STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP1270

In re the commitment of Roy C. O'Neal:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ROY C. O'NEAL,

Respondent-Appellant.

APPEAL FROM AN ORDER DENYING A DISCHARGE PETITION, ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE BEAU G. LIEGEOIS, PRESIDING

PETITIONER-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

Page

Other Authorities

ISSUE PRESENTED

Roy C. O'Neal petitioned for discharge from his commitment as a sexually violent person. To obtain a trial on his petition, O'Neal must satisfy his burden of production under Wis. Stat. § 980.09(2), which requires him to show that his condition has sufficiently changed such that a factfinder would likely conclude that he is no longer a sexually violent person.

Was O'Neal entitled to a discharge trial because he showed that his condition had sufficiently changed such that a factfinder would likely conclude that he is no longer a sexually violent person?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

I. Procedural history

In 1996, the State petitioned to commit O'Neal as a sexually violent person. (R. 1:1.) The petition asserted that O'Neal had been convicted of a sexually violent offense, including second-degree murder, contrary to Wis. Stat. § 940.02 (1973–74), and attempted rape, contrary to Wis. Stat. §§ 939.32 and 944.01 (1973–74). (R. 1:1.) Based on the allegations in the original criminal complaint, the petition characterized both offenses as "sexually motivated." (R. 1:1–2, 8–9.) The petition included an expert's opinion that O'Neal suffered from a mental disorder, sexual sadism. (R. 1:3, 5.) Finally, the expert opined that O'Neal's disorder created a

substantial probability that he would engage in future acts of sexual violence. (R. 1:6.) O'Neal stipulated to his commitment under ch. 980. (R. 13:1; 14:1; 15:1.)

O'Neal petitioned for supervised release in 2014. (R. 44:12.) The circuit court approved a stipulation between the State and O'Neal for supervised release. (R. 45:1–2.) O'Neal was eventually placed on supervised release. (R. 72:3.)

II. O'Neal's 2018 discharge trial

In 2018, O'Neal petitioned for discharge from his commitment. (R. 81:1, 3.) The circuit court granted O'Neal a discharge trial. (R. 165:5–6.)

Three psychologists testified at O'Neal's 2018 discharge trial, including Dawn Pflugradt, who performed O'Neal's 2018 annual reexamination and testified on the State's behalf, and Charles Lodl and David Thornton, who testified on O'Neal's behalf. *State v. O'Neal (In re Commitment of O'Neal)*, No. 2019AP1855, 2020 WL 6877941, ¶¶ 7, 13 (Wis. Ct. App. Nov. 24, 2020) (unpublished). Lodl, Pflugradt, and Thornton agreed that O'Neal had a predisposing mental disorder under ch. 980. *Id.* ¶ 13. But Lodl and Thornton disagreed with Pflugradt's conclusion that O'Neal remained more likely than not to commit another act of sexual violence. *Id.* ¶ 14.

With respect to the assessment of O'Neal's recidivism risk, Pflugradt used risk assessment tools, including the Static-99 Revised (Static-99R) and the Violence Risk Scale–Sex Offender version (VRS-SO). *O'Neal*, 2020 WL 6877941, ¶¶ 8–9. Based on her assessment, Pflugradt opined that O'Neal was more likely than not to commit a sexually violent offense. *Id.* ¶ 9.

In contrast, Lodl and Thornton concluded that O'Neal fell below the "more likely than not" threshold for commitment based on their use of risk instruments. *Id.* ¶¶ 14–15. Although Thornton reported O'Neal's reoffense risk

was "a little below 50%," Thornton testified that O'Neal's sexually violent reoffense risk was in the 25% range. *Id.* ¶ 14. Lodl opined that O'Neal's risk was "'up to 37 percent' over a ten-year period." *Id.* ¶ 15.

In reaching its verdict, the circuit court addressed the three elements required for a commitment. First, it determined that O'Neal had been convicted of a sexually violent offense based on the parties' stipulation. (R. 168:162.) Second, it determined O'Neal had a mental disorder. (R. 168:162.) Third, the circuit court determined that O'Neal was more likely than not to reoffend. (R. 168:165.) Based on these determinations, the circuit court denied O'Neal's discharge petition and found that "the State has met its burden and shown by clear and convincing evidence that [O'Neal] remains a sexually violent person at this time." (R. 109:1.)

O'Neal appealed, asserting that the State failed to present sufficient evidence to support the finding that O'Neal was more likely than not to commit a future act of sexual violence. *O'Neal*, 2020 WL 6877941, ¶ 1. This Court affirmed. *Id.*

III. O'Neal's 2019 discharge petition

As part of O'Neal's 2019 re-examination under Wis. Stat. § 980.07, the Wisconsin Department of Health Services filed a treatment progress report and reexamination report with the circuit court. (R. 122; 123; 124.)

2019 treatment progress report. Psychologist Laura DeMarzo, a Sand Ridge Treatment Center provider, prepared O'Neal's 2019 treatment progress report. (R. 123:1.) DeMarzo's report addressed O'Neal's treatment progress and factors related to his risk of sexually reoffending. (R. 123:3–11.)

DHS's 2019 reexamination report. DHS psychologist Dawn Pflugradt prepared O'Neal's 2019 reexamination

report. (R. 124:1.) Her report provides a variety of information about O'Neal, including his background (R. 124:2–3), his criminal history and a discussion of undetected sex offenses (R. 124:3–5), his treatment history (R. 124:5–7), and O'Neal's statements during an interview with Pflugradt (R. 124:7–9).

Pflugradt diagnosed O'Neal with several disorders including sexual sadism in a controlled environment, exhibitionistic disorder in a controlled environment, voyeuristic disorder in a controlled environment, and antisocial personality disorder. (R. 124:8–10.) She opined that these disorders met Chapter 980's definition of a mental disorder because they affected O'Neal's emotional or volitional capacity and predisposed him to engage in sexually violent acts. (R. 124:9–10.)

Pflugradt opined that O'Neal remained more likely than not to engage in future acts of sexual violence. (R. 124:22.) Pflugradt based her risk assessment on her application of risk assessment tools including the Static-99R and VRS-SO, which "measures changes in the dynamic factors following treatment progress," including sexual deviance, criminality, and treatment responsivity. (R. 124:11–17.) Pflugradt considered other risk factors including O'Neal's psychopathy, age, and treatment progress. (R. 124:17–19.)

The court appointed evaluator's 2019 report. At O'Neal's request, the circuit court appointed psychologist Sharon Kelley, under Wis. Stat. §§ 980.031(3) and 980.07(1). (R. 132.) Kelley diagnosed O'Neal with sexual sadism disorder, antisocial personality disorder, and exhibitionistic disorder. (R. 144:8.) Kelley opined that O'Neal's sexual sadism disorder and antisocial personality disorder constituted predisposing mental disorders under ch. 980. (R. 144:9.)

Kelley opined that O'Neal's risk of committing another sexually violent offense was below the "more likely than not"

threshold and recommended discharge. (R. 144:17.) Kelley assessed O'Neal's risk using the Static-99R and the VRS-SO. (R. 144:9–14.) Kelley also reviewed several protective factors that may further decrease the risk of future sex offending. (R. 144:15.) These factors included the time an individual has been free in the community without reoffending, life expectancy, treatment progress, and intensive supervision. (R. 144:15–16.)

With respect to "time free" in the community, Kelley stated: "Research demonstrates that for each year in an average community setting in which the individual has not received further convictions for sexual and non-sexual reoffending, risk for future sexual offenses decreases in a linear and incremental manner." (R. 144:15.) Kelley cited this research in her report: "Thornton, D., Hanson, R. K., Kelley, S. M., & Mundt, J. C. (2019). Estimating lifetime and residual risk for individuals who remain sexual offense free in the community: Practical applications. *Sexual Abuse*. Online first publication." (R. 144:15.) The article is not in the record.

Based on data related to the Static-99R "and accounting for his time free in the community," Kelley reported "O'Neal has an estimated sexual recidivism risk of 27% across 20 years (± 5% points)." (R. 144:16.) Finally, based on research related to undetected sex offenses, Kelley estimated O'Neal's lifetime sexual recidivism risk to be approximately 34%. (R. 144:16.)

Non-evidentiary hearing on O'Neal's petition. The circuit court conducted a non-evidentiary hearing on O'Neal's petition. (R. 169:1.) O'Neal argued that psychologist Kelley supported her opinion with new research, i.e., the 2019 article she co-authored, which suggests a sex offender's "risk decreases over time based upon the amount of time [he has] been free in the community." (R. 169:4.) O'Neal also asserted discharge was appropriate because he has had greater

freedom, i.e., fewer restrictions on his supervised release, since 2018. (R. 169:4–5.)

The State disagreed, noting that offense-free time in the community is not new research and was part of the original Static-99R study. (R. 169:8.) Further, the State argued that while Kelley referenced the article, she did not explain how it applied to O'Neal. (R. 169:8.) Therefore, the State argued that O'Neal had not met his burden of production of showing sufficient change that warranted granting a discharge trial. (R. 169:11.)

The circuit court's decision. The circuit court denied O'Neal's petition without a discharge trial. (R. 147:5.) While noting that Kelly "mentioned a 2019 instrument that utilizes a time free analysis," the circuit court observed that the "study itself is only cited as a footnote." (R. 147:4.) The circuit court observed that Kelley's report did not state whether "the 2019 study is new information or simply re-affirms old information. A study that concludes that each year an offender remains crime-free reduces their recidivism risks, does not sound like a significant new scientific finding, and that's really all Dr. Kelley's report states about the 2019 study." (R. 147:4–5.) The circuit court concluded that there was "insufficient analysis of the purported 2019 new study cited by Dr. Kelley . . . to Mr. O'Neal individually over an extended period of time." (R. 147:5.)

STANDARD OF REVIEW

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

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

ARGUMENT

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

A. Legal principles guiding a circuit court's decision to grant a sexually violent person a discharge trial.

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

Through 2013 Act 84, the Wisconsin Legislature retained the general framework for reviewing discharge petitions under section 980.09, but it made several significant revisions that guide how a circuit court determines whether to grant a discharge trial. Act 84 retained the two-step process for reviewing a petition for discharge. Under the first step, the circuit court conducts a paper review of the discharge petition and its attachments to determine if the person no longer meets criteria for commitment. *See State v. Hager (In re*

Commitment of Hager), 2018 WI 40, ¶ 24, 381 Wis. 2d 74, 911 N.W.2d 17 (citing *Arends*, 325 Wis. 2d 1, ¶ 27).

Under the second step, the circuit court reviews the petition against facts in the record to determine if the statutory criteria for discharge have been satisfied. *See Hager*, 381 Wis. 2d 74, ¶ 25. This two-step process serves to "weed[] out meritless and unsupported petitions, while still protecting a petitioner's access to a discharge hearing." *Arends*, 325 Wis. 2d 1, ¶ 22.[1]

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

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[1] As amended, Wis. Stat. § 980.09(1) focuses solely on the allegations contained within the discharge petition. The State agrees that O'Neal's *petition* satisfied section 980.09(1) because it "alleges facts from which [the factfinder] would likely conclude [O'Neal's] condition has changed" since his 2018 discharge trial. O'Neal and the State dispute whether *the record* contains facts from which a factfinder would likely conclude that O'Neal is no longer a sexually violent person. Wis. Stat. § 980.09(2). Therefore, the State focuses its argument on subsection 980.09(2)'s application to O'Neal's case.

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

Third, the revision shifts the starting point for assessing whether a committed person's condition has changed from a date to an event. Previously, any change was measured from the date of the initial commitment. Wis. Stat. § 980.09(1) (2005–06). Now, a circuit court assesses change from the most recent order either directing commitment or denying discharge from a commitment after a hearing on the merits. Wis. Stat. § 980.09(1) and (2) (2017–18). Under section 980.09(1), the petition must allege that "the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment order if the person has never received a hearing on the merits of a discharge petition."

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

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

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

Relying on language in the lead opinion in *Hager*, 381 Wis. 2d 74, ¶ 30, both the circuit court and O'Neal assume that section 980.09(2) does not allow a circuit court to weigh evidence when it reviews a discharge petition. (R. 147:2–3; O'Neal's Br. at 4, 9.) Contrary to this interpretation, the supreme court's fractured decision in *Hager* does not resolve how a circuit court should apply section 980.09(2)'s increased burden of production when it reviews a discharge petition.

Three members of the supreme court would have held that circuit courts "are to carefully examine, but not weigh, those portions of the record they deem helpful to their consideration of the petition, including facts both favorable as well as unfavorable to the petitioner." *Hager*, 381 Wis. 2d 74, ¶ 30. These justices reasoned that section 980.09(2)'s plain language does not permit a circuit court to weigh evidence and that a contrary interpretation that allowed a court to weigh evidence would impermissibly shift the burden of persuasion to the committed person and violate the person's due process rights. *Id*. ¶ 31.

In concurrence, two justices joined "the court's opinion except with respect to its conclusion that § 980.09(2) prevents the court from weighing conflicting evidence." *Hager*, 381 Wis. 2d 74, ¶ 77 (Kelly, J., concurring). The concurring justices believed that section 980.09(2) required the circuit court to weigh evidence in the record when it reviewed a discharge petition. *Hager*, 381 Wis. 2d 74, ¶ 66 (Kelly, J., concurring). These justices likened the "would likely conclude" standard to *Strickland*'s[2] prejudice standard. *Id*.

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

¶ 75 (Kelly, J., concurring). Under this standard, the committed person need only demonstrate a reasonable probability that the result of a trial would be different. *Id.* ¶ 76 (Kelly, J., concurring). "[B]ecause demonstrating a reasonable probability does not shift the burden of persuasion to the petitioner," these justices concluded that Act 84's revisions to section 980.09(2) do not violate due process. *Id.* ¶ 77 (Kelly, J., concurring).

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

While two concurring justices and two dissenting justices agreed that section 980.09(2) provided for weighing evidence, their agreement on this point does not establish a holding. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (citations omitted). The Wisconsin supreme court follows the *Marks* rule. *State v. Griep*, 2015 WI 40, ¶ 36, 361 Wis. 2d 657, 863 N.W.2d 567. "Under *Marks*, the positions of the justices who dissented from the judgment are not counted in examining the divided opinions for holdings." *Id.* ¶ 37 n.16.

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

The State, like O'Neal, asks this Court to interpret section 980.09(2) in a manner that allows the circuit court to

assess a petition against the facts in the record without weighing those facts when it decides whether the record supports a discharge trial.[3]

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

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

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[3] Before the supreme court, the State conceded that section 980.09(2) does not allow a circuit court to weigh evidence when it reviews a discharge petition. *State v. Hager (In re Commitment of Hager)*, 2018 WI 40, ¶ 28 n.18, 381 Wis. 2d 74, 911 N.W.2d 17. Consistent with its position before the supreme court, the State follows this position in O'Neal's case.

Wis. 2d 351, 825 N.W.2d 311. This new evidence may be newly-discovered evidence or it may be previously known evidence, but it must be "new" in the sense of being newly presented or used.

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

This test is not concerned with the impact of the new evidence on a reviewing court's view of the case. *See Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 111, ¶ 44. The test focuses, rather, on a reasonable jury's assessment of the new evidence. *Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 111, ¶ 44. So, in a newly discovered evidence case, the reviewing court is not permitted to weigh the evidence favoring a different result against evidence indicating that the result would be the same. *State v. Edmunds*, 2008 WI App 33, ¶ 18, 308 Wis. 2d 374, 746 N.W.2d 590. Rather, the court must compare the new evidence with the old evidence to assess how a reasonable jury would probably decide a new trial with the new evidence added to the evidence that they heard previously.

Similarly, a committed sexually violent person now must show that a trier of fact, if it heard the new evidence, would likely reach a different result from the one reached at

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

Again, the reviewing court does not weigh any competing evidence. Rather, it must compare the new evidence with the previous evidence to assess whether sufficient change has occurred such that it is likely that a trier of fact would reach a different result at a new trial. Wis. Stat. § 980.09(2). Although section 980.09(2) provides that the question is whether the trier of fact would likely conclude that the committed person "no longer meets the criteria for commitment," this language must be considered in the context of Wis. Stat. § 980.09(3). Section 980.09(3) provides that a trial should be held after a determination that a person "no longer meets the criteria for commitment" and that the State bears the burden of proving by clear and convincing evidence "that the person meets the criteria for commitment." This language must also be considered with Wis. Stat. § 980.09(4), which provides that the committed person shall be discharged if the trier of fact "is satisfied that the state has not met its burden of proof."

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

Hence, the statute requires the committed person simply to show that the result of a new discharge trial would likely be different from the result of the last one. This burden

serves the Legislature's statutory purpose of "weeding out meritless and unsupported petitions, while still protecting a petitioner's access to a discharge hearing." *Arends*, 325 Wis. 2d 1, ¶ 22.

Although present section 980.09(2) continues to direct courts to consider any current or past reports of periodic examinations, relevant facts in the petition and response, arguments of counsel, and any documentation provided by the parties, this is a verbatim repetition of a provision in the previous statute. *Compare* Wis. Stat. § 980.09(2) (2005–06) *with* Wis. Stat. § 980.09(2) (2017–18). In *Arends*, this Court concluded that the enumerated items should be examined for facts that could support relief for the committed person at a discharge hearing. *Arends*, 325 Wis. 2d 1, ¶ 38. There is nothing in the revised statute that suggests any intent to alter the effect of that ruling. Therefore, these items, to the extent that they qualify as new evidence, could be used to assess the quality of the new evidence presented by the committed person as compared to the evidence presented at the most recent hearing on the merits of the person's commitment.

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

B. O'Neal's condition has not sufficiently changed such that a factfinder would likely conclude that he is no longer sexually violent.

The circuit court properly denied O'Neal's petition because his petition, when viewed in conjunction with the record, did not allege sufficient facts from which a factfinder would likely conclude that his condition has sufficiently changed. (R. 147:1–4.)

O'Neal could only satisfy his burden of production under section 980.09(2) if the record supported his claim that his condition has sufficiently changed, either because he no longer has a mental disorder or because his risk to reoffend has meaningfully declined. The determination of whether O'Neal has "sufficiently changed" must be assessed by considering the record, including the evidence presented at his 2018 discharge trial. Wis. Stat. § 980.09(2).

O'Neal contends that published research postdating his 2018 discharge trial supported Kelley's opinion that O'Neal was no longer a sexually violent person and, therefore, the circuit court should have granted him a discharge trial. (O'Neal's Br. 9–10.) In her 2019 evaluation, Kelley noted a 2019 study that an offender's risk of sexual reoffending decreases with each year that the offender spends in "an average community setting" without reoffending. (R. 144:15.) Kelley incorporated O'Neal's "time free credit" into her final risk estimate, concluding that "O'Neal's lifetime sexual recidivism risk is estimated to be approximately 34%." (R. 144:15–16.)

"Time free" was just one component of Kelley's assessment of O'Neal's risk. But the task before the circuit court was to assess whether Kelley's opinion, when viewed against the record, demonstrates that O'Neal has sufficiently changed such that a factfinder would reasonably conclude that he was no longer sexually violent. Wis. Stat. § 980.09(2).

And viewing Kelley's risk assessment against the risk assessments presented at O'Neal's 2018 discharge trial does not lead to the conclusion that he has sufficiently changed.

Kelley's assessment of O'Neal's risk at 34% falls within the range of risk assessments of the two experts, Thornton and Lodl, at O'Neal's 2018 trial who opined that O'Neal was no longer sexually violent. Though initially reporting a greater risk, Thornton testified that O'Neal's sexually violent reoffense risk was in the 25% range. *O'Neal*, 2020 WL 6877941, ¶ 14. Lodl opined that O'Neal's risk was "'up to 37 percent' over a ten-year period." *Id.* ¶ 15. The factfinder at O'Neal's 2018 trial rejected O'Neal's and Lodl's opinions, agreeing with the DHS evaluator who opined that O'Neal remained more likely than not to commit a sexually violent offense. *Id.* ¶ 9. And based on her 2019 reexamination under section 980.07, Pflugradt's opinion of O'Neal's risk remains unchanged. (R. 124:22.)

Applying the framework akin to the newly-discovered evidence, *supra* Section A.3., even if the "time free" component is "new" information, there is no reasonable probability that O'Neal's discharge trial would end differently, i.e., result in a discharge from his commitment. Kelley's assessment of O'Neal's total risk falls within Lodl's and Thornton's range of risk. The factfinder rejected Lodl's and Thornton's assessment of O'Neal's risk, and Pflugradt, whom the factfinder previously found credible, had not changed her assessment since O'Neal's 2018 trial. (R. 124:22; 168:164.)

Viewing Kelley's opinion of O'Neal's risk of reoffending against the record, including the experts' 2018 trial testimony and Pflugradt's 2019 reexamination report, the circuit court properly determined that the record did not contain facts from which a factfinder likely would conclude that O'Neal had sufficiently changed such that he no longer met criteria for commitment. On this record, the circuit court properly denied O'Neal's discharge petition.

C. O'Neal's arguments do not entitle him to a new discharge trial.

O'Neal believes that the circuit court should have granted him a discharge trial based on Kelley's consideration of research released in 2019 about recidivism risk and an offender's "time free" in the community without reoffending. O'Neal's singular focus on this component of Kelley's evaluation is misplaced for several reasons.

First, although O'Neal cites no case law discussing the role of new research in assessing a discharge petition, O'Neal's argument appears to implicitly rely on this Court's reasoning in *State v. Richard (In re Commitment of Richard)*, 2014 WI App 28, 353 Wis. 2d 219, 844 N.W.2d 370. In *Richard*, this Court held that a committed person is entitled to a discharge trial when he supports his "petition with a recent psychological evaluation applying new professional research to conclude that the petitioner is no longer likely to commit acts of sexual violence." *Id.* ¶ 1. Even if O'Neal had expressly relied on *Richard*, his reliance would be misplaced.

Richard was decided under a prior version of section 980.09. *State v. Timm (In re Commitment of Timm)*, No. 2018AP1922, 2020 WL 4192075, ¶ 31 (Wis. Ct. App. July 20, 2020) (unpublished) (R-App. 105). As this Court explained, under the prior discharge standard, "the existence of new professional research—if applied to the petitioner by an expert to show that the petitioner's risk had fallen below the 'more likely than not' threshold—constituted evidence from which a fact finder 'may conclude' the petitioner was no longer dangerous." *Id.* In contrast, "the current standard assesses what the fact finder 'would likely conclude' based on the evidence." *Id.* As Act 84 amendments make clear, "the focus of the inquiry is on whether the person's condition has 'sufficiently changed,' rather than—as under the old standard—on whether they had merely supplied some

evidence that they no longer met the criteria for commitment." *Id*. (citing 2013 Wis. Act 84, § 23).

As this Court observed, by "changing the predictive standard to 'would likely conclude,' the legislature has authorized a more searching inquiry—even if one does not 'weigh' the evidence—when determining whether there has been a sufficient change in the person's condition." *Timm*, 2020 WL 4192075, ¶ 32. The "time free" component of Kelley's evaluation was just part of the record that the circuit court considered when it decided whether O'Neal had sufficiently changed under section 980.09(2). And as the State argues, *supra* Section B, Kelley's risk assessment does not demonstrate sufficient change when considering the record, including the risk assessment evidence presented at O'Neal's 2018 discharge trial.

Second, even if *Richards* still applied, O'Neal's argument assumes that Kelley's consideration of the "time free" component is, in fact, new research. As the prosecutor noted at the section 980.09(2) hearing, "While that article is new, the idea of time offense-free in the community is not. That was actually part of the original STATIC 99." (R. 169:8.)

Indeed, the coding rules for the Static-99R include an appendix, "Adjustments in Risk Based on Time Free." Andrew Harris, Amy Phenix, R. Karl Hanson, & David Thornton, *STATIC-99 Coding Rules Revised - 2003*, pp. 59–60, (2003) (available online at http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf, last viewed November 30, 2020). The authors stated, "In general, the expected sexual offence recidivism rate should be reduced by about half if the offender has five to ten years of offence-free behaviour in the community." *Id*. at 59. The appendix also includes a table that shows an offender's decline in risk based on the offender's score on the STATIC-99 and the number of years the offender is risk free in the community. *Id*. at 60.

O'Neal makes no effort to explain how the 2019 article Kelley authored with Hanson and Thornton does anything more than repeat the research summarized in the STATIC-99 Coding Rules. Each evaluator, including Thornton who co-authored the Coding Rules, relied on the STATIC-99R when they conducted their 2018 evaluations. There simply is no reason to believe that the Pflugradt, Thornton, and Lodl did not account for O'Neal's "time free" when they evaluated him in 2018. Further, as the circuit court stated, "Kelley's report does not say whether the 2019 study is new information or simply re-affirms old information. A study that concludes that each year an offender remains crime-free reduces their recidivism risks, does not sound like a significant new scientific finding." (R. 147:4–5.)

Absent further explanation, Kelley's reference to the 2019 article does nothing more than place "the old wine of human experience in the new bottles of recent research and labels the entire package as 'new.'" *State v. McDermott*, 2012 WI App 14, ¶ 21, 339 Wis. 2d 316, 810 N.W.2d 237. It does not demonstrate O'Neal's condition has sufficiently changed such that he should have received a discharge trial.

Third, O'Neal's "time free" argument rests on the assumption that he has been in "*an average community setting*" since his placement on supervised release. (R. 144:15.) O'Neal was released to supervised release in 2015. (R. 72:3.) Kelley determined that O'Neal first met criteria for being deemed "time free" in November 2018, when he had been approved to go to a "Christian coffee bar monthly, use a taxi to engage in services once every other week, walk for exercise three days a week, smoke E-cigarettes, and go for meals and events with his pastor." (R. 144:15.) There is nothing "average" about how O'Neal lives in a community setting. While he has incrementally received additional freedoms since being placed on supervised release, the circuit court noted that O'Neal's community access remained

substantially restricted. (R. 147:5.) Therefore, the circuit court reasonably concluded, "This is just not a long enough period of time for a reasonable court or jury to likely conclude that there is enough data to determine that Mr. O'Neal no longer meets the criteria for commitment at this point in time." (R. 147:5.)

Contrary to O'Neal's argument, the circuit court did not weigh the evidence when it commented that O'Neal had not been time free "long enough." (O'Neal's Br. 10–11.) Rather, the circuit court performed its duty as section 980.09(2) contemplates: It assessed the information O'Neal put forth in support of discharge, i.e., Kelley's report, against the record, including the evidence at his 2018 discharge trial. O'Neal still had qualifying mental disorders, including sexual sadism disorder and antisocial personality disorder. (R. 144:8.) And despite Kelley's "time free" observation, her conclusion regarding O'Neal's total risk fell within the range of risk that O'Neal's experts, Lodl and Thornton, testified about at O'Neal's 2018 trial. Said another way, Kelley's assessment of O'Neal's total risk to reoffend presents an insubstantial change in Lodl's and Thornton's assessments of O'Neal's risk, assessments that the factfinder considered and rejected at O'Neal's 2018 trial.

On this record, it is not likely that a factfinder would conclude that O'Neal's condition has changed such that he no longer meets criteria for commitment.

CONCLUSION

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

Dated this 28th of December 2020.

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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 6043 words.

Dated this 28th day of December 2020.

Electronically signed by:

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

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Supplemental Appendix
In re the commitment of Roy C. O'Neal: State of Wisconsin v. Roy C. O'Neal
Case No. 2020AP1270

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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