STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2018AP002104

In re the Commitment of Jamie Lane Stephenson:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JAMIE LANE STEPHENSON,

Respondent-Appellant-Petitioner.

Review of a Published Court of Appeals Decision Affirming Orders Entered in the Circuit Court for Dunn County, Judge Rod W. Smeltzer, Presiding

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REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER

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ARGUMENT

I. The state must present expert opinion evidence to prove dangerousness in ch. 980 cases.

The state recognizes that a party may have to present expert testimony to prove its case if an issue to be proven involves a subject that is not within the common knowledge or ordinary experience of laypeople. (State's brief at 11). It makes three arguments why this rule does not require expert testimony to prove dangerousness under ch. 980.

First, the state argues ch. 980 does not explicitly require expert opinion evidence, though it acknowledges it is unlikely to meet its burden of proof without such evidence. (State's brief at 12-15). Both parties note that other states explicitly or implicitly require the state to introduce expert evidence. (Stephenson's brief-in-chief at 34-36; state's brief at 12 n.4)). While ch. 980 does not have an explicit command, its language and structure imply expert testimony is required.

This court has held that ch. 980 contemplates expert testimony is needed to prove element two—that the respondent has a mental disorder. *State v. Sorenson*, 2002 WI 78, ¶20 & n.3, 254 Wis. 2d 54, 646 N.W.2d 354 (discussing Wis. Stat. § 980.05(4) and citing *State v. Post*, 197 Wis. 2d 279, 306, 541 N.W.2d 115 (1995)). As Stephenson explained (brief-in-chief

at 15-16), the need for expert testimony on element two, coupled with Wis. Stat. § 980.01(7)'s clear requirement that dangerousness must be caused by a mental disorder, shows that ch. 980 implicitly requires expert testimony to prove dangerousness.

The state asserts (brief at 13-14) the statement in *Sorenson* is dicta because the court was not addressing whether an expert is needed to prove element two. There are "two disparate lines" of Wisconsin cases defining dicta. *Zarder v. Acuity Ins. Co.*, 2010 WI 35, ¶52 n.19, 324 Wis. 2d 325, 782 N.W.2d 682. Under either line the state is wrong.

One line holds that "when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum, but is a judicial act of the court which it will thereafter recognize as a binding decision." *State v. Picotte*, 2003 WI 42, ¶61, 261 Wis. 2d 249, 661 N.W.2d 381 (quoted source omitted). Though the meaning of § 980.05(4) was not dispositive of the issue in *Sorenson*, the court intentionally took up and discussed the statute to decide an issue germane to the controversy in that case. *Sorenson*, 254 Wis. 2d 54, ¶¶17-20. Thus, it is not dicta under the first line of cases.

Nor is it dicta under the second line of cases. They define dictum as "a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary

and not essential to the determination of the issues before it." *Estate of Genrich v. OHIC Insurance Co.*, 2009 WI 67, ¶39, 318 Wis. 2d 553, 769 N.W.2d 481 (quoted source omitted). *Sorenson*'s discussion of § 980.05(4) did not extend beyond the facts and was not broader than, or nonessential to, its decision, as it was necessary to address the reasoning of the lower court. 254 Wis. 2d 54, ¶¶19-20.

The state also claims *Sorenson* is inconsistent with cases holding expert testimony is not required to prove the existence of a mental condition. (State's brief at 14-15). Stephenson explained in his brief-in-chief (at 28-32) why those decisions do not disprove the need for an expert in ch. 980 cases. They are not ch. 980 proceedings; instead, they are criminal prosecutions that focus on questions about a defendant's or victim's mental condition and the effect of the condition on past conduct rather than future dangerousness caused by the condition. Further, lay witnesses and factfinders probably have experience with the mental conditions and behavior at issue in those cases, unlike the narrowly defined mental disorder and dangerousness at issue in ch. 980 cases.

Second, relying on U.S. Supreme Court cases holding that predictions of future criminal dangerousness need not be based on expert testimony, the state argues lay factfinders can decide dangerousness once an expert has diagnosed a mental disorder because that diagnosis shows a

predisposition to reoffend and therefore some level of risk to reoffend. (State's brief at 15-18).

Stephenson explained (brief-in-chief at 32-33) why the Supreme Court cases have no bearing on predicting dangerousness in the ch. 980 context: they involve judgments about the dangerousness of ordinary recidivists, not mentally disordered offenders being committed because their mental disorder causes their dangerousness. This matters because, as Stephenson explained (brief-in-chief at 16-21), both ch. 980's language and substantive due process demand that the offender pose a specific level of risk that is caused by a mental disorder. Risk assessments in criminal proceedings against ordinary recidivists do not depend on whether a specified level of risk is caused by a specially defined mental disorder.

The state asserts the Supreme Court has said experts are not needed to predict dangerousness in the context of civil commitment proceedings. (State's brief at 17-18). The cases the state cites do not support its claim. *Jones v. United States*, 463 U.S. 354 (1983), involved the insanity defense. It contains no discussion about the need for expert versus lay assessments of dangerousness, and says only that a criminal conviction—the necessary predicate of an insanity commitment—is "concrete evidence" of dangerousness that justifies an insanity commitment. *Id.* at 356, 363-65.

Nor does the dissent in *Kansas v. Crane*, 534 U.S. 407 (2002), help the state. The dissent notes that, to commit a person under the Kansas law under review, a jury must find that: (1) the person suffered from a mental disorder; and (2) the condition rendered him likely to commit future acts of sexual violence. It continues: "Both of these findings are coherent, and (*with the assistance of expert testimony*) well within the capacity of a normal jury." *Id.* at 423 (Scalia, J., dissenting) (emphasis added). In other words: expert testimony is necessary to aid the lay factfinder in making its determination.

Third, the state disputes Stephenson's conclusion that, because due process requires commitments like those under ch. 980 to be limited to offenders whose mental disorder causes them to be highly dangerous, proving that the offender is dangerous requires expert testimony to link the mental disorder with the offender's risk. The state's arguments miss the mark.

The state first argues (brief at 18-19) that an expert's diagnosis of a mental disorder is sufficient to distinguish a ch. 980 respondent from the typical recidivist. But the cases—*Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002); and *State v. Laxton*, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784—establish that predisposition *alone* is not enough to distinguish the two classes of offenders because a person with a predisposition may be able to control his behavior. *Hendricks*, 521 U.S. at 357 (due process requires proof of "more than a mere

predisposition to violence; rather, it requires evidence of … a present mental condition that creates a likelihood" of reoffending). Rather, commitment under ch. 980 is for offenders whose mental disorder causes them serious difficulty in controlling behavior; to prove serious difficulty in controlling behavior, the state must prove the offender is a high risk to reoffend. (Stephenson's brief-in-chief at 16-21).

While the state is right (brief at 19) that *Hendricks*, *Crane*, and *Laxton* do not hold the state must prove dangerousness with expert testimony, the nexus required between mental disorder and heightened risk to reoffend demands knowledge and training beyond that possessed by lay factfinders. Without expert testimony, the lay factfinder is left to speculate about whether that nexus exists in the particular case. This follows from the case law addressing situations in which expert testimony is required, in particular *Wal-Mart Stores, Inc. v. LIRC*, 2000 WI App 272, 240 Wis. 2d 209, 621 N.W.2d 633, and *Brown County Human Services v. B.P.*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560.

The state acknowledges that these cases hold that expert testimony was necessary to prevent the factfinder from speculating about the causal link between a party's mental condition and the resulting behavior. (State's brief at 20). But it again asserts that the diagnosis of a mental disorder by an expert is sufficient to establish that causal link because that proves the person has a predisposition to reoffend. (*Id.*). As noted above, predisposition alone is not

enough. That only gets the state past element two. To prove dangerousness, the state must establish the mental disorder makes it more likely than not that the respondent is going to reoffend, for that is necessary to show serious difficulty in controlling behavior and, thus, to assure that ch. 980 is being narrowly applied to the most dangerous offenders.

Finally, the state argues (brief at 19-20, 21) that, once an expert has made a diagnosis of a mental disorder, the factfinder may rely on other evidence—criminal history; behavior in the institution and on supervision; expert testimony about other risk factors—to assess whether the person is dangerous as required under ch. 980. Stephenson addressed this contention in his brief-in-chief (at 25-27). The basic point is that *every* offender, whether typical recidivist or mentally disordered, will have exhibited behavior that can fit into these categories. What matters under ch. 980 is whether, and if so, how, these factors show a person is at high risk to reoffend *because* of his mental disorder. Without expert testimony to explain that, a lay factfinder is free to use these factors as evidence of high risk regardless of whether they are related to the person's mental disorder.

The final matter relating to requiring the state to present expert testimony involves whether this court should overrule *State v. Allison*, 2010 WI App 103, 329 Wis. 2d 129, 789 N.W.2d 120. The state argues the court should not address *Allison* because Stephenson did not raise it in his petition for review. (State's brief at 22). If this court holds the state must

introduce expert opinion testimony on dangerousness, questions about the validity of *Allison* are inevitable. Thus, Stephenson did not need to raise it separately in the petition.

In addition, this court has the power to consider issues beyond those raised in the petitions. *Preisler v. Gen. Casualty Ins. Co.*, 2014 WI 135, ¶57, 360 Wis. 2d 129, 857 N.W.2d 136. This court recently exercised its discretion to address an issue not raised in a state's petition, with the result that the court overruled a prior decision. *State v. Denny*, 2017 WI 17, ¶¶60-71 & n.15, 373 Wis. 2d 390, 891 N.W.2d 144. Like the issue in *Denny*, whether *Allison* remains valid if the state must present expert witness evidence is a legal issue and the parties have briefed it. It also gives immediate clarity to the trial courts and parties about how to implement any new rule this court adopts. Thus, this court should address *Allison*.

The state contends (brief at 22-23) that *Allison* should stand because it is a reasoned interpretation of Wis. Stat. § 980.09(2), which says that when a court finds that a petition for discharge merits a trial, the court "shall set the matter for trial." *Allison*, 329 Wis. 2d 129, ¶¶13-25. This language can be given effect by setting a trial and *then* allowing a summary judgment motion; indeed, the state may not know whether it has the necessary expert testimony until after a trial is set. Moreover, mandating that a trial be *set* does not mandate that a trial be *conducted* when there is no dispute that the state cannot meet

its burden. Holding otherwise leads to the absurd result that the court and parties will assemble for a trial that will inevitably be dismissed at the close of the state's case. Statutes must be read to avoid absurd results. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

Further, if this court agrees that ch. 980 and due process require the state to present expert testimony on dangerousness, then the procedures in § 980.09 must be read in the context of that new interpretation of ch. 980. *Kalal*, 271 Wis. 2d 633, ¶46 (statutory language must be interpreted in relation to surrounding or closely related statutes). That means § 980.09 should be read to allow for summary judgment in cases in which the state cannot secure the expert testimony it needs, and *Allison* should be overruled.

II. Appellate courts should independently review whether the evidence in ch. 980 cases satisfies the legal standard of dangerousness.

The state argues the test for the sufficiency of evidence in *State v. Curiel*, 227 Wis. 2d 389, 416-18, 597 N.W.2d 697 (1999), protects the due process rights of ch. 980 respondents because it rests on the constitutional rules regarding sufficiency in criminal cases and presents a question of law involving an application of a legal standard to the facts. (State's brief at 25-29). Stephenson agrees that clarifying the

current sufficiency standard involves a legal question subject to independent review, as the state suggests (brief at 33), is helpful.

Nonetheless, *Curiel*'s primary foundation for adopting the criminal sufficiency standard was § 980.05(1m), which has been repealed. 227 Wis. 2d at 417; 2005 Wis. Act 434, § 101. And ch. 980 has steadily diverged from criminal law. For instance, a person subject to ch. 980 proceedings now has no due process right to be competent during the proceedings. *State v. Luttrell*, 2008 WI App 93, ¶¶7-11, 312 Wis. 2d 695, 754 N.W.2d 249. Further, ch. 980 now has its own specific statutes governing such things as discovery, venue, and evidentiary issues, and relies on neither the criminal or civil code on those matters. Wis. Stat. §§ 980.034, 980.036, 980.038. And the other-acts evidence limits under Wis. Stat. § 904.04(2) that is so often litigated in criminal cases does not to apply in ch. 980 proceedings. *State v. Franklin*, 2004 WI 38, ¶1, 270 Wis. 2d 271, 677 N.W.2d 276.

Thus, despite the common burden of proof (state's brief at 32), the parallels between criminal and ch. 980 proceedings are attenuated and do not 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. These changes in the law undermine the rationale *Curiel* gave for its conclusion and therefore justify overruling its conclusion about the appropriate standard for reviewing the sufficiency of

evidence in ch. 980 cases. *State v. Roberson*, 2019 WI 102, ¶50, 389 Wis. 2d 190, 935 N.W.2d 813.

Furthermore, as Stephenson argued (brief-in-chief at 40-43), issues about future dangerousness in civil commitment schemes are different than issues of purely historical fact that are the subject of sufficiency claim in the typical criminal case. The latter are appropriately reviewed with deference to the factfinder in the form of viewing the evidence most favorably in support of the verdict. The former involve nuanced judgments about how the person will behave in the future, judgments that are then used to justify substantial deprivations of liberty and therefore require close scrutiny. That difference apparently underlies this court's use of the independent review of dangerousness in ch. 51 cases. *See, e.g., Langlade County v. D.J.W.*, 2020 WI 41, ¶47, 391 Wis. 2d 231, 942 N.W.2d 277.

The state notes (brief at 30) that this court applied the typical sufficiency standard under Wis. Stat. § 805.14(1) in an earlier ch. 51 case, *Outagamie County v. Michael H.*, 2014 WI 127, ¶¶21-22, 359 Wis. 2d 272, 856 N.W.2d 603. The state attempts (brief at 30-31) to harmonize *Michael H.* with *D.J.W.* and other recent cases based on whether the case involved an initial commitment or an extension of a commitment. But both allow the subject to request a jury trial, and both require proof of dangerousness, though there an additional method for proving that in extension proceedings. *D.J.W.*, 391 Wis. 2d 231, ¶¶30-34; Wis. Stat. § 51.20(11) and

(13)(g)3. Furthermore, the test for sufficiency is the same whether the trial is to the court or to a jury. *Curiel*, 227 Wis. 2d at 418-19.

The defects in the sufficiency standard come into sharp focus when, as in this case, the state has no expert to testify the respondent is dangerous. In a case where the state and defense present competing experts, the reviewing court has a firm basis for finding the evidence sufficient based on the prosecution expert. By contrast, when all the experts who testify conclude the respondent does *not* meet the risk criteria, what evidence is being viewed most favorably to the verdict, given that the evidence presented was that the respondent should *not* be committed? Unless the factfinder gives detailed reasons for its conclusions, the current standard of review effectively asks the reviewing court to make assumptions about or fill in the inferences the factfinder made to make up for the absence of an expert opinion that the person is dangerous. And that means the reviewing court is not addressing the question of law of whether the evidence meets the legal standard for dangerousness because it does not know what evidence the factfinder used.

These problems are illustrated by this case, which takes us to the last issue: whether the evidence was sufficient to find Stephenson is dangerous. The state reprises the court of appeals' analysis of the evidence. (State's brief at 34-40). Stephenson addressed the flaws in that analysis in his brief-in-chief (at 45-49), and stands on that argument.

CONCLUSION

For the reasons given above and in Stephenson's brief-in-chief, this court should hold that: (1) the state must present expert opinion testimony that the respondent in a ch. 980 proceeding is dangerous: and (2) appellate courts must independently review the sufficiency of the evidence introduced to prove dangerousness. The court of appeals' decision should be reversed and the case remanded with directions that Stephenson be discharged.

Dated and filed by U.S. Mail this 28th day of August, 2020.

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 3,000 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 and filed by U.S. Mail this 28th day of August, 2020.

Signed:

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