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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2104

In re the Commitment of Jamie Lane Stephenson

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JAMIE LANE STEPHENSON,

Respondent-Appellant-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION
AFFIRMING ORDERS ENTERED IN DUNN COUNTY
CIRCUIT COURT, THE HONORABLE
ROD W. SMELTZER, PRESIDING

PETITIONER-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

INTRODUCTION 3

STATEMENT OF THE CASE 4

I. Procedural history 4

II. Stephenson's discharge trial 5

III. Stephenson's postcommitment proceedings 7

IV. The court of appeals' decision 7

STANDARD OF REVIEW 8

ARGUMENT 9

I. Chapter 980 does not require the State to prove through an expert opinion that a person's mental disorder makes it likely the person will commit another sexually violent act. 9

A. The State has the burden of proving that a person is sexually violent at ch. 980 commitment or discharge trials. 9

B. Expert opinion testimony is generally not required. 10

C. Chapter 980 does not require the State to prove that a person is dangerous through expert opinion testimony. 11

Page

1. Chapter 980's plain language does not require expert opinion testimony on dangerousness. 12

2. The determination of dangerousness rests within the common understanding of the jury. 15

3. Stephenson's arguments notwithstanding, ch. 980 did not require an expert to opine that he was still dangerous. 18

II. Stephenson has not demonstrated a special justification that compels this Court to overrule *Allison* and provide for summary judgment in ch. 980 proceedings. 22

III. Stephenson has not demonstrated a special justification that compels this Court to overrule *Curiel* and adopt a different standard of review. 24

A. Overruling precedent requires a special justification. 24

B. An appellate court independently reviews the sufficiency of the evidence to support a ch. 980 commitment. 25

1. The *Poellinger/Curiel* sufficiency-of-the-evidence test satisfies due process. 25

2. This Court independently reviews the sufficiency of the evidence. 27

Page

C. This Court should not overrule *Curiel* in favor of a different standard. 29

IV. The State proved that Stephenson was still a sexually violent person..... 33

CONCLUSION..... 41

TABLE OF AUTHORITIES

Cases

Addington v. Texas,
441 U.S. 418 (1979) 18

Barefoot v. Estelle,
463 U.S. 880 (1983) 17

Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.,
2006 WI 91, 293 Wis. 2d 38, 717 N.W.2d 216..... 25, 33

Brauneis v. LIRC,
2000 WI 69, 236 Wis. 2d 27, 612 N.W.2d 635..... 13

Brown Cty. Human Servs. v. B.P.,
2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560 20

Commonwealth v. Chapman,
122 N.E.3d 507 (Mass. 2019) 12

Cramer v. Theda Clark Mem'l Hosp.,
45 Wis. 2d 147, 172 N.W.2d 427 (1969) 11

Estelle v. Smith,
451 U.S. 454 (1981) 16

Gauthier v. State,
28 Wis. 2d 412, 137 N.W.2d 101 (1965) 31

In re Vantreece,
771 N.W.2d 585 (N.D. 2009) 12

Page

In re Winship,
397 U.S. 358 (1970) 26

Jackson v. Virginia,
443 U.S. 307 (1979) 26

Jankee v. Clark Cty.,
2000 WI 64, 235 Wis. 2d 700, 612 N.W.2d 297..... 22

Johnson Controls, Inc. v. Employers Ins. of Wausau,
2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257..... 25

Jones v. United States,
463 U.S. 354 (1983) 17, 40

Jurek v. Texas,
428 U.S. 262 (1976) 16, 17

K.N.K. v. Buhler,
139 Wis. 2d 190, 407 N.W.2d 281 (Ct. App. 1987)..... 29, 30

Kansas v. Crane,
534 U.S. 407 (2002) 18, 19

Langlade Cty. v. D.J.W.,
2020 WI 41, 391 Wis. 2d 231,
942 N.W.2d 277 ..... 29, 30, 31

Netzel v. State Sand & Gravel Co.,
51 Wis. 2d 1, 186 N.W.2d 258 (1971) 11, 15, 21

Outagamie Cty. v. Michael H.,
2014 WI 127, 359 Wis. 2d 272, 856 N.W.2d 603..... 30, 31

Peplinski v. Fobe's Roofing, Inc.,
193 Wis. 2d 6, 531 N.W.2d 597 (1995) 27

Racine Cty. v. Oracular Milwaukee, Inc.,
2010 WI 25, 323 Wis. 2d 682, 781 N.W.2d 88..... 8

State v. Allison (In re Commitment of Allison),
2010 WI App 103, 329 Wis. 2d 129,
789 N.W.2d 120 ..... 1, 22, 23, 24

Page

State v. Booker,
2006 WI 79, 292 Wis. 2d 43, 717 N.W.2d 676..... 8, 26, 28

State v. Curiel (In re Commitment of Curiel),
227 Wis. 2d 389, 597 N.W.2d 697 (1999) .....2, *passim*

State v. Friedlander,
2019 WI 22, 385 Wis. 2d 633, 923 N.W.2d 849..... 25

State v. Johnson,
74 Wis. 2d 169, 246 N.W.2d 503 (1976) 31

State v. Jones (In re Commitment of Jones),
2018 WI 44, 381 Wis. 2d 284, 911 N.W.2d 97..... 10

State v. Kienitz (In re Commitment of Kienitz),
227 Wis. 2d 423, 597 N.W.2d 712 (1999) .....11, *passim*

State v. Laxton (In re Commitment of Laxton),
2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784..... 15, 19

State v. Leach,
124 Wis. 2d 648, 370 N.W.2d 240 (1985) 14

State v. Magett,
2014 WI 67, 355 Wis. 2d 617, 850 N.W.2d 42..... 14, 29

State v. Mark (In re Commitment of Mark),
2008 WI App 44, 308 Wis. 2d 191, 747 N.W.2d 727..... 11

State v. Panknin,
217 Wis. 2d 200, 579 N.W.2d 52 (Ct. App. 1998)..... 27

State v. Perkins,
2004 WI App 213, 277 Wis. 2d 243,
689 N.W.2d 684 ..... 14, 15

State v. Poellinger,
153 Wis. 2d 493, 451 N.W.2d 752 (1990) 2, 26, 28

State v. Post (In re Commitment of Post),
197 Wis. 2d 279, 541 N.W.2d 115 (1995) 13

Page

State v. Roberson,
2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813 24

State v. Ryan,
2012 WI 16, 338 Wis. 2d 695, 809 N.W.2d 37 23

State v. Schneck,
2002 WI App 239, 257 Wis. 2d 704,
652 N.W.2d 434 ..... 22, 23

State v. (Jimmie Lee) Smith,
2016 WI 23, 367 Wis. 2d 483, 878 N.W.2d 135 27

State v. (Roshawn) Smith,
2012 WI 91, 342 Wis. 2d 710, 817 N.W.2d 410 ..... 27, 28

State v. Sorenson (In re Commitment of Sorenson),
2002 WI 78, 254 Wis. 2d 54, 646 N.W.2d 354 13

State v. Stephenson (In re Commitment of Stephenson),
2019 WI App 63, 389 Wis. 2d 322,
935 N.W.2d 842 .....7, *passim*

State v. Wright,
2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157 29

Wal-Mart Stores, Inc. v. LIRC,
2000 WI App 272, 240 Wis. 2d 209, 621 N.W.2d 633 20

Waukesha Cty. v. J.W.J.,
2017 WI 57, 375 Wis. 2d 542, 895 N.W.2d 783 ..... 29, 30

Westmas v. Creekside Tree Serv., Inc.,
2018 WI 12, 379 Wis. 2d 471, 907 N.W.2d 68 8

White v. Leeder,
149 Wis. 2d 948, 440 N.W.2d 557 (1989) 11

Statutes

N.D. Cent. Code § 25-03.3-13 12

Wis. Stat. § 51.20(11) 30

Wis. Stat. § 51.20(13)(g)3. 30

Page

Wis. Stat. § 801.01(2) 22, 29
Wis. Stat. § 805.14(1) 28, 29, 31
Wis. Stat. § 907.02(1) 10
Wis. Stat. § 907.04 10
Wis. Stat. § 971.23 32
Wis. Stat. § 980.01(1m) 9
Wis. Stat. § 980.01(7) 1, 9, 19
Wis. Stat. § 980.02(2) 12
Wis. Stat. § 980.02(3) 12
Wis. Stat. § 980.03(2) 32
Wis. Stat. § 980.03(3) 32
Wis. Stat. § 980.031(1) 32
Wis. Stat. § 980.034(1) 32
Wis. Stat. § 980.036 32
Wis. Stat. § 980.04(2) 13
Wis. Stat. § 980.05(1m) (1995–96) 32
Wis. Stat. § 980.05(3) 13
Wis. Stat. § 980.05(3)(a) 9, 32
Wis. Stat. § 980.05(4) 14
Wis. Stat. § 980.09 ..... 1, 4, 23
Wis. Stat. § 980.09(1) 9
Wis. Stat. § 980.09(2) 9, 23, 24
Wis. Stat. § 980.09(3) 9, 10, 13, 26, 32
Wis. Stat. § 980.09(4) 10, 26

Page

Other Authorities

Ronald R. Hofer,
Standards of Review—Looking Beyond the Labels,
74 Marq. L. Rev. 231 (1991)..... 27

Wis. JI–Criminal 2506 (2017) 10

ISSUES PRESENTED

1. At both a commitment and discharge trial under Wis. Stat. ch. 980, the State must prove that a person "is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. § 980.01(7). At Jamie Lane Stephenson's discharge trial, no expert opined that he was likely to commit another sexually violent act. But based on other evidence, the circuit court determined Stephenson was still sexually violent. Was the State required to present expert opinion testimony that Stephenson's mental disorder made it likely that he would commit another sexually violent act?

The circuit court answered: No.

The court of appeals answered: No.

This Court should answer: No.

2. In *State v. Allison (In re Commitment of Allison)*, 2010 WI App 103, ¶ 17, 329 Wis. 2d 129, 789 N.W.2d 120, the court of appeals held that summary judgment is unavailable in chapter 980 proceedings based on a reasoned interpretation of Wis. Stat. § 980.09. Stephenson asks this Court to overrule *Allison* even though he did not raise this issue in his petition.[1] Should this Court overrule *Allison*?

The circuit court did not answer.

The court of appeals did not answer.

This Court should answer: No.

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[1] Stephenson asks this Court to overrule *Allison* in Section I of his brief. (Stephenson's Br. 37–38.) The State addresses this issue separately.

3. In *State v. Curiel (In re Commitment of Curiel)*, 227 Wis. 2d 389, 395, 417–18, 597 N.W.2d 697 (1999), this Court held that *Poellinger*'s[2] sufficiency-of-the-evidence test applies to an appellate court's review of the sufficiency of the evidence at a ch. 980 trial. Stephenson asks this Court to overrule *Curiel* in favor of a mixed standard of review when it reviews whether the State proved that a person is sexually violent. Has Stephenson demonstrated a special justification that compels this Court to overrule *Curiel* and adopt a different standard to review the sufficiency of the evidence in ch. 980 cases?

The circuit court did not answer.

The court of appeals did not answer.

This Court should answer: No.

4. Did sufficient evidence support the circuit court's determination that Stephenson was still a sexually violent person?[3]

The circuit court answered: Yes.

The court of appeals answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

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[2] *State v. Poellinger,* 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

[3] Stephenson addresses whether the State proved he was still sexually violent under his second issue addressing the standard of review. (Stephenson's Br. 44–45.) The State addresses this issue separately.

INTRODUCTION

A person is subject to commitment as a sexually violent person only if that person (1) has a mental disorder that predisposes him to engage in acts of sexual violence and (2) is dangerous because the mental disorder makes it likely he will commit another sexually violent act.

Stephenson petitioned for discharge from his commitment as a sexually violent person. At a bench trial, the State called an expert who opined that Stephenson had a predisposing mental disorder. While the expert identified several factors contributing to Stephenson's risk to reoffend, the expert did not opine that Stephenson was likely to commit another sexually violent act. The circuit court determined that Stephenson was still sexually violent, denied his discharge petition, but ordered supervised release.

This Court should hold that the State is not required to prove that a person is dangerous in a ch. 980 case through expert opinion testimony that the person suffers from a mental disorder that makes it likely he will commit another sexually violent act. The assessment of dangerousness rests within the realm of a factfinder's ordinary experience, informed by evidence about the person's criminal history, performance on supervision, treatment progress, and expert testimony about applicable risk factors. Because the factfinder performs the task of assessing credibility and weighing the evidence, including whether to accept an expert's testimony, an expert's opinion that a person is dangerous is not required to prove that a person is sexually violent.

Stephenson asks this Court to overrule *Allison*, which held summary judgment is not available in ch. 980 proceedings. This Court should decline because Stephenson

did not raise this issue in his petition and because *Allison* is based on a reasoned interpretation of section 980.09.

This Court also should decline Stephenson's invitation to overrule *Curiel*'s sufficiency-of-the-evidence test. Claiming this test deprived him of independent review of the factfinder's determination that he is still sexually violent, Stephenson asks this Court to replace *Curiel*'s sufficiency test with a mixed standard of review. Appellate courts already independently review whether sufficient evidence supports a factfinder's verdict. Therefore, Stephenson has not demonstrated a special justification that compels this Court to overrule *Curiel* and adopt a different review standard.

Finally, this Court should conclude sufficient evidence supported the circuit court's verdict that Stephenson was still sexually violent. Based on Stephenson's sex offending history, his past performance on supervision, his treatment participation, and other factors identified by the experts contributing to risk, the factfinder reasonably determined that Stephenson was still sexually violent. Stephenson has not satisfied his heavy burden of demonstrating, as a matter of law, that no factfinder, acting reasonably, could have found by clear and convincing evidence that he was still sexually violent.

STATEMENT OF THE CASE

I. Procedural history

In 2011, the State petitioned to commit Stephenson as a sexually violent person. (R.1.) The circuit court determined that Stephenson was a sexually violent person and entered a judgment and commitment order. (R.54; 257:60–61.)

In 2017, Stephenson petitioned for discharge and supervised release. (R.154:2–9.) The circuit court set the matter for a bench trial. (R.158; 262:3.)

II. Stephenson's discharge trial

Three witnesses testified at Stephenson's trial: Donn Kolbeck, Department of Health Services (DHS) psychologist, who conducted Stephenson's 2017 reexamination under Wis. Stat. § 980:07, (R.177; 264:8–9, 15); (2) Darren Matusen, a DHS psychologist at Sandridge Secure Treatment Facility, who completed Stephenson's 2017 treatment progress report under Wis. Stat. § 980.07(4), (R.265:30–32); and (3) Courtney Endres, a psychologist appointed to conduct an examination under Wis. Stat. §§ 980.031(3) and 980.07, (R.145; 265:73, 79.) The court received into evidence Kolbeck's 2016 and 2017 reexamination reports, Endres's 2017 report, and the 2017 DHS treatment progress report. (R.174; 176; 177; 185; 187.)

Evidence as to Stephenson's prior convictions. The circuit court took judicial notice that Stephenson's conviction for second-degree sexual assault in Dunn County Case No. 2007CF305 constituted a qualifying conviction under ch. 980. (R.265:24–25.)

Evidence as to Stephenson's mental disorder. Kolbeck diagnosed Stephenson with several disorders, including "Other Specified Personality Disorder, with antisocial and borderline features," and "Alcohol Use Disorder, in sustained remission in a controlled environment." (R.177:6; 264:18.) Kolbeck testified that these disorders were qualifying mental disorders under ch. 980. (R.264:13–14, 18.)

Endres opined that Stephenson no longer had a qualifying mental disorder under ch. 980 because the antisocial and borderline features of his personality disorder had remitted. (R.265:102–109.)

Evidence of Stephenson's risk to commit sexually violent acts. Both Kolbeck and Endres used actuarial risk instruments, including the Static-99R and the Violence Risk Scale—Sex Offender Version (VRS-SO), to assess

Stephenson's risk. (R.177:7–15; 187:15–19; 264:42–43; 265:109, 123.) Kolbeck concluded Stephenson was not likely to commit another act of sexual violence based upon his scores corresponding to a 41% risk of arrest or charge over his lifetime. (R.264:77–78, 140.) Kolbeck testified that he concluded Stephenson's risk met ch. 980's likely threshold in 2016, but he changed his opinion based primarily on his use of the VRS-SO and Stephenson's treatment participation. (R.264:43.) Endres opined that Stephenson was not likely to reoffend, estimating his risk of committing another sexually violent offense at 10 percent over the next five years and 17 percent over the next ten years. (R.265:84–85, 109, 123.)

The State introduced other evidence related to Stephenson's risk of reoffense including his criminal history generally and history of sex offenses beginning as a juvenile (R.177:3–4; 264:24); revocations for violations of his supervision (R.177:12; 264:54); arousal patterns on the penile plethysmograph (PPG) (R.264:55–57); his psychopathy (R.177:9–10; 264:59–65); his statements about alcohol use during his offenses, his interest in using alcohol, and his participation in alcohol treatment (R.264:20, 58–59; 265:55); his behavior pattern in the institution including rules violations (R.264:27–31); and his engagement in sex offender treatment (R.177:13–14; 264:82–85).

The circuit court's decision. With respect to discharge, the circuit court determined (1) Stephenson had previously been convicted of a sexually violent offense; (2) Stephenson suffered from a mental disorder based on Kolbeck's diagnosis; and (3) Stephenson was at risk to reoffend based on his mental disorders. (R.265:165–66.) The circuit court concluded that Stephenson was still a sexually violent person. (R.265:166.) The circuit court determined Stephenson qualified for supervised release. (R.265:166–67.)

III. Stephenson's postcommitment proceedings

Stephenson moved for postcommitment relief, claiming that the evidence presented at his discharge trial was insufficient to prove that he was still sexually violent. (R.232:1.) First, he argued that the State must prove dangerousness through expert testimony. (R.232:6.) Second, Stephenson asserted that even if expert testimony is not required, the evidence was insufficient to support the circuit court's determination that he was still sexually violent. (*Id.*)

The circuit court denied Stephenson's postcommitment motion. (R.236:1.) It determined Stephenson was more likely than not to reoffend based on the totality of the evidence before it, including his mental disorders, his behavior pattern before his placement at Sandridge, and his behavior at Sandridge. (R.266:16.) Based on this analysis, the circuit court also determined that expert testimony that Stephenson was more likely than not to reoffend was unnecessary "to tie" Stephenson's mental disorders to his patterns of behavior. (R.266:16.)

IV. The court of appeals' decision

The court of appeals affirmed the circuit court's order denying Stephenson discharge. *State v. Stephenson (In re Commitment of Stephenson)*, 2019 WI App 63, ¶ 2, 389 Wis. 2d 322, 935 N.W.2d 842. It held that the State is not required to present expert opinion testimony to prove that Stephenson's predisposing mental disorder made it likely that he would commit another sexually violent act. *Id.* ¶¶ 2, 46, 49. Viewing the evidence in the light most favorable to the State and the commitment, the court of appeals concluded that sufficient evidence supported the factfinder's determination that Stephenson was likely to commit a future act of sexual violence. *Id.* ¶ 61.

STANDARD OF REVIEW

Statutory interpretation. Stephenson's case requires this Court to interpret Wisconsin's sexually violent person commitment law under Wis. Stat. ch. 980 and the admissibility of expert witness testimony under Wis. Stat. ch. 907. Questions of statutory interpretation and application present legal questions that this Court independently reviews, benefiting from the lower courts' analysis. *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶ 17, 379 Wis. 2d 471, 907 N.W.2d 68.

Proof by expert testimony. Whether exert testimony is necessary to prove a claim, e.g., Stephenson's risk of committing another sexually violent offense, presents a legal question that this Court independently reviews. *Racine Cty. v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶ 24, 323 Wis. 2d 682, 781 N.W.2d 88.

Sufficiency of the Evidence. The parties dispute the standard of review that should apply to an appellate court's review of a factfinder's determination that a person is sexually violent as defined in Wis. Stat. § 980.01(7). Whether the evidence presented to the factfinder is sufficient under *Poellinger*'s sufficiency-of-the-evidence test presents a legal question this Court independently reviews. *Curiel*, 227 Wis. 2d at 418; *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 717 N.W.2d 676. Stephenson asks this Court to overrule *Curiel*'s sufficiency test and adopt a mixed standard of review. (Stephenson's Br. 38–44.) The State argues in Section II.B. and C., *infra*, that Stephenson has not demonstrated a special justification that satisfies this Court's demanding standards for departing from the precedent established in *Curiel*.

ARGUMENT

I. Chapter 980 does not require the State to prove through an expert opinion that a person's mental disorder makes it likely the person will commit another sexually violent act.

First, the State addresses ch. 980's legal standards. Second, it discusses the principles guiding the admission of expert testimony. Third, the State explains why an expert opinion that a person is likely to commit another sexually violent act is not necessary for a factfinder's assessment of the person's dangerousness.

A. The State has the burden of proving that a person is sexually violent at ch. 980 commitment or discharge trials.

At an initial commitment trial under ch. 980, the State must prove "beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person." Wis. Stat. § 980.05(3)(a). Under Wis. Stat. § 980.01(7), a sexually violent person is a person who (1) has been convicted of a sexually violent offense, as defined under Wis. Stat. § 980.01(6); (2) has a mental disorder, which means "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence" under Wis. Stat. § 980.01(2); and (3) is dangerous because his mental disorder "makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. § 980.01(7). "Likely" means "more likely than not." Wis. Stat. § 980.01(1m).

After commitment, the sexually violent person may petition for discharge at any time. Wis. Stat. § 980.09(1). The circuit court holds a discharge trial if it determines that a factfinder "would likely conclude the person no longer meets the criteria for commitment." Wis. Stat. §§ 980.09(2) and (3).

Like the initial commitment trial, the State must prove the person (1) has been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is dangerous to others because his mental disorder makes it more likely than not that he will engage in a future act of sexual violence. *See* Wis. JI–Criminal 2506 (2017). The circuit court must discharge the person from the commitment unless the State proves "by clear and convincing evidence" that the person still "meets the criteria for commitment as a sexually violent person." Wis. Stat. §§ 980.09(3) and (4).

B. Expert opinion testimony is generally not required.

Wisconsin Stat. § 907.02(1) guides a circuit court's discretionary decision to admit expert testimony. *State v. Jones (In re Commitment of Jones)*, 2018 WI 44, ¶¶ 27–29, 381 Wis. 2d 284, 911 N.W.2d 97. Expert testimony is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Wis. Stat. § 907.02(1). This section requires the circuit court to make five determinations before it decides whether to admit expert testimony. *Jones*, 381 Wis. 2d 284, ¶ 29. These include whether (1) "the scientific, technical, or other specialized knowledge will assist the [jury] to understand the evidence" or determine a fact at issue, (2) the expert is qualified "by knowledge, skill, experience, training, or education," (3) "the testimony is based upon sufficient facts or data," (4) the testimony is based on "reliable principles and methods," and (5) the witness reliably applied those principles and methods to the case's facts. *Id*.

A witness's "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Wis. Stat. § 907.04. An expert's opinion is admissible under section 907.04 when it satisfies section 907.02's requirements

and is not otherwise subject to exclusion under Wis. Stat. § 907.0.

Expert testimony may occasionally be a prerequisite to a party proving its case if "the matter is not within the realm of ordinary experience and lay comprehension." *White v. Leeder*, 149 Wis. 2d 948, 960, 440 N.W.2d 557 (1989). However, the requirement for expert testimony is "an extraordinary one [applied] only when unusually complex or esoteric issues are before the jury." *Id*. The determination of whether expert testimony is required is made "on a case-by-case" basis. *Netzel v. State Sand & Gravel Co*., 51 Wis. 2d 1, 6, 186 N.W.2d 258 (1971). If the factfinder can "draw its own conclusions without the assistance of an expert opinion, the admission of such testimony is not only unnecessary but improper." *Cramer v. Theda Clark Mem'l Hosp*., 45 Wis. 2d 147, 151, 172 N.W.2d 427 (1969).

C. Chapter 980 does not require the State to prove that a person is dangerous through expert opinion testimony.

In *State v. Kienitz (In re Commitment of Kienitz*), 227 Wis. 2d 423, 439, 597 N.W.2d 712 (1999), Kienitz argued that the determination of dangerousness under ch. 980 "must be based on expert testimony." This Court observed that neither it "nor the United States Supreme Court have squarely addressed whether expert testimony is required for a determination on the question of future dangerousness." *Id*.; *see also State v. Mark (In re Commitment of Mark)*, 2008 WI App 44, ¶ 51, 308 Wis. 2d 191, 747 N.W.2d 727. This Court did not decide whether expert testimony is legally required to prove dangerousness because experts testified "on the issue of future acts of sexual violence." *Kienitz*, 227 Wis. 2d. at 440. This Court reaffirmed that the factfinder determines whether a witness is credible and what weight to give to the witness's

testimony, noting that it "has never bound the trier of fact to the opinion of an expert; rather, it can accept or reject it." *Id*.

1. Chapter 980's plain language does not require expert opinion testimony on dangerousness.

Implicit in its decision in *Kienitz* is this Court's recognition that the factfinder, not experts, decides whether a person is sexually violent, an assessment consistent with ch. 980's structure and plain language. The legislature contemplated a role for experts in ch. 980 litigation, including serving as experts for the parties under section 980.031, conducting annual reexaminations under section 980.07(1), and preparing treatment progress reports under section 980.07(4). Experts performing these statutory functions will undoubtedly provide information that will assist the factfinder, but unlike commitment laws in some states,[4] expert opinions are not statutorily required for the State to proceed.

Chapter 980 does not prevent the State from initiating or proceeding in a prosecution without an expert opinion that the person is dangerous. The pleading requirements under Wis. Stat. §§ 980.02(2) and (3) for initiating a ch. 980 action do not require the State to support its petition with an

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[4] In North Dakota, a person may not be committed "unless expert evidence is admitted" that establishes the person has a qualifying disorder and is likely engage in "sexually predatory conduct." *In re Vantreece*, 771 N.W.2d 585, 589 (N.D. 2009) (citing N.D. Cent. Code § 25-03.3-13). The Massachusetts Supreme Judicial Court concluded that experts have an "implicit statutory role as gatekeepers" because its commitment law "implicitly provides" that a person may not be committed unless an independent, court-appointed, "qualified examiner" opines the person is sexually dangerous. *Commonwealth v. Chapman*, 122 N.E.3d 507, 508, 516 (Mass. 2019).

expert's opinion that a person is a sexually violent person. While Wis. Stat. § 980.04(2) requires the circuit court to conduct a probable cause hearing when a petition is filed, it does not require the State to establish probable cause through expert testimony. While Wis. Stat. §§ 980.05(3) and 980.09(3) specify the State's burden and what it must prove at a commitment or discharge trial, neither section requires the State to prove that a person meets criteria through expert opinion testimony. In most ch. 980 cases, the State will be unlikely to meet its burden without expert testimony, but this Court should decline to "read into [ch. 980] language that the legislature did not put in." *Brauneis v. LIRC*, 2000 WI 69, ¶ 27, 236 Wis. 2d 27, 612 N.W.2d 635.

Based on *State v. Sorenson (In re Commitment of Sorenson)*, 2002 WI 78, 254 Wis. 2d 54, 646 N.W.2d 354, Stephenson argues that because this Court already requires expert testimony to prove a mental disorder, it logically follows that expert testimony is necessary to prove that the mental disorder makes it likely the person will reoffend. (Stephenson Br. 15.) Stephenson is mistaken.

In *State v. Post (In re Commitment of Post)*, 197 Wis. 2d 279, 306, 541 N.W.2d 115 (1995), this Court explained a mental disorder under section 980.01(2) "requires a nexus—persons will not fall within chapter 980's reach unless they are diagnosed with a disorder that has the specific effect of predisposing them to engage in acts of sexual violence." Based on *Post*'s reasoning, this Court assumed that ch. 980 "contemplates that the state must put forth expert evidence showing the respondent's mental disorder" because section 980.05(4) states that evidence of past convictions for sexually violent offenses alone are insufficient to establish that someone has a mental disorder. *Sorenson*, 254 Wis. 2d 54, ¶ 20. This statement about the requirement for expert testimony regarding a mental disorder is dicta. This Court

was not asked to decide whether an expert opinion is necessary to prove the existence of a qualifying mental disorder. It was only asked to decide if Sorenson could introduce recantation evidence for the purpose of ensuring accurate expert opinions about his mental disorder and future dangerousness. *Id.* ¶¶ 1, 25.

Also, while section 980.05(4)'s plain language states that evidence of a prior conviction for a sexually violent offense is an insufficient basis to establish a mental disorder, it does not state that expert testimony is required to prove a mental disorder's existence. Further, while section 980.05(4) only speaks to the sufficiency of the evidence as to proof of a mental disorder, it says nothing about what evidence is necessary to prove dangerousness.

Finally, *Sorenson*'s statement about the need for an expert to testify about diagnosis is inconsistent with other decisions holding that expert testimony is not required to prove the existence of a mental condition. "A favorable expert opinion is not an indispensable prerequisite to a finding of mental disease or defect." *State v. Leach*, 124 Wis. 2d 648, 666, 370 N.W.2d 240 (1985). Therefore, "as a general rule, a defendant is not required to present expert testimony to prove the elements of his NGI defense." *State v. Magett*, 2014 WI 67, ¶ 7, 355 Wis. 2d 617, 850 N.W.2d 42. As this Court explained, expert testimony may be probative, but is not required "where the issue is within the common understanding of a jury, as opposed to technical or esoteric, and when lay testimony speaks to the mental illness." *Id.* ¶ 43.

Similarly, in a prosecution for second-degree sexual assault under Wis. Stat. § 940.225(2)(c), expert testimony was not required to prove the victim suffered from a mental illness or deficiency that rendered her incapable of appraising her conduct. *State v. Perkins*, 2004 WI App 213, ¶ 1, 277 Wis. 2d 243, 689 N.W.2d 684. The court explained, "[W]hen the

matter to be determined is within the common understanding of the jury, lay opinion testimony may be sufficient." *Id.* ¶ 21. It declined to mandate expert testimony based on the lack of statutory language defining the requisite illness "or requiring such testimony." *Id.* The court concluded that "lay opinion testimony supported by ample testimony as to the victim's behavior" was sufficient to establish the existence of the requisite mental illness or deficiency without expert testimony. *Id.* ¶ 23.

A categorical rule requiring the State to prove that a person is sexually violent through expert opinion testimony is contrary to this Court's decisions holding that expert testimony is not required "in every situation" and is decided "on a case-by-case basis." *Netzel,* 51 Wis. 2d at 6. Absent a clear statutory mandate, this Court should hold that ch. 980 does not categorically require the State to prove that a person is sexually violent through an expert opinion that a person's qualifying mental disorder makes it likely they will commit another sexually violent act.

2. The determination of dangerousness rests within the common understanding of the jury.

In *State v. Laxton (In re Commitment of Laxton)*, 2002 WI 82, ¶ 22, 254 Wis. 2d 185, 647 N.W.2d 784, this Court explained that a nexus may be shown between a qualifying mental disorder and dangerousness by evidence that "the mental disorder predispose[s] the individual to engage in acts of sexual violence." Thus, when Kolbeck opined that Stephenson had a qualifying mental disorder (R.177:17), Kolbeck was, by definition, opining that Stephenson's underlying mental condition presented some level of risk to reoffend. Once the circuit court accepted Kolbeck's opinion that Stephenson had a qualifying mental disorder

(R.265:165), one question remained: Did Stephenson's mental disorder make it "likely" he would commit another sexually violent act?

The assessment of how much risk Stephenson presented did not require expert testimony because it was within the realm of lay comprehension to assess the likelihood that he would reoffend based on facts, including his criminal history, performance on supervision, progress in treatment, and general expert testimony about risk factors. *Stephenson*, 389 Wis. 2d 322, ¶ 46 (citing *Kienitz*, 227 Wis. 2d at 436).

In *Kienitz*, this Court referenced several Supreme Court decisions when it noted the absence of Supreme Court precedent requiring expert testimony to prove dangerousness. *Kienitz*, 227 Wis. 2d at 439–40. In *Estelle v. Smith*, 451 U.S. 454, 468–69, 471 (1981), the Supreme Court held that the prosecution's use of psychiatric testimony that relied on a compelled examination of Smith to establish future dangerousness in the penalty phase of a capital murder trial violated his Fifth and Sixth Amendment rights. But it also stated that its holding would not prevent a state from proving future dangerousness in capital cases without compelled psychiatric testimony, explaining that "the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts." *Id.* at 472. The Supreme Court recognized, "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." *Id.* at 473 (quoting *Jurek v. Texas*, 428 U.S. 262, 275 (1976)).[5] It concluded, "While in no sense disapproving the use of psychiatric

[5] In *Jurek v. Texas*, 428 U.S. 262, 271 (1976), the Supreme Court held that a capital sentencing scheme violates the Eighth and Fourteenth Amendments if it does not allow the sentencing authority to consider mitigating circumstances.

testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts." *Id.*

In *Barefoot v. Estelle*, 463 U.S. 880, 896, 903, *reh'g denied*, 464 U.S. 874 (1983), the Supreme Court held that psychiatric testimony, including expert testimony without a personal examination and in response to hypothetical questions, at the punishment phase of a capital case was not constitutionally barred. It observed, without disapproval, "[T]here was only lay testimony with respect to dangerousness in *Jurek*." *Id*. at 897. The Supreme Court's statements—"if it is not impossible for even a lay person sensibly to arrive at that conclusion" and "[i]f the jury may make up its mind about future dangerousness unaided by psychiatric testimony"—demonstrate its acceptance of the principle that a factfinder can determine dangerousness based on lay testimony without an expert opinion. *Id.* at 896–98.

Stephenson suggests that the Supreme Court's death penalty cases concerning assessment of dangerousness generally are irrelevant because ch. 980 cases are civil and require a showing of a nexus between the mental disorder and risk. (Stephenson's Br. 32–33.) But the Supreme Court's observations about predicting dangerousness are not limited to death penalty cases. "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness [and] generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding." *Jones v. United States*, 463 U.S. 354, 364 (1983), *quoted in Kienitz*, 227 Wis. 2d at 437 n.10. While expert testimony regarding a person's likelihood to reoffend can assist the factfinder, a finding that a person is likely to reoffend is "well within the

capacity of a normal jury." *Kansas v. Crane*, 534 U.S. 407, 423 (2002) (Scalia, J., dissenting).

To be sure, in *Addington v. Texas*, 441 U.S. 418, 429 (1979), the Supreme Court stated that the issues in civil commitment cases, including the questions of a mental illness dangerousness, will turn "on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." But, as this Court recognized, *Addington* did not hold that an expert opinion is required to prove dangerousness at a civil commitment trial. *Kienitz*, 227 Wis. 2d at 439. Rather, the Supreme Court's statement in *Addington* about experts merely recognizes, consistent with section 907.02, that expert testimony will assist the factfinder in deciding the issues in a civil commitment trial.

3. Stephenson's arguments notwithstanding, ch. 980 did not require an expert to opine that he was still dangerous.

Relying on *Crane, Laxton*, and *Sorenson*, Stephenson argues that because a nexus is required between a person's qualifying mental disorder and his dangerousness, expert opinion testimony is required to prove the person's mental disorder causes their dangerousness. (Stephenson's Br. 19–21.) Stephenson misplaces his reliance on these cases.

In *Crane*, the Supreme Court explained civil commitment requires "proof of serious difficulty in controlling behavior," a concept that "will not be demonstrable with mathematical precision." *Crane*, 534 U.S. at 413. Lack of control, when viewed in light of the nature of the diagnosis and 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*. (emphasis added).

In *Laxton*, this Court rejected a due process challenge to ch. 980 based on its determination that ch. 980 does not require a separate finding that the individual's mental disorder involves serious difficulty controlling behavior. *Laxton*, 254 Wis. 2d 185, ¶ 2. Because section 980.01(7)'s plain language—"he or she suffers from a mental disorder that makes it likely"—requires a nexus between the mental disorder and dangerousness, ch. 980 satisfies the due process requirement that the State prove the person has serious difficulty controlling behavior. Wis. Stat. § 980.01(7); *Laxton*, 254 Wis. 2d 185, ¶¶ 20–21. "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." *Laxton*, 254 Wis. 2d 185, ¶ 22.

Taken together, *Crane* and *Laxton* simply hold that commitment laws do not violate due process when they provide a framework for distinguishing between persons subject to commitment because of their mental condition and dangerousness and persons who are "dangerous but typical recidivist[s]." *Crane*, 534 U.S. at 413. Neither *Crane* nor *Laxton* dictates that the State must prove this nexus through an expert opinion that the person's mental disorder makes it likely the person will commit another sexually violent act.

Stephenson is not a "typical [criminal] recidivist" because an expert, consistent with *Sorenson*, concluded that Stephenson's mental condition predisposed him to engage in sexually violent acts. (R.264:18–27.) Whether his disorder made him "dangerous" was a determination within the factfinder's capacity, based on its evaluation of the evidence, including Stephenson's criminal history, the nature of his

offenses, his compliance with supervision and institutional rules, his treatments, and the experts' testimony about his risk.

Relying on several cases, including *Wal-Mart Stores, Inc. v. LIRC*, 2000 WI App 272, 240 Wis. 2d 209, 621 N.W.2d 633 and *Brown Cty. Human Servs. v. B.P.*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560, Stephenson states the evidence is insufficient when the "factfinder lacks the assistance of expert testimony and has to resort to speculation." (Stephenson's Br. 12–14, 36–37.) Therefore, Stephenson argues that because the State did not present an expert opinion that he was dangerous, the proof was insufficient. (*Id.*)

In *Wal-Mart Stores*, the court of appeals determined that whether a causal link existed between the employee's disability and conduct that triggered his termination presented a question of medical or scientific fact requiring expert testimony. *Wal-Mart Stores*, 240 Wis. 2d 209, ¶ 19. No expert evidence was presented that the employee's condition caused his outburst resulting in his firing. *Id.* ¶¶ 21–23. In *B.P.*, the court of appeals held that expert testimony was necessary to establish that his mental health caused him not to visit or communicate with his child to support a good cause defense. *B.P.*, 386 Wis. 2d 557, ¶¶ 48–49. Thus, in both *Wal-Mart Stores* and *B.P.*, the court recognized that expert testimony was necessary to prevent the factfinder from speculating about the causal link between the underlying mental condition and resulting behavior.

Unlike *Wal-Mart Stores* and *B.P.*, the State established a causal link between Stephenson's underlying mental condition and his future risk of sexually violent behavior through expert testimony. Kolbeck testified that Stephenson suffered from mental disorders that predisposed him to commit sexually violent acts, explaining that there was a

"direct causal connection" between his personality disorder and sexually violent behavior. (R.264:18–23.) Further, while Kolbeck opined that Stephenson was not likely to commit another sexually violent act based on his risk assessment, he acknowledged that just one year earlier Stephenson's risk of reoffense exceeded the legal threshold. (R.176:14; 264:77.)

That the factfinder disagreed with the experts' ultimate opinion about Stephenson's current dangerousness does not mean that the factfinder's determination was speculative, unaided by expert testimony. Rather, the factfinder's assessment of whether Stephenson's risk met ch. 980's likely standard was within the realm of an ordinary lay person's experience based upon the totality of the evidence, including information about his offense history, his community supervision, behavior at Sandridge, his treatment participation, and testimony from the experts regarding diagnosis and risk factors. *See supra* Sec. IV.

* * * * *

Consistent with section 907.02(1), experts serve an important role assisting the factfinder in ch. 980 cases. But this Court should not adopt a categorical rule that requires the State to present expert opinion testimony that a person's mental disorder makes it likely they will commit another sexually violent act. Chapter 980's plain language imposes no such rule. A categorical rule would undermine this Court's past decisions holding that the requirement for expert testimony is "an extraordinary one," decided "on a case-by-case basis" when the factfinder must decide "unusually complex or esoteric issues," *Netzel*, 51 Wis. 2d at 6–7. Stephenson has not demonstrated that a factfinder's ability to assess dangerousness is outside "the realm of [the factfinder's] ordinary experience" and lay comprehension and, therefore, requires an expert opinion that the person's mental disorder makes it likely the person will reoffend. *Id*.

II. Stephenson has not demonstrated a special justification that compels this Court to overrule *Allison* and provide for summary judgment in ch. 980 proceedings.

Stephenson argues that this Court should allow him to seek summary judgment when the State does not have an expert who will opine that he is dangerous under chapter 980. (Stephenson's Br. 37.) To this end, he asks this Court to overrule *Allison*, 329 Wis. 2d 129, ¶ 17, which held that summary judgment is unavailable in chapter 980 proceedings. This Court should decline for two reasons.

First, Stephenson did not ask this Court to overrule *Allison* in his petition for review. (Stephenson's Pet.) Consistent with Wis. Stat. § (Rule) 809.62(6), this Court's order granting review expressly provided that Stephenson could "not raise or argue issues not set forth in [his] petition for review unless otherwise ordered by the court." (Wis. Sup. Ct. Order dated Mar. 17, 2020); *see also Jankee v. Clark Cty.*, 2000 WI 64, ¶ 7, 235 Wis. 2d 700, 612 N.W.2d 297.

Second, the court of appeals' holding in *Allison* is based on a reasoned interpretation of section 980.09(2). *Allison*, 329 Wis. 2d 129, ¶¶ 11–21. Chapter 980 proceedings are civil proceedings. *Curiel*, 227 Wis. 2d at 417. The rules of civil practice apply in civil actions "except where different procedure is prescribed by statute." Wis. Stat. § 801.01(2). Chapter 980 does not expressly state whether summary judgment is available in discharge proceedings under section 980.09. But "mere silence regarding a rule of civil procedure does not automatically mean that the procedure is permitted." *State v. Schneck*, 2002 WI App 239, ¶ 14, 257 Wis. 2d 704, 652 N.W.2d 434. "[T]he test for the application of the civil rules of procedure is not only whether the statutes governing the instant proceeding are silent on the matter or otherwise set out a different procedure, but also whether the instant

proceeding can be reconciled with the rules of civil procedure." *State v. Ryan*, 2012 WI 16, ¶ 49, 338 Wis. 2d 695, 809 N.W.2d 37 (quoting *Schneck*, 257 Wis. 2d 704, ¶ 7).

Applying the principles of statutory interpretation to section 980.09(2), the court of appeals determined that "the legislature explicitly prescribed a different procedure from those outlined in Wis. Stat. chs. 801 to 847." *Allison*, 329 Wis. 2d 129, ¶ 18.[6] When reviewing a discharge petition, section 980.09(2) only authorizes the circuit court to exercise two options. First, "the court shall deny the petition" if it 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." Wis. Stat. § 980.09(2). Second, "the court shall set the matter for trial" if it determines "that the record contains facts from which a court or jury would likely conclude the person no longer meets the criteria for commitment." *Id.*

"By stating that the court 'shall' set the matter for a hearing, the legislature has precluded a court from exercising any other options that might otherwise be available, including summary judgment." *Allison*, 329 Wis. 2d 129, ¶ 18. The court of appeals explained, "The unambiguous and clear understanding of § 980.09(2) is that a trial court is limited to these two options when faced with a petition for discharge." *Id.* Allowing the circuit court to grant summary judgment under section 980.09(2) would frustrate section 980.09's

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[6] In *Allison*, the court of appeals interpreted a previous version of section 980.09(2) (2007–08), which the legislature subsequently amended. The amendments change the showing required to obtain a discharge trial but did not change the circuit court's limited choice to deny the petition without a trial or to set the case for trial.

scheme by allowing a circuit court to grant a discharge petition before the State has the opportunity to prove that a person still meets criteria for commitment at a trial under section 980.09(3). *Id*. ¶ 19.

Should this Court hold that the State must introduce expert opinion testimony to meet its burden at a discharge trial, section 980.09(2)'s plain meaning would remain unchanged. A circuit court may only exercise one of two options under section 980.09(2): (1) deny the petition; or (2) set the matter for trial. Neither option allows the circuit court to grant discharge through summary judgment.

III. Stephenson has not demonstrated a special justification that compels this Court to overrule *Curiel* and adopt a different standard of review.

First, the State addresses the principles guiding this Court's decision to overrule precedent. Second, the State discusses the standard of review and sufficiency-of-the-evidence test applicable to ch. 980 verdicts. Third, the State explains why this Court should decline Stephenson's invitation to apply a mixed standard of review to a factfinder's determination that a person is sexually violent.

A. Overruling precedent requires a special justification.

This Court respects the doctrine of stare decisis and will not overturn precedent absent a "special justification." *State v. Roberson,* 2019 WI 102, ¶ 49, 389 Wis. 2d 190, 935 N.W.2d 813 (citation omitted). Five factors contribute to a decision to overturn prior case law:

> (1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and

> consistency in the law; (4) the prior decision is "unsound in principle;" or (5) the prior decision is "unworkable in practice."

Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp., 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 717 N.W.2d 216. Further, "the decision to overrule a prior case may turn on whether the prior case was correctly decided and whether it has produced a settled body of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 99, 264 Wis. 2d 60, 665 N.W.2d 257. Finally, "[w]hen a party asks this court to overturn a prior interpretation of a statute, it is his 'burden ... to show not only that [the decision] was mistaken but also that it was objectively wrong, so that the court has a compelling reason to overrule it.'" *State v. Friedlander*, 2019 WI 22, ¶ 18, 385 Wis. 2d 633, 923 N.W.2d 849 (citation omitted).

B. An appellate court independently reviews the sufficiency of the evidence to support a ch. 980 commitment.

1. The *Poellinger/Curiel* sufficiency-of-the-evidence test satisfies due process.

This Court applies the criminal legal standard for assessing the sufficiency of the evidence to a determination of whether sufficient evidence exists to prove that a person is sexually violent. *Curiel*, 227 Wis. 2d at 417–18. Under this legal standard, this Court will not reverse a commitment determination under ch. 980 based on insufficient evidence "unless the evidence, viewed most favorably to the state and the [commitment], is so insufficient in probative value and force that it can be said *as a matter of law* that no trier of fact, acting reasonably, could have found [the person sexually violent] beyond a reasonable doubt" at an initial commitment trial, *Kienitz* 227 Wis. 2d at 434 (emphasis added) (quoting

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)), and "by clear and convincing evidence" at a discharge trial, Wis. Stat. §§ 980.09(3) and (4). *Poellinger*'s sufficiency framework places a "heavy burden" on a litigant seeking to set aside a verdict based on insufficiency of the evidence grounds. *Booker*, 292 Wis. 2d 43, ¶ 22. This sufficiency standard applies whether a jury or the circuit court serves as the factfinder. *Curiel*, 227 Wis. 2d at 418.

Contrary to Stephenson's suggestion (Stephenson's Br. 43–44), *Curiel*'s and *Poellinger*'s sufficiency-of-the-evidence test protects a ch. 980 litigant's substantive due process rights. The test itself rests on a constitutional foundation. *In re Winship*, 397 U.S. 358, 364 (1970) and *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) establish that criminal defendants have a constitutional right to have the State prove every element of an offense, clearly tying sufficiency of the evidence analysis to the statutory elements of crimes.

The Supreme Court's articulation of the sufficiency test in *Jackson* is remarkably similar to *Poellinger*'s sufficiency framework and asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. The Supreme Court recognized that this test preserves the factfinder's role as the weigher of evidence "through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution," while impinging "upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id*.

2. This Court independently reviews the sufficiency of the evidence.

In *Curiel*, this Court characterized *Poellinger*'s sufficiency test as the "criminal standard of review." *Curiel*, 227 Wis. 2d at 417–18. While it extended *Poellinger*'s legal framework for assessing the sufficiency of the evidence to ch. 980 cases, this Court did not distinctly and separately articulate the standard of review in *Curiel*.

"A standard of review is 'a limiting mechanism which defines an appellate court's scope of review,' and hence its power." Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 Marq. L. Rev. 231, 232 (1991), *quoted in Peplinski v. Fobe's Roofing, Inc.,* 193 Wis. 2d 6, 13 n.1, 531 N.W.2d 597 (1995). The "standards of review are measures of the degree of deference that appellate courts must pay to lower tribunals." *Id*. The most common standards of review include the erroneous exercise of discretion standard, the clear error or clearly erroneous standard, and the *de novo* or independent review standard.[7] As general rule, appellate courts independently review legal questions without deference to trial courts "because there is nothing intrinsic to their determination which gives the trial court any advantage over an appellate court." *State v. Panknin*, 217 Wis. 2d 200, 207, 579 N.W.2d 52 (Ct. App. 1998).

This Court's decisions interpreting *Poellinger*'s sufficiency standard after *Curiel* differentiate between the standard of review and the principles guiding review of the sufficiency of the evidence itself. *State v. Smith*, 2012 WI 91,

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[7] *See, e.g., State v. (Jimmie Lee) Smith*, 2016 WI 23, ¶¶ 24 n.10, 29, 367 Wis. 2d 483, 878 N.W.2d 135 (comparing application of clearly erroneous standard and erroneous exercise standard in competency proceeding); *State v. (Roshawn) Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410 (*de novo* review standard).

¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. This Court treats the question of whether the evidence is sufficient to sustain a conviction under the *Poellinger*'s sufficiency standard as a legal question subject to this Court's *de novo* review. *Id.* As this Court explained, "whether evidence presented to a jury was sufficient to support the jury's verdict" requires the "[a]pplication of a statute to facts," a legal question that this Court independently reviews. *Booker*, 292 Wis. 2d 43, ¶ 12.

Neither *Booker*'s nor *Smith*'s characterization of criminal sufficiency as presenting a legal question is surprising based on this Court's use of the phrase "*as a matter of law*" in its formulation of the sufficiency-of-the-evidence test. *Poellinger,* 153 Wis. 2d at 501 (emphasis added). By extending *Poellinger*'s sufficiency standard, including the phrase "*as a matter of law*," to ch. 980 cases, this Court recognized that review of the sufficiency of the evidence presents a legal question. *Curiel*, 227 Wis. 2d at 416. And it presents a legal question because it requires a reviewing court to apply the statute, i.e., sec. 980.01(7)'s definition of a sexually violent person, to the facts.

The *Curiel*/*Poellinger* sufficiency-of-the-evidence test is consistent with Wis. Stat. § 805.14(1)'s sufficiency-of-the-evidence test. Under section 805.14(1), a circuit court may not grant:

> [a] motion challenging the sufficiency of the evidence *as a matter of law* to support a verdict . . . unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

Wis. Stat. § 805.14(1).

Because ch. 980 proceedings are civil cases and because ch. 980 does not proscribe a different standard for assessing

the sufficiency of the evidence, section 805.14(1)'s framework for assessing the sufficiency of the evidence applies to ch. 980 cases. *See* Sec. I.B, *supra*; *Curiel*, 227 Wis. 2d at 417; Wis. Stat. § 801.01(2). Finally, the phrase "as a matter of law" in section 805.14(1) demonstrates that the question of sufficiency presents a legal question that a court independently reviews. *Magett*, 355 Wis. 2d 617, ¶ 28.

C. This Court should not overrule *Curiel* in favor of a different standard.

Stephenson asks, "for constitutional policy reasons," to treat the review of a factfinder's determination of dangerousness under ch. 980 as a question of constitutional fact requiring a mixed standard of review. (Stephenson's Br. 40–44.) Questions of constitutional fact are subject to a mixed standard of review in which an appellate court (1) upholds the circuit court's findings of historical fact unless they are clearly erroneous; but (2) independently applies constitutional principles to those facts. *State v. Wright*, 2019 WI 45, ¶ 22, 386 Wis. 2d 495, 926 N.W.2d 157. Stephenson relies on cases involving pretrial litigation of a criminal defendant's constitutional rights and cases assessing dangerousness under Wis. Stat. § 51.20. His reliance is misplaced.

In asking this Court to review dangerousness under a mixed review standard, Stephenson relies on cases under section 51.20 that treat the question of dangerousness as a mixed question of law and fact. (Stephenson's Br. 43–44 (citing *Langlade Cty. v. D.J.W.*, 2020 WI 41, ¶ 47, 391 Wis. 2d 231, 942 N.W.2d 277; *Waukesha Cty. v. J.W.J.*, 2017 WI 57, ¶ 15, 375 Wis. 2d 542, 895 N.W.2d 783).) The use of the mixed review standard in these cases finds its genesis in *K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987), which applied this standard to a Wis. Stat. ch. 55 protective placement decision. This Court subsequently applied the

mixed review standard in *J.W.J.* and *D.J.W.* to proceedings under section 51.20. *J.W.J.*, 375 Wis. 2d 542, ¶ 15 (citing *K.N.K.,* 139 Wis. 2d at 198); *D.J.W.*, 391 Wis. 2d 231, ¶ 47.

But Stephenson fails to recognize that the mixed standard does not apply to the review of all decisions involving dangerousness in section 51.20 proceedings. In *Outagamie Cty. v. Michael H.*, 2014 WI 127, ¶¶ 1, 21–22, 359 Wis. 2d 272, 856 N.W.2d 603, this Court characterized the question of the sufficiency of the evidence as a legal question and applied the civil sufficiency-of-the-evidence test to its review of the jury's determination that Michael was subject to commitment based on its determination that he was dangerous.

This Court's application of the mixed standard in *D.J.W.* and *J.W.J.* and its application of the civil sufficiency standard in *Michael H.* makes sense if one considers the legal context in which the question of dangerousness arose. *Michael H.* concerned a challenge to the initial involuntary commitment determination. *Michael H.*, 359 Wis. 2d 272, ¶ 1. A person subject to an initial commitment under section 51.20 has the right to a jury trial. Wis. Stat. § 51.20(11). In contrast, both *D.J.W.* and *J.W.J.* concerned postcommitment proceedings to extend an involuntary commitment under section 51.20(13)(g)3. *D.J.W.*, 391 Wis. 2d 231, ¶¶ 1, 31; *J.W.J.*, 375 Wis. 2d 542, ¶¶ 1, 13. In an extension proceeding, the circuit court determines if the person is still a proper subject for commitment, which may be based, in part, on a showing of dangerousness. Wis. Stat. § 51.20(13)(g)3.

The use of the mixed standard in *D.J.W.* and *J.W.J.* and the sufficiency test in *Michael H.* is easily reconciled. The mixed standard applies when the statute requires the circuit court to decide an issue based on the application of a statutory standard to the facts. When circuit courts are charged with applying the law to the facts, they often have an obligation to

make factual findings to which the appellate court can apply the law. *See, e.g., D.J.W.*, 391 Wis. 2d 231, ¶ 40. In contrast, when a party has the right to a jury determination of an issue, often related to the cause of action itself, the jury decides the question through its verdict without making specific factual findings. Consistent with section 805.14(1)'s sufficiency test, appellate courts treat sufficiency as a legal question subject to independent review but reviews those facts in a manner deferential to the jury's verdict. And because the burden of proof is the same at a jury trial or a bench trial, courts apply the sufficiency standard to the review of the sufficiency of the evidence at a bench trial. *Curiel*, 227 Wis. 2d at 418–19 (citation omitted).

For the same reason, Stephenson's effort to extend the mixed standard used to decide questions of constitutional fact to commitment and discharge determinations fails. (Stephenson's Br. 41–42.) The mixed standard applies because circuit courts, not juries, decide whether a violation of constitutional rights occurs in the first instance, before a factfinder decides whether the State proved guilt at trial. Circuit courts have a duty make specific and complete factual findings when they decide constitutional issues. *State v. Johnson*, 74 Wis. 2d 169, 174–75, 246 N.W.2d 503 (1976). In contrast, on questions of guilt, the factfinder, whether it is a jury or a circuit court, determines whether the State has proved its case without specific credibility or factual findings. *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). Therefore, an appellate court's review is limited to whether there is sufficient evidence to sustain the verdict. *Michael H.*, 359 Wis. 2d 272, ¶ 21.

Stephenson contends that the legislature's changes to ch. 980 since *Curiel* support overturning it. (Stephenson's Br. 44.) This Court extended *Poellenger*'s sufficiency-of-the-evidence test to ch. 980 proceedings based on its assessment

that ch. 980 proceedings share "many of the same procedural and constitutional features present in criminal prosecutions." *Curiel*, 227 Wis. 2d at 416–18. As Stephenson correctly notes, this Court's decision in *Curiel* relied partly on a now repealed statutory provision that provided the rules of evidence in criminal actions apply to ch. 980 proceedings and a person subject to a commitment petition has the same constitutional rights. *Id*. at 417 (citing Wis. Stat. § 980.05(1m) (1995–96), repealed 2005 Wis. Act 434, § 101); (Stephenson's Br. 44). But despite section 980.05(1m)'s repeal, the rights afforded to persons whom the State seeks to commit extensively parallel the rights conferred on criminal defendants, including the rights to counsel, remain silent, present and cross-examine witnesses, a jury trial at initial commitment and discharge proceedings, appointment of an expert witness, request a change of venue, and discovery. *See* Wis. Stat. §§ 971.23, 980.03(2) and (3), 980.031(1), 980.034(1), and 980.036.

Further, as this Court recognized, ch. 980 requires an original commitment to satisfy the "beyond a reasonable doubt" burden applicable to criminal cases, a standard that remains unchanged. *Curiel*, 227 Wis. 2d at 416–17; *see also* Wis. Stat. § 980.05(3)(a). "Because of the parallels between ch. 980 proceedings and criminal actions, review of ch. 980 proceedings will quite frequently involve applying much of the existing case law involving evidentiary and constitutional issues in criminal cases to ch. 980 appeals." *Curiel*, 227 Wis. 2d at 417. This Court continued: "This may be particularly true where sufficiency of the evidence questions are interwoven with the discussions of the reasonable doubt standard." *Id*. While the lower clear and convincing standard applies to discharge determinations, the State must still prove a ch. 980 patient meets criteria for commitment as a sexually violent person. *Compare* Wis. Stat. § 980.05(3)(a) and Wis. Stat. § 980.09(3).

In *Curiel*, this Court previously declined to adopt *K.N.K.*'s mixed review standard, and neither *D.J.W.* nor *J.W.J.* provide a compelling reason to overturn *Curiel* now. Stephenson fails to show that *Curiel* was unsound in principle, unworkable in practice, or detrimental to coherence and consistency in the law. *Bartholomew,* 293 Wis. 2d 38, ¶ 33. And, he has not shown that developments in the law have undermined *Curiel*'s rationale or that newly ascertained facts warrant its change. *Id.* Without these showings, Stephenson has not demonstrated a special justification that warrants overturning *Curiel*.

* * * * *

This Court should reaffirm its holdings in *Curiel* and *Kienitz* that it applies *Poellinger*'s sufficiency-of-the-evidence test when it assesses whether legally sufficient evidence supports a commitment. *Curiel*, 227 Wis. 2d at 417–18; *Kienitz*, 227 Wis. 2d at 434–35. An appellate court should uphold the factfinder's verdict unless the evidence, when viewed most favorably to the State and commitment, is so insufficient in probative value that no factfinder acting reasonably could find that the person was sexually violent. *Kienitz*, 227 Wis. 2d at 434. This Court should clarify, consistent with *Booker* and *Smith*, that the question of whether sufficient evidence supports a ch. 980 commitment presents a legal question, subject to independent appellate review.

IV. The State proved that Stephenson was still a sexually violent person.

The State proved by clear and convincing evidence that Stephenson was still a sexually violent person.

First, Stephenson concedes that he was convicted of a sexually violent offense. (Stephenson's Br. 8.) The record supports this concession. The circuit court took judicial notice

that Stephenson had been convicted of a sexually violent offense based on a Dunn County conviction for second-degree sexual assault. (R.265:24–25, 165.)

Second, the circuit court determined Stephenson had a mental disorder based on Kolbeck's report documenting diagnoses of "Other Specified Personality Disorder, with antisocial and borderline features" and "Alcohol Use Disorder." (R.177:6–7; 265:165.) Stephenson concedes "that Kolbeck's diagnosis provided sufficient evidence to prove element two." (Stephenson's Br. 8–9.)

Third, based on its conclusion that Stephenson was still a sexually violent person, the circuit court determined that Stephenson was more likely than not to commit a future act of sexual violence. (R.265:165–66.) When it denied Stephenson's postcommitment motion, the circuit court explained that it concluded Stephenson was likely to reoffend based on his behavior patterns before and after he was committed to Sandridge. (R.266:16.)

Even without an expert's opinion that Stephenson's mental disorder made him likely to reoffend, the evidence supported the circuit court's decision that Stephenson's risk met ch. 980's likely threshold. *See Stephenson*, 389 Wis. 2d 322, ¶¶ 52–61.

Criminal history. The circuit court reasonably considered Stephenson's persistent pattern of sex offending. *See Kienitz*, 227 Wis. 2d at 437. Kolbeck estimated Stephenson had been arrested for 13 charges of illicit sexual contact and had six convictions or adjudications for sex offenses. (R.177:3; 264:24.) Stephenson's documented history of sex offenses reflect that:

- In 2001, Stephenson was adjudicated delinquent of one count of fourth-degree sexual assault. Two other counts

of fourth-degree sexual assault were dismissed but read in. (R.177:3.)

- In 2002, Stephenson was adjudicated delinquent of repeated sexual assault of the same child, a 15-year-old female classmate, whom he threatened to kill if she told anyone. (*Id.*)
- In 2002, Stephenson was adjudicated delinquent of second-degree sexual assault of a 15-year-old female whom he forcibly pushed against a wall and had penis-to-vagina contact. (*Id.*)
- In 2004, Stephenson was charged with two counts of second-degree sexual assault of a child. Those charges were dismissed and read-in at sentencing in another case. (*Id.*)
- In 2004, Stephenson was charged and convicted of fourth-degree sexual assault of a 15-year-old female, based on allegations that he twice had penis-to-vagina contact. (*Id.*)
- In 2006, Stephenson was convicted in Minnesota of second-degree criminal sexual conduct with a 12-year-old girl based on an allegation of penis-to-vagina sexual contact. (*Id.*) Other charges were dismissed. (*Id.*)
- In his 2007 Dunn County case, Stephenson was convicted of second-degree sexual assault of a child based on an allegation that he met a 12-year-old girl in a chat room and later met when she turned 14. (*Id.*) Stephenson engaged in sexual contact with the child, who resisted and was able to free herself. (*Id.*)
- Stephenson was also charged with third-degree sexual assault in the Dunn County case based on an allegation of penis-to-vagina intercourse with a 16-year-old girl. (*Id.*) That charge was dismissed. (*Id.*)

But Stephenson notes that sex offender recidivism rates are generally less than 10% and that public misperceptions about sexual reoffending may obscure the question of whether there is the necessary linkage between the person's mental disorder and risk of reoffense. (Stephenson's Br. 26.) Stephenson's concerns are misplaced. As Kolbeck explained, "Sexual recidivism after a single offense does not tend to be as high as sexual recidivism for individuals who have reoffended after multiple offenses." (R.264:51.) Based on *his* sex offending history, Stephenson is unlike 90% of the sex offenders who do not recidivate. He is in the class of 10% who reoffend.

Stephenson's performance on supervision. Stephenson's poor performance on supervision was "a proper factor for consideration when assessing [Stephenson's] risk of reoffense." *Stephenson*, 389 Wis. 2d 322, ¶ 53. On multiple occasions, Stephenson was placed on supervision that was revoked after he committed new offenses. (R.264:53–54.) Kolbeck noted that Stephenson had absconded from community supervision and failed to comply with his sex offender registry obligations. (R.177:4, 6.) Endres acknowledged that Stephenson had "significant problems abiding by the rules of community supervision" before his last offense. (R.187:19.)

The ongoing manifestations of Stephenson's mental disorders. In assessing Stephenson's dangerousness, the factfinder could reasonably consider whether Stephenson still exhibited the manifestations of his disorders present when he committed his past offenses and whether their presence contributed to his ongoing risk of reoffense.

Kolbeck concluded Stephenson's alcohol abuse disorder was a predisposing mental disorder based partly on Stephenson's admissions that "he never committed a crime sober." (R.264:20, 57–58.) Both Kolbeck and DHS

psychologist, Darren Matusen, noted Stephenson's conflicting statements about his alcohol use and treatment, including Stephenson's belief that the diagnosis of alcohol use disorder did not fit him, that he was capable of engaging in social drinking in the community, that his alcohol abuse issue rather is his most pressing problem, and other statements about remaining abstinent and seeking treatment. (R.264:57–58; 265:55–56.) A factfinder could reasonably determine that Stephenson's inability to come to terms with his alcohol abuse disorder still contributed to his ongoing reoffense risk.

Kolbeck diagnosed Stephenson with a personality disorder with antisocial features based on his pattern of repeated arrests for sexual assault, lying, conning, deceit, manipulation, impulsivity, irresponsibility, and the lack of remorse. (R.177:6; 264:24–25.) Kolbeck noted several aspects related to the borderline features of Stephenson's personality disorder pertinent to his sex offending, including impulsive, promiscuous sexual encounters and impulsive use of alcohol. (R.264:25.) Stephenson's ongoing behavior at Sandridge still suggests these traits persisted and contributed to his reoffense risk.

Stephenson's behavior at Sandridge. Kolbeck noted Stephenson's violation of Sandridge's institutional rules, including the most serious known as a behavior dispositional record (BDR), and said it reflected ongoing evidence of Stephenson's antisocial traits. (R.264:27–29.) In a polygraph, Stephenson was found to have untruthfully responded to questions about exploiting others for money, use of alcohol, and engaging in physical aggression, which are indicative of lying or deception. (R.264:29.) Stephenson's admissions to "an unauthorized phone call" indicated continued "resistance to rules, certainly rule violations." (*Id*.) Stephenson also demonstrated resistance to rules and manipulative and deceitful behavior by repeatedly covering his room window

with a towel, in violation of the institution's rules. (R.264:30–31.) When caught by staff, Stephenson suggested that he had received permission from another staff member, which was untrue. (R.264:31.) Likewise, Stephenson's attempts to obtain prohibited clothing showed "resistance to rules by ordering items already known to him to be likely prohibited by the Sandridge team," and "suggest[ed] that he's pushing boundaries with staff and also just a general resistance to rules." (R.264:36–37.)

Stephenson's PPG results. Kolbeck and Matusen noted that Stephenson had undergone a series of penile plethysmograph tests (PPG). (R.177:4; 264:55–56; 265:45–47.) A nonsuppression PPG test in 2016 revealed that "stimuli depicting teenager coercive interactions" and "relatively graphic descriptions of victims crying or in some form of suffering" aroused Stephenson. (R.264:55–56.) Consistent with his arousal to these stimuli, Kolbeck reported that Stephenson's offenses involved the use and threats of use of physical force and coercion, and, in one case, included a threat to kill a victim if she told anyone. (R.177:10, 12.) While additional testing demonstrated that Stephenson had the capability to suppress his arousal, Kolbeck agreed that the tests did not measure whether Stephenson was actually interested in suppressing his urges. (R.264:57.) "That consideration is highly relevant given that discharge would place Stephenson in an unsupervised community setting." *Stephenson*, 389 Wis. 2d 322, ¶ 57.

Stephenson's psychopathy. Kolbeck observed that Stephenson had a psychopathy score of 29 on the Hare Psychopathy Checklist-Revised consistent with a high degree of psychopathy. (R.177:9–10; 264:64–65.) Kolbeck explained that he considered Stephenson's psychopathy when he assessed Stephenson's risk because of the direct correlation between elements of psychopathy and antisocial personality

disorder and traits. (R.264:59–60.) Attributes associated with psychopathy include superficiality, grandiosity, conning, manipulation, lying, shallow affect, lack of empathy, lack of remorse, and callousness. (*Id.*) Kolbeck noted that Stephenson's offenses showed conning and manipulative behavior, using deception to lure victims into secluded locations, and misleading others that he had sincere romantic interest in them. (R.177:10; 264:24–26.) He observed that Stephenson engaged a child victim in an internet chat room for over two years, demonstrating "his capacity for predatory planning and grooming." (R.177:10; 264:25–26.)

Treatment engagement. The circuit court could reasonably consider Stephenson's treatment engagement when it assessed his risk to reoffend. *Kienitz*, 227 Wis. 2d at 436. Kolbeck noted that while Stephenson continued to participate in his core treatment, Kolbeck had concerns about Stephenson's treatment engagement. (R.264:82–83.) Consistent with Kolbeck's testimony, the 2017 treatment progress report reflects that Stephenson's treatment engagement and participation were insufficient. (R.185:3; 264:82.) Stephenson dropped out of one group and discontinued his participation in the intensive alcohol group. (R.264:83.) The circuit court could reasonably conclude that Stephenson's failure to fully engage in treatment contributed to an increased reoffense risk.

Stephenson's estimation of risk. In 2016, Stephenson told DHS Sandridge psychologist, Darren Matusen, that he estimated his risk to commit another sexual assault as "approximately five out of ten." (R.265:62.) Thus, Stephenson's own statement just a year before his discharge trial placed him at the boundary of the legal threshold for establishing dangerousness.

The actuarial risk instruments. While Kolbeck and Endres concluded that Stephenson's risk did not meet

ch. 980's "likely" threshold, neither suggested that Stephenson presented no risk or, at most, a nominal risk of reoffense. Using actuarial instruments, Endres assessed Stephenson's reoffense risk was 17% over a 10-year period. (R.187:19; 265:124.) While Kolbeck concluded that Stephenson was dangerous during his 2016 evaluation, he determined Stephenson's scores corresponded to a 41% risk that he would be arrested or charged over his lifetime. (R.264:43, 47–48, 77–78.)

Both Kolbeck and Endres acknowledged the limitations of actuarial instruments. Kolbeck stated that the instruments may underestimate or overestimate the actual risk of sexual violence in a specific case. (R.177:9.) And Endres reported that the instruments were not intended to measure an absolute prediction of risk but to provide a group estimate based on the assessment of risk factors present in sex offenders released to the community. (R.187:14–15.) Stephenson asserts that these limitations leave the factfinder to guess how much greater or higher an offender's risk might be. (Stephenson's Br. 49.) If anything, the instruments' limitations and Kolbeck's and Endres's disparate assessment of Stephenson's risk based on their application of the same instruments underscores the Supreme Court's observation that a person's conviction for a "criminal act certainly indicates dangerousness [and] generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding." *Jones*, 463 U.S. at 364.

This Court should decline Stephenson's invitation to reweigh the evidence. Based on the totality of the evidence, the absence of an expert's ultimate opinion that Stephenson's mental disorder made him likely to commit another sexually violent act was not fatal to the court's determination that Stephenson was dangerous. As the factfinder, the court was free to assess how much weight, if any, it should give to the

experts' ultimate opinion on dangerousness. *See Kienitz*, 227 Wis. 2d 423. When viewed most favorably to the State and the commitment, the evidence was not so insufficient that no reasonable factfinder could have determined that Stephenson was more likely than not to commit a future act of sexual violence.

CONCLUSION

This Court should affirm the court of appeals' decision affirming the circuit court's order denying Stephenson's petition for discharge and the circuit court's order denying postcommitment relief.

Dated this 14th day of August 2020.

Respectfully submitted,

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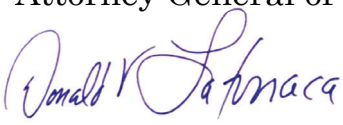

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CERTIFICATION

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 10,877 words.

Dated this 14th day of August 2020.

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I hereby certify that:

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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 14th day of August 2020.

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