STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1922

In re the commitment of Rodney Timm:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

RODNEY TIMM,

Respondent-Appellant.

APPEAL FROM AN ORDER DENYING A DISCHARGE PETITION WITHOUT A TRIAL ENTERED IN OCONTO COUNTY, THE HONORABLE MICHAEL T. JUDGE, PRESIDING

PETITIONER-RESPONDENT'S BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Petitioner-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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ISSUE PRESENTED

Was Rodney Timm entitled to a discharge trial because he satisfied his burden of production under Wis. Stat. § 980.09(2) of showing that his condition had sufficiently changed such that a factfinder would likely conclude that he is no longer a sexually violent person?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be appropriate should this Court decide questions not previously addressed in prior cases interpreting Wis. Stat. § 980.09(2) as amended by 2013 Wis. Act 84.

INTRODUCTION

In 2004, the State petitioned to commit Timm as a sexually violent person under Wis. Stat. Chapter 980. In 2006, following Timm's admission to the petition, the circuit court entered a judgment and order committing Timm.

In 2018, Timm petitioned for discharge. Timm supported his petition with an expert's opinion. The expert determined that Timm still had qualifying mental disorders, but opined Timm no longer appeared to meet the legal threshold of "more likely than not" to commit a sexually violent offense. Based in part on Timm's expert's observation that Timm continued to experience deviant sexual thoughts about children and violence or force, the circuit court denied Timm's petition.

The circuit court properly denied Timm's discharge petition without a trial. Without weighing evidence, the

circuit court could reasonably determine, based on the information presented to it, that there was not a reasonable probability that a factfinder would likely conclude that the person is no longer a sexually violent person.

STATEMENT OF THE CASE

In 2004, the State filed a petition alleging that Timm was a sexually violent person. (R. 4.) The State's petition relied in part on the evaluation of Anthony Jurek, a Department of Corrections' psychologist. (R. 4:1, 4–16.)

Dr. Jurek's report detailed Timm's sexual assaults of different people, including several children and an intimate partner, and described the violence associated with these assaults. (R. 4:5–7.) Dr. Jurek diagnosed Timm with pedophilia and sexual sadism. (R. 4:10.)

Dr. Jurek also opined that Timm suffered "from a mental disorder that makes it likely that he will engage in future acts of sexual violence." (R. 4:13.) As part of his risk assessment, Dr. Jurek considered several risk instruments, including the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR), the Minnesota Sex Offender Screening Tool (MnSOST-R), and the Static-99. (R. 4:11–12.) Offenders who had the same score as Timm on the RRASOR had a reoffense rate of 49.8% and 73.1% over a five- and ten-year follow-up period. (R. 4:11.) Offenders who had the same score as Timm on the MnSOST-R had a reoffense rate of between 29% and 44% over a six-year follow-up period. (R. 4:11–12.) Offenders who had the same score as Timm on the Static-99 had a reoffense rate of between 26% and 36% over a 5- and 10-year follow-up period. (R. 4:12.)

Dr. Jurek noted that these instruments do not incorporate the "assessment of dynamic factors that are clearly associated with the risk of future re-offending." (R. 4:11.) As part of the risk assessment, Dr. Jurek noted that

DOC terminated Timm from sex offender treatment based on a diagnosis of sexual sadism and an indication of pedophilia. (R. 4:12–13.) Timm disclosed that he deliberately picked up women who had children. (R. 4:13.) When a treatment provider asked him why he inflicted pain on his partner, Timm replied, "It makes me aroused." (R. 4:13.)

Department of Health Services' psychologist Lori Pierquet also evaluated Timm. (R. 16.) She too determined that Timm had qualifying mental disorders, including pedophilia and sexual sadism. (R. 16:9–10.) In assessing Timm's risk to reoffend, Dr. Pierquet considered several risk instruments, including the RRASOR, the MnSOST-R, and the Static-99 as well as other information. (R. 16:12–13; 17:1.) Dr. Pierquet opined that Timm was "more likely than not" to engage in a future act of sexual violence. (R. 16:14.)

In 2006, Timm waived his rights to a trial and admitted to the petition. (R. 31:1.) The circuit court accepted Timm's waiver and entered a commitment order. (R. 32.)

In 2017, the Department of Health Services (DHS) filed reports associated with Timm's 2017 re-examination under Wis. Stat. § 980.07, including DHS psychologist Carolyn Hensel-Fixmer's re-examination report and DHS psychologist James Tomony's treatment progress report. (R. 120; 122; 123.) Dr. Hensel-Fixmer diagnosed Timm with a pedophilic disorder and sexual sadism. (R. 123:7.) As part of her risk assessment, Dr. Hensel-Fixmer reviewed several factors, including Timm's sexually deviant interests, his distorted attitudes supportive of sexual offending, his impaired socio-affective functioning, impaired self-management or general criminality, and treatment progress. (R. 123:9–14.)

Dr. Hensel-Fixmer opined that Timm's risk of sexually violent reoffending exceeded the legal threshold of "more likely than not." (R. 123:18.)

In his treatment progress report, Dr. Tomony noted that Timm had "regressed [with respect to] his ability or willingness to manage his deviant sexual interests in the past year." (R. 120:10.) Dr. Tomony opined that Timm had not made significant treatment progress in the last year. (R. 120:11.)

At Timm's request, the circuit court appointed psychologist Charles Lodl to conduct an evaluation. (R. 124.) Dr. Lodl concluded that Timm had two predisposing mental disorders: pedophilic disorder and sexual sadism disorder. (R. 125:12.) Dr. Lodl based his pedophilic disorder diagnosis on Timm's history, including his sexual abuse of children and his continued sexual fantasies about children. (R. 125:12.) Dr. Lodl based his sexual sadism disorder diagnosis on Timm's reported "deviant arousal to situations where he forces sexual activity on another or causes another pain." (R. 125:12.)

With respect to his assessment of Timm's risk, Dr. Lodl relied on a risk instrument, the Static-99R, which he described as "a commonly used, modest index of recidivism risk." (R. 125:12–13.) Offenders with scores like Timm's score recidivated at a rate of 18.2% to 28.5 over a ten-year period. (R. 125:13.) While noting that Timm "continues to experience deviant sexual thoughts about children and violence or force," Dr. Lodl opined that Timm "no longer appears to meet the legal threshold of 'more likely than not' to commit a sexually violent offense." (R. 125:14.)

Based on Dr. Lodl's evaluation, Timm petitioned for discharge. (R. 125:1.) In seeking discharge, Timm noted that the instruments used to assess risk have changed since his original commitment, that those assessments show a lower

risk range than those presented in Dr. Jurek's and Dr. Pierquet's evaluations before his commitment, and that he had progressed to Phase Three in treatment. (R. 125:3–5.)

On April 20, 2018, the circuit court denied Timm's petition, based in part on Dr. Lodl's observations that "Timm continues to have struggles with sexual matters" even after "he has had treatment now for many years." (R. 143:10–11.)

Timm appeals.[1]

ARGUMENT

Timm was not entitled to a discharge trial because he did not satisfy his burden of production under section 980.09(2) to show that his condition had sufficiently changed such that a factfinder would likely conclude that he is no longer a sexually violent person.

A. Standard of review and general legal principles

1. Standard of review

Whether Timm met his burden to obtain a discharge trial under section 980.09(2) presents a question of statutory interpretation. The interpretation and application of a statute presents a legal question that this Court independently reviews, but it benefits from the circuit court's analysis. *State v. Arends (In re Commitment of Arends)*, 2010 WI 46, ¶ 13, 325 Wis. 2d 1, 784 N.W.2d 513.

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[1] Shortly after the circuit court denied Timm's discharge petition, DHS filed its 2018 re-examination report under Wis. Stat. § 980.07. (R. 131:1.) The DHS evaluator, Robert Barahal, reached conclusions similar to Dr. Hensel-Fixmer's conclusions in 2017. (R. 131:11–12.) The State does not address this report further.

This Court will give a statute's words their "common, ordinary, and accepted meaning" unless a technical or specialized meaning applies. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. This Court interprets a statute's language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46.

2. Section 980.09(2), as revised by Act 84, retained the framework for reviewing a discharge petition, but significantly revised the standard that a circuit court applies when it decides whether to grant a discharge trial.

Through 2013 Act 84, the Wisconsin Legislature retained the general framework for reviewing discharge petitions under section 980.09, but it made several significant revisions that guide how a circuit court determines whether to grant a discharge trial.

Act 84 retained the two-step process for reviewing a petition for discharge. Under the first step, the circuit court conducts a paper review of the discharge petition and its attachments to determine if the person no longer meets criteria for commitment. *See State v. Hager (In re Commitment of Hager)*, 2018 WI 40, ¶ 24, 381 Wis. 2d 74, 911 N.W.2d 17 (citing *Arends*, 325 Wis. 2d 1, ¶ 27).

Under the second step, the circuit court reviews the petition against facts in the record to determine if the statutory criteria for discharge have been satisfied. *See Hager*, 381 Wis. 2d 74, ¶ 25. This two-step process serves to "weed[] out meritless and unsupported petitions, while still

protecting a petitioner's access to a discharge hearing." *Arends*, 325 Wis. 2d 1, ¶ 22. [2]

While the Legislature retained the two-step process for reviewing a discharge petition under Act 84, it significantly changed how the circuit court should review the petition against the facts in the record under section 980.09(2). First, as this Court recognized, section 980.09(2) increases the committed person's burden of production. *State v. Hager (In re Commitment of Hager)*, 2017 WI App 8, ¶¶ 32, 40–41, 373 Wis. 2d 692, 892 N.W.2d 740, *reversed by Hager*, 381 Wis. 2d 74. Under the prior version, a committed person only needed to allege facts from which a factfinder "may" conclude that the person no longer met the criteria for commitment. Wis. Stat. § 980.09(2) (2005–06). In contrast, the revised statute required the committed person to allege facts from which a trier of fact "would likely" conclude that the person no longer meets the criteria for commitment. *Hager*, 381 Wis. 2d 74, ¶¶ 23–26, *see also* ¶ 67 (Kelly, J., concurring).

Second, the committed person must now show that his condition has changed. The revision requires the person to show that his condition has "sufficiently changed" such that he no longer meets the criteria for commitment. Wis. Stat. § 980.09(2).

Third, the revision shifts the starting point for assessing whether a committed person's condition has changed from a date to an event. Previously, any change was measured from the date of the initial commitment. Wis. Stat. § 980.09(2) (2005–06). Now, a circuit court assesses change

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[2] Based on the content of Timm's pleading and the State's statement at the hearing that, "The hearing for today is on . . . the intermediate step," the State assumes that the petition satisfied subsection 980.09(1)'s requirements. (R. 143:2.) Therefore, the State focuses its argument on Act 84's changes to subsection 980.09(2), and the application of those changes to Timm's case.

from the most recent order either directing commitment or denying discharge from a commitment after a hearing on the merits. Wis. Stat. § 980.09(1) and (2) (2017–18). Under section 980.09(1), the petition must allege that "the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment order if the person has never received a hearing on the merits of a discharge petition."

Under section 980.09(2), the circuit court assesses the petition against the record to determine if the person's condition has "sufficiently changed." As part of this assessment, the circuit court may consider the evidence presented at the prior trial. Thus, under section 980.09(1) and (2), the most recent evidentiary hearing at which the State proved that the person is sexually violent becomes the starting point for assessing whether the record contains facts from which a factfinder would likely conclude that the person "no longer" meets criteria for commitment.

Fourth, section 980.09(2) now allows the "circuit court[ ] to consider the entire record—not just the facts favorable to the petitioner—when determining whether the statutory criteria for a discharge trial have been met." *Hager*, 381 Wis. 2d 74, ¶ 27, *see also id.* ¶ 67 (Kelly, J., concurring).

3. In *Hager*, the supreme court did not resolve whether section 980.09(2)'s "would likely conclude" language allows a circuit court to weigh the facts in the record.

In *Hager*, the supreme court did not resolve how a circuit court should apply section 980.09(2)'s increased burden of production when it reviews a discharge petition.

Three members of the supreme court would have held that circuit courts "are to carefully examine, but not weigh, those portions of the record they deem helpful to their

consideration of the petition, including facts both favorable as well as unfavorable to the petitioner." *Hager*, 381 Wis. 2d 74, ¶ 30. These justices reasoned that section 980.09(2)'s plain language does not permit a circuit court to weigh evidence and that a contrary interpretation that allowed a court to weigh evidence would impermissibly shift the burden of persuasion to the committed person and violate the person's due process rights. *Id.* ¶ 31.

In concurrence, two justices joined "the court's opinion except with respect to its conclusion that § 980.09(2) prevents the court from weighing conflicting evidence." *Hager*, 381 Wis. 2d 74, ¶ 77 (Kelly, J., concurring). The concurring justices believed that section 980.09(2) required the circuit court to weigh evidence in the record when it reviewed a discharge petition. *Hager*, 381 Wis. 2d 74, ¶ 66 (Kelly, J., concurring). These justices likened the "would likely conclude" standard to *Strickland*'s[3] prejudice standard. *Id.* ¶ 75 (Kelly, J., concurring). Under this standard, the committed person need only demonstrate a reasonable probability that the result of a trial would be different. *Id.* ¶ 76 (Kelly, J., concurring). "[B]ecause demonstrating a reasonable probability does not shift the burden of persuasion to the petitioner," these justices concluded that Act 84's revisions to section 980.09(2) do not violate due process. *Id.* ¶ 77 (Kelly, J., concurring).

Finally, two justices dissented. They would have concluded that the "would likely conclude" language involves weighing evidence and shifts the burden of persuasion to the committed person, "and is therefore constitutionally suspect." *Id.* ¶ 84 (Abrahamson, J., dissenting).

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

4. Section 980.09(2), as revised by Act 84, requires the circuit court to review the petition in light of the facts in the record when it decides whether to grant a discharge trial.

The State asks this Court to interpret section 980.09(2) in a manner that allows the circuit court to assess a petition against the facts in the record without weighing those facts when it decides whether the record supports a discharge trial.[4]

As revised by Act 84, section 980.09(2) requires a circuit court to consider whether the record contains facts that demonstrate that a person's condition has "sufficiently changed" since the last evidentiary hearing at which the State proved that a person was sexually violent. Section 980.09(2) directs the circuit court to compare the new evidence with the evidence previously presented to determine whether the result of a new trial would likely be different from the result of the previous trial. Thus, under section 980.09(2)'s revisions, what a committed person must establish to obtain a trial on a petition for discharge is substantially similar to what a criminal defendant must demonstrate to get a new criminal trial based on newly discovered evidence.

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[4] In *Hager*, the State argued before this Court that section 980.09(2) as revised allowed a circuit court to weigh facts favorable to a petition against facts unfavorable to the petition when deciding whether to grant a discharge trial. *State v. Hager*, (In re the commitment of Haber) 2017 WI App 8, ¶ 3, 373 Wis. 2d 692, 892 N.W.2d 740, *reversed by* 2018 WI 40, 381 Wis. 2d 74, 911 N.W.2d 17. But before the supreme court, the State conceded that section 980.09(2) does not allow a circuit court to weigh evidence when it reviews a discharge petition. *State v. Hager (In re Commitment of Hager)*, 2018 WI 40, ¶ 28 n.18, 381 Wis. 2d 74, 911 N.W.2d 17. Consistent with its position before the supreme court, the State adopts this position in this case.

First, in both situations, the evidence must be "new." A criminal defendant who seeks a new trial on the basis of evidence not presented at the trial resulting in his conviction must show that he has new evidence that was discovered after his conviction. *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Love*, 2005 WI 116, ¶ 43, 284 Wis. 2d 111, 700 N.W.2d 62. Although a committed person seeking a new discharge trial does not have to show that he has evidence that was newly discovered since his previous trial, he has an analogous burden of production. He has to show that he has new evidence that was not introduced at a previous commitment or discharge trial. *State v. Schulpius* (*In re Commitment of Schulpius*), 2012 WI App 134, ¶ 35, 345 Wis. 2d 351, 825 N.W.2d 311. This new evidence may be newly discovered evidence or it may be previously known evidence, but it must be "new" in the sense of being newly presented or used.

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

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

Plude, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 11, ¶ 44. So, in a newly discovered evidence case, the reviewing court is not permitted to weigh the evidence favoring a different result against evidence indicating that the result would be the same. *State v. Edmunds*, 2008 WI App 33, ¶ 18, 308 Wis. 2d 374, 746 N.W.2d 590. Rather, the court must compare the new evidence with the old evidence to assess how a jury would probably decide a new trial with the new evidence added to the evidence that they heard previously.

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

Again, the reviewing court does not weigh any competing evidence. Rather, it must compare the new evidence with the previous evidence to assess whether sufficient change has occurred such that it is likely that a trier of fact would reach a different result at a new trial. Wis. Stat. § 980.09(2).

Although section 980.09(2) provides that the question is whether the trier of fact would likely conclude that the committed person "no longer meets the criteria for commitment," this language must be considered in the context of Wis. Stat. § 980.09(3). Section 980.09(3) provides that a trial should be held after a determination that a person "no longer meets the criteria for commitment" and that the State bears the burden of proving by clear and convincing evidence "that the person meets the criteria for commitment." This language must also be considered with Wis. Stat.

§ 980.09(4), which provides that the committed person shall be discharged if the trier of fact "is satisfied that the state has not met its burden of proof."

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

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

Hence, the statute requires the committed person simply to show that the result of a new discharge trial would likely be different from the result of the last one. This burden serves the Legislature's statutory purpose of "weeding out meritless and unsupported petitions, while still protecting a petitioner's access to a discharge hearing." *Arends*, 325 Wis. 2d 1, ¶ 22.

Although present section 980.09(2) continues to direct courts to consider any current or past reports of periodic examinations, relevant facts in the petition and response, arguments of counsel, and any documentation provided by the parties, this is a verbatim repetition of a provision in the previous statute. *Compare* Wis. Stat. § 980.09(2) (2005–06) with Wis. Stat. § 980.09(2) (2017–18). In *Arends*, this Court concluded that the enumerated items should be examined for facts that could support relief for the committed person at a

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

In all, this Court should conclude that the Wisconsin Legislature's revisions to section 980.09 changed the procedure for determining whether a discharge trial is warranted. The circuit court must consider both the evidence presented at the most recent commitment or discharge trial and other evidence in the record, including the new evidence presented by the committed person, in determining whether a trier of fact would now find that the State cannot meet its burden to prove that the person is still sexually violent.

B. Timm's condition has not sufficiently changed such that a fact finder would likely conclude that he is no longer sexually violent.

The circuit court properly denied Timm's petition, because, when viewed in a light most favorable to Timm, his petition did not allege sufficient facts from which a factfinder would likely conclude that Timm's condition has sufficiently changed. (R. 143:10–11.)

Timm could only satisfy his burden of production under section 980.09(2) if the record supported his claim that his condition has sufficiently changed, either because he no longer has a mental disorder or because his risk to reoffend has meaningfully declined. Because Timm has not had a discharge hearing on the merits, whether Timm has "sufficiently changed" must be assessed from the date of his original commitment. Wis. Stat. § 980.01(1) and (2).

Timm offered no evidence that showed he no longer had a qualifying mental disorder under Wis. Stat. § 980.01(2). He cannot. When he stipulated to his original commitment, he agreed that he had a qualifying mental disorder. (R. 31:1.) Both Dr. Jurek and Dr. Pierquet diagnosed Timm with pedophilia and sexual sadism. (R. 4:10; 16:9–10.) Most recently, Dr. Hensel-Fixmer and Dr. Lodl diagnosed Timm with two predisposing mental disorders: pedophilic disorder and sexual sadism disorder. (R. 123:7; 125:12.) Focused solely on his unchanged diagnosis, Timm cannot show change such that a factfinder would likely conclude that he is no longer sexually violent.

Therefore, because his mental condition remains unchanged, he is only entitled to a discharge trial if he presented sufficient facts from which a factfinder would likely conclude that he is no longer "more likely than not" to commit a future act of sexual violence. Wis. Stat. § 980.09(2). To this end, Timm relies on his risk assessment scores and treatment participation.

To be sure, as this record demonstrates, the instruments used to assess risk have changed since Timm's original commitment.[5] When Dr. Jurek and Dr. Pierquet originally assessed Timm's risk, they relied on the RRASOR, MnSOST-R, and Static-99. (R. 4:11; 16:12.) Applying these instruments, they determined that Timm's scores were

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[5] Under the prior version of section 980.09(2), this Court held that a committed person was entitled to a discharge trial if the petition was supported by either new facts or new research that supported the conclusion that the person was no longer a sexually violent person. *State v. Combs* (*In re Commitment of Combs*), 2006 WI App 137, ¶ 32, 295 Wis. 2d 457, 720 N.W.2d 684; *see also State v. Richard* (*In re Commitment of Richard*), 2014 WI App 28, ¶ 1, 353 Wis. 2d 219, 844 N.W.2d 370. Act 84's revisions did not change the type of information that a circuit court may consider when it decides whether a committed person has "sufficiently changed" and is entitle to a discharge trial.

comparable to offenders whose recidivism rates ranged from as low as 21% over a six-year follow-up period to as high as 73% over a ten-year follow-up period. (R. 4:11; 16:12.) When Dr. Hensel-Fixmer and Dr. Lodl conducted their more recent evaluations, they applied the Static-99R, and received scores of three, which correlated to re-offense rates of between 18% and 29% over a ten-year follow-up period. (R. 123:6; 125:13.)

But the psychologists who assessed Timm's sexually violent recidivism risk did not ground their evaluations solely in the use of these instruments. They considered several dynamic factors, including sexual deviance, treatment effect, and aging. (R. 4:11; 16:13–14; 123:10–17; 125:13.) In Timm's most recent evaluations, Dr. Hensel-Fixmer and Dr. Lodl recognized that psychologists have developed instruments to capture the impact of these dynamic factors on risk assessment. (R. 121:9; 125:13.) Dr. Lodl incorporated this data into his evaluation and reported that offenders with scores similar to Timm's had recidivism rates between 12.7% and 19.4% over a ten-year period. (R. 125:13.) While Dr. Hensel-Fixmer acknowledged that these dynamic instruments have some usefulness for risk assessment, she questioned their reliability, stating that "using an instrument that has not been developed for or validated on a population on which it will be used may provide misleading information." (R. 123:9.)

Standing alone, Dr. Lodl's risk assessment suggests that Timm has changed. But the question under section 980.09(2) is whether Dr. Lodl's opinion, when viewed against the record, demonstrates that Timm has *sufficiently* changed and, therefore, is entitled to a discharge trial. New research, even without new facts about Timm, may support a conclusion that he is no longer sexually violent. But here, Dr. Lodl referenced Timm's treatment participation but noted that he continued "to experience deviant sexual thoughts about children and violence or force and reports masturbating

to this imagery." (R. 125:14.) As Dr. Hensel-Fixmer noted from her more detailed review of Timm's treatment records, Timm continued to express an interest in forceful sexual acts to increase his arousal, despite his treatment participation. (R. 123:11.)

Whether Timm is entitled to a discharge trial requires a comparison of the new evidence, i.e., Dr. Lodl's favorable risk assessment and unfavorable observation that Timm showed ongoing arousal to children and violence, to the evidence that resulted in his commitment. It is not reasonably probable that a jury looking at this new information against the information that resulted in his commitment would find that Timm is not a sexually violent person. Timm has not demonstrated sufficient change to entitled him to a discharge trial. The circuit court properly denied Timm's petition.

Timm argues that the circuit court failed to look at the items enumerated in section 980.09(2), as required under *Arends*. (Timm's Br. 7.) To be sure, the version of section 980.09(2) that the supreme court reviewed in *Arends* provided that "the court *shall* consider any current or past reports filed under s. 980.07, relevant facts in the petition and in the state's written response, arguments of counsel, and any supporting documentation provided by the person or the state." *See Arends*, 325 Wis. 2d 1, ¶ 31 (quoting Wis. Stat. § 980.09(2) (2005–06)) (emphasis added). But when the Legislature rewrote section 980.09(2) through Act 84, it specifically substituted the word "may" for "shall." Wis. Stat. § 980.09(2) (2017–18.) Because the circuit court is no longer required to review each enumerated item, its failure to do so, by itself, does not otherwise undermine its determination that Timm's ongoing arousal to children and violence undermines his claim that he has sufficiently changed such that a factfinder would likely conclude that he is no longer sexually violent.

Based on this record, Timm has also not met his burden of production under section 980.09(2) of demonstrating that his risk of re-offense has sufficiently changed such that it is now reasonably probable that a factfinder would conclude that Timm is no longer likely to commit another sexually violent act.

CONCLUSION

This Court should affirm the circuit court's order denying Timm's petition for a discharge trial.

Dated this 3rd day of June 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Petitioner-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,023 words.

_____
DONALD V. LATORRACA
Assistant Attorney General

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

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

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

Dated this 3rd day of June 2019.

_____
DONALD V. LATORRACA
Assistant Attorney General