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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP001082

In re the Commitment of Michael L. McGee:

STATE OF WISCONSIN,

Petitioner-Respondent,

COUNTY OF KENOSHA,

Intervenor-Appellant-Cross-Respondent

v.

MICHAEL L. McGEE,

Respondent-Respondent-Cross-Appellant.

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT

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STATE OF WISCONSIN

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Appeal of an Order Granting Kenosha County's
Motion to Intervene Entered in Racine County Circuit Court,
Judge Allan B. Torhorst, Presiding

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

ISSUE PRESENTED

Did the circuit court properly exercise its discretion in confirming its previous order placing Michael McGee on supervised release in Kenosha County?

After a hearing to take evidence and consider the legal arguments regarding Kenosha County's challenges to the supervised release plan (31; A-App. 106-15) that had previously been approved (32; A-App. 105), the circuit court

concluded the plan was appropriate and should be implemented. (57:7; A-App. 125).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented can be resolved by applying well-established legal principles to the facts of this case, so oral argument should not be necessary. Publication may be warranted to develop the law on the effect of the recent amendments to the supervised release statute, Wis. Stat. § 980.08, by 2015 Wisconsin Act 156.

STATEMENT OF THE CASE AND FACTS

Given the nature of the arguments raised the appellant's brief of intervenor-appellant-cross-respondent Kenosha County, Michael McGee exercises his option not to present a statement of the case and facts. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

The Circuit Court Properly Exercised its Discretion when it Confirmed its Previous Order Placing Michael McGee on Supervised Release in Kenosha County.

The issue under review in this case is the circuit court's decision to place Michael McGee on supervised release under a plan placing him in a residence in Kenosha County. (31: A-App. 106-15). Resolution of this issue involves, in part, the meaning of some recent

amendments to Wis. Stat. § 980.08. As Kenosha County notes (brief at 14-15), statutory interpretation is a question of law this court decides *de novo*.

The County also claims (brief at 15) that the circuit court's decision to implement the supervised release plan under the amended version of § 980.08, in light of all the facts known, is a mixed question of fact and law, and that this court reviews the legal question independently. This is not correct—and, in any event, the County does not actually apply that standard, except implicitly in its argument that McGee's placement violates Wis. Stat. § 980.08(4)(f)2. (as created by 2015 Wisconsin Act 156). (County's Brief at 31-33). Instead, when the County refers to the standard of review in its argument, it asserts the circuit court erroneously exercised its discretion. (County's Brief at 19, 26).

The standard of review of a circuit court's approval of a supervised release plan under § 980.08(4) is, in fact, the erroneous exercise of discretion standard. ***State v. Thiel***, 2012 WI App 48, ¶6, 340 Wis. 2d 654, 813 N.W.2d 709, As ***Thiel*** explained, the objectives of ch. 980 are both treatment of the offender and protection of the public, and circuit courts and the Department of Health Services are entitled to "reasonable latitude" in trying to achieve these two objectives. ***Id.***, *citing* ***State v. Burris***, 2004 WI 91, ¶¶35–36, 273 Wis. 2d 294, 682 N.W.2d 812.

A circuit court properly exercises its discretion if it relies on relevant facts in the record and applies a proper legal standard to reach a reasonable decision. ***Thiel***, 340 Wis. 2d 654, ¶6. The County argues the circuit court erred in part because it misinterpreted or misapplied provisions of § 980.08. The failure to apply the correct legal standard is an erroneous exercise of discretion, and whether the circuit court

misinterpreted or misapplied the statute is a question of law that a reviewing court decides independently as part of its review of the exercise of discretion. ***King v. King***, 224 Wis. 2d 235, 248, 251, 590 N.W.2d 480 (1999).

Otherwise, review of a circuit court's discretionary decision is highly deferential. ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶16, 296 Wis. 2d 337, 723 N.W.2d 131. "'Discretion' contemplates a measure of latitude which recognizes that the circuit court might reach a decision that another judge or court might not reach, without making what the circuit court did erroneous." ***Id.*** *See also* ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995) (the exercise of discretion carries with it "a limited right to be wrong" without the danger of incurring reversal). Discretionary determinations are not tested on appeal by the reviewing court's sense of what might be a "right" or "wrong" decision in the case. ***Jeske***, 197 Wis. 2d at 913. *Cf.* ***Olivarez***, 296 Wis. 2d 337, ¶35 ("Our inquiry … is whether discretion was exercised, not whether it could have been exercised differently."). The circuit court's determination will stand "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***Jeske***, 197 Wis. 2d at 913.

In reviewing a discretionary decision, this court examines the circuit court's on-the-record explanation of the reasons underlying its decision. ***Olivarez***, 296 Wis. 2d 337, ¶17. The circuit court must state reasons for its decision, though the statement "need not be exhaustive." ***Id.***, *quoting* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). "It is enough that we can glean from them that the circuit court undertook a reasonable inquiry and examination of the facts and that the record shows a reasonable basis for its determination." ***Id.***, *citing* ***Hedtcke v.***

Sentry Ins. Co., 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982). Because the exercise of discretion is so essential to a circuit court's functioning, the reviewing court may search the record for reasons to sustain the exercise of discretion. ***Id.***

I. The Circuit Court Properly Exercised its Discretion in Concluding that the Supervised Release Plan was Appropriate.

The County opens its challenge to the circuit court's approval of the supervised release plan by arguing that public safety is the "paramount" consideration when reviewing the plan. (County's Brief at 16). But the statute it cites for this proposition actually says the plan must "adequately meet the treatment needs of the individual *and* the safety needs of the community," not that the latter trumps the former. Wis. Stat. § 980.08(4)(g) (emphasis added). That there are *two* objectives explains why the circuit court and DHS are entitled to "reasonable latitude" in balancing them. ***Thiel***, 340 Wis. 2d 654, ¶6, *quoting* ***Burris***, 273 Wis. 2d 294, ¶36.

Because the County fails to recognize the latitude given to the circuit court and DHS, its arguments as to why the circuit court erred in approving the plan are misplaced. A circuit court properly exercises its discretion if it relies on relevant facts in the record and applies a proper legal standard to reach a reasonable decision, ***Thiel***, 340 Wis. 2d 654, ¶6, and the circuit court satisfied that standard here.

From information already in the record (*e.g.*, 10:2; 21:2-3), as well as from the County's pleadings and the evidence admitted at the hearing on the County's challenges, the circuit court was well aware of McGee's predicate conviction; his revocation from parole in 1992 based, in part, on allegations he had sexual contact with a child; and the content of the special bulletin notice about his impending

release. (34; 35; 36; 37; 40; 41; 43; 82:56-61, 78-80, 116-17; R-App. 156-61, 178-80, 216-17).

Further, while the County (brief at 17) is correct that the supervised release plan materials submitted by DHS (31; A-App. 106-15) did not include this information, the circuit court was informed by the County's pleadings as well as testimony at the evidentiary hearing that the residence McGee was to be placed in was next to a home with a one-year-old child, that other children stayed at the home on a regular basis, and that it was near a county bicycle route and public fishing area frequented by children and families. (82:10-11, 22-23, 81-82; R-App. 110-11, 122-23, 181-82). DHS also knew and considered the information regarding the child living adjacent to the placement because, using the Department of Corrections as intermediary, it asked the sheriff's department to conduct a site visit to assess the residence. (31:1-2; 41; 82:8-14, 56-61, 98; A-App. 106-07, 147-48; R-App. 108-14, 156-61, 198).

Most importantly, it is clear the circuit court took account of all of this information in reaching its decision to confirm the supervised release plan because its written decision refers to all the information. (57:2, 3-7; A-App. 120, 121-25). Even if the court's written decision is not exhaustive, it does not have to be. ***Olivarez***, 296 Wis. 2d 337, ¶17.

Moreover, Angie Serwa and Stephen Kopetskie from DHS explained how supervised release planning takes offense history into account in general as well as why, in McGee's case in particular. Specifically, Kopetskie explained that DHS considered the allegation of child sexual contact in 1992. Despite the language in the special notice bulletin about "targeted victims" (53:1; 82:57-60; R-App. 157-60), they

concluded the Kenosha placement was still appropriate because the allegation was consistent with the majority of child sex offenses being committed by someone with a social connection to the child—something the rules and conditions of supervised release are designed to prevent—and the fact McGee has not been treated for deviant sexual interest in children because he has not shown such an interest. (82:72-74, 88, 92-94, 98-101, 105-06, 111-14, 116-22; R-App. 172-74, 188, 192-94, 198-201, 205-06, 211-14, 216-22).[1]

While the circuit court did not specifically refer to or adopt this testimony in its written decision, it did find that the plan was appropriate even in light of McGee's offense history and the allegations of child sexual contact. (57:6-7; A-App. 124-25). Because Kopetskie's testimony supports that conclusion and because a court reviewing an exercise of discretion searches the record for reasons to sustain the decision, ***Olivarez***, 296 Wis. 2d 337, ¶17, the circuit court's decision should be sustained.

The County claims that DHS and the circuit court have "repeatedly stated" that the information about the child residing next door is "not relevant" to the appropriateness of the plan. (County's brief at 17). This misunderstands the testimony at the evidentiary hearing and the circuit court's written decision which, as just explained, are clear that DHS and the circuit court took that information into account in deciding the appropriateness of the placement. With one exception, the comments about the lack of "relevancy" of that

[1] The County suggested on cross-examination that there was a child present in the home when McGee committed his predicate sex offense against an adult woman. (82:111, 117; R.-App. 211, 217). That assertion is not established in the record, nor is it relevant if there is no proof McGee sexually assaulted the child.

information involve the issue of whether the presence of the one-year-old child next door precluded McGee's placement.

Specifically, a provision created by Act 156 prohibits a "serious child sex offender," as defined by § 980.01(4m), from being placed with 1,500 feet of a property containing the primary residence of a child. *See* Wis. Stat. § 980.08(4)(f)4. That restriction does *not* apply to McGee because he has never been convicted of child sexual assault. The allegation he had sexual contact with his nephew in 1992 did not lead to a conviction; in fact, it is not clear his parole was revoked on that basis or for other rules violations or both. (10:2; 21:2-3; 82:72, 79, 98-99).[2] DHS's reading of the statute to require a conviction is clearly correct, for the plain language uses that term. The circuit court's decision agreed. (57:5; A-App. 123). The County does not argue otherwise, and conceded the point below (75:13; A-App. 138).

The County cites one specific comment in support of its claim that DHS did not consider the child sexual assault allegations to be "relevant." (County's Brief at 13). That is a comment by Kopetskie. (82:98; R-App. 198). But the full context of his answer shows an infelicitous use of the word "relevant." He was asked if DHS ignored the allegations, and after clarifying that § 980.08(4)(f)4. requires a conviction but then continued: "So *we did consider that fact that there was in fact a charge brought against him* and deemed it not to be relevant in terms of his placement." (*Id*.). He then proceeded to explain why DHS's consideration of the allegation did not lead them to conclude the placement was inappropriate.

[2] Though the County claims McGee "undisputably molested a young boy" (brief at 18), the record shows that the charge for that conduct was dismissed and, while McGee's parole was revoked, there were other rule violations that could have led to revocation. (1:3-4; 10:2; 21:2; 75:13; 82:98; A-App. 138; R-App. 198).

(82:98-101; R-App. 198-201). In addition, Kopetskie explained that there have been cases where, despite the lack of a conviction for child sexual assault, and thus the inapplicability of § 980.08(4)(f)4., their consideration of the offender's history overall lead them to reject placements close to children. After consideration of McGee's history, they decided that was not necessary. (82:98-99; R-App. 198-99).

In other words, the child sexual assault allegation was relevant and it was considered by DHS and the circuit court; it simply did not, in the opinion of DHS or the circuit court, mean the placement was inappropriate. Contrary to the County's claim (brief at 18), neither DHS nor the circuit court believed they were "precluded" from considering the information.

A final point on this issue. The County criticizes DHS for not including in its written supervised release plan a statement that there was a one-year-old next door to the proposed residence and claims this "glaring omission" warrants rescission of the plan "standing alone…." (County's Brief at 17). The County cites no authority for its claim that DHS's submissions must contain that specific information and that failure to include it is a basis for reversing approval of a plan. This court should refuse to consider the argument, as it is undeveloped, inadequately briefed, and made without citation to legal authority. ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315(Ct. App. 1997); ***State v. Pettit***, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

In any event, there *is* nothing in § 980.08 that dictates the content of the written material regarding the supervised release plan submitted to the circuit court, no doubt because the legislature recognized that each case is different, that the

myriad considerations go into the adequacy of any particular plan, and that such a statutory mandate would be onerous and difficult. While more information rather than less is a prudent approach, if the circuit court or the parties believe DHS's submissions are incomplete, or, as in this case, if others bring to their attention information they believe should be addressed, they may demand more information in writing or by testimony.

In short, the record refutes the County's argument that the circuit court erroneously exercised its discretion in approving the plan by refusing to consider the facts that there is a one-year-old child living next door to the placement and that McGee was alleged to have had sexual contact with a child in 1992. Because the circuit court and DHS considered that information, the County's claim must be rejected.

II. The Requirements of § 980.08(4) as Amended by Act 156 Were Either Followed or, if They Were Not, the Failure to Follow the Requirement Does Not Invalidate the Circuit Court's Decision.

A. DHS consulted with local law enforcement as required by § 980.08(4)(em).

To understand the issue regarding § 980.08(4)(em), some background about the recent changes to § 980.08 is necessary.

The changes made to § 980.08 by Act 156 show the legislature intended to establish a statewide standard for restricting the place of residency of sex offenders placed on supervised release in order to address the problem local sex offender residency restrictions caused for finding supervised release placements—a problem illustrated by what happened in this case. (74:3; 76:2-5; 77:2; 78:2-3; 79:2; 82:69-70, 77,

94-96, 102; R-App. 169-70, 177, 194-96, 202). For instance, the ordinance in Wheatland, the township where McGee was to be placed, prohibits a sex offender not placed under Department of Corrections guidelines from residing within 2,500 feet of: any school, licensed day care center, unlicensed care facility where three or more children may be related by heredity; any park, trail, playground, place of worship; "or any other place designated by the Town as a place where children are known to congregate." Wheatland, Wis., Ord. § 47.01(B)(6) and (C)(1)(a). (35:5-6). Indeed, DHS had identified the Wheatland residence as a possible placement for McGee before Act 156, but rejected it because of Wheatland's ordinance. (31:1; 82:107-08; R-App. 207-08).

With Act 156 the legislature imposed uniformity on the restrictions for placements under § 980.08. Specifically, Act 156 created a basic restriction of 1,500 feet from schools, child care facilities, parks, places of worship, youth centers, *see* § 980.08(4)(f)2., as well as two restrictions listing additional places that cover placement of persons convicted of sexual assault of certain vulnerable adults or of children, *see* § 980.08(4)(f)3. and 4., as created by Act 156.[3]

Having created new statewide residency restrictions, the act also created § 980.08(4)(em) to require DHS to consult with local agencies. The new statute provides as follows:

> The department shall consult with a local law enforcement agency having jurisdiction over any prospective residential option identified under par. (e)

[3] As noted above, McGee has not been convicted of a sexual assault of a vulnerable adult or a child, so the restrictions in § 980.08(4)(f)3. and 4. do not apply to him. (75:13; 82:72-73; A-App. 138; R-App. 172-73).

> and identified under par. (e) and shall request the law enforcement agency to submit a written report that provides information relating to the prospective residential option.

It is undisputed that, as required by § 980.08(4)(em), DHS (through the good offices of DOC's Division of Community Corrections) asked a Kenosha County Sheriff's detective to prepare a written report about the Kenosha County residence that DHS proposed for McGee's placement. That is how DHS discovered there was a one-year-old boy on an adjacent property. (82:9-11, 13-14; R-App. 109-11, 113-14).

The County asserted below that it was not enough to get a report about the *residence*. Instead, DHS should have asked the sheriff's office about the advisability of placing *McGee*, specifically, in the residence. The circuit court disagreed. Contrary the County's claim (brief at 25) that it did not reach a conclusion on this issue, the circuit court agreed with the interpretation of DHS (82:62-64, 70-72, 114-16; R-App. 162-64, 170-72, 214-16) and held that the statute required only an inquiry for information about the *residence*, not the proposed *resident*. (57:5; A-App. 123).

The County renews the argument in this court, arguing that, based on the dictionary definition of the word "consult," the requirement that DHS consult with local law enforcement necessarily means getting the law enforcement agency's opinion about the specific person who is going to be placed in the residence. (County's Brief at 21-24). The County puts too much emphasis on one word and so misses the meaning of the statute as a whole.

The common-language definition the County cites shows the word "consult" could have a meaning as expansive as "to ask advice of" or "seek the opinion of;" or it could have

the more narrow meaning of "apply to for information…." (County's Brief at 23, quoting ***Webster's Third New Int'l Dictionary*** 490 (1971)). Since the dictionary definition does not resolve the matter, the plain meaning of the statute should be ascertained by looking to statutory context and history.

The statutory context in which a term is used, including the language and structure of surrounding or closely related statutes, is often highly instructive in determining a term's meaning. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶¶45-46, 49, 271 Wis. 2d 633, 681 N.W.2d 110 (context and purpose of statute are important in determining a statute's plain meaning); ***Richards v. Badger Mut. Ins. Co.***, 2008 WI 52, ¶22, 309 Wis. 2d 541, 749 N.W.2d 581 (reviewing court may consider the statutory history—*i.e.*, the changes the legislature has made over time—as part of the context analysis). The purposes underlying a statute are also useful in ascertaining a statute's meaning. ***State v. Soto***, 2012 WI 93, ¶20, 343 Wis. 2d 43, 817 N.W.2d 848.

The context and history of § 980.08(4)(em) show it was created to assure DHS would collect information about a proposed residence. It is a new part of the whole supervised release planning scheme under sub. (4); it requires DHS to collect information that will not necessarily be collected under the longstanding information gathering provisions of sub. (4)(d) and (e), which deal will identifying possible residences; it will provide information that DHS could not find out as easily as the local agency can; and the information will assist DHS in making sure it is complying with the three new statewide residency restrictions also created by Act 156.

Further, as DHS and the circuit court appropriately concluded, the word "residence" is just as—if not more—important than "consult." That refers to a *place*, not the person who might be placed there. The legislature is presumed both to know the meaning of the words it selects and to choose its terms carefully and with precision to express its meaning. ***Johnson v. City of Edgerton***, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996).

Not only does the legislature's use of "*residence*" rather than *resident* make sense in light of sub. (4)(em)'s enactment as part of Act 156, it makes sense as a practical matter, for several reasons. Given the difficulty in finding placements, DHS frequently has to first identify a *residence*, get information from the local law enforcement agency, and *then* determine *who* of the many persons awaiting a placement might be appropriate for the residence. Requiring the names of all persons who might be considered for the placement could require a long list. (82:71-72; R-App. 171-72). Also, focusing on one offender at a time would often require multiple requests that would collect the same basic information. That is illustrated by this case. The letter sent to the sheriff named Thomas Johnson as a possible resident. (56:1). He could not be placed at the residence because he is a serious child sex offender. (82:18-19, 20; R-App. 118-19, 120).

Second, while a local law enforcement agency will have (or can easily obtain) very helpful knowledge of the residence, its setting, and its surroundings, there is no reason to suppose the agency is able to offer an informed opinion about the appropriateness of a placement for a particular person. The agency may know nothing about the person proposed for the placement; and even if it is familiar with the

predicate ch. 980 offense, it will have little or no knowledge of the person's history since being committed under ch. 980, including the progress in treatment that makes the person appropriate for supervised release, or the relevant requirements of § 980.08. That is illustrated by this case, too, as the detective who did responded to DHS's request acknowledged. (82:15-17; R-App. 115-17).

These considerations show it is reasonable for DHS to construe sub. (4)(em) as requiring only consultation about the *residence*, not the *resident*. As the entity to which a person is committed for "control, care and treatment," *see* § 980.06, DHS is the entity the legislature has charged with forming an opinion about the appropriateness of a placement, which opinion is then subject to approval by the circuit court under § 980.08(4)(g). DHS's responsibility for implementing ch. 980 and the consistency of its interpretation with the statutory language supports giving its construction due weight. *See* ***MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.***, 2010 WI 87, ¶30, 328 Wis. 2d 110, 786 N.W.2d 785 (stating standard for due weight deference).

This is true despite what is, as the County points out (brief at 24), DHS's badly drafted submission to the circuit court, which said the sheriff's office was asked to "provide any information or concerns they may have regarding Mr. McGee's placement." (31:5-6; A-App. 110-11; *cf.* 31:1-2; A-App. 106-07). Thought misleading, the statement is harmless given that DHS complied with the statute.

Finally, the County claims that if the sheriff's department had been given more information about McGee they would have in turn "highlighted" the presence of the one-year-old child next door, noted the lack of physical barriers between the residence and the child's residence, and

would have advised DHS about the nearby fishing area and bike route. (County's Brief at 24-25). This claim is disingenuous. The request to the sheriff's department for information *did* identify a person—Thomas Johnson—who was, as it turns out, a serious child sex offender who could not be placed at the residence. (56:1; 82:20; R-App. 120). Despite having a name (and a circuit court case number), the sheriff's department provided none of the information it now insists it would have provided had it been given McGee's name. (82:18-20; R-App. 118-20). That failure to dig deeper cannot be explained away by saying Johnson was a Kenosha County resident, for sub. (4)(em) does not limit its consultation requirement to placements outside the county of residence. If the statute requires a law enforcement agency's opinion for McGee, it requires one for Johnson, too.

In conclusion, § 980.08(4)(em) requires DHS to collect information from a local law enforcement agency about a prospective residence, not obtain the opinion of local law enforcement about the appropriateness of placing a specific person. DHS did what the statute required, so the circuit court correctly found DHS complied with the statute and did not erroneously exercise its discretion in affirming the placement is sound.

B. Any error in failing to consult with Kenosha County's victim-witness coordinator was harmless.

Another change made by Act 156 is to § 980.08(4)(f)(intro.). That statute now requires DHS to search its victim database, to consult with the office of victim services in DOC and the Department of Justice, and to consult with "the county coordinator of victims and witnesses services in the county of intended placement, the county

where the person was convicted, and the county of commitment to determine the identity and location of known and registered victims of the person's acts."

McGee does not dispute that DHS did not consult the Kenosha County victim-witness coordinator before placement was to occur, but only after the circuit court approved the supervised release plan. (82:38-40, 43; R-App. 138-40, 143). Further, the coordinator did not have the names of McGee's victims and so could not search the registered victim database to see if they lived near the proposed placement; however, she did have McGee's name and she could—and did—search the registered victim database for victims of McGee's offenses. None were found. (82:40, 43-47; R-App. 140, 143-47).

The County is right that DHS should have followed the clear requirement of sub. (4)(f)(intro.). (County's Brief at 27-28). But that is not the end of the analysis. Even if a circuit court erroneously exercises its discretion by applying an incorrect legal standard in making its decision, the error is harmless when it does not affect the substantial rights of the parties. ***Weborg v. Jenny***, 2012 WI 67, ¶¶73–74, 341 Wis. 2d 668, 816 N.W.2d 191 (addressing erroneous exercise of discretion in modifying standard jury instruction); ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶19, 27-28, 246 Wis. 2d 1, 629 N.W.2d 768 (addressing erroneous exercise of discretion in finding admission by default to grounds for termination of parental rights without taking supporting evidence).

While strict compliance with the statute is obviously preferred, in this case the failure to do so is harmless and thus does not provide grounds for reversing the circuit court's exercise of discretion. Even if Kenosha County's victim-witness coordinator would have been contacted sooner, she

would have found no information because, as the State informed the court, McGee's cases are so old there are *no* registered victims and the Racine County prosecutor had not been able to find any victims despite several attempts. (82:47-49; R-App. 147-49). Thus, if DHS had complied with the statute and given the coordinator the names before the order was entered, a search of the registered victim database would not have returned any results. The failure to strictly comply with sub. (4)(f)(intro.) therefore had no practical legal effect on the proceeding.

While DHS should abide by the requirements of the statute, reversing McGee's supervised release order to hold DHS "accountable" for its failure to comply in this case is inappropriate. (County's Brief at 27). There is no practical reason to rescind the order and make DHS resubmit the plan after first notifying the Kenosha victim-witness coordinator because we already know what the result will be: She will not find any registered victims. Redoing the procedure would be futile, and the law does not require futile acts. ***State v. Perry***, 136 Wis. 2d 92, 109, 401 N.W.2d 748 (1987). Nor should *McGee* bear the burden of further delay of supervised release just to punish DHS for failing to take action that has no practical effect on the outcome, especially since he has little, if any, control over whether DHS complies.

For these reasons, DHS's failure to comply with § 980.08(4)(f)(intro.) does not merit reversing the circuit court's supervised release order.

C. The circuit court was not required to conduct a new good cause hearing, and in any event the evidentiary hearing it conducted showed there was good cause.

Before Act 156 took effect in March 2016, the circuit court, acting under § 980.08(4)(cm) (2013-14), found good cause to search for a placement outside of Racine County and ordered a statewide search for placements. (26; 28). Operating under this good-cause order, DHS identified the residence in Kenosha County as a possible placement for McGee but ruled it out because of the township's sex offender residency ordinance. After Act 156, and still operating under the pre-Act 156 good-cause order, DHS looked again at the Kenosha residence and concluded it was appropriate because it was exempt from the township's ordinance by virtue of § 980.135, also created by Act 156. (31:1-2; 82:107-08; A-App. 106-07; R-App. 207-08).

In its cover letter to the supervised release plan, DHS noted that there had been a change in the good cause standard and asked the circuit court to determine whether the previous order for a statewide search was still valid; if so, DHS said, the attached plan proposed the placement in Kenosha. (31:2; A-App. 107). Neither the circuit court nor the parties raised the issue about the validity of the previous good-cause order at the hearing on approving the plan. (80:2-3).

The County argued below that the circuit court was required to hold a new good-cause hearing by the new language in Act 156. (44:1-3; 82:124-25). The circuit court rejected the argument. (57:4; A-App. 122). The County renews that argument, and adds the assertion that it was improper to attempt to make a retroactive good-cause determination at the evidentiary hearing held after it

intervened. (County's Brief at 29-31). These arguments are not supported by the statutory language.

The statute at issue says the following, with the language added by Act 156 in bold:

> 980.08(4)(cm) If the court finds that all of the criteria in par. (cg) are met, the court shall select a county to prepare a report under par. (e). Unless the court has good cause to select another county, the court shall select the person's county of residence as determined by the department under s. 980.105. **An actual or alleged lack of available housing for the person within a county because of an ordinance or resolution in effect or proposed by the county or by a city, town, or village within the county may not constitute good cause to select another county under this paragraph.** The court may not select a county where there is a facility in which persons committed to institutional care under this chapter are placed unless that county is also that person's county of residence.

The language added by Act 156 is clear on its face and must be given effect. ***Kalal***, 271 Wis. 2d 633, ¶45. It alters the standard for finding good cause consistently with the other changes made by the Act—namely, imposing new uniform statewide residency restrictions, *see* § 980.08(4)(f)2., 3., and 4., in place of local residency restrictions, which § 980.135 made unenforceable against persons placed on supervised release in compliance with the new statewide standards. Under the new standard, a *local* residency restriction can no longer be good cause to look outside the county because the local ordinances cannot be enforced under § 980.135. But the new *statewide* restrictions might result in DHS being unable to find a residence in the county of residence; if so, there will be good cause to look elsewhere, as

the language added by Act 156 only prohibits (now abrogated) local ordinances from providing good cause.

While the Act 156 amendment clearly alters the grounds for finding good cause, it says nothing at all about the *procedure* required to find good cause. In fact, § 980.08(4)(cm) did not prescribe a procedure *before* Act 156. In this case the pre-Act 156 good cause order was entered by motion and order, without a hearing—presumably because the State did not object, knowing there are problems in finding placements in Racine. (26; 28; 74:2-4; 76:2-5). But the statute as amended by Act 156 does not prescribe a procedure, either, so nothing in Act 156 changes how a good cause determination is made or a good cause order is entered.

Not surprisingly, then, when the County argues that "[a] new *hearing* should have been held" (brief at 31 (emphasis added)) it does not cite any language in revised § 980.08(4)(cm) or Act 156 that mandates a hearing or any other particular process for determining good cause, let alone a new hearing in cases where good cause was found under the previous standard. Its claim that it was "improper" to do a *nunc pro tunc* good-cause determination at the evidentiary hearing is similarly devoid of support in the statutory language. A court should not read into the statute language that the legislature did not put in. ***Brauneis v. LIRC***, 2000 WI 69, ¶27, 236 Wis. 2d 27, 612 N.W.2d 635. Thus, the County's reading of the statute's requirements must be rejected.

Even if Act 156 required a new good cause hearing, and the circuit court erroneously exercised its discretion to order an out-of-county placement without first revisiting the good-cause question, that would not be a basis for reversing the supervised release order in this case. As noted above,

even when a circuit court erroneously exercises its discretion by applying an incorrect legal standard in making its decision, the error is harmless when it does not affect the substantial rights of the parties. ***Weborg***, 341 Wis. 2d 668, ¶¶73–74; ***Tykila S.***, 246 Wis. 2d 1, ¶¶19, 27-28. Contrary to the County's claim (brief at 29-30), in this case any error in failing to hold a new good-cause hearing before ordering supervised release was harmless because the record shows there was good cause under the Act 156 standard.

Serwa and Kopetskie, the witnesses from DHS, explicitly testified that they are continually looking for in-county placements for supervised release candidates; that even *after* Act 156's effective date in March 2016 they continued to look for a Racine County placement for McGee; and that despite Act 156's limitation on local ordinances they could not find a placement for McGee in Racine County. (82:54-55, 67-70, 74-75, 76, 77-78, 95-97, 101-05, 107-11; R-App. 154-55, 167-70, 174-75, 176, 177-78, 195-97, 201-05, 207-11). The County presented no contrary evidence at the hearing, and the circuit court accepted the testimony from the DHS witnesses, as it was entitled to do, and cited it as an basis for rejecting the County's challenge to the supervised release order if the statute is construed as requiring a new good cause determination. (57:4; A-App. 122).

It is true that a circuit court erroneously exercises discretion when the facts do not support its decision. ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986). However, a reviewing court affirms the circuit court's factual findings unless they are clearly erroneous. Wis. Stat. § 805.17(2). The County does not expressly argue that the circuit court's factual findings about good cause are clearly erroneous, and

its cursory complaints about the evidence (brief at 30) do not amount to such a claim.

First, the County claims that the evidence does not show how DHS changed its search methods after Act 156. That is of no moment. DHS has conducted broad searches, looking at hundreds of potential homes (82:55, 78; R-App. 155, 178), under both pre- and post-Act 156 standards because both contain residency restrictions DHS. The testimony the circuit court accepted shows that even searches conducted *after* Act 156 yielded nothing in Racine. (82:95-97; R-App. 195-97). Nor does it matter that, after Act 156 took effect, DHS immediately revisited the viability of the Kenosha residence. That says nothing about whether there were residences available in *Racine*, which is the focus of the good-cause determination. Finally, the claim that DHS "has not updated any of their [property] lists or postings since February 2016" misstates the evidence; what the witness said is that due to a loss of staff, "the log is not as well kept as it was previously." (82:109; R-App. 209).

Thus, nothing in § 980.08(4)(cm) as amended by Act 156 provides a basis for concluding that the circuit court's erroneously exercised its discretion by failing to conduct a new good-cause hearing. Nor is there any statutory text supporting the County's claim (brief at 31) that the circuit court "should have pushed DHS to more fully explore how the passage of new legislation created new residential options in Racine County." Moreover, even if the court was required to revisit good cause, the record shows the new standard was satisfied. The supervised release order should stand.

D. McGee is not being placed within 1,500 feet of a park in violation of § 980.08(4)(f)2.

Finally, the County argues that the supervised release order is invalid because it does not comply with § 980.08(4)(f)2. Specifically, the County contends that the residence McGee would be placed at is within 1,500 feet of a public park. (County's Brief at 31-33). This argument fails on both the law and the facts.

Along with the residency restriction at issue, Act 156 defined "public park" to mean "a park or playground that is owned or maintained by the state or by a city, village, town, or county." Wis. Stat. § 980.01(3g). While this definition is not very detailed by itself, case law provides further guidance, for the legislature is presumed to know the case law in existence when they change the statutes, ***Kenosha County v. Frett***, 2014 WI App 127, ¶11, 359 Wis. 2d 246, 858 N.W.2d 397, and, as mentioned earlier, to choose its terms carefully and with precision to express its meaning, ***City of Edgerton***, 207 Wis. 2d at 351.

When construing "park" as used in other statutes bearing on issues of public protection, the case law has applied common definitions of the word and interpreted it to mean "a tract of land maintained by a city or town as a place of beauty or public recreation," ***State v. Lopez***, 207 Wis. 2d 413, 432, 559 N.W.2d 264 (Ct. App. 1996), *limited on other grounds by* ***State v. Jackson***, 2016 WI 56, 369 Wis. 2d 673, 882 N.W.2d 422; or as "[a] piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation," ***State ex rel. Hammann v. Levitan***, 200 Wis. 271, 279, 228 N.W. 140 (1929). The County does not look to this definition, however. It asserts that the definition of "park" in

its own ordinance should determine the meaning of "park" in § 980.08(4)(f)2. (County's brief at 32). This claim is unsupported—and unsupportable—by authority.

First, the claim is contrary to long-established rules of statutory construction. "Wisconsin courts have long followed the rule that '[w]here a word or phrase is specifically defined *in a statute*, its meaning is as defined in the statute, and no other rule of statutory construction need be applied.'" ***Wisconsin Citizens Concerned for Cranes and Doves v. DNR***, 2004 WI 40, ¶21, 270 Wis. 2d 318, 677 N.W.2d 612 (emphasis added; quoted source omitted). Therefore, the definition the *legislature* has provided for a term controls the plain meaning of that term in the statute. ***State ex rel. Girouard v. Cir. Ct. for Jackson County***, 155 Wis. 2d 148, 156, 454 N.W.2d 792 (1990).

Moreover, while counties have statutory home rule authority under Wis. Stat. § 59.03, they may not exercise that authority in a way that conflicts with legislative enactments of statewide concern that uniformly affect all counties. ***State ex rel. Ziervogel v. Washington County Board of Adjustment***, 2004 WI 23, ¶37, 269 Wis. 2d 549, 676 N.W.2d 401. Local units of government may adopt ordinances which, "while addressed to local issues, concomitantly regulate matters of statewide concern," but this authority is limited to ordinances that complement rather than conflict with the state legislation. ***Id.*** (quoted source omitted). Thus, local regulations in areas where the legislature has adopted uniformly applicable statutes on matters of statewide concern are invalid if: 1) the legislature withdraws the power of municipalities to act; 2) the local ordinance logically conflicts with the state legislation; 3) the ordinance defeats the purpose of the state legislation; or 4) the ordinance goes against the spirit of the state legislation. ***Id.***, ¶38.

As explained above (in Section II.A.), the clear impetus behind the changes made by Act 156 was to create a uniform statewide residency restriction to replace the patchwork of local sex offender residency ordinances that were making supervised release placements more difficult. Allowing a county or other local ordinance to define "public park" for purposes of § 980.08(4)(f)2. is inconsistent with the legislature's intent to impose *uniform* restriction for the entire state, and it would allow the local government to effectively reimpose a local sex offender residency restriction for supervised release cases by defining "public park" very broadly so that it sweeps in more places.

Indeed, that is the likely effect of Kenosha's ordinance, which defines "park" to include "boulevards, pleasure drives, golf courses, and bicycle trails," among other places. Kenosha Cty., Wis., Ord. § 10.01(3). (48:1). This is broader than the definition adopted in case law to other statutory uses of the term and that presumably was intended by the legislature in adopting Act 156. The County's definition therefore logically conflicts with the state legislation, defeats the purpose of the state legislation, and goes against the spirit of the state legislation. Accordingly, it is improper to use Kenosha County's ordinance to determine the meaning of "public park" as used in ch. 980. ***Ziervogel***, 269 Wis. 2d 549, ¶38.

Even if the ordinance did define "public park" for purposes of § 980.08(4)(f)2., the record does not establish that McGee's placement is within 1,500 feet of a "park" under Kenosha's ordinance. The County (brief at 32) says the property is within 1,500 feet of the "Kenosha County Fox River Bike Trail." But to prove that a bicycle trail is a park under its ordinance, Kenosha had to prove the trail was on land that was "acquired by the county for park or recreational

purposes and placed under the jurisdiction of the Parks Division of the Kenosha County, …" Kenosha Cty., Wis., Ord. § 10.01(3). (48:1). No witness identified the bike "trail" by the name cited in the County's brief, nor did any of the County's witnesses testify that the County owned or maintained the trail—in fact, when asked, the witness said he did not know (82:32-33; R-App. 132-33)—much less that it was on land acquired for park or recreational purposes, or that it was under the jurisdiction of the parks department, or that it was on private land which the owner was allowing the County to use for park or recreation purposes. (82:22-26, 31-33, 35; R-App. 122-26, 131-33, 135).

While the term "bicycle trail" may conjure up an image of a crushed limestone path along an abandoned railroad bed similar to, say, the Glacial Drumlin Trail, that is not the kind of "trail" the witnesses are referring to. According to the County's bicycling information brochure, the only bicycle "trail" in the Town of Wheatland close to 32200 Geneva Road, Salem, Wisconsin (31:3; 47:2; A-App. 110), which is also State Highway 50 (47:3; 82:18; R-App. 118), is what is more aptly termed a bicycle-friendly route over public highways. The route runs west on County Highway K, turns south County Road W to Geneva Road (*i.e.*, State Highway 50/83, then west across the river on Geneva Road to County Highway JI and heads south. (R-App. 223-24).[4]

[4] McGee asks this court to take judicial notice under Wis. Stat. § 902.01(2)(b) of the fact that the bike trail in the Town of Wheatland is on public highways because, based on the County's own bicycling brochure, it is fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The brochure is available Kenosha County's website at http://www.kenoshacounty.org/DocumentCenter/View/1098.

That the bike route is on public roads satisfies the "public" part of the definition in § 980.01(3g) (as well as the county-owned aspect of the Kenosha ordinance, at least for the county road sections). But a public road does not satisfy the salient part of the definition of "public park": A tract of land maintained as a place of beauty or public recreation. If it does, as McGee argued below (82:24; R-App. 124), every public road in the state could be a "park" and the new residency restriction in § 980.08(4)(f)2. will exclude more residences than the local ordinances it was meant to replace. This is not to say a bicycle trail or path or route can never be a public park under § 980.01(3g), just that the one in this case is not.[5]

For these reasons, the County's claim that McGee's placement violates § 980.08(4)(f)2. is meritless.

[5] The County also claims there is a "fishing area" near the property that is frequented by families (brief at 6, 32), but does not argue this area is a "park" under either § 980.01(3g) or its ordinance. The fishing area therefore does not provide grounds to conclude the placement violates § 980.08(4)(f)2.

CONCLUSION

As this court has said, the erroneous exercise of discretion standard of review of circuit court decisions is difficult to overcome in the best of cases. ***Olivarez***, 296 Wis. 2d 337, ¶35. Even if the facts about McGee's placement could have supported a different exercise of discretion, this court's inquiry is whether discretion was exercised, not whether it could have been exercised differently. Even if DHS did not comply with every detail of the new process in § 980.08, the circuit court properly exercised its discretion in concluding that the supervised release order was appropriate, and the order should be affirmed.

Dated this 27th day of October, 2016.

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 7,735 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.

Date this 27th day of October, 2016.

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STATE OF WISCONSIN

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

DISTRICT II

Case No. 2016AP001082

In re the Commitment of Michael L. McGee:

STATE OF WISCONSIN,

Petitioner-Respondent,

COUNTY OF KENOSHA,

Intervenor-Appellant-Cross-Respondent

v.

MICHAEL L. McGEE,

Respondent-Respondent-Cross-Appellant.

Appeal of an Order Granting Kenosha County's
Motion to Intervene Entered in Racine County Circuit Court,
Judge Allan B. Torhorst, Presiding

CROSS-APPELLANT'S BRIEF

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CROSS-APPELLANT'S BRIEF

ISSUE PRESENTED

Was Kenosha County entitled to intervene in Michael McGee's supervised release proceedings under Wis. Stat. § 980.08?

The circuit court granted the County's motion to intervene under Wis. Stat. § 803.09. (57:1; 81:21, 33, 37; Cross-A-App. 132, 144, 148, 150).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented can be fully addressed by the parties' briefs, so oral argument is not necessary. Publication may be warranted to establish that a county does not have the right to intervene in a ch. 980 supervised release proceeding based on the requirement that the Department of Health Services consult with counties of intended placement.

STATEMENT OF THE CASE AND FACTS

Michael McGee was committed under Wis. Stat. ch. 980 in 2004. (14:1). He filed a petition for discharge under Wis. Stat. § 980.09 in November 2013. (3). The circuit court initially denied the petition without a hearing, but after McGee requested reconsideration the court ordered the petition to be set for trial. (3; 4; 5; 6).

In March 2015, shortly before the discharge trial, the parties advised the court they had reached an agreement to resolve the matter without a trial. (74:1-2). McGee withdrew his petition for discharge and agreed to participate in treatment for the next six months; the State agreed that if he was in compliance with the treatment program during that time period, it would not object to McGee being placed on supervised release under Wis. Stat. § 980.08. (74:2-3). Because of the time it takes to arrange a supervised release placement, the parties requested a status hearing in three months so that if McGee was in compliance the court could order the Department of Health Services to begin preparing a supervised release plan. (74:3-4).

At the scheduled status hearing in June 2015 the circuit court ordered DHS to prepare a supervised release plan and to look for placements in both Racine and Kenosha County. (19:1; 76:2-3). Racine County is McGee's county of residence for purposes of Wis. Stat. §§ 980.08(4)(cm) and 980.105. McGee's attorney asked that the order authorize a search in Kenosha County as well because, in his experience in other ch. 980 cases, DHS had been unable to find placements in Racine County. (76:2-4).

At the next status hearing in October 2015, the parties informed the circuit court that DHS needed more time to find a placement, so the matter was set over to November. (77:2-3).[6] In November the parties advised the court that DHS was now looking at a placement in Clark County, so the case again adjourned, to December. (78:2-3). In December the parties advised the court that DHS had not found a placement, and that a potential placement in St. Croix County had not materialized. (79:1). A subsequent letter to the court from DHS explained the difficulties in finding supervised release placements and asked for an additional 90 days to find a placement for McGee. (25).

In January 2016 McGee asked the circuit court to modify the supervised release plan order to find good cause under § 980.08(4)(cm) for DHS to search for a placement anywhere in the state, formalizing what DHS had already been doing. (26). In addition, DHS asked the court to order Racine County to prepare a list of residences under

[6] The parties referred to a memorandum from DHS (77:2), and a subsequent letter from DHS also refers to a letter it sent to the court in September 2015 (25:1); however, there is no September or October memo or letter from DHS in the record.

§ 980.08(4)(e). (29). The circuit court granted both requests. (27; 28).[7]

In April 2016, DHS informed the circuit court it had finally found a placement for McGee in the Town of Wheatland in Kenosha County. (31:1-2). The residence had been identified before, but a town ordinance restricting where sex offenders can live had made the residence impossible. (31:1; 82:107-08). The ordinance prohibited sex offenders (other than those placed under Department of Corrections guidelines) from residing within 2,500 feet of places including schools, day care centers, parks, places of worship, or places where the Town determined children congregate. (35:5-6; Cross-A-App. 105-06). However, after March 1, 2016, the date of publication of 2015 Wisconsin Act 156, the restrictions in Wheatland's ordinance would no longer apply to offenders on supervised release; instead, one of the uniform statewide residency restrictions in § 980.08(4)(f)2., 3., or 4. would apply. (31:1). The Wheatland residence did not run afoul of the statewide restriction applicable to McGee, so it could now be used for his placement. (31:1-2).

Act 156 also created Wis. Stat. § 980.08(4)(em), which requires DHS to consult with a local law enforcement agency having jurisdiction over a potential residential option and to request a report from the agency with information about the

[7] In March, McGee filed a *pro se* discharge petition, alleging his right to a discharge trial given the delay in arranging supervised release. (30). The circuit court never expressly addressed the petition. However, the court had previously indicated that, given the stipulation for supervised release, it did not see the need to address the required annual review of McGee, which included the annual reexamination under Wis. Stat. § 980.07. (20:1; 77:4). It is notable that the report of that annual reexamination supports discharge because it concludes McGee is *not* likely to commit sexually violent acts if released. (21:4-7, 8-9).

residence. Through the Department of Corrections, DHS asked the Kenosha County Sheriff's Department for a report about the Wheatland property. In response a sheriff's department detective provided a report regarding the occupants of the house adjacent to the residence McGee would be placed. (31:1-2; 47; 52:1-2; 82:9-14, 70-71).

On May 4, 2016, the parties asked the circuit court to approve the plan, and the court did so. (32; 80:2-3).

A week later, on May 11 Kenosha County and the Town of Wheatland filed motions to intervene under Wis. Stat. § 803.09 and to stay the supervised release order, arguing that the plan should not have been approved because it did not comply with requirements of ch. 980 created by Act 156. (35; 36; 38; Cross-A-App. 101-11).

The circuit court held a hearing on the motions to intervene. (81; Cross-A-App. 112-49). At the hearing, McGee argued that neither the Town nor the County sufficiently pleaded a basis for intervention under either subsection of § 803.09. In addition, based on the "interest" language in the two petitions, McGee argued that neither the Town nor the County met all four of the requirements for intervention as of right under § 803.09(1). (81:3-8, 13-15; Cross-A-App. 114-19, 124-26).

After hearing from the Town and the County the circuit court concluded that the County met the four criteria for intervention, but questioned the Town about its interest in the proceedings. (81:9-11, 21-25; Cross-A-Ap. 120-22, 132-36). The court ultimately concluded the Town did not meet the requirements under § 803.09(1), denied its motion to intervene, and confirmed its earlier conclusion that Kenosha

met the requirements. (57:1; 81:21, 37; Cross-A-App. 132, 148, 150).[8]

The circuit court later held an evidentiary hearing on the County's challenges to the validity of the supervised release order, at which counsel for the State, McGee, Kenosha County, and DHS appeared. (57:1-2; 82:3-4; Cross-A-App. 150-51). After that hearing, the court issued a written decision rejecting the County's challenges to McGee's supervised release plan and ordering the plan to be implemented. (57:2-7; Cross-A-App. 151-56).

The County filed a notice of appeal from the May 24 decision. (63). McGee cross-appealed the circuit court's decision to allow Kenosha County to intervene. (72).

Additional relevant facts will be included in the argument section.

ARGUMENT

I. Kenosha County Did Not Have a Right to Intervene Under Wis. Stat. § 803.09(1) Because it Does Not Have Any Interest in the Proceedings That is Not Already Adequately Represented by the State of Wisconsin.

A. Relevant legal standards.

Intervention is "[t]he entry into a lawsuit by a third party who, despite not being named a party to the action, has

[8] Wheatland appealed the denial of its motion. That appeal is pending in Case No. 2016AP001068. This court denied the Town's motion to consolidate the cases, but indicated it would consider and decide them together. (Order dated Sept. 9, 2016, in Case Nos. 2016AP001068 & 2016AP001082).

a personal stake in the outcome." ***City of Madison v. WERC***, 200 WI 39, ¶11 n.7, 234 Wis. 2d 550, 610 N.W.2d 94 (quoted source omitted). To establish a right to intervene under Wis. Stat. § 803.09(1), the person moving to intervene must show that: (1) the motion to intervene is timely; (2) the movant has an interest sufficiently related to the subject of the action; (3) disposition of the action may impair the movant's ability to protect its interest; and (4) the existing parties do not adequately represent the movant's interest. Wis. Stat. § 803.09(1); ***Helgeland v. Wisconsin Municipalities***, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1.

The four requirements for intervention under § 803.09(1) are not viewed in isolation from each other. Instead, "there is interplay between the requirements; the requirements must be blended and balanced to determine whether [there is a] right to intervene." ***Helgeland***, 307 Wis. 2d 1, ¶39.

> "Courts have no precise formula for determining whether a potential intervenor meets the requirements of § 803.09(1)…." The analysis is holistic, flexible, and highly fact-specific. A court must look at the facts and circumstances of each case "against the background of the policies underlying the intervention rule." A court is mindful that Wis. Stat. § 803.03(1) "attempts to strike a balance between two conflicting public policies." On the one hand, "[t]he original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit...." On the other hand, "persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies."

Id., ¶40 (footnotes and quoted sources omitted). At the same time, to intervene as of right a party must demonstrate "a direct, significant, and legally protectable interest in the question at issue in the lawsuit.... That interest must be unique

to the proposed intervenor." ***One Wisconsin Institute, Inc. v. Nichol***, 310 F.R.D. 394, 397 (W.D. Wis. 2015), *quoting* ***Wis. Educ. Ass'n Council v. Walker,*** 705 F.3d 640, 658 (7th Cir. 2013) (internal citations and quotation marks omitted).[9]

The person seeking to intervene bears the burden of showing that all four factors are met, and failure to establish one element means the motion must be denied. ***Olivarez v. Unitrin Property & Casualty Co.***, 2006 WI App 189, ¶12, 296 Wis. 2d 337, 723 N.W.2d 131. Whether a person is entitled to intervene under § 803.09(1) is a question of law that this court decides independently of the circuit court. ***Helgeland***, 307 Wis. 2d 1, ¶41.

B. Kenosha satisfies only one of the four requirements for intervention under § 803.09(1).

Kenosha's motion to intervene did not set out a detailed argument as to why it satisfies the four requirements under § 803.09(1). It simply asserted that it is "an interested party" because the proposed placement is in Kenosha County and that "[w]ithout intervening, Kenosha County would be unable to protect its interest in this matter and direct harm to Kenosha County and its residents could result." (38:2; Cross-A-App. 110). The County did offer more explanation at the hearing on its motion:

> As we set forth in our moving papers, in May of this year a decision was made to place Mr. McGee

[9] ***One Wisconsin Institute*** and ***Wis. Educ. Ass'n Council*** addressed intervention under Fed. R. Civ. P. 24(a)(2). Because Wis. Stat. § 803.09(1) is based on the federal rule, Wisconsin courts look to federal decisions for guidance in applying the Wisconsin rule. ***Helgeland***, 307 Wis. 2d 1, ¶37.

> within Kenosha County in the Town of Wheatland. That's - - we have an interest in that placement in that if you look at the statute in [ch.] 980 there's [*sic*] certain requirements that have to be met with regards to the county of intended placement. You need to consult with law enforcement. You need to consult with the victim/witness coordinator, all of these things that have to be done. Once Kenosha County was named as a county of intended placement we became an interested party in this action. And I think when you look at that standard for intervention we clearly have an interest in the transaction which is now the subject of this proceeding. The disposition of this action may as a practical matter impede our ability to protect that interest. If we're not given the opportunity to be heard and to discuss whether or not the statutory requirements would be met, we would be harmed.
>
> And while I can appreciate, you know, everyone else speaking on behalf of Kenosha County I think partly what this Court has to decide is was the statute followed, was Kenosha County's interest as the County of intended placement adequately represented and protected. I don't think it was and if we are not given the opportunity to participate we would be harmed.

(81:12-13; Cross-A-App. 123-24). For the following reasons, these claims fail to satisfy three of the four requirements for intervention under § 803.09(1).

1. The County's motion was timely.

As he did in the circuit court (81:8; Cross-A-App. 119), McGee concedes that the County's motion to intervene was timely. Therefore, the County has satisfied the first requirement.

2. Kenosha does not have an interest in the proceeding.

The second requirement for intervention is that the movant have an interest sufficiently related to the subject of the proceedings. The interest must be "'of such direct and immediate character that the movant will gain or lose by the direct operation of the judgment'"—as, for instance, when the movant "'to protect a right that would not otherwise be protected.'" ***Helgeland***, 307 Wis. 2d 1, ¶45 (footnotes and quoted sources omitted). *Cf.* ***One Wisconsin Institute***, 310 F.R.D. at 397 (movant must have "a direct, significant, and legally protectable interest" in the question at issue in the lawsuit that is "unique" to the intervenor). Whether a movant has such an interest is gauged using a broad, pragmatic approach, viewing the interest element "'practically rather than technically.'" ***Id.***, ¶43 (footnotes and quoted sources omitted). This approach considers the facts and circumstances of the particular case along with the movant's stated interest in intervention, and views them in light of the need to balance between allowing the original parties to conduct and conclude the lawsuit and allowing persons to join a lawsuit in the interest of the speedy and economical resolution of controversies "without rendering the lawsuit fruitlessly complex or unending." ***Id.***, ¶44.

When DHS identifies a county of intended placement, certain county agencies are authorized—and in some cases required—to submit information to DHS about "prospective residential options." Wis. Stat. § 980.08(4)(d) and (e). In addition, in language added to § 980.08 by 2015 Wisconsin Act 156 (Cross-A-App. 157-58), when DHS identifies a county of intended placement it is required to "consult" with

certain agencies in the county regarding an identified residential option. Specifically, DHS must:

- "consult with a local law enforcement agency having jurisdiction over any prospective residential option identified under par. (e) and … request the law enforcement agency to submit a written report that provides information relating to the prospective residential option." Wis. Stat. § 980.08(4)(em).

- "search its victim database, and consult with the office of victim services in the department of corrections, the department of justice, and the county coordinator of victims and witnesses services in the county of intended placement, the county where the person was convicted, and the county of commitment to determine the identity and location of known and registered victims of the person's acts." Wis. Stat. § 980.08(4)(f)(intro).

It is these new consultation requirements that the County asserted gave it an interest in McGee's supervised release proceeding. (81:12-13; Cross-A-App. 123-24). For the following reasons, these requirements do not give a county of intended placement a direct, significant, and legally protectable interest in supervised release proceedings.

First, it is clear from that plain language of these statutes, as well as their purpose, context, and history, that the consultation requirements are part and parcel of a procedure intended to allow DHS and, in turn, the original parties and the circuit court, to obtain additional information about the potential placement, especially now that there are statewide residency restrictions with which DHS must comply. ***State ex***

rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶¶45-46, 49, 271 Wis. 2d 633, 681 N.W.2d 110 (context and purpose of statute are important in determining a statute's plain meaning); ***Richards v. Badger Mut. Ins. Co.***, 2008 WI 52, ¶22, 309 Wis. 2d 541, 749 N.W.2d 581 (reviewing court may consider the statutory history—*i.e.*, the changes the legislature has made over time—as part of the context analysis).

Even before Act 156 took effect, § 980.08 imposed responsibilities on local agencies to provide information about prospective residential placements to DHS. *See* Wis. Stat. § 980.08(4)(d) and (e) (2013-14). As McGee noted below (81:31-32; Cross-A-App. 142-43), the changes made to § 980.08 show the legislature intended to establish a statewide standard for restricting the place of residency of sex offenders placed on supervised release in order to ameliorate the problem local sex offender residency restrictions caused for finding supervised release placements—a problem illustrated by this case. (74:3; 76:2-5; 77:2; 78:2-3; 79:2; 82:69-70, 77, 94-96, 102). Wheatland's ordinance, for instance, prohibits a sex offender not placed under Department of Corrections guidelines from residing within 2,500 feet of: any school, licensed day care center, unlicensed care facility where three or more children may be related by heredity; any park, trail, playground, place of worship; "or any other place designated by the Town as a place where children are known to congregate." Wheatland, Wis., Ord. § 47.01(B)(6) and (C)(1)(a). (35:5-6; Cross-A-App. 105-06). Indeed, DHS had identified the Wheatland residence as a possible placement for McGee before Act 156, but rejected it because of Wheatland's ordinance. (31:1; 82:107-08).

With Act 156 the legislature imposed uniformity on the restrictions for placements under § 980.08. Specifically, Act 156 created a basic restriction of 1,500 feet from schools, child care facilities, parks, places of worship, youth centers, *see* § 980.08(4)(f)2., as well as two restrictions listing additional places that cover placement of persons convicted of sexual assault of certain vulnerable adults or of children, *see* § 980.08(4)(f)3. and 4. (Cross-A-App. 157-58).[10]

Having created new statewide residency standards, the act also created § 980.08(4)(em) to require DHS to consult with local agencies. Why? The answer is evident from the supervised release planning scheme as a whole: So that DHS can collect the information necessary to make sure it is complying with the new restrictions—information that is not necessarily required or collected under sub. (4)(d) and (e) and that DHS could not find out as easily as the local agency can.

While they are not directly connected with the new residency requirements, the changes to sub. (4)(f)(intro.) regarding consultation with the county's victim and witness services coordinator are also about providing additional information to DHS, the parties, and the court so that a placement does not occur in proximity to a victim of the person being released. That is why the consultation requirement in sub. (4)(f)(intro.) is not limited to an agency of the county of intended placement, but also mandates consultation with the office of victim services in the Department of Corrections and the Department of Justice as well as counties where the person was convicted or

[10] McGee has not been convicted of a sexual assault of a vulnerable adult or a child, so the restrictions in § 980.08(4)(f)3. and 4. do not apply to him. (82:72-73).

committed, which may be different than the county of intended placement.

Thus, the purpose, context, and history of the consultation requirements show that the requirements do not bring agencies from the county of intended placement into the process for the first time and simply expand upon the information collecting process already in place to help comply with the new statewide residency restrictions § 980.08(4)(f)2., 3., and 4. and to make sure it had a comprehensive canvass of the area to avoid contact with victims. While the county officials who must provide information to DHS and with whom DHS must consult have a connection to the supervised release planning process, those duties and opportunities to consult do not give the county a substantial, legally protectable interest in the ultimate release decision.

State ex rel. Bilder v. Township of Delavan, 112 Wis. 2d 539, 334 N.W.2d 252 (1983), shows why the County's reliance on the statutory consultation requirements is misplaced. ***Bilder*** held that a newspaper was properly allowed to intervene in a lawsuit a police chief brought against a township. The court file had been sealed, and the newspaper sought access to the file, citing a statute (Wis. Stat. § 59.14(1)(1979-80)) permitting court files to be inspected. ***Id.*** at 543-44, 546.

The statute that the intervenor in ***Bilder*** relied on contained an express directive that court files be open for public examination, and newspapers may enforce that right because they qualified as a persons authorized to secure access to public records under Wisconsin statutes. 112 Wis. 2d at 546. Since the newspaper had a legal interest in being able to seek the opening the file to public inspection

and could have initiated a separate mandamus action to assert that interest, intervention was appropriate to avoid multiple suits. ***Id.*** at 549-50. Unlike § 59.14(1) in ***Bilder***, there is no statutory authorization in § 980.08 in particular, or in ch. 980 in general, that supports the conclusion that a county of intended placement has a legally enforceable right to enforce the standards governing supervised release.

Furthermore, if the County's claim is correct, every county of intended placement will have sufficient interest to intervene in § 980.08 proceedings. So would counties of commitment and conviction, even if they are not counties of intended placement, as they, too, are covered by the consultation requirement in § 980.08(4)(f)(intro.). That means a supervised release proceeding could be subject to petitions to intervene from multiple counties. Under the County's approach, every county of intended placement would have the right to intervene as it is identified. That may be one county at a time, but it could be multiple counties at once because even though § 980.08(4)(cm) makes the person's county of residence the default site of placement, nothing in the statute limits DHS to searching one county at a time in a particular case. DHS searches widely for residential placements, sometimes considering more than one at a time given that, for various reasons, some potential sites will be ruled out; and even Act 156's statewide residency restrictions have not eliminated the problems DHS has finding residences. (82:55, 68, 78, 95-97, 101-02, 108-09). So DHS will still have to search multiple counties in many cases, and in each case where multiple counties are consulted there will be multiple potential intervenors.

This militates strongly against finding that a county of intended interest has an interest justifying intervention. As ***Helgeland*** explains, whether the movant has a sufficient

interest it intervene is considered in light of the need to balance between, on the one hand, allowing the original parties to a lawsuit to conduct and conclude their own lawsuit, and, on the other hand, disposing of lawsuits by involving as many apparently concerned persons, so long as that is compatible with efficiency and due process and does not render the lawsuit "fruitlessly complex or unending." 307 Wis. 2d 1, ¶44. The interests of judicial efficiency and of avoiding complex and lengthy litigation would not be served by the frequent, multiple interventions that could result if being a county of intended placement confers the right to intervene.

Moreover, such a broad right of intervention may create due process problems. The fact that ch. 980 is intended and actually does provide treatment to persons committed under the law is important because that is part of what assures ch. 980 satisfies the demands of substantive due process. *See* ***State v. West***, 2011 WI 83, ¶¶27-47, 336 Wis. 2d 578, 800 N.W.2d 929; ***State v. Rachel***, 2002 WI 81, ¶¶61-68, 254 Wis. 2d 215, 647 N.W.2d 762. Supervised release is a necessary component of treatment under ch. 980. (82:92-94). Intervention will likely cause delay in finalizing supervised release plans, and inordinate delay in placement will violate the due process rights of the person if the delay effectively deprives the person of further treatment. The broader the right of intervention, the more likely there will be more delays in more cases.

There is another reason why the fact the County is the intended site of placement is not sufficient to establish an interest supporting intervention. As explained above, the purpose of the consultation requirements with local agencies is to get information to help assure the plan is appropriate and will protect the public. Thus, Kenosha's overarching interest

is not in opportunity to consult *per se*, but in the public protection the information-gathering process is intended to promote.

This interest is not unique or special to the County. All political subdivisions have that interest. So does the State. The very purpose of ch. 980 is to protect the public as a whole from sexually violent persons, and the provisions of ch. 980—including the recent amendments to § 980.08 made by Act 156—codify the legislature's judgments about how best to do that. *See, e.g.*, ***State v. Post***, 197 Wis. 2d 279, 302-03, 541 N.W.2d 115 (1995) (ch. 980 advances legitimate and compelling interests of protecting the community from, and providing care and treatment to, sexually violent persons); ***State v. Ransdell***, 2001 WI App 202, ¶8, 247 Wis. 2d 613, 634 N.W.2d 871 (referring to the legislature's determination that "the safety of innocent persons in society warrants the finely tuned procedures" in ch. 980).

For instance, the criteria for supervised release require the circuit court to conclude that "[i]t is substantially probable that the person will not engage in an act of sexual violence while on supervised release"; that the person "can be reasonably expected to comply … with all of his or her conditions or rules of supervised release that are imposed by the court or by the department"; and that there are sufficient resources to provide for "the safe management of the person while on supervised release." Wis. Stat. § 980.08(4)(cg)2., 4., and 5.

Further, a person released to the community under § 980.08 is not free from restraint; instead, he is subject to the stringent rules and conditions of the supervised release plan. In McGee's case, that includes, among other features, "intensive" supervision by a Department of Corrections

agent, GPS monitoring, and the requirement of § 980.08(9)(a) that he be escorted if he leaves the residence any time during the first year of release. (31:3-4, 8-10). Finally, the new statewide residency restriction in § 980.08(4)(f)2. applies to McGee, so he cannot be placed within 1,500 feet of a school, child care facility, park, place of worship, or youth center. While that is not as stringent as the Town of Wheatland ordinance made inapplicable by § 980.135, in the judgment of the legislature that restriction is appropriate in conjunction with the rules and conditions of supervised release to further § 980.08's goal of public protection.

In short, considered pragmatically, in light of all the facts of this case, the County's real interest—public protection—is not special or unique to the County. Further, even if the County cannot intervene that interest is protected because the requirements that must be met before supervised release may be ordered under § 980.08, and the conditions placed on supervised release, are designed to protect the public as a whole. Thus, Kenosha County does not have a sufficient interest relating to McGee's supervised release proceeding to justify intervention.

3. The disposition of the proceedings will not impair or impede Kenosha's ability to protect any interest it has in the proceeding.

The next requirement for intervention asks whether the disposition of the proceeding may, as a practical matter, impair or impede the movant's ability to protect interests related to the subject of the proceeding. ***Helgeland***, 307 Wis. 2d 1, ¶75. Although the ability of a movant to protect its interests is analyzed separately, it is part and parcel of analyzing the interest involved and determining whether an

existing party adequately represents the movant's interest; thus, as with the interest requirement, a court must take a pragmatic approach and focus on the facts of each case and the policies underlying the intervention statute. ***Id.***, ¶79.

The County summarily asserted that disposition of the supervised release proceedings without its intervention would impede or impair its ability to protect its interest in the proceeding (81:12-13; Cross-A-App. 123-24), but it did not explain how that was so. This lack of specificity reflects the fact that, for the reasons given in the last section, Kenosha does not have a unique, legally protectable interest to intervene.

As explained in the last section, the interest the County has in protecting its residents is not impeded or impaired in light of the standards and conditions that must be met before supervised release can be ordered. Further, as will be discussed in the next section, in a § 980.08 proceeding the State has the responsibility to represent and advocate for the protection of the public by assuring the standards for release are met. Thus, the State will necessarily also represent and advance the County's interest in public protection.

Accordingly, the County has not shown, and cannot show, that its ability to protect its interest in public protection will be impaired or impeded if it is not allowed to intervene.

4. The State will fully represent the County's interest.

The last requirement for intervention is whether the movant's interest can be adequately represented by one or more of the original parties. While it has been said the showing required for proving inadequate representation is treated as "minimal," it "cannot be treated as so minimal as to

write the requirement completely out of the rule." ***Helgeland***, 307 Wis. 2d 1, ¶85. In addition, this requirement is also "blended and balanced" with the other requirements:

> If a movant's interest is identical to that of one of the parties, or if a party is charged by law with representing the movant's interest, a compelling showing should be required to demonstrate that the representation is not adequate. When the potential intervenor's interests are substantially similar to interests already represented by an existing party, such similarity will weigh against the potential intervenor.

Id., ¶86.

The County asserted that it did not think Kenosha's interest would be adequately represented and protected. (81:13; Cross-A-App. 124). Again, as explained above, the County's interest here is in public protection. The State fully represents that interest, as that is its role in every ch. 980 proceeding.

It is the State, represented by the attorney general's office or a district attorney, that petitions for commitment under ch. 980 in the first instance based on its belief that the person meets the criteria for commitment—namely, that he is dangerous to others because he has a mental disorder that makes it likely he will engage in acts of sexual violence. Wis. Stat. § 980.02(1) and (2)(b) and (c). The State remains a party throughout any subsequent proceedings for supervised release under § 980.08 or discharge under § 980.09.

In this case, the State contested McGee's 2013 petition for discharge from the commitment under § 980.09. (3; 4:1-2). By doing so the State has maintained its position that McGee still meets the criteria for commitment. *See* Wis. Stat. § 980.09(3). While the State subsequently agreed that McGee

meets the criteria for supervised release (74:2-3), that agreement is not a concession that McGee is no longer dangerous. Instead, it is a recognition that McGee has progressed sufficiently in treatment that the risk he will reoffend can be managed in a community placement subject to the stringent rules and conditions of supervised release, including the new uniform residency requirement. Wis. Stat. § 980.08(4)(cg) and (f)2.

Given the State's interest in using ch. 980 to assure the protection of all Wisconsin residents, including those in Kenosha County, the interests the State is identical to the interest of the County. Therefore the County must make "a compelling showing" to demonstrate that the State's representation is not adequate. ***Helgeland***, 307 Wis. 2d 1, ¶86. It offered no such showing in its intervention motion or in its argument to the circuit court on that motion. Instead, the County simply offered the conclusory statement that it did not think it would be adequately represented and protected. (81:13; Cross-A-App. 124). Further, if the requirement that the County be consulted means its interests and the State's are not identical, it is still the case that the overarching interest of both § 980.08 and the County is public protection. That makes the County's interest substantially similar to interests already represented by the State in its role as prosecutor under ch. 980, and that weighs against the County's claim its interest cannot be protected by the state. ***Id.***

Further, two interrelated, rebuttable presumptions refute the County's claim that the State will not represent the County's interest in public protection. First, adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action. ***Helgeland***, 307 Wis. 2d 1, ¶90. Second, when the party is a state governmental body or officer charged by law with

representing the state's interests, there is a presumption the state will adequately represent the interests of its citizens. ***Id.***, ¶91 n.81. These presumptions apply here because the ultimate objective, even for the County, is assuring that the supervised release placement complies with § 980.08 and, thus, is consistent with public protection. The County made no suggestion, and certainly no showing, that these presumptions should not apply to the question of whether the State will adequately advocate compliance with § 980.08.

Finally, in determining whether an existing party adequately represents a movant's interest, a court must look to see if there is a showing of collusion between the representative and the opposing party; if the representative fails in the fulfillment of his duty; or if the representative's interest is adverse to that of the proposed intervenor. ***Helgeland***, 307 Wis. 2d 1, ¶87.

Kenosha did not allege any collusion between McGee and the State, nor is there any basis in the record to support such a claim. The initial agreement for supervised release is not evidence of such collusion because, as noted, supervised release is governed by strict standards intended and designed to serve the same purpose as the County's ordinance. Further, the State changed its position after learning of the same facts about the placement that caused the County concern and thereafter advocated that the supervised release plan not be approved. (43; 59; 82:123).

While the State did not present its own evidence regarding the issues Kenosha raised about the supervised release plan, the circuit court had allowed Kenosha County to intervene and present the same evidence. That the State did not try to present what would have been cumulative evidence does not show that, absent the County's intervention, the

State would have done nothing to advance its change of position on the plan. In addition, in this case the State has been represented by the same prosecutor's office since the petition was filed in 2003, and frequently by the same lawyer who filed the petition. (1:7; 43; 59; 74:2). This illustrates the reality that the State is represented by lawyers from district attorneys' offices (and the Attorney General's office) who have experience and expertise in ch. 980 proceedings. Accordingly, there is no basis in the record to support a claim of collusion, a claim that the State's interest is adverse to Kenosha County's, or a claim that the State has failed or will fail in the fulfillment of its duty.

For these reasons, the County of Kenosha has failed to make the "minimal showing" necessary on the adequate representation requirement. Because the County has failed to meet three of the four requirements of the § 809.03(1) balancing test, it did not establish that is entitled to intervene as a matter of right and its motion to intervene as of right should have been denied.

II. There is No Basis for Permissive Intervention Under Wis. Stat. § 803.09(2).

Kenosha's motion to intervene stated that in the alternative to granting intervention as of right under § 803.09(1) the circuit court should grant permissive intervention under Wis. Stat. § 803.09(2). (38:1; Cross-A-App. 109). The standard for permissive intervention under § 803.09(2) provides, in relevant part, that:

> Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or

> prejudice the adjudication of the rights of the original parties.

The County's motion offered no details as to why it satisfied the standard for permissive intervention, and the closest it came to referring to the standard was an assertion that its motion to intervene and stay the placement "relate to questions of law and fact in common with this proceeding…." (38:2; Cross-A-App. 110). It did not elaborate on the permissive intervention at the hearing on its motion and the circuit court did not explicitly address the issue because it concluded Kenosha had met the requirements for intervention as of right under § 803.09(1). (57:1; 81:21; Cross-A-App 132, 150).

Beyond requiring timeliness and common questions of law and fact, permissive intervention under § 803.09(2) is wholly discretionary. ***Helgeland***, 307 Wis. 2d 1, ¶120; ***One Wisconsin Institute***, 310 F.R.D. at 399.[11] While the circuit court did not reach the question of permissive intervention, there is no basis for remanding this case of the circuit court to exercise its discretion on the matter. That is because "[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." ***One Wisconsin Institute***, 310 F.R.D. at 399, *quoting* ***Menominee Indian Tribe of Wis. v. Thompson***, 164 F.R.D. 672, 678 (W.D. Wis. 1996).

As explained above, the State pursued the same challenge to the supervised release order that the County sought. It advised the circuit court that it was now objecting

[11] Wisconsin's permissive intervention statute is based on Fed. R. Civ. P. 24(b)(1), ***Helgeland***, 307 Wis. 2d 1, ¶120, so federal cases interpreting Rule 24(b)(1) provide guidance in applying § 803.09(2).

to the order for the same reasons the County objected. (43; 59; 82:123). The State did not call witnesses on its own (82:87), but there was no need to present duplicative evidence after the County was allowed to intervene and indicated it would present the testimony it believed would change the circuit court's mind. (81:33-38; Cross-A-App. 144-49). Because the existing parties were and are capable of identifying and presenting the relevant issues in this case, there is no reasonable basis to grant permissive intervention by Kenosha County.

A final note about the remedy for improper joinder. Wisconsin law does not appear to address the remedy for improper granting of intervention, as the appeals under § 803.09 involve either unsuccessful challenges to a denial of intervention or unsuccessful challenges to a grant of intervention. *See, e.g.*, ***Helgeland***, 307 Wis. 2d 1, ¶1 (affirming denial of intervention); ***Bilder***, 112 Wis. 2d at 545-51 (affirming grant of intervention). The experience of the federal courts under Rule 24 is similar. *See* ***Prete v. Bradbury***, 438 F.3d 949, 959-60 (9th Cir. 2006) (noting the remedy for an improper grant of intervention "has not been clearly established" because it is more common for appellate courts to consider the *denial* of a motion to intervene).

If Kenosha was improperly allowed to intervene its appeal should be dismissed because it is not a party. Further, for the reasons given above showing it does not have an interest in the proceeding that entitles it to intervene, the County is not aggrieved by the circuit court's order. ***Tierney v. Lacenski***, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983) (only aggrieved parties have a right to appeal, and a party is aggrieved only if the appealed judgment or order directly injures the party's interests in an appreciable manner).

This court need not address the issue of remedy, however, for as McGee shows in his respondent's portion of this combined brief, the circuit court was correct to reject the County's challenges to the supervised release order. Because the circuit court can and should be affirmed on those grounds, the error in allowing Kenosha to intervene is harmless. *Cf.* ***Prete***, 438 F.3d at 960 (finding improper grant of intervention harmless).

CONCLUSION

For the reasons given above, this court should reverse the circuit court's order granting Kenosha County the right to intervene in Michael L. McGee's supervised release proceeding.

Dated this 27th day of October, 2016.

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 6,763 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 27th day of October, 2016.

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