed March 26, 2009, Jaworski again moved for relief and asserted that *Carpenter*

and *Virlee* were inapplicable to his case. In his motion, he alleges that a DOC employee, "'illegally' miscalculated his mandatory release dates to make it appear that they were still within [the] 90 days periods." He asserted that the employee had "falsified times and dates" and that prison officials "maintained 'tainted' and 'false records' . . . ." (36:9.) He claimed that prison officials "intentionally [ ] miscalculated his mandatory release and disseminating information concerning [an] invalidated disciplinary proceeding." (36:9.) He did not offer a factual basis in support of this claim, other than Briones memorandum reflecting that DOC employees had miscalculated the mandatory release date. (36:10.) The State responded that under *Carpenter* and *Virlee*, its petition was still timely filed. (47:6.)

On October 7, 2009, the circuit court conducted a nonevidentiary hearing on Jaworski's claim. (124.) The State asserted that whether or not Jaworski's claim regarding the good time calculation had merit, the State still filed its petition before his release. (124:17.) Jaworski did not dispute that he was in custody when the State filed the petition. "I have no argument with what the district attorney just stated that I was in custody . . . [but] it was illegal custody." (124:18.) Relying on *Carpenter* and *Virlee*, the circuit court denied Jaworski's motion. It concluded that even if it accepted Jaworski's assertions as true, once a petition is filed irrespective of whether the MR date has changed, the circuit court did not lose jurisdiction. (124:20-21.)

The trial. At trial, the State called Mary Martin, a DOC Offender Records Supervisor. (211:33.) Her responsibilities include the calculation of inmate release dates. She explained that because Jaworski committed his offense before June 1, 1984, his sentence was calculated under "the old law[.]" (211:33-34.) She noted that younger

DOC employees are less familiar with it. (211:34.) Martin explained that the release date is calculated upon admission, and assumes that the inmate will earn that good time that he or she is eligible to receive over the period of the sentence. (211:35.) She noted that an inmate could lose good time due to conduct violations. Under the old law, they could also lose industrial good time if they were voluntarily unassigned and would not accept a job or performed poorly. The commission of new offenses would also prompt a recalculation of the release date. (211:35.)

In Jaworski's case, Martin reviewed the DOC-192 which is certified February 9, 2006.[1] That document reflects that Jaworski's mandatory release date was April 1, 2006, and that his actual release date was March 28, 2006. (211:37-38.)

On cross-examination, Jaworski offered additional pages to the circuit court. The circuit court marked these pages as Exhibit 22. (211:42.) This document appears to be the memorandum that Briones prepared regarding the errors in calculating Jaworksi's release dates. (221:48.) It apparently also contained several pages regarding the calculations of the release date. (221:49.)[2] Martin had not previously seen the documents. (221:50.) Citing *Virlee*, the State objected to the relevance of these documents. (221:50-52.) The circuit court sustained the State's objection to the

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[1] The DOC-192 form was marked as Exhibit 1. (211:37.) The exhibits are not included in the record. But Exhibit 1 would appear to be the same document attached to the Chapter 980 petition. (3:16.) Jaworksi offered additional pages. The circuit court marked these pages as Exhibit 22. (211:42.)

[2] The State believes that Exhibit 22 includes Briones' memorandum and accompanying calculations that appeared in a motion that Jaworski filed. (48:14-17.)

admissibility of the documents, due in part to the lack of foundation. (221:53-54.)

Jaworski's motion for postjudgment relief. Jaworski filed a motion for postjudgment relief. (166.) He requested an evidentiary hearing for the purpose of determining whether "DOC deliberately miscalculated his release date." (166:3.) Jaworski argued that DOC violated his due process rights if it miscalculated his release date for the purpose of manipulating the ch. 980 filing deadline. (166:6.)

At a nonevidentiary hearing on the motion, the State asserted that Jaworski's motion was insufficient to require a hearing. While the motion noted that DOC acknowledged miscalculating his release date, it did not provide a basis from which to conclude that DOC "deliberately falsified the calculation" for purposes of filing the State's petition. (221:2-3.) The circuit court requested Jaworski to provide it with "some possibility that [the motion] is going to succeed." (*Id*. at 3.) When asked for an offer of proof as to why DOC may have acted as it did, Jaworski replied that the only information that he had was in his motion. (*Id*. at 3-4.)

The circuit court denied Jaworski's motion without a hearing.

> [Y]ou make allegations that they deliberately miscalculated his release date in order to manipulate the deadline for filing a Chapter 980 petition, but you don't give me any [ ] reason to believe that allegation, and that's what I need. I need some reason to believe that allegation. So if you

> haven't got any reason, I'm going to deny your motion.

(*Id.* at 4.) The circuit court denied Jaworski's postcommitment motion without a hearing. (167:1.)

SUMMARY OF THE ARGUMENT

Jaworski argues that the State did not timely file its ch. 980 petition against him. He contends that DOC acted in bad faith when it calculated his mandatory release date and did so deliberately to facilitate the filing of its ch. 980 petition against him. Had DOC staff properly calculated his mandatory release date, he would have been released before the State actually filed its petition in this case. Jaworski also contends that the circuit court should have granted him an evidentiary hearing to determine whether DOC acted in bad faith and violated his due process rights.

The circuit court properly denied Jaworski's postcommitment motion without a hearing. He grounded his motion on a conclusory assertion: DOC officials acted in bad faith when they miscalculated his release date to facilitate the timely filing of a ch. 980 petition. The circuit court denied Jaworski a hearing because he could not offer any facts in support of his assertion. The circuit court could also have denied the motion without a hearing for another reason. Jaworski focuses on the timing of the filing of the petition relative to the mandatory release date. But under Wis. Stat. § 980.02(1m), the State may file its petition anytime before the mandatory release date *or* discharge date. Even if DOC had manipulated the mandatory release date, the petition was still timely filed because it was filed before his discharge date.

ARGUMENT

The circuit court properly exercised its discretion when it denied Jaworski an evidentiary hearing to pursue his postcommitment claim that the State did not timely file its ch. 980 petition against him.

A. General legal principles related to the sufficiency of a motion and a litigant's right to an evidentiary hearing.

A defendant is entitled to a hearing on a postcommitment motion if the motion alleges "sufficient material facts that, if true, would entitle the [party] to relief." *State v. Allen*, 2004 WI 106, ¶ 14, 274 Wis. 2d 568, 682 N.W.2d 433.[3] A party's motion for relief must contain more than conclusory allegations. *Id.* ¶ 15. It must include facts that permit a "court to meaningfully assess" the party's claim. *Id.* ¶ 21 (internal quotation and citation omitted). Facts that allow a court to meaningfully assess a claim are "those facts that are *material* to the issue presented to the court." *Id.* ¶ 22. A motion satisfies sufficiency standards if it:

> allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for

[3] Jaworski asks this Court to review his claim under the *Allen* standard. (Jaworski's Br. 10-11.) The State is unaware of any decisions applying the *Allen* pleading sufficiency standard to a motion for postcommitment relief under Wis. Stat. § 980.038(4). The State agrees that *Allen* provides an appropriate framework for determining whether a motion is sufficient to entitle a party in a ch. 980 proceeding to an evidentiary hearing.

> reviewing courts to meaningfully assess a defendant's claim.

Id. ¶ 23.

A circuit court has the discretion to grant or deny a hearing if: (1) the motion does not raise facts sufficient to entitle the moving party to relief; (2) the motion presents only conclusory allegations; or (3) the record demonstrates that the moving party is not entitled to relief. *Id*. ¶ 9.

Standard of review. Whether a motion alleges sufficient facts entitling a party to a hearing presents a question of law that an appellate court reviews *de novo*. But an appellate court reviews a circuit court's decision to deny a hearing under a deferential erroneous exercise of discretion standard. *Id.* ¶ 9.

B. General legal principles to the timeliness of filing a ch. 980 petition.

"[C]h. 980 provides for the involuntary commitment of certain individuals who are found to be sexually violent persons. As such, ch. 980 prescribes a detailed procedure that the State must follow in order to commit a sexually violent person." *In re Commitment of Gilb*ert, 2012 WI 72, ¶ 22, 342 Wis. 2d 82, 816 N.W.2d 215 (citation omitted).

Under Wis. Stat. § 980.02(2), the State may file a petition alleging that a person is a sexually violent person subject to commitment. Wisconsin Stat. § 980.02(1m) specifies that the State must file the petition "before the person is *released or discharged*." In *In re the Commitment of Stanley*, 2014 WI App 89, 356 Wis. 2d 268, 853 N.W.2d 600

(2014), this Court observed that the words "release" and "discharge" are legal terms of art. *Id.* ¶ 17. It explained that:

> "released" means to free a person from confinement in prison, and "discharged" means to free a person from DOC custody status upon completion of the criminal sentence. A person serving a prison sentence is "confined" until he or she is "released" from prison, and the person remains in DOC "custody status" until he or she is "discharged" upon completion of the criminal sentence. Hence, the use of the word "discharge" in a person's maximum "discharge" date corresponds to its use in WIS. STAT. § 980.02(1m), and in both usages the meaning is the completion of the criminal sentence.

Id. ¶ 22 (citation omitted). This Court concluded that Wis. Stat. § 980.02(1m) requires the State to file a petition "*either* before the person is freed from confinement in prison or before the person's entire sentence is completed." *Stanley*, 356 Wis. 2d 268, ¶ 23.[4]

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[4] A review of Wis. Stat. § 980.02(1m)'s history reinforces this Court's prior interpretation of this section in *Stanley*. Before the Legislature enacted § 980.02(1m), the State was required to allege and prove that the person was within 90 days of discharge or release on parole. Wis. Stat. § 980.02(2)(ag) (2003-04); *see also In re the Commitment of Byers*, 2003 WI 86, ¶ 14, 263 Wis. 2d 113, 665 N.W.2d 729 (holding that a ch. 980 petition must be filed on or before a person's release or discharge date). Failure to file a petition within the 90 day time period deprived the circuit court of its competency to proceed. *State v. Pharm*, 2000 WI App 167, ¶ 11, 238 Wis. 2d 97, 111, 617 N.W.2d 163.

The Legislature subsequently repealed Wis. Stat. § 980.02(2)(ag) (2003-04), which required the filing within the 90-day time period before the release or discharge date. 2005 Wis. Act 434, § 83. In the same act, the Legislature created Wis. Stat. § 980.02(1m) that simply required the State to file the petition before the release or discharge date. Wis. Act 434, § 82. *Gilbert*, 342 Wis. 2d 82, ¶¶ 36-39.

Miscalculation of the release date. Even if DOC miscalculated an inmate's release date, the date of an inmate's actual release from prison is the date that determines whether the State timely filed its petition.

In *Carpenter*, DOC had paroled Carpenter in 1993. *Carpenter*, 197 Wis. 2d at 260. Based on this Court's decision in *State ex rel. Parker v. Fiedler*, 180 Wis. 2d 438, 509 N.W.2d 440 (Ct. App. 1993), *rev'd*, *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 517 N.W.2d 449 (1994), DOC recalculated Carpenter's sentence and reincarcerated him. *Carpenter*, 197 Wis. 2d at 260. The supreme court subsequently reversed this Court's decision in *Parker* and ordered that all prisoners detained under *Parker* be released on July 15, 1994. *Carpenter*, 197 Wis. 2d at 260. On July 14, 1994, the State petitioned to commit Carpenter as a sexually violent person under ch. 980. Carpenter challenged the petition's timeliness, contending that the State should have filed its petition when he was first released to parole in 1993. *Id*. at 261, 275. The Supreme Court rejected this argument, finding that the subsequent recalculation of the release date did not render the previously filed petition untimely. *Id*.

In *Virlee*, Virlee asserted that the trial court lost its competency to proceed when it retroactively granted Virlee sentence credit that placed his mandatory release date before the date that the State filed its ch. 980 petition against him. Relying on *Carpenter*, this Court rejected the argument, finding that the State had timely filed its petition before Virlee's "actual release" from prison. A subsequent modification of Virlee's sentence did not change the fact that the State timely filed its petition according to the then-known mandatory release date. *Virlee*, 259 Wis. 2d 718, ¶¶ 17-18.

Finally, in *In re the Commitment of Spaeth*, 2014 WI 71, 355 Wis. 2d 761, 850 N.W.2d 93, the supreme court addressed whether a petition "that was sufficient at the time it was filed is invalidated when the conviction recited in the petition is later reversed." *Id.* ¶ 13. Following a supreme court decision reversing Spaeth's conviction for a sexually violent offense, the State had sought to amend its petition to allege a different, unreversed sexually violent offense. The circuit court denied the motion to amend and dismissed the petition. *Id.* ¶¶ 8-9. The supreme court reversed. *Id.* ¶ 15. Relying on *Carpenter* and *Virlee*, it held that a court should assess the sufficiency of the petition at the time it was filed. That is, it must determine whether the petition satisfied Wis. Stat. § 980.02's pleading requirements when the State filed the petition. *Id.* ¶¶ 33, 35.

The time limits for challenging the timeliness of filing a ch. 980 petition. A person challenging the timeliness of a ch. 980 petition must file a motion within 30 days after the court conducts the probable cause hearing. A failure to timely file a motion results in a waiver of the right to challenge the timeliness of the petition's filing. Wis. Stat. § 980.038(1)(a).[5]

[5] Jaworski orally challenged the timeliness of the petition's filing at the probable cause hearing. (122:49.) But he did not file a motion challenging its timeliness until two years later. (21.) After the circuit court decided the motion (123:4), a DOC employee determined that staff had miscalculated the release date (48:14; 185:3). Under the circumstances, the State will not argue that his motion was untimely.

C. The State's petition was timely filed because the State filed it before Jaworski's discharge date.

Jaworski's appeal focuses on whether the State timely filed its petition before his mandatory release date. He contends that Wis. Stat. § 980.02(1m) requires the State to file its ch. 980 petition "before the person is released from prison." (Jaworski's Br. 5 n.2.) But a petition is timely filed if it is filed before a person is either released from prison *or discharged* from his sentence. Wis. Stat. § 980.02(1m); *Stanley*, 356 Wis. 2d 268, ¶ 23.

If the record demonstrates that the State filed its petition before Jaworski's discharge date, then this Court need not consider whether Jaworski is entitled to a hearing on whether DOC acted in bad faith when it calculated his release date. While neither party nor the circuit court considered whether the State filed the petition before his discharge date, this Court may consider it. *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) (this Court may affirm a circuit court's ruling on grounds that the circuit court did not consider).

Jaworski has never suggested that the State failed to file the petition before his discharge date. He cannot. On June 18, 1984, the Racine County Circuit sentenced Jaworski to 16 years imprisonment on count one and 7 years imprisonment each on counts two through five. It ordered Jaworski to serve those sentences consecutively to each other, for a total of 44 years. Jaworski only had pretrial incarceration credit of 20 days. (3:1, 5.) The circuit court relied on this sentence computation when it found probable cause on the petition. (11:1.)

When Jaworski argued his motions in this case, he acknowledged receiving lengthy sentences for sexually violent offenses. In a motion challenging the timeliness of the State's petition, he acknowledged that "[h]e was convicted and sentenced in 1984 in Racine and Milwaukee County Circuit Courts to a total of forty-seven (47) years in the Wisconsin State Prison System for sexually violent offenses committed in those counties." (21:1.) In a hearing, Jaworski stated:

> My sentence was three-and-a-half, 16, 7, 7, 7, 7, so that the part of this case as a whole it can't be taken out because time ran all together as one sentence . . . because you can't exclude that first three-and-a-half years that is the front end of the sentence of the 44 years, or technically 47 and-a-half years.

(124:34.)[6]

Jaworski has never suggested that he has been discharged from his convictions for his sexually violent offenses. Other information suggests that he has not been discharged for these offenses. For example, in a summary of Jaworski's sentences, an evaluator noted that Jaworski's discharge date for the Racine sexual assault convictions was November 27, 2030. (165:5.) Finally, DOC offender locator website reflect that Jaworski's current discharge date is March 11, 2031. Wisconsin Department of Corrections' "Offender Locator," available at http://offender.doc.state.wi.us/lop/home.do (last accessed June 30, 2016); *see also Sisson v. Hansen Storage Co.*, 2008

[6] When the circuit court sentenced Jaworski to 44 years of imprisonment, it ordered him to serve that sentence consecutive to other sentences. Jaworski had previously been sentenced on a charge of false imprisonment in a prior case. (165:5.)

WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667 (appellate court may take judicial notice of matters of record in government files under Wis. Stat. § 902.01).

The State filed its ch. 980 petition against Jaworski on March 24, 2006. Based on the record, Jaworski has not yet been discharged from his sentences that were imposed as a result of his convictions for sexually violent offenses. The record demonstrates that Jaworski is not entitled to relief. The circuit court did not err when it declined to grant him a hearing. *See Allen*, 274 Wis. 2d 568, ¶ 9.

D. Jaworski's motion did not allege sufficient facts to entitle him to a hearing on his claim of bad faith.

Acknowledging *Virlee*'s applicability to ch. 980 cases when DOC errs in calculating a release date, Jaworski concedes that DOC's miscalculation of the mandatory release date does not, by itself, entitle him to the relief that he seeks. Instead, he asserts that *Virlee* does not apply to his case because *Virlee* did not include an allegation that DOC acted in bad faith and violated his due process rights when it calculated his mandatory release date. (Jaworski's Br. 11.) Jaworski contends that the circuit court erred when it did not grant him a hearing to explore his assertion that DOC manipulated his release. (Jaworski's Br. 14.)

This Court must assess whether Jaworski's postcommitment motion alleges sufficient facts entitling him to an evidentiary hearing. Based on Jaworski's claims in his postcommitment motion and other evidence in the record,

the State assumes the following assertions to be true for purposes of reviewing his claim:

- The State filed its ch. 980 petition against Jaworski on March 24, 2006; (184:4.)

- When the petition was filed, DOC calculated his mandatory release date as April 1, 2006, and his actual release date as March 28, 2006; (184:4; 211:37-38.)

- DOC employee Carol Briones later determined that DOC staff made two errors when it calculated Jaworski's release dates. One error related to inconsistent data on a security card and file information. With respect to the second error, Briones stated that DOC's policy on good time was not followed; (48:14.)

- Based on additional sentence calculation data accompanying Briones' note, it appears that Jaworski would have been released sooner, perhaps as early as January 10, 2006, a difference of 75 days from his actual release date of March 28, 2006. (48:17.)

This information would support Jaworski's claim that DOC miscalculated the release date and that the ch. 980 petition was not filed until after he should have been released.

But Jaworski makes one additional assertion: DOC deliberately manipulated his release date to make the filing of the ch. 980 petition timely. Jaworski offers no facts in support of this assertion. He readily acknowledges that this claim is a "conclusory allegation." But he contends that under *Allen* a conclusory allegation supported by factual details entitles him to a hearing. (Jaworski's Br. 14.) The

State disagrees. *Allen* unequivocally states that a conclusory allegation alone is insufficient to entitle a person to a hearing. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 12, 15.

More importantly, the facts as alleged here do not support an inference that DOC acted in bad faith with an eye toward manipulating Jaworski's release date to facilitate the ch. 980 filing again him. The form itself was prepared on October 20, 2005. (3:16.) This was well before the earliest date that he would have been released, January 10, 2006, and would have provided sufficient time for DOC to conduct an evaluation and complete a report had the form indicated an earlier release date.[7] Jaworski has identified no incentive for DOC to miscalculate his release date. Had DOC properly calculated the release date as Jaworski believes that DOC should have calculated it, DOC would simply have scheduled his ch. 980 evaluation sooner, before the properly calculated release date.

Further, the record also reflects that good time calculations and release dates are not always easily determined. Briones explained that the miscalculations stemmed in part from the way good time computations occurred for offenders sentenced under the "old law" and how policies governing those calculations were discontinued.[8] (48:14.) DOC employee Mary Martin noted

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[7] The DOC evaluator conducted the evaluation on February 14, 2006, and completed his report by February 22, 2006. (119:1.)

[8] Jaworski would have been sentenced under the "old law." (211:33-34.) *See also State ex rel. Hauser v. Carballo*, 82 Wis. 2d 51, 57, 261 N.W.2d 133 (1978) (discussing good time and release calculation under the "old law"). This framework for determining parole eligibility and mandatory release changed with the enactment of 1983 Wis. Act 528 and 1983 Wis. Act 66 - the "new law."

that younger DOC employees are less familiar with "old law" calculations. (211:34.) She also explained how the release date may be recalculated depending on the loss of certain types of good time. (211:35.) At best, the record suggests that a DOC employee made a mistake when he or she calculated Jaworski's release date. It hardly supports an inference that DOC officials acted in bad faith with an eye toward manipulating Jaworski's release date to facilitate a ch. 980 petition.

On its face, Jaworski's motion simply does not allege sufficient material facts to meaningfully assess his claim. *See Allen*, 274 Wis. 2d 568, ¶ 23. In a hearing to determine whether to schedule an evidentiary hearing on his motion, the circuit court asked Jaworski to provide it with "some possibility that [the motion] is going to succeed." (221:3.) Jaworksi replied that the only information he had appears in the allegations in his motion. The circuit court observed that Jaworski provided him with no reason to believe his allegation that DOC deliberately miscalculated his release date to manipulate the deadline for filing the ch. 980 petition. (*Id.* at 4.) Under the circumstances, the circuit court appropriately denied Jaworski's motion without an evidentiary hearing.

E. Jaworski is not entitled to an evidentiary hearing simply because he believes that DOC staff acted in bad faith.

Jaworski seeks to differentiate his case from *Virlee* because *Virlee* did not address a claim that DOC deliberately miscalculated his release date in violation of his due process rights. He relies on several other types of cases in other contexts to suggest he is entitled to a due process hearing.

For example, relying on *Arizona v. Youngblood*, 488 U.S. 51 (1988), Jaworski suggests that due process requires dismissal of a case if the defendant proves that the State acted in bad faith when it fails to preserve potentially exculpatory evidence. But *Youngblood* still requires a defendant to show bad faith to establish a due process violation. *Id*. at 58. And nothing in *Youngblood* suggests that a court is required to conduct a hearing based on an allegation of bad faith alone. Ultimately, in *Youngblood*, the court suggested that the police conduct at best suggests negligence. *Id*. Similarly, the record in Jaworski's case suggests that the miscalculation resulted from negligence rather than deliberate action. He offers no basis for asserting that DOC staff acted in bad faith. And without some reason to believe it, the circuit court could deny him an evidentiary hearing.

Similarly, Jaworski also relies on *State v. Lettice*, 221 Wis. 2d 69, 585 N.W.2d 171 (Ct. App. 1998) to suggest that when the State's conduct seems legal and benign, a defendant is entitled to a due process hearing. (Jaworski's Br. 13.) *Lettice* addressed whether double jeopardy bars retrial after the prosecutor engaged in misconduct that deprived the defendant of his right to counsel and due process under the facts of the case. *Lettice,* 221 Wis. 2d at 75. While the circuit court conducted a hearing, nothing within the decision suggests that a court was required to conduct a due process hearing based on unsubstantiated allegations alone. Further, unlike Jaworski's case, the facts in *Lettice* supported an assertion that the prosecutor's conduct was egregious. *Id*. at 90 (e.g., the prosecutor charged Lettice's attorney with a crime immediately before trial and sought to dismiss the charges promptly after Lettice was convicted).

To be sure, in *State v. Becker*, 74 Wis. 2d 675, 247 N.W.2d 495 (1976), the supreme court mandated a hearing to determine if the State deliberately delayed filing a delinquency petition for the purpose of orchestrating charges against a defendant as an adult. But *Becker* presents a unique situation in which the juvenile would not be entitled to the protections afforded if he were prosecuted as a delinquent because the State deliberately manipulated a delay to gain an advantage of prosecuting him in adult court. In Jaworski's case, no such advantage to the State would occur. As long as the State filed its petition against him before he was discharged, the petition was still timely. And granting a hearing to discover whether the State manipulated the release date to facilitate filing of the ch. 980 petition would not change the fact that the petition was still timely. Based on the record, Jaworski simply was not entitled to an evidentiary hearing since the State timely filed its ch. 980 petition before his discharge date.

Standing alone, Jaworski's conclusory allegation that DOC officials acted in bad faith should not automatically entitle him to a hearing on his claim. Absent some factual support for his claim, the circuit court appropriately exercised its discretion when it denied him a hearing.

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm Jaworski's judgment of commitment and the circuit court order denying Jaworski postcommitment relief.

Dated this 12th day of August, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 5,573 words.

Dated this 12th day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of August, 2016.

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