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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE No. 2018AP001922

In re the commitment of Rodney Timm:

STATE OF WISCONSIN,
Petitioner-Respondent,

v.

RODNEY TIMM,
Respondent-Appellant

APPEAL FROM THE ORDER DENYING PETITION FOR DISCHARGE WITHOUT A TRIAL

THE HONORABLE JUDGE MICHAEL T JUDGE PRESIDING

Oconto County Case No. 2004CI000001

APPELLANT'S REPLY BRIEF

Respectfully submitted by:
COVEY LAW OFFICE
PO Box 1771
Madison, WI 53701-1771
Office: (608) 230-5648
Fax: (608) 230-5649
E-mail: michaelcovey1@yahoo.com

By: Michael Covey
State Bar ID: 1039256
Attorney for Respondent –Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Case

Statute

STATEMENT OF THE ISSUE PRESENTED

Whether the petition for discharge alleged facts from which a court or jury would likely conclude that Timm's condition has changed since the date of Timm's initial commitment order so that Timm no longer meets the criteria for commitment as a sexually violent person.

SUMMARY OF THE ARGUMENTS

Rodney Timm appeals the Honorable Michael T Judge's order denying Timm's petition for discharge without a jury trial. (R.129) Timm waived his right to a trial on May 10, 2016 and was subsequently committed under Chapter 980 of the Wisconsin Statutes. (R.31 at 1 – 5 and R.32 at 1) Although 13 years have passed, Timm has never had a trial to determine whether or not he still is a sexually violent person and appropriate for discharge.

In the ensuing 13 years, there have been numerous changes in the actuarial instruments used to assess Timm's risk to recidivate. On 02/16/18, Timm filed a petition for discharge and attached Dr. Charles Lodl's re-examination report. (R.125 at 1 – 14) Dr. Lodl used instruments that were not in existence in 2006, the VRS-SO and the Static 99R. *Id*. at 4 – 5. These instruments showed that Timm's predicted recidivism range was 7.4 percent over a 5 year period and 19.4 percent over a 10 year period. *Id*. Additionally, Timm advanced to Phase III of treatment in February 2016. *Id*. at 4. Phase III is the highest level of treatment available at the Sand Ridge Secure Treatment Center. (R.120 at 2) Prior to his commitment, Timm's treatment had been minimal; just 3 months of treatment all the way back in 2003. (R.4 at 12 – 13)

A hearing to determine whether there should be a discharge trial was held on April 17, 2018. (R. 143 at 1 – 12) The State's sole argument to the court against a discharge trial was that Timm was having deviant thoughts. *Id* at 3:4 – 14. The court never discussed the actuarial instruments and denied Timm's petition for a discharge based solely on Timm's deviant thoughts about children. *Id* at 10:8 – 11:6. Timm appeals this decision.

Assistant Attorney General Donald Latorraca filed a response to Timm's brief on June 3, 2019. The State argues that 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. (State Br. at 5 – 18) The State concedes that "…the instruments used to assess risk have changed since Timm's original commitment." *Id* at 15. However, the assessing psychologists also looked at dynamic factors, such as sexual deviance, treatment effect, and aging. *Id* at 16. The State argues that "[W]hether 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." *Id* at 17. The State concludes that a jury looking at this information would still find Timm to be a sexually violent person and therefore he is not entitled to a discharge trial. *Id*.

The State also argues that the court's failure to look at other items on the record; such as relevant facts in the petition, current or past reports, arguments of counsel, and written documentation, does not undermine the court's ruling. *Id*. Prior to Act 84, Wisconsin Statute § 980.09(2) stated that the court "shall" consider these enumerated materials. *Id*. However, Act 84 substituted the word "may" for "shall" therefore relieving the court of its duty to review these items. *Id*. The State concludes that the record shows that Timm has not met his burden of production to show that he is entitled to a discharge trial. *Id* at 18.

ARGUMENT

Timm has met his burden of production to show that he is entitled to a discharge trial pursuant to Wisconsin Statute § 980.09(2).

Wisconsin Statute § 980.09 states in relevant part as follows:

(1) A committed person may petition the committing court for discharge at any time. The court shall deny the petition under this section without a hearing unless the petition alleges facts from which the court or jury would likely conclude 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, so that the person no longer meets the criteria for commitment as a sexually violent person.

(2) In reviewing the petition, the court may hold a hearing to determine if the person's condition has sufficiently changed such that a court or jury would likely conclude the person no longer meets the criteria for commitment as a sexually violent person. In determining…whether the person's condition has sufficiently changed such that a court or jury would likely conclude that the person no longer meets the criteria for commitment, the court may consider the record, including evidence introduced at the initial commitment trial or most recent trial on a petition for discharge, 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 documents provided by the person or the state. If the court determines that the record does not contain facts from which a court or jury would likely conclude that the person no longer meets the criteria for commitment, the court shall deny the petition. If the court determines that the record contains facts from which a court or jury would likely conclude the person no longer meets the

> criteria for commitment, the court shall set the matter for trial.
>
> See Wisconsin Statute § 980.09(1) and (2)

The State correctly argues that Timm's burden of production to get a discharge trial has increased since the law was revised under Act 84. (State Br. at 7) Although previously the committed person needed to allege facts from which a factfinder "may" conclude that the person no longer met the criteria for sexually violent commitment; the revised statute requires 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. (State Br. at 7 quoting *State v. Hager*, 2018 WI 40 at ¶ 23 - 26, 381 Wis. 2d 74, 911 N.W.2d 17)

The State conceded that the trial court should not be weighing the evidence in deciding whether Timm should be granted a discharge trial. (State Br. at 10) The State argues that the court should follow a process analogous to deciding whether a person should get a trial under newly discovered evidence. *Id*. The State argues that the evidence a petitioner presents must be "new" and that there must be a reasonable probability for a different outcome. *Id* at 11. The State argues that a reviewing 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 the jury heard previously."

As a practical matter, it is difficult to argue how this process is different from "weighing" the evidence. Regrettably, the *Hager* court doesn't explain the difference between examining the evidence and weighing the evidence. Moreover, there aren't quantified bright lines for a trial court to follow when considering to grant a discharge trial. For example, there isn't a rule that a certain percentage decline in a committed person's Static 99R recidivism risk merits a discharge trial. Nor is there a bright line rule that advancing

to Phase II, or Phase III of treatment should require the court to allow a discharge trial.

However, nothing in the *Hager* decision, or the statutes, relieves the trial court from its duty to carefully consider Timm's petition for discharge. True, Wisconsin Statute 980.09(2) states that a trial court "may" consider the record, rather than requiring the court to do so. However, it defies common sense to argue that the court has the right to ignore arguments made by counsel, massive changes in the actuarial instruments and the petitioner's scores, years of treatment, and the petitioner's advancing age. To argue that the court's failure to even consider these items doesn't undermine the court's ruling is silly. (State Br. at 17)

Certainly, the trial court can and should consider Timm's ongoing deviant thoughts. The State, at both the trial and appellate level, relies entirely on those thoughts as justification to deny Timm his first discharge trial after 13 years. Yet both the State and the trial court failed to acknowledge that Timm's advancement into Phase III of treatment, despite his challenges, is an extraordinarily mitigating factor that a jury should be allowed to consider.

In the instant case, the actuarial instruments have undergone dramatic changes since Timm was committed in 2006. As the science and statistics underlying these instruments have changed, Timm's predicted recidivism scores have like wised decreased considerably from when he was first committed. His life expectancy is also less than it was 13 years ago; it is mathematically impossible to argue otherwise.

Timm has the burden of production to show that these new and significant changes since 2006 are sufficient enough such that a court or jury would likely conclude that Timm no longer meets the criteria for a sexually violent person. [See Wis. Stat. § 980.09(2)]. Timm does not have the burden to show that he has a 100% chance of winning his discharge

trial, or even 90%. "Would likely conclude" implies a greater than 50 % chance that Timm would prevail at trial. Of course, it is impossible for any court, trial or appellate, to look at Timm's record and assign a numerical prediction of Timm's success at trial. However, Timm's actuarial scores, age, and treatment should have been enough, after 13 years of commitment, for the court to grant Timm his first discharge trial.

CONCLUSION

Timm has met his burden of production under Wisconsin Statute 980.09(2) to show that his condition has changed such that a factfinder would likely conclude that he is no longer a sexually violent person. The trial court erred by not even considering the facts alleged in Timm's petition for discharge, such as his actuarial scores, his age, and his progress in treatment. Consequently, Timm requests that the order denying his discharge petition be overturned and that the case be remanded to the trial court.

Dated this 10th day of July, 2019

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Michael Covey
Attorney for the Respondent-Appellant
State Bar ID: 1039256

CERTIFICATION OF THE BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 2082 words as counted by the commercially available Microsoft Word Processor.

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Attorney for the Respondent-Appellant

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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

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

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Attorney for the Respondent-Appellant