Wisconsin Department of Justice

**POTENTIAL MODIFICATIONS TO CH. 980**

**FOR CONSIDERATION BY THE SPECIAL COMMITTEE ON SUPERVISED RELEASE AND DISCHARGE OF SEXUALLY VIOLENT PERSONS**

This document sets forth those portions of ch. 980 that the Department of Justice has identified as falling within the scope of the Special Committee's study assignment and which, if modified, may improve the process for considering and granting both supervised release and discharge under ch. 980. Those modifications identified by the Department as potentially improving the process are highlighted below by ***bold text***.

I. § 980.07 - PERIODIC RE-EXAMINATION AND TREATMENT PROGRESS REPORT

a. DHS must conduct a periodic (annual) re-examination of the committed person. The 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 be 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 (really the standard for commitment).

i. 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)]

1. **Consider Clarification: The Committee may consider adopting language clarifying in § 980.07(1) that the court shall appoint an examiner for the person upon the person's request.**

b. The DHS shall submit the periodic re-examination report and the treatment progress report 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)]

i. **Consider Modifications: The Committee may wish to consider the following modifications to § 980.07, based on the suggestion below that § 980.075 be considered for repeal. These provisions currently appear in § 980.075(6) and (1m)(a). They would be retained from § 980.075.**

1. **Create a new § 980.07(7) providing in substance that: At any time before a hearing under ss. 980.08 or 980.09, the department may file a supplemental report if the department determines that court should have additional information. The court shall accept the supplemental and permit testimony from the department regarding the report or any relevant portion of the report.**

2. **Create a new § 980.07(8) providing in substance that: When the department provides a copy of the report under s. 980.07 (6) to the person who has been committed under s. 980.06, the department shall provide to the person a standardized petition form for supervised release under s. 980.08 and a standardized petition form for discharge under s. 980.09.**

II. § 980.075 – "PATIENT PETITION PROCESS" – CURRENT LAW AND POSSIBLE MODIFICATIONS

a. Section 980.075 sets forth a number of procedural requirements that may be better contained within either §§ 980.07, 980.08 or 980.09 directly. **Therefore, we generally see § 980.075 as unnecessary if the useful portions of it are transferred elsewhere, as suggested later.**

b. Section 980.075(2)(a) sets forth a 30 day time limit during which a committed person may file either a petition for SR or for discharge from commitment. The 30 day time limit is measured from the date DHS files the periodic reexamination report required by § 980.07. However, the supervised release statute (§ 980.08(1)) and the discharge statute (§ 980.09) contain specific provisions defining when a petition for either

can be filed. The § 980.075(2)(a) time limit may conflict with both of the specific "timing" provisions in the substantive statutes.

c. Section 980.075(2)(b) provides that if no SR or discharge petition is filed with the court after the periodic reexamination report is received by the court, the person's commitment status remains unchanged from that previously ordered by the court.

i. **Consider Modification: Even if § 980.075 is otherwise retained, the Committee should consider recommending the repeal of § 980.075(2). It confuses the issue of the proper time frame within which SR and discharge petitions can be filed. Section 980.075(2)(b) appears to be unnecessary – if no petition is filed the status quo continues by definition.**

III. § 980.08 - SUPERVISED RELEASE - CURRENT LAW AND POSSIBLE MODIFICATIONS

a. Section 980.08(1) sets out the time frame within which the committed person may file a petition for supervised release (SR). The SR 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.

i. **Consider Modification: The discharge statute (§ 980.09) currently provides that if, after a discharge trial, the discharge petition is denied, the court can proceed to consider whether an order for SR is appropriate. The court applies the same standards for that determination as it would if an actual SR petition had been filed by the committed person. § 980.09(4). The Committee should consider modifying § 980.08(1) to provide that if a court considers SR under § 980.09(4) and denies SR at that time, a new petition for SR cannot be filed until 12 months have passed from that denial. DOJ also suggests the Committee consider modification to § 980.09(4), to include a**

**mandate that courts consider SR and either grant or deny SR whenever a discharge trial is held. (*See*, section IV. g. below).**

b. 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) and, if SR is deemed appropriate, the type of treatment and services that the person may need on SR. [§ 980.08(3)]

i. **Consider Modifications:**

1. **Consider clarifying that the examiner(s) appointed at this stage is/are the examiner(s) for the court. The committed person will already have had the opportunity to obtain a court appointed examiner under §§ 980.07(1) and 980.031(3).**

2. **The 30 day period for completion of the report is often insufficient and requires extension. Consider extending it statutorily to 60 days and specifically authorizing the court to extend the time limit for good cause.**

3. **Consider creating a provision preceding § 980.08(3) in order to add to § 980.08 the content of what is now § 980.075(4). That new provision in 980.08 could read:**
**"(2a) (a) The petitioner may use experts or professional persons to support his or her petition.**
**(b) The district attorney or the department of justice may use experts or professional persons to support or oppose any petition."**

4. **Consider including a provision in § 980.08(3) that provides, in substance, essentially: "If the person requests the appointment of an examiner after the filing of the supervised release petition, the court shall appoint an examiner for the person unless the court has previously appointed an examiner under s. 980.07 (1) and/or**

**s. 980.031 (3) for the current re-examination period. If supervised release is supported by an examination conducted within the 6 months preceding the filing of the petition for supervised release by the examiner assigned by the department (DHS) to conduct a periodic reexamination under s. 980.07(1), the court may elect to appoint that examiner as the examiner for the person under this section."**

c. 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)]

i. **Consider Modification: This time limit is honored more often in the breach. Consider setting a more expansive time period for commencement of trial while still including a "good cause" provision for extension. For example, "upon motion of a party, the court shall hold a hearing on the petition for supervised release within 120 days of the filing of the petition unless the court extends that time limit for good cause."**

d. The court may not authorize SR unless, based on all of the reports, trial records and evidence presented to it, the court finds that all of the criteria in § 980.04(4)(cg) are met. In considering whether those criteria are met the court can consider, among other things, the factors set forth in § 980.08(4)(c). The first criterion that must be established is that the person has made "significant progress in treatment" and that the progress can be sustained on SR § 980.08(4)(cg)1. "Significant progress in treatment" is legislatively defined in detail and requires findings that the committed person has done a number of things, suggesting completion of all of those requirements at the time of the judicial determination. § 980.01(8) (*See*, Appendix 1 to DOJ's original August 8, 2012, submission to the Committee – attached hereto – for a full listing of the statutory criteria).

i. § 980.08 does not assign the burden of proof or the standard of proof to either party regarding proof of the SR criteria at an SR hearing.

1. **Consider Modification: Codify the Wisconsin Supreme Court decision in *State v. West*, 2011 WI 83, ¶¶ 55, 81, 336 Wis. 2d 578, 800 N.W.2d 929, placing the burden on the committed person of proving that the criteria are met by "clear and convincing evidence."**

ii. The criterion that the person has made "significant progress in treatment" and the current statutory definition of that term have apparently made it very difficult for DHS to opine, and for courts to find, that the SR criteria have all been met. DOJ is aware that DHS has recently presented to the Committee a proposal that, if adopted, would modify § 980.08(4)(cg)1 so that it requires a finding that the person "is making" significant progress in treatment rather than "has made" that progress. In addition, the DHS proposal would, if adopted, modify the definition of "significant progress in treatment" in § 980.01(8) so that it is met if the person "is doing" those things previously required.

1. **Consider Modifications: DOJ's opportunity to review the DHS proposal was limited. At this point, DOJ does not oppose it, subject to further review. It appears the proposal is consistent with a goal of making more rare the outright discharge of a person before any placement on SR.**

## IV. § 980.09 – PETITION FOR DISCHARGE - CURRENT LAW AND POSSIBLE MODIFICATIONS

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

[1] 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)." The Committee may wish to recommend that the first paragraph be numbered.

b. 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 interpretation, as discussed at length in the August 8, 2012, submission to the Committee by DOJ (specifically, part VII at pp. 13 – 15). The current statutory language establishes a two-step process for the court's consideration of whether a discharge petition is (1) facially sufficient, and (2) factually sufficient to warrant holding a trial on whether the person is currently a proper subject for commitment. The statutory language is set out in detail below, followed by possible modifications for the Committee's consideration. The rationale for those possible modifications is explained after they are set out below.

c. Section 980.09(1) provides: "A committed person may petition the committing court for discharge at any time. 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 changed *since the date of his or her initial commitment* order so that the person does not meet the criteria for commitment as a sexually violent person." (emphasis added)

i. **<u>Consider Modification</u>: The Committee may wish to consider modifying the statute to establish a more definitive standard for determination of the facial sufficiency of the discharge petition and clarify that the necessary change is one occurring since the initial commitment trial or the most recent denial of a discharge petition on the merits. While we hesitate to propose specific statutory language at this stage, DOJ has previously considered language for this purpose, such as "The court shall deny the petition under this section without a hearing unless the petition alleges facts from which the court or jury ~~may~~ <u>would likely</u> conclude the person's condition has <u>sufficiently</u> changed since the date of his or her initial commitment order<u>, or the most recent order denying a petition for discharge after a hearing on the merits,</u> so that the person ~~does not~~ <u>no longer</u> meets the criteria for commitment as sexually violent person."**

d. 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* under this subsection *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)

DOJ previously identified for the Committee that the italicized language above can be seen as confusing regarding the court's task at this stage of review of the petition. Additionally, the standard of whether a jury or court "may conclude" or "could conclude" that the person no longer meets the commitment standard provides little or no ability for the court to actually "weed out" non-meritorious petitions for discharge and avoid the waste of resources associated with the evaluations and litigation that results from such petitions.

i. **Consider Modification: Specifically, DOJ suggests consideration of statutory language like "In reviewing the petition, [t]he court may ~~review the petition within 30 days and may hold a hearing~~ hold a non-evidentiary hearing to determine if ~~it contains facts from which the court or jury may conclude that the person does not meet~~ the person's condition has sufficiently changed such that a court or jury would likely conclude the person no longer meets the criteria for commitment as a sexually violent person. In determining under this subsection whether ~~facts exist that might warrant such a conclusion,~~ the person's condition has sufficiently changed such that a court or jury would likely conclude that the person no longer meets the criteria for commitment, the court shall consider the record, including but not limited to the evidence introduced at the initial commitment trial or the most**

**recent trial on a petition for discharge, 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~~ above record does not contain facts from which a court or jury ~~may~~ would likely conclude that the person ~~does not~~ no longer meets the criteria for commitment, the court shall deny the petition. If the court determines that ~~facts exist~~ the above record does contain facts from which a court or jury would likely ~~could~~ conclude the person ~~does not~~ no longer meets criteria for commitment the court shall set the matter for ~~hearing~~ trial.**

e. The rationale for the suggested changes to §§ 980.09(1) and (2) is to provide more guidance to trial courts in evaluating whether petitions for discharge allege a real change in condition such that the patient is entitled to a trial to determine whether the person should be discharged from his or her commitment. In *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513, the Wisconsin Supreme Court determined there is a two step procedural process involved when evaluating discharge provisions. The court ruled that, although under § 980.09(2) trial courts are to consider the record and past examinations in determining whether a petition for discharge alleges sufficient facts to justify a trial, they are not to weigh the facts in support of release against those facts in support of continued commitment. Under current law, if the petition and other documents raise a possibility that a reasonable court or jury "could conclude" that the commitment criteria are not met, the court is likely obligated to order a trial – even if the court believes that it is highly unlikely that a reasonable jury would so conclude. The *Arends* court acknowledged that §§ 980.09(1) and (2) are designed to permit trial courts to perform a gate keeping function and "weed out" insufficient petitions. But the statute's use of the phrases "may conclude" and "could conclude" leave the courts with little ability to actually perform that "gate-keeping" function. The suggested language above is of a type that provides distinct guidance to trial courts on this issue by setting forth a clear pleading burden for petitioners. Petitioners must allege facts from which a reasonable court or jury would likely conclude their condition has changed such that they are no longer

sexually violent before the court and the state must bear the costs of a trial. This pleading burden allows trial courts to weigh evidence when it is determining whether there are sufficient facts from which a reasonable court or jury would likely conclude the person's condition has sufficiently changed. It would not unduly restrict a committed person's access to the discharge process.

f. 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)

   i. **Consider Modifications: If the Committee decides to pursue statutory changes consistent with, or similar to, the changes identified above, § 980.09(3) would have to be modified to use consistent language. For example, "The court shall hold a ~~hearing~~ trial within 90 days of the determination that the person's condition has sufficiently changed such that a ~~the petition contains facts from which the~~ court or jury ~~may~~ would likely conclude that the person ~~does not~~ no longer meets the criteria for commitment as a sexually violent person. At trial, ~~T~~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."**

g. 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), the supervised release statute.

i. **Consider Modifications: The Committee may wish to consider a requirement in § 980.09(4) that, unless a committed person specifically waives it, a court which has denied a petition for discharge under sub. (4) must address the SR criteria and make a determination as to whether they are met at that time, applying the same burden and standard of proof applicable under § 980.08. The statute could also provide that a committed person's waiver of the consideration of SR criteria after a discharge trial and/or the finding by a court after a discharge trial that SR criteria are not met constitutes a denial of SR such that the 12 month waiting period for filing of a new SR petition applies to the committed person. Under the current process, a committed person may seek discharge, lose at the discharge trial, not seek consideration of SR at that time and then file a SR petition shortly after and obtain another court-ordered evaluation and a SR hearing (assuming the current filing limits under § 980.08(1) are not a bar). This is inefficient and costly.**

h. Finally as to § 980.09, there are several procedural clarifications or provisions that the Committee might consider for inclusion in the statute. Some of these new sub-sections would relate to the suggestion that § 980.075 be repealed and useful provisions there be incorporated into substantive statutory sections. These provisions might be placed as § 980.09(1m)(a) – (e). The suggestions are set forth below in the form of statutory language.

i. **Consider Modifications: As below:**

**§ 980.09(1m)(a) If the person files a petition for discharge under s. 980.09 without counsel, the court shall serve a copy of the petition and any supporting documents on the district attorney or department of justice, whichever is applicable. If the person petitions for discharge under s. 980.09 through counsel, his or her attorney shall serve the district attorney or department of justice, whichever is applicable.**

**§ 980.09(1m)(b) If the person files a petition for discharge under s. 980.09 without counsel, as soon as circumstances permit, the**

**court shall refer the matter to the authority for indigency determinations under s. 977.07 (1) and appointment of counsel under s. 977.05 (4) (j) if the person is not represented by counsel.**

**§ 980.09(1m)(c) The petitioner may use experts or professional persons to support his or her petition. (This is current § 980.075(4)(a))**

**§ 980.09(1m)(d) The district attorney or the department of justice may use experts or professional persons to support or oppose any petition. (This is current § 980.075(4)(b))**

**§ 980.09(1m)(e) After receiving the petition for discharge and upon request of the person, the court shall appoint an examiner for the person, unless the court has previously appointed an examiner under ss. 980.07(1) and 980.031(3) for the current reexamination period, having the specialized knowledge determined by the court to be appropriate who shall examine the person. If discharge is supported by an examination conducted under s. 980.07(1) within the 6 months preceding the filing of the petition the court may appoint the examiner who conducted that examination as the examiner for the person. The examiner shall have reasonable access to the person for purposes of examination and to the person's past and present treatment records, as defined in s. 51.30 (1) (b), and patient health care records, as provided under s. 146.82 (2) (c). The county shall pay the costs of an examiner appointed under this subsection as provided under s. 51.20 (18) (a).**

V. § 980.095 – PROCEDURES FOR DISCHARGE TRIALS – CURRENT LAW AND POSSIBLE MODIFICATIONS

a. § 980.095(1)(a) governs the request for a jury trial in discharge proceedings. The statute now provides that the discharge trial is to the court (without a jury) unless a party makes a request for a jury trial within 10 days of the filing with the court of the discharge petition. That 10 day time limit, measured from the time of filing, requires parties to make the

demand in most cases before the court has determined if the petition is sufficient to warrant a trial.

i. **Consider Modification: The Committee may wish to consider a modification to the statute that requires the jury demand to be filed within 10 days of the determination by the court that it is likely that a court or jury would find that the person's condition had sufficiently changed to warrant a discharge trial.**

VI. § 980.11 – NOTICE CONCERNING SR OR DISCHARGE

a. Section 980.11(2) provides that, if a court orders that a person be placed on supervised release under § 980.08(4) or discharges a person under § 980.09(4), the DHS "shall do all of the following …," including attempting to notify any prior victim of the order for release or discharge [§ 980.11(2)(am)] and "Notify the department of corrections." [§980.07(2)(bm)]. Section 980.11(3) describes what the notice to DOC must include and requires that DHS provide that notice to DOC "postmarked at least 7 days before" the person is placed on SR or is discharged. The notice to DOC is designed to facilitate compliance with the GPS tracking requirement set forth in §§ 301.48(2)(b)1 and (b)2. (Emphasis added).

i. **Consider Modification: The Committee may consider a modification to § 980.11(2) that directs that if a court orders a person placed on SR or orders discharge of a person from a commitment, "the court shall stay the execution of the order for 15 days and" the DHS shall do all of the following, etc.. The Committee or the Legislature could consult with DHS and DOC on what period of "stay" of the order would be required to allow them to accomplish the tasks and arrange the GPS monitoring (the "15 days" included above is only a suggestion.**

# 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 and 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.