STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP002104



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In re the Commitment of Jamie Lane Stephenson:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JAMIE LANE STEPHENSON,

Respondent-Appellant.

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Appeal from an Order Denying Discharge Under Wis. Stat. § 980.09 Entered in Dunn County Circuit Court, Judge Rod Smeltzer, Presiding

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# BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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## ISSUES PRESENTED

1. To prove that a person meets the criteria for commitment under Chapter 980, must the state present expert opinion testimony that a person has a mental disorder that makes the person dangerous as defined under ch. 980?

The state did not present expert testimony to prove dangerousness at Jamie Stephenson's discharge trial; the circuit court held the state was not required to do so. (266:16-17; App. 152-53).

2. If it is not necessary for the state to present expert testimony, was the evidence presented sufficient to establish that, because of his mental disorder, Stephenson is more likely than not going to commit acts of sexual violence?

The circuit court answered "yes." (265:165-66, 167; 266:15-16; App. 125-26, 127, 151-52).

## POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary. The parties' briefs will fully address the issues presented.

Publication is warranted to address whether, in a ch. 980 proceeding, the state can meet its burden of proving that a person has a mental disorder that makes him dangerous without presenting expert opinion testimony on that issue.

## STATEMENT OF THE CASE AND FACTS

Jamie Lane Stephenson was committed under Wis. Stat. Ch. 980 in 2012. (54). He filed *pro se* petitions for discharge from the commitment in 2013, 2014, and 2015. (82; 105; 132). The circuit court denied discharge after a trial to the court in 2015. (133; 135). He filed but then withdrew a discharge petition in 2016. (143; 150; 151).

In January 2017 Stephenson filed a discharge petition supported with an evaluation by Courtney Endres, a forensic psychologist. (153; 154). Endres concluded Stephenson no longer meets the criteria for commitment under ch. 980. (153:21-22). The state initially asserted the petition did not allege a change in condition sufficient to merit an evidentiary hearing under Wis. Stat. § 980.09(2) (2015-16), but after considering further argument from Stephenson's attorney the state agreed the court should hold a trial on the petition. (155; 156; 157).

Three witnesses testified at the two day discharge trial. (264; 265). The first witness was called by the state; Stephenson called the other two witnesses.

The state's witness was Donn Kolbeck, a psychologist employed by the Department of Health Services to conduct ch. 980 evaluations. (175:2; 264:6, 8-9). Kolbeck did the 2016 and 2017 annual Wis. Stat. § 980.07 evaluations of Stephenson, both of which were admitted as evidence at the trial. (176; 177; 264:16-17). In both evaluations Kolbeck diagnosed Stephenson with two mental disorders as defined by Wis. Stat. § 980.01(2)—namely, Other Specified Personality Disorder (OSPD), with

antisocial and borderline features, and Alcohol Use Disorder. (176:6; 177:6).

In the 2016 evaluation Kolbeck concluded these mental disorders made it likely Stephenson would engage in acts of sexual violence; thus, he concluded, Stephenson still met the criteria for commitment as a sexually violent person. (176:7-13). In the 2017 evaluation, however, Kolbeck concluded that Stephenson was no longer likely to engage in acts of sexual violence and therefore no longer met the criteria for commitment. (177:7-15). As will be detailed below in section C of the argument, in his testimony at the discharge trial Kolbeck reaffirmed and explained his opinion that, while Stephenson has two mental disorders, he no longer is likely to engage in acts of sexual violence because of those disorders and therefore no longer meets the criteria for commitment. (264:18, 43, 95).

After Kolbeck finished his testimony the state rested. (265:24-25; App. 101-02). Stephenson moved for a directed verdict, arguing the state had failed to prove he will more likely than not engage in future acts of sexual violence. (265:25-27; App. 102-04). Stephenson noted there was no expert testimony that Stephenson met that risk standard because Kolbeck, the state's only witness, concluded Stephenson did not meet the standard. (265:26; App. 103). Further, he argued, even if the court did not find Kolbeck to be credible, the state "has not put in any [other] type of expert or any analysis" to show Stephenson meets that standard. (*Id.*).

The state countered that it "doesn't have to put on any expert testimony at all." (265:27; App. 104). Instead, the state argued, the court could accept all or part or none of the expert's opinion, and that there was "ample evidence available to the Court that the actual lifetime risk of re-offense is higher than the number that's been testified to." (265:27; App. 104). The court took the motion under advisement. (*Id.*).

Stephenson then called his two witnesses. The first was Darren Matusen, a psychologist at Sand Ridge Secure Treatment Center (SRSTC) who prepared the annual treatment progress report for Stephenson in 2017. (185; 265:28, 30, 32-33).

Matusen gave an overview of SRSTC's intensive, three-phase treatment program, the goal of which is to reduce the risk a person will commit sexually violent acts in the future. (265:34-40). He confirmed Stephenson was in phase three of the program and that his record showed real engagement in treatment, and in particular demonstrated he was not a patient who needed a plan to help him focus on treatment. (265:42, 70-71). He explained that the treatment program was designed to reduce risk by addressing an offender's dynamic risk factors and described Stephenson's progress in addressing those factors. (265:44-51). He testified that Stephenson recognized the need to continue addressing his alcohol use issues in order to avoid offending. (265:54-55, 68). Matusen did not give an estimate of Stephenson's risk to reoffend, as his role in the process is to address whether a committed person has met the criteria under Wis. Stat. § 980.08(4)(cg) for supervised release. (265:50).

Stephenson then called Courtney Endres, a psychologist. (265:72-125). In her 2017 evaluation of Stephenson she concluded he no longer meets the criteria for commitment concluded because he does not have a mental disorder as that is defined by Wis. Stat. § 980.01(2) and is not likely to reoffend. (187:14, 19-20). In her trial testimony she reaffirmed her conclusions. (265:84-85).

After arguments by counsel (265:145-65; App. 105-25) the circuit court ruled on the petition for discharge. The court held that, based on Kolbeck's conclusion, Stephenson has the mental disorders of OSPD with antisocial and borderline features and Alcohol Use Disorder. (265:165; App. 125). The court also found Stephenson "does have a risk to reoffend" sufficient to conclude he is still a sexually violent person. (265:165-66, 167; App. 125-26, 127). Based on those conclusions the court denied the petition for discharge. (193:1; 265:166; App. 135, 126).[1]

Stephenson filed a notice of intent to pursue postcommitment relief and counsel was appointed to represent him. (194; 198) After filing a notice of appeal and drafting a brief for filing in this court, counsel concluded there was an issue in the case that was not previously raised in the circuit court (211; 227). This court granted counsel's request to dismiss the appeal and allow Stephenson to file a postcommitment motion to raise the issue. (228).

[1] The court went on to grant supervised release based on the parties' agreement that Stephenson met the criteria under Wis. Stat. § 980.08(4)(cg). (193:1; 265:166; App. 126, 135). Stephenson is now on supervised release. (248; 249).

Stephenson filed a postcommitment motion arguing that the evidence presented at the discharge hearing was insufficient because: 1) the state failed to present expert opinion testimony showing Stephenson will more likely than not reoffend; and 2) even if expert opinion testimony on risk to reoffend is not required, the evidence that was presented at the discharge hearing was insufficient to prove Stephenson meets the level of risk required for commitment. (232). The circuit court denied the motion after a hearing. (236; 266:15-17; App. 151-53, 155). Stephenson once again appeals. (238).

Additional relevant facts will be set out in the argument section below.

## ARGUMENT

### The State Did Not Present Sufficient Evidence To Prove That Stephenson Is Likely To Engage In Acts Of Sexual Violence And Therefore Did Not Prove He Is Still A Sexually Violent Person.

#### A. Introduction: What the state must prove at a discharge hearing and why it failed to meet its burden on one of the elements at the discharge trial in this case.

At a discharge hearing under Wis. Stat. § 980.09(3) (2015-16), the state must prove by clear and convincing evidence that the respondent still meets the criteria for commitment as a sexually violent person under ch. 980. Based on the definitions of "sexually violent person" and related terms in

Wis. Stat. § 980.01(1m), (2), and (7) (2015-16), the state must prove three elements:

> 1) the respondent has been convicted[2] of a sexually violent offense;
>
> 2) the respondent currently has a mental disorder—that is, a congenital or acquired condition affecting the person's emotional or volitional capacity that predisposes the person to engage in sexual violence and causes serious difficulty in controlling behavior; and
>
> 3) the respondent is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in future acts of sexual violence.

***Wis. J.I.—Criminal*** 2506 (2017) at 1-2.

Stephenson does not dispute the first element—that he has been convicted of a sexually violent offense. (265:24-25; App. 101-02). At the discharge trial Stephenson disputed the second element—that he has a mental disorder—by presenting Endres's opinion that he does not. (265:84-85, 88-109). But at this juncture Stephenson concedes that, under the applicable standard of review, there is sufficient evidence for the circuit court to have concluded, as it did, that he has a mental disorder

[2] Alternatively, the respondent could have been found not guilty of a sexually violent offense by reason of mental disease or defect or adjudicated delinquent for a sexually violent offense. Wis. Stat. § 980.02(2)(a)2. and 3. (2015-16). Because Stephenson was convicted of a sexually violent offense, this brief will refer only to that predicate.

because the court could reasonably accept Kolbeck's conclusion on that issue. (265:165; App. 125).

But the evidence is not sufficient to support the third element—that Stephenson is dangerous to others because he has a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence. The evidence to establish that element is insufficient for two reasons.

First, because of the nature of the element, the state must present expert testimony in support of the element. It failed to do that here. Instead, the state's own expert witness concluded Stephenson is *not* dangerous. Thus, the state's proof was insufficient as a matter of law and Stephenson must be discharged from the commitment.

Second, if this court concludes expert testimony is not required, then the evidence at trial, even when viewed most favorably to the state and the commitment, is so insufficient in probative value and force that as a matter of law no trier of fact, acting reasonably, could have found by clear and convincing evidence that Stephenson is dangerous to others as defined in element three. Because the evidence is insufficient, Stephenson must be discharged from the commitment.

B. To prove that a person meets the criteria for commitment under ch. 980 the state must present expert opinion testimony in support of elements two and three; thus, the state's failure to present expert testimony in support of element three in this case means the evidence was insufficient.

Under Wis. Stat. § 907.02, expert testimony is permitted when scientific, technical, or specialized knowledge will assist the trier of fact. Wisconsin courts have long recognized that some kinds of evidence are more difficult than others for fact finders to weigh and comprehend without the benefit of expert testimony. ***State v. Kandutsch***, 2011 WI 78, ¶27, 336 Wis. 2d 478, 799 N.W.2d 865. They have also recognized that expert testimony is required when the issue involves "special knowledge, skill, or experience on subjects not within the ordinary experience of mankind." ***Kujawski v. Arbor View Health Care Center***, 139 Wis. 2d 455, 463, 407 N.W.2d 249 (1987), *citing* ***Cramer v. Theda Clark Memorial Hospital***, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969). *See also* ***Kandutsch***, 336 Wis. 2d 478, ¶28.

Whether expert testimony is necessary to prove a given claim is a question of law. ***Racine County v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶24, 323 Wis. 2d 682, 781 N.W.2d 88. Because the requirement of expert testimony is an extraordinary one to be used in cases where the trier of fact needs assistance in deciding the issue presented, courts must evaluate, on a case-by-case basis, whether

expert testimony is required because the issue is outside the realm of ordinary experience and lay comprehension. ***Kandutsch***, 336 Wis. 2d 478, ¶¶28-29. If a case presents an issue that is complex or technical enough to require the assistance of expert testimony, then the *absence* of such testimony requires the fact finder to engage in speculation to decide the case; therefore, the lack of expert testimony in such a case "constitutes an insufficiency of proof." ***Wal-Mart Stores, Inc. v. LIRC***, 2000 WI App 272, ¶16, 240 Wis. 2d 209, 621 N.W.2d 633, *quoting* ***Cramer***, 45 Wis. 2d at 152.

Courts have held expert testimony is required in a variety of situations. *See, e.g.,* ***Cramer***, 45 Wis. 2d at 151-52 (collecting cases requiring expert testimony involving medical conditions and treatment); ***State v. Johnson***, 54 Wis. 2d 561, 565, 196 N.W.2d 717 (1972) (whether tablet delivered by defendant was LSD); ***Koele v. Radue***, 81 Wis. 2d 583, 590, 260 N.W.2d 766 (1978) (awards for loss of earning capacity). Not surprisingly, as ***Cramer*** indicates many of the cases in which expert testimony has been required involve medical issues, which are often not within the realm of ordinary experience and require "special learning, study, or experience." ***Cramer***, 45 Wis. 2d at 150.

For example, in medical malpractice cases, expert testimony is generally required to establish the degree of care and skill required of a physician. ***Christianson v. Downs***, 90 Wis. 2d 332, 338-39, 279 N.W.2d 918 (1979). *See also* ***Albert v. Waelti***, 133 Wis. 2d 142, 145, 394 N.W.2d 752 (Ct. App. 1986) (expert required to support dental malpractice claim). It is also not surprising that expert testimony may be

required in cases involving psychological conditions. A negligence claim involving a psychiatrist's judgment on the appropriate level of supervision for a mentally ill patient must be established by expert testimony. ***Payne v. Milwaukee Sanitarium Foundation, Inc.***, 81 Wis. 2d 264, 272-73, 260 N.W.2d 386 (1977). Likewise, in an employment discrimination case involving whether an employee was wrongfully terminated because of his mental health disability, the question of whether the employee's psychiatric illness caused him to engage in the conduct that led to his firing was sufficiently complex or technical and outside the realm of ordinary experience that, without the assistance of expert testimony, a lay fact finder would be speculating on the issue of causation. ***Wal-Mart Stores***, 240 Wis. 2d 209, ¶17.

The first element the state must prove at a discharge trial—the prior conviction for a sexually violent offense—requires no expertise and, as in this case, is never in dispute. The other two elements, however, involve exactly the kind of complex and technical issue that are outside the realm of ordinary experience and that a lay fact finder will be forced to speculate about without the assistance of expert testimony.

To begin with the second element, determining whether a person has a mental disorder requires a determination of whether the person has a congenital or acquired condition that affects his emotional or volitional capacity, that predisposes him to engage in sexual violence, and that causes him serious difficulty in controlling behavior. ***Wis. J.I.—Criminal*** 2506 (2017) at 1-2. As with the

determination of any psychological condition, assessing whether a person has a ch. 980 mental disorder will require special knowledge, skill, or experience on subjects that are not within the realm of the ordinary experience of mankind.

The supreme court has recognized that proving whether a person has a ch. 980 mental disorder requires the state to present expert testimony. As the court has noted, Wis. Stat. § 980.05(4) specifically provides that evidence of the respondent's prior sexually violent offenses is insufficient by itself to prove the respondent has a mental disorder. ***State v. Sorenson***, 2002 WI 78, ¶20, 254 Wis. 2d 54, 646 N.W.2d 354. Thus, a plain reading of § 980.05(4) reveals that the statute "contemplates that the state must put forth expert evidence showing the respondent's mental disorder." ***Id.***, ¶20 & n.4 (*citing* ***State v. Post***, 197 Wis. 2d 279, 306, 541 N.W.2d 115 (1995), as "specifically contemplat[ing] that mental disorder must be proven through expert examination….")).

Because proving a person has a mental disorder requires expert testimony, it follows that expert testimony is also required to prove element three, which is that the person is dangerous to others. To understand why requires a discussion of a principle essential to the constitutionality of the ch. 980 commitment scheme.

The cases addressing the constitutionality of sexually violent person commitment laws make it clear that the fundamental justification for the civil commitment of sexual offenders is that the offenders are different from the typical dangerous criminal

recidivist. Sexually violent persons are different because they have a mental illness, abnormality, or disorder that causes them serious difficulty in controlling their behavior and, thus, makes them a danger to others.

The first case to address the importance of the difference between ordinary criminal recidivists and offenders subject to civil commitment was ***Kansas v. Hendricks***, 521 U.S. 346 (1997), which upheld the Kansas sexually violent person law in the face of a substantive due process challenge. In addressing this challenge, the Court noted that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." ***Id.*** at 358. Instead, a commitment law must couple proof of dangerousness with proof of some additional factor, such as a mental illness or mental abnormality, in order "to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control" ***Id.***

The Kansas law under review in ***Hendricks*** required that the person being committed suffer from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence. ***Id.*** at 352 (quoting Kan. Stat. Ann. § 59-29a02(a)). The Court concluded that because the statute required a finding of future dangerousness linked to the existence of a mental condition "that makes it difficult, if not impossible, for the person to control his dangerous behavior," the statute "narrows the class of persons eligible for confinement to those who are unable to control their dangerousness." ***Id.*** at 358. Accordingly, the statute

was drawn in a sufficiently narrow manner to pass due process muster because it "requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." ***Id.*** at 357-58.

The Court expanded on and clarified this feature of civil commitment of sex offenders in ***Kansas v. Crane***, 534 U.S. 407 (2002). The Court concluded that ***Hendricks*** mandated "proof of serious difficulty in controlling behavior." ***Crane***, 534 U.S. at 413. As the Court further explained, such proof,

> when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Id.

The Wisconsin Supreme Court applied ***Hendricks*** and ***Crane*** to ch. 980 in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784. As ***Laxton*** recognized, the principle articulated by the Supreme Court in ***Hendricks*** and ***Crane*** is that "the presence of a mental disorder—under which a 'critical distinguishing feature' consisted of a serious lack of ability to control behavior—draws the line between a dangerous sexual offender subject to civil commitment and the typical recidivist." ***Id.***, ¶15 (*quoting* ***Crane***, 534 U.S. at 412). It read ch. 980 to

comport with the requirements of ***Hendricks*** and ***Crane*** because the statute's definitions of "mental disorder" and "sexually violent person" necessarily include the concept of serious difficulty in the ability to control dangerous behavior. ***Id.***, ¶¶20-21.

Recognizing that, under ***Crane***, there must be proof of a mental disorder and a link between the mental disorder and the individual's lack of control, ***Laxton*** concluded that "the required proof of lack of control … may be established by evidence of the individual's mental disorder and requisite level of dangerousness, which together distinguish a dangerous sexual offender who has serious difficulty controlling his or her behavior from a dangerous but typical recidivist." ***Laxton***, 254 Wis. 2d 185, ¶21. The court explained:

> Wisconsin ch. 980 satisfies this due process requirement because the statute requires a nexus between the mental disorder and the individual's dangerousness. Proof of this nexus necessarily and implicitly involves proof that the person's mental disorder involves serious difficulty for the person to control his or her behavior. The definition of a sexually violent person requires, in part, that the individual is "dangerous *because* he or she suffers from a *mental disorder* that *makes it substantially probable that the person will engage in acts of sexual violence*." Wis. Stat. § 980.01(7) (emphasis added). …. The nexus—linking a mental disorder with dangerousness by requiring that the mental disorder predispose the individual to engage in acts of sexual violence—narrowly tailors the scope of ch. 980 to those most dangerous sexual offenders whose mental condition predisposes them to re-offend.

***Id.***, ¶22.

In reading ch. 980 to comport with the due process requirements recognized in ***Hendricks*** and ***Crane***, the ***Laxton*** court emphasized that there must be a "nexus between the mental disorder and the substantial probability that the person will engage in acts of sexual violence," as that nexus "necessarily and implicitly requires proof that the person's mental disorder involves serious difficulty for such person in controlling his or her behavior." ***Laxton***, 254 Wis. 2d 185, ¶23.

Taken together, then, ***Hendricks***, ***Crane***, and ***Laxton*** establish that the constitutional rationale for ch. 980's commitment scheme is satisfied only if the person being committed is different from the typical dangerous recidivist because the person has a mental disorder, the "critical distinguishing feature" of which is that the disorder causes the person to have a serious difficulty in controlling behavior. Under ch. 980, proof of serious difficulty in controlling behavior is assured only when there is proof of the nexus between the person's mental disorder and the requisite level of dangerousness—that is, when there is sufficient proof that it is the person's mental disorder that makes it likely the person will engage in acts of sexual violence.

From this it follows that determining dangerousness requires expert opinion testimony. Dangerousness is based on, and is therefore an extension of, the threshold determination of whether the person has a mental disorder, for determining dangerousness requires determining what kind of behavior the person's mental disorder will cause. As

with the threshold question of whether the person has a mental disorder as defined under ch. 980, the question of whether the mental disorder that makes the person dangerous as defined under ch. 980 cannot be answered without specialized knowledge, study, skill, or experience on a subject that is not within the realm of the ordinary experience of lay persons.

Determining dangerousness for purposes of ch. 980 commitments is conceptually indistinguishable from the issue presented in ***Wal-Mart Stores*** where an employee was asserting that his behavior that led to his firing was caused by his obsessive-compulsive disorder and, therefore, by firing him the employer discriminated against him because of his disability. 240 Wis. 2d 209, ¶¶2-7. The court held that whether the employee's disorder caused his behavior was a complex and technical issue of "medical/scientific fact." ***Id.***, ¶19. Thus, it was not within the realm of ordinary experience and the employee needed to present expert testimony to support the claim. ***Id.***, ¶¶16-19.

That question is the same kind of question posed by element three in a ch. 980 trial: whether a person is dangerous *because* he has a mental disorder that makes it more likely than not that he will engage in acts of sexual violence. Like the question of whether the employee's obsessive-compulsive disorder caused the conduct that got him fired, the question of whether a person is dangerous as defined by ch. 980 is a "medical/scientific fact" and proving it requires expert testimony.

That expert testimony is required to prove the elements of mental disorder and dangerousness is consistent the statutory scheme of ch. 980 as a whole, for that scheme clearly contemplates a central role for experts. In particular, a court must order an evaluation by an expert once it finds probable cause to support a petition. Wis. Stat. § 980.04(3) (2015-16). And throughout the proceedings—before trial, or at any other time the person is required to submit to an examination, including the annual reexamination under § 980.07—the respondent may retain his or her own examiner or seek appointment of an examiner if the person is indigent. Wis. Stat. § 980.031(1) and (3) (2015-16). Requiring the participation of experts throughout the proceedings reflects the legislature's conclusion that such expertise is crucial to help the fact finder decide whether the person has mental disorder and, if so, whether there is a nexus between the mental disorder and the person's dangerousness.

The need for expert testimony is also supported by the United States Supreme Court's suggestion that whether a person is mentally ill and dangerous in a mental commitment proceeding is an issue that must be determined with the assistance of expert testimony. In ***Addington v. Texas***, 441 U.S. 418 (1979), the Court noted that civil commitment proceedings, unlike criminal prosecutions, involve issues about an individual's mental condition and dangerousness that are outside the realm of ordinary experience:

> There may be factual issues in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous either to

> himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.

441 U.S. at 429.

True, ***Addington*** does not squarely declare there must be expert testimony in every case. ***State v. Kienitz***, 227 Wis. 2d 423, 439, 597 N.W.2d 712 (1999). But its observation recognizes the indisputably complex and specialized questions that a fact finder faces when it is asked to determine whether a person has a mental condition that makes him or her dangerous. Because ch. 980 poses complex and specialized questions that are outside the realm of ordinary knowledge or experience, the state cannot prove a person meets the criteria for commitment without expert testimony supporting its claims that the person has a mental disorder and that there is a nexus between the mental disorder and the person's likelihood of reoffending.

Moreover, the fact that commitment under ch. 980 involves a severe deprivation of liberty makes it appropriate to require the state to present expert testimony to prove its case rather than rely on the judgment of lay witnesses without knowledge or experience in psychology. A person committed under ch. 980 must be committed to institutional care at SRSTC. Wis. Stat. §§ 980.06 (2015-16). The commitment is indefinite, lasting until a fact finder concludes at a discharge hearing that the person no longer meets the commitment criteria. Wis. Stat. § 980.09(3) and (4) (2015-16). Getting a discharge hearing is not easy; the person must allege there are facts from which a fact finder will likely conclude the

person's condition has changed so much that he no longer meets the commitment criteria. Wis. Stat. § 980.09(1), (1m), and (3) (2015-16). While the person can seek the less-restrictive setting of supervised release after 12 months, realistically it will be much longer, for to be eligible for supervised release the person must show significant progress in treatment. Wis. Stat. § 980.08(1) and (4)(cg) (2015-16). These substantial consequences to a person's liberty should follow only if the trier of fact has had the assistance of expert testimony in making the complex medical/scientific determinations ch. 980 demands.

Finally, it is correct, as the state argued at trial (265:27; App. 104), that a fact finder is not bound by an expert's opinion testimony, since the credibility of an expert witness and the weight to give to the expert's testimony is for the trier of fact to determine. ***Kienitz***, 227 Wis. 2d at 438-39. But whether an expert's testimony is credible or entitled to more or less weight is a wholly different question from whether expert testimony is necessary before the fact finder can even consider the issue. It is one thing for a fact finder to choose between *conflicting* expert opinions on an issue; it is another thing entirely for the jury to decide an issue when one of the parties has provided no expert testimony at all in support of an issue that is technical and complex enough to require expert testimony. When the issue is technical and complex enough to require expert testimony, the absence of expert testimony on that issue means the party has provided no basis for a fact finder to conclude the party has met its burden of proof.

As the cases addressing whether expert testimony is necessary make clear, when the issue to be proved requires special knowledge, skill, or experience that is not within the realm of the ordinary experience, expert testimony is necessary because without it the fact finder is left to speculate. ***Cramer***, 45 Wis. 2d at 152; ***Wal-Mart Stores***, 240 Wis. 2d 209, ¶16. And when a lay fact finder lacks the assistance of expert testimony and has to resort to speculation, "the absence of expert testimony 'constitutes an insufficiency of proof.'" ***Wal-Mart Stores***, 240 Wis. 2d 209, ¶16, *quoting* ***Cramer***, 145 Wis. 2d at 152.

For these reasons, proving the element of dangerousness under ch. 980 requires expert testimony because it is an issue requiring special knowledge, skill, or experience that is not within the realm of the ordinary knowledge or experience. The state provided no expert testimony to prove the dangerousness element at Stephenson's discharge trial. Therefore, the state's proof was insufficient as a matter of law and Stephenson must be discharged from the commitment.

C. Even if it is not necessary for the state to present expert testimony in support of element three, the evidence in this case is insufficient to establish that, because of his mental disorder, Stephenson is more likely than not going to commit acts of sexual violence.

As noted above, at trial Stephenson conceded element one. (265:24-25; App. 101-02). Given Kolbeck's testimony that Stephenson has a mental

disorder as defined in ch. 980 (264:18), Stephenson concedes in this court that there was sufficient evidence for the court to find the state had proven element two. So the sufficiency of the evidence for element three—dangerousness—is the only dispute in this appeal.

The test for the sufficiency of the evidence presented at a ch. 980 discharge is whether that evidence, when viewed most favorably to the state and the commitment, is so insufficient in probative value and force that no trier of fact, acting reasonably, could have found by clear and convincing evidence that the person is dangerous to others as defined in element three. *See* ***State v. Brown***, 2005 WI 29, ¶39, 279 Wis. 2d 102, 693 N.W.2d 715; ***State v. Marberry***, 231 Wis. 2d 581, 593, 605 N.W.2d 612 (Ct. App. 1999); ***State v. Curiel***, 227 Wis. 2d 389, 418, 597 N.W.2d 697 (1999).

Because Kolbeck testified that Stephenson is *not* dangerous to others as defined in ch. 980, the state argued it did not need expert testimony to prove that element. (265:27; App. 104). Instead, the state argued, it had proven element three because there was "ample evidence" that Stephenson's lifetime risk of reoffending is higher than Kolbeck concluded and because Stephenson's "pattern of behavior" over time shows he is likely to reoffend. (265:149, 164; App. 108, 124). But while the state tried to undermine the actuarial foundation of Kolbeck's risk assessment, it presented no alternative substantive evidence for the trial court to use to decide for itself what Stephenson's risk really is, leaving the court to speculate on that issue. Further, while Stephenson's "pattern of behavior" shows he has a mental disorder,

it fails to show he is likely to reoffend because of that mental disorder.

Assessing why the evidence at Stephenson's discharge trial was insufficient to prove element three requires reviewing the testimony of Kolbeck, who was the state's only witness.

In his trial testimony Kolbeck reaffirmed and explained the opinion expressed in his 2017 evaluation (177) that Stephenson has OSPD with antisocial and borderline features and Alcohol Use Disorder. (264:18). He also explained that the latter disorder is in sustained remission because Stephenson has been custody over the last decade, first in the prison system and then in SRSTC. (177:6; 264:19-20, 34, 91).

Kolbeck based his diagnoses in large part on Stephenson's history of criminal activity, which includes 13 charges for sexual offenses that led to six convictions. (177:3-4; 264:24). As to the OSPD, Kolbeck concluded Stephenson's criminal acts—and in particular his record of sexually violent offenses—demonstrated the constituent traits of the disorder. They show an enduring pattern of behavior that deviates significantly from societal norms, that interfered with his social functioning, and that had an onset in late adolescence and continued through adulthood. (177:6; 264:23-24). Kolbeck said the antisocial features were demonstrated by Stephenson's disregard for and violation of the rights of others, his history of deceitfulness and manipulation, and his impulsivity, irritability, irresponsibility, and lack of remorse. (177:6; 264:24-25, 26). The borderline features, which Kolbeck found

to be "more peripheral" to Stephenson's acts of sexual violence, were evidenced by his history of having an unstable self-image (shown by his struggle with his sexual identity), his self-damaging impulsivity, and his self-mutilation and suicidal gestures threats. (177:6; 264:25). Finally, the Alcohol Use Disorder was based on Stephenson's self-report of a history of alcohol abuse and his statement that he had never committed a crime while sober. (177:6; 264:20).

Kolbeck's diagnoses of Stephenson were also based on Stephenson's conduct since he has been institutionalized. As Kolbeck acknowledged, the fact a person is in a controlled environment like SRSTC does not mean the person's behavior is controlled in every way; the person can still violate rules and commit crimes, and Stephenson has received a number of disciplinary sanctions at SRSTC, where he has been since 2011. (264:27, 34, 97, 99).

But as Kolbeck also testified, OSPD and its antisocial and borderline features "are not necessarily lifetime" disorders. (264:116). "They tend to be chronic, but there are indications that like other personality disorders, they tend to decrease in intensity over time." (264:116). Persons with antisocial traits "can begin to show a decline in antisocial traits by the fourth decade of life, so by the age of 30." (264:117).

Stephenson was 32 at the time of trial. (264:55). And his antisocial traits are now less evident than in the past. (230:116). As of the time of the discharge trial Stephenson had not had a formal disciplinary sanction in almost two years; though there were incidents in this time frame when

Stephenson was apparently deceitful, manipulative, or resistant to or violating rules, he was not formally disciplined for that behavior. (264:27-32, 34-40, 99, 101-02; 265:10-13, 17-19). From this significant improvement in Stephenson's behavior Kolbeck concluded that his antisocial traits have become less evident over time, resulting in fewer impulsive and overtly manipulative behaviors and less resistance to rules and suggesting "a declining trajectory of his antisocial traits." (264:33). Further, Kolbeck found Stephenson's Alcohol Use Disorder to be in sustained remission, and he noted some patients at SRSTC have illicitly made and consumed alcohol, but Stephenson was never involved in such conduct. (264:98).

Stephenson's improved behavior is not just due to the fact he is getting older. Instead, as Kolbeck's testimony shows, it is also directly attributable to Stephenson's participation and progress in treatment. He is in the corrective thinking track at SRSTC, which is aimed at addressing OSPD with antisocial and borderline features. (264:117). He also completed the alcohol and drug abuse work group and has consistently told Kolbeck he is willing to do AODA in community, though he has not always been so consistent about that with others, as he recently expressed his belief he could drink socially. (264:118-20). While that gave Kolbeck some concern Stephenson was relaxing his previously expressed belief that he must maintain absolute sobriety, Kolbeck concluded Stephenson has taken significant steps at SRSTC to maintain his sobriety. (264:57-59, 120, 121-22).

Stephenson's "unquestionably" improved conduct (264:32-33) and progress in treatment does not show that he is "cured" or that his OSPD is in remission. (264:33). But his improved conduct and treatment progress provided the foundation for Kolbeck's conclusion that Stephenson is no longer likely to commit sexually violent offenses, a conclusion Kolbeck arrived at using empirical methods of risk prediction. He uses such instruments because he believes they are superior to applying clinical judgment and therefore make his opinion more accurate. (264:123-24). He used the Static-99R, a very commonly employed actuarial assessment, and in addition, when Kolbeck evaluated Stephenson in 2017, he used for the first time a risk assessment tool called the Violence Risk Scale—Sex Offender Version (VRS-SO). (264:42-44, 46).

The VRS-SO is an instrument developed to structure assessment of dynamic risk factors, and in particular the change in risk due to treatment because the instrument looks at dynamic risk factors both before and since treatment began. (264:44-46). Kolbeck decided to use the VRS-SO because the actuarial instruments employing only static factors did not provide a "quantification" of the reduction of Stephenson's due to his progress in treatment at SRSTC. (264:42-43). He also perceived a danger in simply using "a guided clinical judgment approach to the assessment of dynamic risk…." (264:127).

The VRS-SO offered the kind of "quantifiable approach to measuring dynamic risk in treatment change" (264:127) that he sought. He chose the VRS-SO over other available instruments because "it looks at more domains of dynamic risk. It offers a

more coherent framework for the assessment of dynamic risk and it offers superior psychometric properties to the other instruments." (264:128). Instruments with psychometric properties enhance the assessment of risk in a quantitative fashion. (264:14). Further, the VRS-SO was developed and tested against groups of higher risk offenders comparable to Stephenson. (264:128-29). Finally, the VRS-SO can be used to determine which group of offenders to compare Stephenson against when applying the Static-99R—the high risk/high needs group, or the routine group. (264:48-49).

Kolbeck explained how the VRS-SO is applied to assess the change in a person's risk based on treatment, and his worksheet for that scoring was admitted as evidence. (178; 264:44-46, 72-78). Stephenson's VRS-SO score showed he has improved his self-regulation and prosocial attitude, which led to improved compliance with institutional rules. (264:130-32). Also, despite the fact Stephenson continues to show some irritability, he is better at coping with not getting his way. (264:137-38). And among other effects of Stephenson's treatment was that phallometric assessments of Stephenson using a penile plethysmograph demonstrated he has the capacity to suppress arousal to deviant sexual interest. (264:55-57, 109-12). Thus, despite some indications in treatment records that Stephenson was not sufficiently engaged in treatment, Kolbeck concluded that did not detract from what he had accomplished in treatment and the unquestionable improvement in his behavior over time. (264:82-86).

Kolbeck found that Stephenson's VRS-SO treatment change score is similar to those of other sex offenders whose treatment progress has resulted in substantially reduced recidivism rates. (177:15; 264:77-78, 138-39). As Kolbeck said in his report:

> The improved management of his intrusive sexual drives, improved self-regulation, and treatment responsivity contribute to a reduction in Mr. Stephenson's recidivism risk. When considering the combined effect of his static risk, pre-treatment dynamic risk, and treatment change, he has lowered his risk below the Static-99R predicted risk estimates.

(177:15). According to Kolbeck, Stephenson's reduction of risk because of the substantive change in his dynamic risk factors is 33 percent, which shows the significance of the progress he has made. (264:77, 138).

Finally, using the VRS-SO, Kolbeck concluded Stephenson was in the high risk/high needs group for purposes of the Static-99R. (264:49). Stephenson's score on the Static-99R corresponds to a group of offenders with a 41 percent risk of reoffending over 10 years (with a 95 percent confidence interval of 35 percent to 46 percent). (177:9; 264:47-48). Kolbeck noted that the likelihood of reoffending under ch. 980 is not limited to the next 10 years, but applies to the offender's lifetime; thus, he said, the Static-99R risk estimate is, to some extent, an understatement. (177:9). In addition, actuarial risk instruments underestimate risk because they are based on samples of offenders who are arrested or charged. That means the samples, and thus the risk estimates generated from them, do not include offenders who

commit offenses that are not detected or prosecuted. (177:9; 264:79).

To account for these sources of potential understatement of risk, Kolbeck assessed the "real" risk of reoffending over Stephenson's lifetime using a peer-reviewed study (and noting Bureau of Justice Statistics regarding sexual offense reporting levels) to estimate undetected recidivism. Using this method, he calculated Stephenson's real lifetime risk, as adjusted by the reduction in risk using the VRS-SO, as 41 percent. (264:77-81).

Finally, Kolbeck testified about other potential factors in Stephenson's case affecting his risk to reoffend:

- He agreed community supervision helps reduce the risk a person will reoffend by providing "sort of an invisible fencing around future recidivism," and that Stephenson is no longer on probation, parole, or extended supervision. (264:52, 53). Stephenson would, however, be subject to the sex offender registration requirements of Wis. Stat. § 301.45 and lifetime GPS monitoring under Wis. Stat. § 301.48. (264:125-26).

- Kolbeck explained that sex offender recidivism risk declines with age, though Stephenson, who was 32 at the time of trial, was not yet at an age threshold that reduced his risk. (264:54-55).

- While Stephenson has been scored as having high psychopathy, Kolbeck said there is insufficient basis in the research—and in particular no quantitative guidance—to use that score to adjust the risk indicated by the Static-99R. (264:59-65).

Having applied quantitative methods to the relevant facts of Stephenson's case, Kolbeck ultimately concluded that Stephenson is not likely to engage in acts of sexual violence and therefore no longer meets the criteria for commitment. (264:43, 77-78, 95).

Because the state's own expert opined that Stephenson is not likely to reoffend and therefore no longer meets the criteria for commitment, the state argued that, for two basic reasons, and in light of all the evidence presented, Kolbeck's opinion about Stephenson's risk to reoffend was too low.

The first reason the state cited is based on the limitations of the actuarial instruments that cause them to understate risk—namely, as noted above, that the instruments are based on samples of offenders who were charged or convicted over a 10 year period. (265:147-48, 149; App. 107-08, 109). Assessing risk under ch. 980 requires assessment of reoffending over the person's lifetime. Further, because not all sexual offenses are detected or prosecuted, the real rate of offending is higher than the charge or conviction rates used for the actuarial instruments. (264:78-81; 265:147-48, 149; App. 107-08, 109). For the following reasons these limitations in the risk instruments do not prove Stephenson is likely to reoffend.

To begin with, the simple existence of the limitations does not tell the finder of fact *how much* the risk is understated, either generally or in Stephenson's case specifically. To reach a conclusion about the effect of the instruments' limitations on their results, the fact finder needs evidence on which

it could make a reasonable assessment of *how much* the instruments understate Stephenson's risk; otherwise, the fact finder is just speculating, both as to the effect of the limitations and what Stephenson's real risk is.

There was no such evidence here. On the contrary, the evidence shows Kolbeck acknowledged the limitations and accounted for them when forming his opinion. (177:9; 264:77-81). Further, the state introduced no evidence contradicting or undermining Kolbeck's deliberate and methodical work taking account of the limitations. In particular the state offered no conflicting expert testimony about why Kolbeck's methods were incorrect in either conception or execution. Given the absence of evidence other than Kolbeck's about the effect of the instruments' limitations, the fact there are limitations to the instruments by itself provides no evidentiary basis on which a fact finder reasonably calculate that, contrary to Kolbeck's opinion, Stephenson's risk meets the level required under ch. 980.[3]

In addition, the limitations of the risk assessment methods do not offer any substantive evidence on which to assess whether Stephenson is likely to reoffend *because* of his mental disorder. The actuarial instruments do not even take account of an offender's mental disorder, as the samples on which are based include both ordinary recidivists and mentally disordered offenders. ***State v. Smalley***, 2007 WI App 219, ¶¶17-20, 305 Wis. 2d 709, 741

[3] The state's argument about lifetime risk and undetected offenses is not itself evidence. ***Merco Distributing Corp. v. O & R Engines, Inc.***, 71 Wis. 2d 792, 795–96, 239 N.W.2d 97 (1976) (attorneys' arguments are not evidence).

N.W.2d 286. Do the limitations of the actuarial methods cause them to understate the recidivism risk of mentally disordered offenders in a way that is the same as or different from the way they understate risk for ordinary recidivists? We do not know, and there is no evidence on this point. And it matters because the risk at issue in a ch. 980 commitment is risk caused by a mental disorder.

Thus, even though the court was not required to credit Kolbeck's effort to account for undetected offenses and lifetime risk, without some evidence of how much the risk for mentally disordered offenders is understated because of the flaws in the risk instruments, the fact finder can only speculate about how much the risk instruments understate Stephenson's risk when they are applied to him. A fact finder cannot base its decision on conjecture and speculation. *See* ***State ex rel. Kanieski v. Gagnon***, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972). Conjecture and speculation are what the state's argument boiled down to, for the best it could offer in closing argument was that because of the number of sex offenses that are not reported—a number the state itself argued was unknown (264:79; 265:148; App. 108)—then the rates of offense are "far greater" and so risk of reoffending "must be much higher." (*Id.*). Accordingly, the general proposition that the existence of undetected sex offenses understates, in some unknown way, the lifetime risk of all sex offenders—the mentally disordered and the ordinary recidivist both—provides no evidentiary basis for the court to conclude Stephenson was dangerous because of his mental disorder.

The second reason the state cited in arguing that Kolbeck understated Stephenson's risk is that various "protective" factors—age, community supervision, treatment—do not apply to Stephenson. (265:148-49; App. 108-09). This argument suffers flaws similar to the ones just noted regarding the limitations of the risk instruments.

Again, these protective factors were considered by Kolbeck, and the state offered no contrary expert opinion on which a fact finder could base a contrary conclusion. (264:52-55, 77-78). Moreover, Kolbeck paid special attention to Stephenson's progress in treatment and used the VRS-SO to better gauge how his treatment progress had reduced his risk. (264:42-46, 72-78). The state even conceded Stephenson has made "great progress in treatment," though said it was not enough to "negate the overall risk." (265:149; App. 109). Yet again the state's argument that these factors do not sufficiently reduce Stephenson's risk fails to cite any evidentiary basis the finder of fact could reasonably use to decide what Stephenson's risk really is. Lastly, one of the factors—community supervision—is wholly irrelevant to element three because it has no bearing on whether the person is dangerous because of his mental disorder. ***State v. Budd***, 2007 WI App 245, ¶¶8-14, 306 Wis. 2d 167, 742 N.W.2d 887.

Finally, at both the trial and the hearing on Stephenson's postcommitment motion the state argued that Stephenson's "pattern of behavior" over time showed he is more likely than not going to

reoffend. (265:149, 164; 266:9-10; App. 108, 124, 145-46).[4] This claim is flawed legally and factually.

The legal problem is that the argument assumes away what the state is required to prove. The argument is a response to Kolbeck's conclusion that, based on his treatment and behavioral improvement, Stephenson's risk was less than the required threshold. Kolbeck came to this conclusion by starting from the question: What is Stephenson's risk, based on all the relevant static and dynamic factors accounted for in the risk assessment tools? (177:7-15; 264:42-53).

The state's argument is that, while Stephenson has made progress and reduced his risk, his "patterns of concerning behavior" show he "hasn't gotten himself into that lower risk area yet" and so has not reduced his risk enough to be discharged. (265:149; 266:10; App. 109, 146). That goes at the question from the wrong angle, for it *assumes* Stephenson is more likely than not to reoffend and then claims the evidence must show his risk has been reduced to a level below that standard.

The reality, of course, is that a discharge trial involves a person who is under a commitment order and thus *has* been found to meet that threshold in

[4] The state's closing at trial also cited evidence of a phallometric examination showing Stephenson's deviant sexual interests. (265:165; App. 125). To the extent that was meant to suggest he is dangerous because of the deviant interest, the argument ignores Stephenson's subsequent successful completion of a suppression phallometric examination, showing he has the ability to suppress the deviant stimuli. (185:6; 264:55-57). That likely accounts for the fact the circuit court did not rely on the argument in its rulings.

the past. Nonetheless, the person does not have to prove he has lowered his risk; instead, the state has the burden to prove the person still meets all the criteria for commitment, one of which is that he is dangerous as defined in ch. 980. Wis. Stat. § 980.09(3). The state cannot claim that its evidence was sufficient by implicitly relieving itself of the burden of proof.

The circuit court ultimately understood that the state bore the burden of persuasion (266:12; App. 148), but there is also a factual problem with the state's argument: Stephenson's "pattern of behavior" does not show the evidence at trial was sufficient to prove he is more likely than not going to commit sexually violent offenses. The state cited evidence of Stephenson's "pattern of behavior" at trial to argue the evidence supported Kolbeck's diagnosis of OSPD. (265:145-46; App. 105-06). And so it is, as Kolbeck said in his testimony. (264:27). But diagnosing a mental disorder is only the first step. The next step is showing that the mental disorder is more likely than not going to cause the person to engage is certain behavior. The "pattern of behavior" evidence does not show that risk here.

For a committed person who, like Stephenson, has engaged in significant treatment, it cannot be enough for the state to rely solely on the same "pattern of behavior" evidence that led to the original commitment; that would mean no committed person will ever be discharged because the person's behavior is a static, immutable part of the his history. So while it cited Stephenson's conduct before he was committed, the state also pointed generally to his conduct at SRSTC. (266:10; App. 146). More

specifically, at trial the state elicited from Kolbeck a number of recent incidents which, as Kolbeck stated, show Stephenson still has some resistance to rules, some irritability, some irresponsibility. (264:27-32, 34-40, 99, 101-02; 265:10-13, 17-19).

Stephenson's conduct over five years at SRSTC was one of the foundations for Kolbeck's conclusion that Stephenson still has OSPD, which is chronic and never cured, but may decrease in intensity. (264:33, 116). None of the recent conduct involves sexual misconduct; moreover, the reports of the incidents show how much Stephenson has improved in dealing with being called to account for the violations, which is wholly consistent with Kolbeck's conclusion that Stephenson is exhibiting a declining trajectory of antisocial traits. (179; 180; 181; 182; 183; 264:27-32, 33, 34-40, 99, 101-02; 265:10-13, 17-19; 265: 10-13, 17-19). Thus, while the incidents support Kolbeck's current OSPD diagnosis, they provide no additional, independent probative evidence that, because of his diagnosed mental disorders, Stephenson will more likely than not commit acts of sexual violence in the future. And that is the test for whether Stephenson is dangerous to others.

In short, the evidence the state presented in this case, even when viewed most favorably to the state and the commitment, is still so insufficient in probative value and force that no trier of fact, acting reasonably, could have found by clear and convincing evidence that Stephenson is more likely than not to engage in acts of sexual violence because of his mental disorder. Accordingly, the court should have granted his petition for discharge.

## CONCLUSION

For the reasons given above, this court should hold that the state failed to prove that Stephenson is still a sexually violent person because there it did not present sufficient evidence that his mental disorder makes it more likely than not that he will engage in acts of sexual violence. Because the state's evidence was insufficient, the circuit court's order denying Stephenson's petition for discharge should be reversed and the case remanded with directions that he be released from the commitment.

Dated this 4th day of February, 2019.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,823 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 4th day of February, 2019.

Signed:

JEFREN E. OLSEN
Assistant State Public Defender

## CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Signed:

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