Wisconsin Department of Justice Presentation to the

SPECIAL COMMITTEE ON SUPERVISED RELEASE AND DISCHARGE OF SEXUALLY VIOLENT PERSONS

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I. REVIEW CHAPTER 980 INITIAL COMMITMENT PROCESS

a. Persons are evaluated by DOC or other agency having custody of a person with a qualifying prior record to determine if the person meets commitment criteria under ch. 980 for commitment as a sexually violent person (SVP).

b. If deemed to qualify for civil commitment as a SVP, the agency with custody of the person must notify the relevant DA's and WI DOJ re: the person and the evaluation result not sooner than 90 days from the date the person will be discharged from custody. [§ 980.015(2)]

c. At the request of the agency with custody, DOJ may file a petition seeking commitment. If DOJ declines to file, the DA for either: the county of conviction for the sexually violent offense, the county of anticipated residence upon discharge from custody, or the county where the person is then in custody may file a petition for commitment in their respective counties. [§ 980.02(1)]

d. A petition filed under § 980.02 must be filed before the person is released or discharged from custody. [§ 980.02(1m)]

e. After the filing of a petition seeking commitment, the court shall review the petition to determine if it states probable cause to believe that the person is a SVP and, if the court finds probable cause so to believe, the person is ordered detained pending disposition of the petition. [§ 980.04(1)]

f. If the court finds that the petition alleges probable cause to believe the person is eligible for commitment, the court must hold an evidentiary hearing to determine if there is evidence sufficient to establish probable cause to believe the person is a SVP. [§ 980.04(2)] If the court finds there

is probable cause to so believe, the person is ordered detained and transferred to an appropriate institution for further evaluation and pending trial. [§ 980.04(3)]

g. The initial commitment trial is to the court unless the subject to be committed, his attorney or the state requests a trial to a jury within 10 days after the probable cause hearing. [§ 980.05(2)]

h. In order to prevail on the petition for commitment, the state must prove beyond a reasonable doubt that:

i. The person has been convicted of/found delinquent for/found not guilty by reason of mental disease or defect for a sexually violent offense [defined in § 980.01(6)];

ii. The person has a mental disorder [defined in § 980.01(2)], and

iii. The person is dangerous to others because the person's mental disorder makes it likely that he will engage in acts of sexual violence [defined in § 980.01(1b) and (6)].

i. If the court or jury finds that the person is a sexually violent person, the court shall enter judgment to that effect and shall commit the person to the custody of the Department of Health Services (DHS) for control, care and treatment until such time as the person is no longer a sexually violent person. The initial commitment order must specify that the commitment is for institutional placement at the outset. [§§ 980.05(6) and 980.06]

II. CURRENT LAW - PERIODIC RE-EXAMINATION AND TREATMENT PROGRESS REPORT

a. DHS must conduct a periodic (annual) re-examination of the committed person, within 12 months of the initial commitment and again thereafter at least once every 12 months. [§ 980.07(1)] The court may order a re-examination of the person at its discretion at any time. [§ 980.07(3)]

i. Purpose of re-examination is to determine whether the person has made sufficient progress for the court to consider whether the person should be placed on supervised release or discharged from commitment. The DHS examiner must apply the criteria for

supervised release set out in § 980.08(4)(cg) and the criteria for discharge **set out in § 980.09(3).**

ii. At the time of the DHS periodic re-examination, the committed person may retain or have the court appoint an examiner as provided in § 980.031(3). [§ 980.07(1)

b. At the time of the re-examination required by § 980.07(1), the treating professional(s) providing treatment to the person (the SRSTC treatment staff) must prepare a "treatment progress report" (TPR) and provide it to the DHS examiner. The TPR shall consider: (1) the specific factors associated with the person's risk for committing a SVO; (2) whether the person has made "significant progress in treatment" or has refused treatment; (3) the person's ongoing treatment needs; and, (4) any specialized needs or conditions associated with the person that must be considered in future treatment planning. [§ 980.07(4)]

c. The DHS must submit the periodic re-examination report and the TPR to the committing court and provide copies to the committed person, the DOJ and any applicable DA. The court is required to forward a copy of the reports to the attorney for the committed person. [§ 980.07(6)]

III. CURRENT LAW - POST-COMMITMENT PROCEEDING – SUPERVISED RELEASE, § 980.08 AND PROPOSED PROCEDURAL CHANGES

a. Many of the relevant provisions of § 980.08 were created or substantially modified by 2005 Act 434.

b. A committed person may petition the court for an order modifying the commitment order by authorizing "supervised release" (SR) [§ 980.08(1)]

i. The petition can only be filed if at least 12 months have passed since the initial commitment order or at least 12 months have passed since

the most recent petition for supervised release was denied or the most recent order for supervised release was revoked.[1]

ii. The director of SRSTC may file a supervised release petition at any time on the committed person's behalf.

c. Within 20 days of receipt of a petition for SR, the court shall appoint one or more qualified examiners to examine the person and furnish the court with a written examination report within 30 days of the appointment. The report is to address the SR criteria set out in § 980.08(4)(cg)[2] and, if SR is deemed appropriate, the type of treatment and services that the person may need on SR. [§ 980.08(3)]

d. The hearing on an SR petition is to be held within 30 days of receipt of the report of the court-appointed examiner, unless the court extends the time for good cause. Trial on the petition is to the court, not a jury. [§ 980.08(4)(a)]

e. The court may not authorize SR unless, based on all of the reports, trial records and evidence presented to it, the court finds that <u>all</u> of the criteria in § 980.04(4)(cg) are met. See, Appendix 1. In considering whether those criteria are met the court can consider, among other things, the factors set forth in § 980.08(4)(c). See also, Appendix 1.

i. The current statutory language does not expressly assign the burden of proof or the standard of proof to either party. The former version of 980.08 required the state to prove that SR was not appropriate by clear and convincing evidence.

1. The Wisconsin Supreme Court interpreted current § 980.08(4)(cg) and determined that the terms of the statute unambiguously assigned the burden of proof on the criteria

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[1] Current § 980.075(2)(a) provides that a committed person may file a supervised release or a discharge petition "within 30 days after the department submits its report to the court under s. 980.07(6)." This appears to conflict with the specific provision of 980.08(1) (and 980.09(1)) regarding the appropriate timing of the filing of the petitions.

[2] The supervised release criteria, including the definition of "significant progress in treatment" from § 980.01(8), are set out in Appendix 1 along with the other factors the court may consider as set forth in § 980.08(4)(c).

for SR upon the committed person and concluded that the standard of proof that must be met by the committed person was by "clear and convincing evidence." *State v. West*, 2011 WI 83, ¶¶ 55, 81, 336 Wis. 2d 578, 800 N.W.2d 929.

f. If the court finds that all of the criteria for SR have been proven, the court must select a county to prepare a SR report for the court. That county is to be the county of residence for the committed person unless the court has good cause to select another county. [§ 980.08(4)(cm)]

g. Sections 980.08(4)(d) – (f) set forth specifics regarding the preparation of and content of the SR report and plan, including the identification of residential placements and the cooperation between the county departments and the DHS. Any county department preparing plans for residential placement must submit its plan within 60 days of the finding that SR is appropriate and the DHS must submit its full SR plan and report within 90 days of that finding. Both time periods may be extended for cause.

h. After the SR plan/report is submitted the court must review it and determine if it is adequate to meet the needs of the person and the protection of the public. If the court finds that it is the court must enter an order granting SR. If the court concludes the plan/report is not sufficient for those purposes it must either (1) determine that SR is not appropriate, or (2) direct the preparation of another SR plan/report for consideration. [§ 908.08(4)(g)]

i. The DHS cannot arrange placement in a facility that did not exist before January 1, 2006. [§ 980.08(5m)]

j. An order for SR places the person in the custody and control of DHS on an outpatient basis and DHS must arrange for his control, care and treatment in the least restrictive manner consistent with his needs and the requirements/rules established by the court's order [and consistent with § 980.09(9)(a) below]. The person is subject to the conditions set by the court and the rules of the department. Before placement is accomplished DHS must notify the municipal police department and the sheriff of

municipality and county where the person will be residing of the placement unless they have waived in writing the notice requirement. [§ 980.08(6m)]

i. **It is important to understand that an order for "supervised release" does not terminate the ch. 980 commitment. The person remains "committed" but is simply being granted an outpatient status under the control and supervision of DHS. This is distinguished from a grant of "discharge" under § 980.09. "Discharge" does terminate the commitment and the person is released from commitment and any DHS supervision and is returned to the community. That discharged patient will be supervised only to the degree that the GPS monitoring program applies to him or to the degree that he continues to be under the supervision of DOC as a result of a criminal sentence.**

k. Sections 980.08(7) and (8) sets out the procedures by which the department may seek revocation of the SR order/placement upon alleged violations of rules or conditions of SR and the procedures and standards by which the court decides whether to revoke supervised release.

l. Section 980.08(9) provides that, for the first year of supervised release, the court order must restrict the person to their residence except for outings directly supervised by a Department of Corrections (DOC) escort for the limited purposes of employment, religious activities, or caring for the person's basic living needs (shopping, banking, etc.).

IV. SIGNIFICANT DFFERENCES BETWEEN CURRENT § 980.08 AND § 980.08 PRIOR TO 2005 WI ACT 434

a. Under prior law, the committed person could not petition for SR until 18 months had elapsed since the initial commitment order was entered (current law – 12 month wait). The person could petition for SR after waiting only 6 months after denial of most recent SR petition or revocation of previous SR (current law – 12 month wait). [§ 908.08(1), 2003-04 Wis. Stats.)

b. Section 980.08(4)(b), 2003-04 Wis. Stats. provided that: The court shall grant the petition unless the state proved by clear and convincing evidence one of the following:

1. That it is still likely that the person will engage in acts of sexual violence if the person is not continued in institutional care.
2. That the person has not demonstrated significant progress in his or her treatment or the person has refused treatment.

c. Section 980.08(4)(c), 2003-04 Wis. Stats. was substantively the same as current § 980.08(4)(c) regarding the factors that the court could consider in making its decision as to whether to grant the SR petition (see Appendix 1).

d. Section 980.08(5), 2003-04 Wis. Stats., set forth the entirety of the requirements/guidelines for the department in developing the SR plan and identifying the residential placement.

V. CURRENT LAW - POST-COMMITMENT PROCEEDING - DISCHARGE FROM COMMITMENT, § 980.09

a. A committed person may petition for discharge at any time. [§ 980.09(1)[3]]

b. The filing of a discharge petition does not necessarily mean that a trial or evidentiary hearing on merits of that petition will occur. Sections 980.09(1) and (2) contain directions for, and directives to, the court for review of the petition before an evidentiary hearing on the petition is required. The meaning of this statutory language has required judicial (discussed below). The statutory language is set out in detail here for purposes of review.

i. Section 980.09(1) provides: "The court shall deny the petition under this section without a hearing unless the petition alleges *facts* from which the court or a jury *may conclude* the person's condition has

[3] The first paragraph of text in § 980.09 is not numbered. The first numbered paragraph in the section is § 980.09(2). The state will refer to the first, unnumbered paragraph of 980.09 as "980.09(1)."

changed *since the date of his or her initial commitment* so that the person does not meet the criteria for commitment as a sexually violent person." (emphasis added)

ii. Section 980.09(2) provides: "The court shall review the petition within 30 days and may hold a hearing to determine if it *contains facts* from which the court or jury *may conclude* that the person does not meet the criteria for commitment as a sexually violent person. *In determining ... whether facts exist* that might warrant such a conclusion, the court *shall consider* any current or past reports filed under s. 980.07, relevant facts in the petition and in the state's written response, arguments of counsel, and any supporting documentation provided by the person or the state. *If the court determines that the petition does not contain facts* from which a court or jury may conclude that the person does not meet the criteria for commitment, the court shall deny the petition. *If the court determines that facts exist* from which a court or jury could conclude the person does not meet criteria for commitment the court shall set the matter for hearing." (emphasis added)

iii. Section 980.09(3) provides: The court shall hold a hearing within 90 days of *the determination that the petition contains facts* from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. The state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person. (emphasis added)

1. We note at this point that §§ 980.09(2) and (3) seem to alternate between describing the court's task in reviewing the petition at that stage as deciding if the petition does, or does not, "contains facts" supporting a discharge conclusion and deciding if "facts *exist*" to support that conclusion. Perhaps these phrases are intended to mean the same thing. Regardless, the statutes could be clarified to establish more clearly the court's task in reviewing the petition and other materials and the standard to be applied by the court.

iv. Section 980.09(4) provides that if the court or jury concludes that the state has not met its burden of proof to show that the person currently meets the criteria for commitment as a sexually violent person the committed person shall be discharged from commitment. It further provides that if the court or jury finds that the state has met its burden so that the commitment will continue, the court may then proceed to consider whether to modify the institutional commitment by an order for supervised release under the standards set forth in § 980.08(4).

c. The courts have interpreted the meaning of §§ 980.09(1) and (2). A review of prior statutory and case law related to discharge processes before enactment of 2005 WI Act 434 may be helpful to understand the court interpretations of current § 980.09. That history is provided now.

VI. PRIOR LAW – POST-COMMITMENT PROCEEDING – DISCHARGE FROM COMMITMENT, § 980.09 and 980.10

a. Prior to the enactment of 2005 WI Act 434 (eff. August 1, 2006), ch. 980 contained 3 distinct methods by which the issue of discharge from commitment could be presented to the court.

i. Section 980.09(1)(a) – (c), 2003 – 04 Wis. Stats: The DHS secretary could authorize the committed person to petition for discharge at any time if the secretary determined that the person was no longer a sexually violent person.

1. Upon a discharge petition under this procedure, the court was required to automatically order a hearing on discharge without review of the petition at any intermediate stage.
2. The state carried the burden of proof to proof that the person was still a sexually violent person by clear and convincing evidence. If the state did not meet its burden, discharge followed.
3. If the state met its burden of proof, the commitment continued but the court could proceed to consider whether an order for supervised release was appropriate.

ii. Section 980.09(2)(a) – (c), 2003 – 04 Wis. Stats.: The committed person could petition for discharge without the approval of the secretary of DHS. This process did not actually involve the filing of a distinct "petition" for discharge. Rather, at the time of the periodic re-examination required by § 980.07, the person was notified of his right to seek discharge without DHS approval and was offered the opportunity to waive that right. If the person did not expressly waive the right to seek discharge at the time the re-examination report was presented to the court, the court was required to set a "probable cause" hearing to determine "whether facts exist that warrant a hearing on whether the person is still a sexually violent person." If the court found "probable cause," the court set a trial on the discharge issue. The state again bore the burden of proof.

1. This "probable cause hearing" was held to be a "paper review" of the § 980.07 report and any competing evaluation reports from an expert on behalf of the committed person and was for the purpose of "weeding out" frivolous petitions. *State v. Paulick*, 213 Wis. 2d 432, 570 N.W.2d 626 (Ct. App. 1997).
2. The court was not permitted to weigh competing inferences or conclusions but was to determine if there was a plausible basis for concluding that the person was no longer a sexually violent person. *State v. Kruse*, 2006 WI App. 179, 296 Wis. 2d 130, 722 N.W.2d 742.
3. However, an expert opinion supporting discharge was required to be based on some relevant facts, change in the person, or change in the professional knowledge or research <u>that had not previously been considered by prior experts or a fact-finder in a previous proceeding that resulted in continued commitment</u>. *Kruse; State v. Combs*, 2006 WI App 137, 295 Wis. 2d 457, 720 N.W. 2d 684.

iii. Section 980.10, 2003 -04, Wis. Stats: Notwithstanding the provisions of the § 980.09, the committed person was authorized to petition for discharge <u>at any time</u>.

1. The court was required to set a probable cause hearing in accordance with § 980.0992) above if the person had never before filed a petition for discharge without secretary's approval.
2. But if the person had previously pursued discharge without the secretary's approval under § 980.09(2) and the court had denied discharge at that time either because there was not "probable cause" or because, after a hearing on the merits, the court found that the person was still a sexually violent person, the court could deny the current discharge petition under § 980.10 without a hearing, unless the discharge petition under § 980.10 contained facts upon which a court could find the person had so changed that a discharge trial was now warranted.
   a. If the court found that the petition did contain facts warranting a hearing, the court was required to set a "probable cause" hearing in accordance with § 980.09(2)

VII. INTERPRETATION/MEANING OF CURRENT §§ 980.09(1) AND (2)

a. In *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513, the WI Supreme Court concluded that § 980.09(1) and (2), 2005-06 Wis. Stats. required a two part inquiry into (1) the sufficiency of a petition for discharge filed under these new provisions and (2) the total record to determine if sufficient facts supported holding an evidentiary hearing on the petition.

b. Section 980.09(1), 2005-06 Wis. Stats.

i. *Arends* concluded that § 980.09(1) requires the court to engage in a "paper review" of the petition and its attachments only to determine if it alleges facts from which a reasonable trier of fact could conclude from the facts in the petition that the petitioner does not meet the commitment criteria, using a standard similar to that used to decide a motion to dismiss for failure to state a claim in general civil practice. *Id.*, ¶¶ 27, 29.

1. This appears similar to the *Paulick* "paper review" under § 980.09(2), 2003-04 Wis. Stats.

ii. In *State v. Ermers*, 2011 WI App 113, 336 Wis. 2d 451, 802 N.W.2d 540, the court clarified that the "change" required by Wis. Stat. § 980.09(1) includes any "change in the person himself. . . [and any] change in the professional knowledge and research used to evaluate a person's mental disorder or dangerousness if the change is such that a fact finder could conclude the person does not meet the criteria for a sexually violent person." *Id.*, ¶ 16.

c. Section 980.09(2), 2005-06 Wis. Stats.

i. The *Arends* court held that the reviewing circuit court is to examine <u>all</u> of the documents described in the statute that exist in the file and is to "determine whether the documents and arguments before the court contain 'facts from which the court or jury may conclude that the person does not meet the criteria for commitment . . .'." *Id.*, ¶¶ 33, 37.

ii. The court noted that this review is also a limited one, testing whether the total record presented to the court could support discharge. *Id.*, ¶ 38.

iii. The *Arends* court also indicated that the determination of whether the petition and record satisfies the new § 980.09(2) sufficiency test is made with reference to prior proceedings in the case, not just the content of the documents in the file. The court appears to have confirmed that the review under the current version of Wis. Stat. § 980.09(2) remains subject to the *Combs* and *Kruse* limitation that was previously applied to review under the prior version of § 980.09(2), 2003-04 Wis. Stats. *Id.*, ¶ 39, n.21. The court of appeals has confirmed this reading of *Arends* and the conclusion that the same standard also applies to court review of the sufficiency of a petition under current § 980.09(1). *State v. Ermers*, 336 Wis.2d 451, ¶ 35.

1. That is, under *Combs, Kruse*, *Arends* and *Ermers*, to survive review under either § 980.09(1) or (2), there must be some meaningful change in circumstances (either the person's condition or the relevant professional knowledge) since the last determination that the person meets the commitment standard, whether that was at the initial commitment trial or some subsequent discharge proceeding.

VIII. CONSTITUTIONAL STANDARDS FOR CIVIL COMMITMENTS GENERALLY

The Department of Justice will be prepared to discuss generally the principles of law relating to constitutional issues of substantive due process, equal protection, double jeopardy, and *ex post facto* laws in the civil commitment context. Addressing those issues relative to specific questions or proposals will likely require research, study and careful consideration. Therefore, the Department elects not to set out in detail those principles here in order to avoid providing misimpressions about the applicability of a particular analysis to a particular proposal.

It is sufficient to say here that any substantive change to standards for supervised release, availability of discharge proceedings, or other substantive matters relating to supervised release or discharge will almost certainly result in constitutional challenges and great care and consideration are necessary.

It is clear that the courts consider at least the following things critical to, or very important for, the constitutionality of civil commitment procedures:

- Generally, a commitment standard and procedure that is narrowly tailored to address the compelling state interests in (1) protecting the public from dangerously mentally disordered offenders and (2) providing care and treatment to those persons.
    - The court's will scrutinize all civil commitment procedures and standards, and any changes to them, to determine if those procedures are "narrowly tailored" or if they sweep too broadly.
    - The court's will also carefully scrutinize the procedures to assure that the means and the ends of the procedure remains civil and not punitive
- The availability of periodic review for ongoing assessment of continuing mental illness/disorder (however that mental health status is defined).

- The availability of periodic review for ongoing assessment of continuing dangerousness linked to the mental status.
- The availability of a procedure to permit the committed person and/or the state to seek review of whether the person still meets commitment criteria or to require the court to review that issue.

APPENDIX 1

SUPERVISED RELEASE CRITERIA/CONSIDERATIONS 980.08(4)(cg)/980.08(4)(c)

980.08(4)(cg) – The court may not authorize SR unless court finds all of following are met:

1. Person has (a) made "significant progress in treatment" and (b) that progress can be sustained on SR. "Significant progress in treatment," as defined in § 980.01(8), means:

    a. Meaningfully participated in treatment program specifically designed to reduce his risk to reoffend offered at a facility described in 980.065;

    b. Participated in the treatment program to a level that was sufficient to allow ID of his specific treatment needs <u>and</u> then demonstrated, through overt behavior, a willingness to work on addressing specific treatment needs;

    c. Demonstrated an understanding of the thoughts, attitudes, emotions, behaviors and sexual arousal linked to his sexual offending and an ability to ID when they occur;

    d. Demonstrated sufficiently sustained change in the thoughts, attitudes, emotions and behaviors and demonstrated sufficient management of sexual arousal such that one could reasonably assume that, with continued treatment, the change could be maintained.

2. It is substantially probable [much more likely than not - § 980.01(9)] that the person will not engage in an act of SV while on SR;

3. Treatment that meets the person's needs and a qualified provider of the treatment are reasonably available on SR;

(OVER)

4. The person can be reasonably expected to comply with his treatment requirements and all of his conditions or rules of SR imposed by the court or the Department;

5. A reasonable level of resources can provide for the level of residential placement, supervision, and ongoing treatment needs that are required for the safe management of the person on SR.

980.08(4) – Other factors to be which may be considered (without limitation by enumeration):

1. The nature and circumstances of underlying or historical sexual offenses;
2. Mental health history;
3. Current mental condition;
4. Where the person will live;
5. How the person will support himself;
6. What arrangements are available to assure he will have access to necessary treatment (including pharmacological treatments);
7. What arrangements are available to assure he will participate in necessary treatment.

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