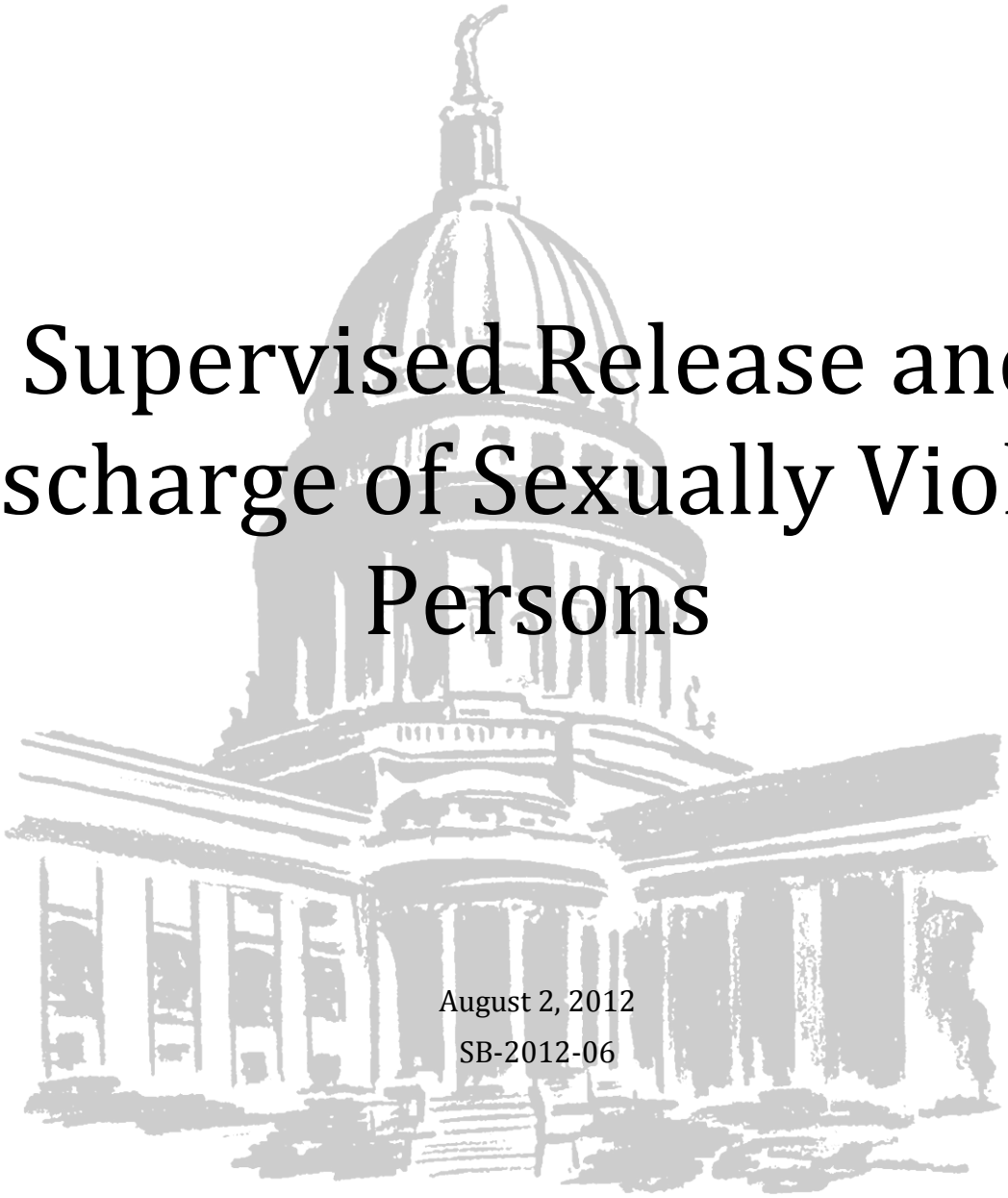
Staff Brief

Supervised Release and Discharge of Sexually Violent Persons



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INTRODUCTION

This Staff Brief describes the standards that must be met in order for a person who has been civilly committed as a sexually violent person to be released to supervised release or discharged from the commitment.

Chapter 980, Stats., governs civil commitments of sexually violent persons. Wisconsin was one of the first states to enact such a law. Currently, 20 states civilly commit certain sex offenders. These laws have been challenged on the basis of due process, double jeopardy, and equal protection and have generally been held to be constitutional.

This Staff Brief summarizes sections of ch. 980, *Civil Commitment of Sexually Violent Persons*, Stats., related to initial commitment under the chapter and to petitions for discharge and supervised release. The Brief also summarizes case law relevant to the constitutionality of ch. 980 civil commitments and to discharge and supervised release procedures.

- **Part I** describes sections of ch. 980 related to initial commitment of sexually violent persons and summarizes case law related to the constitutionality of civil commitments.
- **Part II** describes sections of ch. 980 related to supervised release from civil commitment and summarizes Wisconsin case law regarding supervised release.
- **Part III** describes sections of ch. 980 related to discharge from civil commitment and summarizes Wisconsin case law regarding discharge.

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PART I – OVERVIEW OF SEXUALLY VIOLENT PERSON COMMITMENTS

Chapter 980 of the Wisconsin Statutes, entitled *Sexually Violent Person Commitments*, creates a procedure for the involuntary civil commitment of certain persons who have been convicted of or otherwise found to have committed a sex offense and who are found to be "sexually violent persons."

DEFINITION OF "SEXUALLY VIOLENT PERSON" AND "SEXUALLY VIOLENT OFFENSE" [S. 980.01, STATS.]

"Sexually Violent Person"

A "sexually violent person" is a person who meets both of the following criteria:

- The person has been **convicted of a sexually violent offense**, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness.
- The person is dangerous because he or she suffers from a **mental disorder that makes it likely that the person will engage in acts of sexual violence**. "Mental disorder" is defined to mean a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence. "Likely" is defined to mean more likely than not.

  Prior law provided that the person was dangerous because he or she suffered from a mental disorder that made it "substantially probable" that the person would engage in acts of sexual violence, rather than "likely." The wording was changed by 2003 Wisconsin Act 187.

"Sexually Violent Offense"

A sexually violent offense is a specified sex offense or other offense that is sexually motivated. Specifically, "sexually violent offense" includes all of the following offenses:

- First-, second-, or third-degree sexual assault or an offense that, prior to June 2, 1994, was a crime that is comparable. [s. 940.225 (1), (2) or (3), Stats.]
- First- or second-degree sexual assault of a child [s. 948.02 (1) or (2), Stats.], engaging in repeated acts of sexual assault of the same child [s. 948.025, Stats.], incest with a child [s. 948.06, Stats.], enticement of a child [s. 948.07, Stats.], sexual assault of a child placed in substitute care [s. 948.085, Stats.], or an offense that, prior to June 2, 1994, was a crime that is comparable.

- **If the offense was sexually motivated**, first- or second-degree intentional or reckless homicide [s. 940.01, 940.02, 940.05 or 940.06, Stats.], felony murder [s. 940.03, Stats.], substantial or aggravated battery [s. 940.19 (2), (4) or (5), Stats.], great bodily harm to an unborn child [s. 940.195 (4) or (5), Stats.], false imprisonment [s. 940.30, Stats.], hostage-taking [s. 940.305, Stats.], kidnapping [s. 940.31, Stats.], administering dangerous or stupefying drug [s. 941.32, Stats.], burglary [s. 943.10, Stats.], robbery [s. 943.32, Stats.], physical abuse of a child [s. 948.03, Stats.], or an offense that, prior to June 2, 1994, was a crime that is comparable.

  The law defines "**sexually motivated**" to mean that one of the purposes for an act is for the actor's sexual arousal or gratification.

- Any solicitation, conspiracy, or attempt to commit a crime described above.

NOTICE TO THE DEPARTMENT OF JUSTICE AND DISTRICT ATTORNEY [S. 980.015, STATS.]

The agency that has custody of or control over a person as the result of the commission of a sexually violent offense, generally the Department of Corrections (DOC) or the Department of Health Services (DHS), must inform each appropriate district attorney and the Department of Justice (DOJ) if the agency determines that the person may meet the "sexually violent person" criteria. The statutes refer to the agency with custody or control as the "agency with jurisdiction." The agency with jurisdiction must notify the appropriate district attorneys and DOJ regarding the person as soon as possible beginning **90 days prior** to the applicable date of the following:

- The anticipated discharge or release, on parole, extended supervision, or otherwise, from a sentence of imprisonment or term of confinement in prison for which any part was imposed for a conviction for a sexually violent offense.
- The anticipated release date from a juvenile secured correctional facility (e.g., Lincoln Hills), or a secured residential care center for children and youth, if the person was placed in the facility as a result of being adjudicated delinquent on the basis of a sexually violent offense.
- The anticipated release date of a person on conditional release, the anticipated termination of a commitment, or the anticipated discharge of a person from a commitment order under s. 971.17, Stats., if the person has been found not guilty of a sexually violent offense by reason of mental disease or defect.
- The anticipated release on parole or discharge of a person committed under ch. 975, Stats., the former chapter governing sex crime commitments, for a sexually violent offense.

SEXUALLY VIOLENT PERSON PETITION [S. 980.02, STATS.]

The filing of a petition is an initial step in committing a sexually violent person under ch. 980. A petition alleging that a person is a sexually violent person must be filed before the person is released or discharged by DOC or DHS. The petition may be filed by one of the following::

- The **DOJ**, at the request of the agency with jurisdiction over the person.
- If DOJ does not file a petition, the **district attorney** for one of the following:
    - The county in which the person was convicted.
    - The county in which the person will reside or be placed.
    - The county in which the person is under custody.

ORDER FOR AND LENGTH OF COMMITMENT [S. 980.06, STATS.]

The determination that a person is a "sexually violent person" is made by a court or a jury after a trial. If a court or jury determines that the person is a sexually violent person, the court must order the person to be committed to the custody of DHS for control, care, and treatment **until such time as the person is no longer a sexually violent person**.

The commitment order must specify that the person be placed in institutional care. Prior law provided a procedure by which the court could enter an initial order committing a sexually violent person to supervised release, rather than institutional care. This option was eliminated by 1999 Wisconsin Act 9.

SECURED MENTAL HEALTH UNIT OR FACILITY FOR SEXUALLY VIOLENT PERSONS [S. 980.065, STATS.]

Once a person has been committed as a sexually violent person, the law specifies that:

- DHS must place a person committed to a secure mental health unit or facility **at one of the following**:
    - The Sand Ridge Secure Treatment Center.
    - The Wisconsin Resource Center.
    - A secure mental health unit or facility provided by DOC.
- Notwithstanding the above, DHS may place a female person at Mendota Mental Health Institute, Winnebago Mental Health Institute, or a privately operated residential facility under contract with DHS.
- DHS may contract with DOC for the provision of a secure mental health unit or facility for persons committed. The law requires DHS to operate any such secure mental health

unit or facility provided by DOC and to promulgate rules governing the custody and discipline of persons placed in the unit or facility provided by DOC.

PERIODIC REEXAMINATION; REPORT [S. 980.07, STATS.]

Reexamination Each 12 Months Post-Initial Commitment

If a person is committed and has not been discharged, DHS **must** appoint an examiner to conduct a reexamination of the person's mental condition: (a) **within 12 months** after the date of the initial commitment order; and (b) again thereafter at least **once each 12 months**. The purpose of the 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 the commitment. The examiner must apply the same criteria as a court must apply when considering if the person should be placed on supervised release or should be discharged.

Notwithstanding this provision, the court that committed a sexually violent person may order a reexamination of the person **at any time** during the period in which the person is subject to the commitment order.

Treatment Progress Report

At any reexamination, the treating professional must prepare a treatment progress report. The treating professional must provide a copy of the treatment progress report to DHS. The treatment progress report must consider all of the following:

- The specific factors associated with the person's risk for committing another sexually violent offense.
- Whether the person has made significant progress in treatment or has refused treatment.
- The ongoing treatment needs of the person.
- Any specialized needs or conditions associated with the person that must be considered in future treatment planning.

DHS must submit an annual report comprised of the reexamination report and the treatment progress report to the court that committed the person.

DHS DUTIES; PAYMENT OF COSTS FOR EVALUATION, TREATMENT, AND CARE [S. 980.12, STATS.]

The law specifies that, except as otherwise provided, DHS must pay for all costs relating to the evaluation, treatment, and care of persons evaluated or committed under ch. 980, Stats.

CHALLENGES TO SEX OFFENDER COMMITMENTS

Twenty states, including Wisconsin, have statutory schemes providing for the civil commitment of sexually violent offenders who have completed their prison sentences. The general constitutionality of these civil commitments has been upheld by both the U.S. Supreme Court and the Wisconsin Supreme Court.

The following section briefly summarizes three cases, one from the U.S. Supreme Court and two from the Wisconsin Supreme Court, which uphold the constitutionality of a civil commitment process for sexually violent offenders. The U.S. Supreme Court decision described below, *Kansas v. Hendricks*, was decided in 1997. The Wisconsin Supreme Court cases, *State v. Post* and *State v. Carpenter*, predate the U.S. Supreme Court decision and were decided in 1995.

U.S. SUPREME COURT CASE LAW

Kansas v. Hendricks, 521 U.S. 346, 138 L. Ed. 2d 501 (1997)

The U.S. Supreme Court upheld a Kansas state law, the "Sexually Violent Predators Act," which established civil commitment procedures for individuals who had completed their prison sentences but were likely to engage in predatory acts of sexual violence due to a "mental abnormality." The Court found that these individuals may be indefinitely confined pursuant to a civil commitment process, even if they were not found to have a "mental illness."

In its decision, the U.S. Supreme Court rejected three specific constitutional challenges to the Kansas law. The challenges alleged that the Sexually Violent Predators Act: (1) violated substantive due process; (2) constituted double jeopardy; and (3) represented *ex post facto* punishment. The following provides a general explanation of the constitutional argument, summarizes the specific argument made by the plaintiff in *Kansas v. Hendricks*, and provides the Court's response to each argument:

Substantive Due Process Argument

A substantive due process argument under the U.S. Constitution typically arises from the Due Process Clause of the Fourteenth Amendment. The Due Process Clause states in relevant part: "No State shall…deprive any person of life, liberty, or property, without due process of law." [U.S. Const. amend. XIV, § 1.] A substantive due process argument essentially asserts that the government cannot take away life, liberty, freedom, or property without appropriate government justification.

In *Kansas v. Hendricks*, the plaintiff argued that the Kansas "Sexually Violent Predators Act" violated substantive due process because the law required only a "mental abnormality," a term created by the Kansas Legislature and not by the psychiatric community, before a person could be involuntarily committed, rather than requiring that the person have a "mental illness." The Kansas Legislature defined "mental abnormality" as a condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses to the degree that such person is a menace to the health and safety of others.

The Court rejected the substantive due process argument arising from the statutory definition of "mental abnormality." The Court found that the Kansas Act sufficiently limited civil commitment to those individuals with a volitional impairment that prevented the person from controlling their dangerousness. The Court noted that states do not need to use particular vocabulary in creating a civil commitment statute, but instead, may define terms like "mental abnormality" that have a medical nature and legal significance.

Double Jeopardy Argument

A double jeopardy argument under the U.S. Constitution is a defense against prosecution or punishment arising from the Fifth Amendment. The Fifth Amendment states in relevant part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb…." [U.S. Const. amend. V.] The Double Jeopardy Clause prevents a defendant from being prosecuted a second time for the same crime after being acquitted or convicted, and also prevents a defendant from receiving multiple punishments for the same offense.

In *Kansas v. Hendricks*, the plaintiff argued that involuntary civil commitment for sexually violent predators constitutes a second prosecution and second punishment for the same offense, in violation of the Double Jeopardy Clause. The Court rejected the double jeopardy argument and found that civil commitment under the Act was not punishment because the Kansas process was a civil proceeding, rather than a criminal proceeding. The Court further found that the Act did not impose a second prosecution or punishment because the primary purpose of the Kansas civil commitment process was not punishment, but rather, was an attempt to hold the individual until his mental abnormality no longer caused him to be a threat to others.

Ex Post Facto Lawmaking Argument

An *ex post facto* argument under the U.S. Constitution arises from Article I, Section X, which prohibits the states from passing any "ex post facto law." The phrase "ex post facto" means "after the fact," and refers to the retroactive application of laws. The *Ex Post Facto* Clause prevents a state from criminalizing actions that were legal when committed, and also prevents a state from increasing the penalties for a crime after the crime was committed.

In *Kansas v. Hendricks*, the plaintiff argued that civil commitment following the completion of his criminal sentence imposed additional punishment for his crime, in violation of the prohibition on *ex post facto* lawmaking. The Court rejected the *ex post facto* argument and found that the Kansas civil commitment process did not represent punishment because it is a civil process, not a criminal one. Further, the process is not *ex post facto* lawmaking because it is concerned with a sexually violent predator's future behavior and not his past crimes.

WISCONSIN SUPREME COURT CASE LAW

The Wisconsin Supreme Court has also upheld the ch. 980 civil commitment process for sexually violent persons. In two opinions issued on the same day, *State v. Post* and *State v. Carpenter*, the Wisconsin Supreme Court rejected challenges to ch. 980 commitments under both the U.S. and Wisconsin Constitutions. The Court addressed two different constitutional challenges in each opinion.

State v. Post, 197 Wis. 2d 279, 541 N.W.2d 115 (1995)

The Wisconsin Supreme Court addressed constitutional challenges in *State v. Post* asserting that the ch. 980 commitment process: (1) violated substantive due process; and (2) violated equal protection. The following summarizes the constitutional arguments offered in the case and the Court's response to each.

Substantive Due Process Argument

A substantive due process argument under the Wisconsin Constitution arises from Article 1, Section 8, which reads in relevant part: "No person may be held to answer for a criminal offense without due process of law…." [Wis. Const. art. 1, § 8 (1).] In *State v. Post*, the plaintiffs argued that ch. 980 interfered with their fundamental right to liberty without providing the protection required by the Due Process Clause.

Specifically, the plaintiffs asserted that ch. 980 violated substantive due process because it allowed civil commitment without a showing of mental illness, because it did not require the state to show that the individual would be responsive to treatment, and because it required an insufficient showing of dangerousness. The Court rejected the arguments and found that the state had a compelling interest in protecting the public by preventing future acts of sexual violence through the commitment and treatment of individuals identified as most likely to commit sexually violent acts. The Court further stated that the nature and duration of commitment under ch. 980 was reasonably related to the identified, compelling state purposes.

Equal Protection Argument

Equal protection arguments under the U.S. and Wisconsin Constitutions arise from the Equal Protection Clauses contained in the Fourteenth Amendment to the U.S. Constitution and Article I, Section 1 of the Wisconsin Constitution. The Fourteenth Amendment provides that states cannot "deprive any person of…the equal protection of the laws." [U.S. Const. amend. XIV § 1.] Similarly, Article I, Section 1, provides that "All people are born equally free…and have certain inherent rights…." [Wis. Const. art. I § 1.] The Equal Protection Clauses require that the laws of the state treat an individual in the same manner as they treat others in similar conditions and circumstances. Courts evaluate equal protection challenges to statutes by considering whether the government has a sufficiently strong purpose for the distinctions it makes and whether the law furthers that purpose.

In *State v. Post*, the plaintiff argued that state law denied him equal protection because it treated sexually violent persons subject to civil commitment under ch. 980 differently than it treated individuals subject to civil commitment under other chapters of the statutes, such as ch. 51 emergency mental health detentions. Specifically, the plaintiff noted that ch. 51 requires a showing of "mental illness" not merely a "mental disorder," that ch. 51 requires a finding of suitability for treatment not required under ch. 980, and that ch. 51 includes a standard for dangerousness that requires a recent overt act that is not paralleled in ch. 980. The Court rejected the equal protection argument and found that the State's compelling interest in protecting the public justifies the differential treatment of individuals civilly committed pursuant to ch. 980 because of mental disorders that make them distinctively dangerous due to the likelihood that

they will commit future sexually violent crimes, and those who are civilly committed pursuant to other chapters.

State v. Carpenter, 197 Wis. 2d 252, 541 N.W.2d 105 (1995)

The Wisconsin Supreme Court addressed constitutional challenges in *State v. Carpenter* asserting that the ch. 980 commitment process: (1) violated the Double Jeopardy Clause; and (2) constituted *ex post facto* lawmaking. The following summarizes the constitutional arguments offered and the Court's response to each.

Double Jeopardy Argument

A double jeopardy argument under the Wisconsin Constitution arises from Article I, Section 8, which reads in relevant part: "…no person for the same offense may be twice in jeopardy of punishment…." [Wis. Const. art. 1, § 8 (1).] In *State v. Carpenter*, the plaintiff argued that ch. 980 constituted additional punishment in violation of the Double Jeopardy Clauses of the U.S. and Wisconsin Constitutions.

The Court rejected the double jeopardy argument and found that the principle purpose of ch. 980 was protection of the public and treatment of convicted sex offenders to prevent commission of a future sexually violent offense. The Court concluded that ch. 980 did not violate double jeopardy because its primary purposes of protection and treatment were not punishment, and instead, were nonpunitive and remedial.

Ex Post Fact Lawmaking Argument

An *ex post facto* argument under the Wisconsin Constitution arises from Article I, Section 12, which reads in relevant part: "No…ex post facto law…shall ever be passed…." [Wis. Const. art. 1, § 12.] In *State v. Carpenter*, the plaintiff argued that ch. 980 imposed additional punishment in violation of the prohibition on *ex post facto* lawmaking.

The Court rejected the *ex post facto* argument because it concluded that the primary purpose of ch. 980 was not punishment. The Court found that the nonpunitive purposes served by the civil commitments were rationally connected to the purpose of ch. 980, which is to protect the public from dangerous sex offenders by providing treatments in order to reduce the likelihood of future sexually violent acts. In reaching its decision, the Court emphasized that the focus of ch. 980 was on the offender's current mental condition and the present danger to the public and not on punishment for previous behavior.

PART II – DESCRIPTION OF CH. 980 RELATED TO SUPERVISED RELEASE

Chapter 980 creates a process by which an individual who is civilly committed under the chapter may petition for and be granted supervised release. Supervised release is a community placement option for individuals who are still under the custody and control of DHS. The program is intended to release committed individuals into the community while allowing DHS to closely monitor their activity to build greater community living skills and detect dangerous behaviors.

Before a court may authorize supervised release, the committed individual must prove that he or she meets five specific criteria relating to treatment progress, likelihood of reoffending, treatment availability, compliance with treatment and conditions, and resources necessary for managing the person on supervised release. If the individual is granted supervised release, DHS must arrange for control, care, and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the plan for supervised release approved by the court.

Individuals on supervised release are subject to rules imposed by DHS, as well as conditions imposed by the court which authorized supervised release. Individuals on supervised release from civil commitment are restricted to their homes for the first year, except that they are permitted outings for employment purposes, religious purposes, or attending to basic living needs. All outings must be conducted under the direct supervision of a DOC escort.

THE PETITION PROCESS [S. 980.075, STATS.]

As discussed in the previous Part, DHS must reexamine each committed person at least every 12 months to determine if the person should be placed on supervised release or discharged and must compile an annual report. DHS must provide a copy of the report to the committed person and must submit its annual treatment report of the person to the court. DHS must also provide the committed person with a standardized petition form for supervised released.

Within 30 days after DHS submits its treatment progress report to the court, the person who has been committed may submit a completed form to the court to initiate a petition for supervised release. If a completed petition is not filed in a timely manner, the person who has been committed will remain committed and the person's placement at a facility remains in effect without review by the court. If the person files a timely petition, the court must appoint an examiner to examine the person and furnish a written report to the court.

Under **prior law**, a committed person could petition the court to authorize supervised release if at least **six months** had elapsed since the initial commitment order was entered, or at least **six months** had elapsed since the most recent release petition was denied, or the most recent order for supervised release was revoked. The director of the facility at which the person was placed could also file a petition on the person's behalf at any time.

Under **current law**, any person who is committed as a sexually violent person may petition the committing court to modify its order by authorizing supervised release if: (a) **at least 12 months** have elapsed since the initial commitment order was entered; or (b) **at least 12 months** have elapsed since the most recent such petition was denied, or the most recent order for supervised release was revoked. The required time period under prior law was changed by 1999 Wisconsin Act 9, and again by 2005 Wisconsin Act 434. Like prior law, the **director of the facility** at which the person is placed may file the petition for supervised release on the person's behalf **at any time**.

CRITERIA FOR GRANTING SUPERVISED RELEASE [S. 980.08, STATS.]

In order to grant a petition for supervised release, the court must hear the petition **within 30 days** after the report of the court-appointed examiner is filed with the court, unless the court extends this time limit for good cause. The court may not authorize supervised release unless, based on all the reports, trial records, and evidence presented, the court finds that **all** of the following criteria are met:

- The person has made **significant progress in treatment** and the person's progress can be sustained while on supervised release. "Significant progress in treatment" means that the person has done all of the following:
  - Meaningfully participated in the treatment program specifically designed to reduce his or her risk to reoffend offered at Sand Ridge or another facility.
  - Participated in the treatment program at a level that was sufficient to allow the identification of his or her specific treatment needs and then demonstrated, through overt behavior, a willingness to work on addressing the specific treatment needs.
  - Demonstrated an understanding of the thoughts, attitudes, emotions, behaviors, and sexual arousal linked to his or her sexual offending and an ability to identify when the thoughts, emotions, behaviors, or sexual arousal occur.
  - Demonstrated sufficiently sustained change in the thoughts, attitudes, emotions, and behaviors and sufficient management of sexual arousal such that one could reasonably assume that, with continued treatment, the change could be maintained.
- It is **substantially probable that the person will not engage in** an act of sexual violence while on supervised release. "Substantially probable" means much more likely than not.
- Treatment that meets the person's needs and a qualified provider of the treatment are reasonably available.
- The person can be reasonably expected to comply with his or her treatment requirements and with all of his or her condition or rules of supervised release that are imposed by the court or by DHS.

- 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 while on supervised release.

In making this decision, the court may consider: (a) the nature and circumstances of the behavior that was the basis of the allegation in the petition; (b) the person's mental history and present mental condition; (c) where the person will live; (d) how the person will support himself or herself; and (e) what arrangements are available to ensure that the person has access to and will participate in necessary treatment, including pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen if the person is a serious child sex offender. However, a decision on a petition for supervised release filed by a person who is a serious child sex offender may not be made based on the fact that the person is a proper subject for pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen, or on the fact that the person is willing to participate in pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen.

Current law does not explicitly indicate which party has the burden of proof at a supervised release hearing. However, the Wisconsin Supreme Court recently held that s. 980.08 (4) (cg), Stats., assigns the burden to the **petitioner** to prove each of the supervised release criteria by **clear and convincing evidence**. [*State v. West*, 2011 WI 83.]

The current requirements for granting supervised release were enacted in 2006 and are more extensive, and more difficult to meet, than under prior law. Prior to the 2006 legislation, the court was required to grant supervised release unless the **state** could prove the following by clear and convincing evidence:

- The person was still a sexually violent person.
- It was still substantially probable that the person would engage in acts of sexual violence if the person was not confined in a secure mental health unit or facility.

In making its decision, the court could consider the nature and circumstances of the behavior that were the basis of the allegation in the original petition by the state to have the person committed, the person's mental history and present mental condition, where the person would live, how the person would support himself or herself and what arrangements were available to ensure that the person would have access to and would participate in necessary treatment.

DEVELOPING A SUPERVISED RELEASE PLAN

Current law provides that if the court finds that the criteria for supervised release have been met, the court must select the person's county of residence pursuant to statutory guidance. The court orders the intended county of placement to prepare a report identifying prospective residential options for community placement.

The court must also direct DHS to prepare a supervised release plan for the person that identifies the proposed residence. The plan must also address the person's need, if any, for

supervision, counseling, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment. The plan must be submitted to the court within 90 days of the finding that the person meets the five criteria for supervised release (unless the court grants an extension of this time period for good cause).

GRANTING SUPERVISED RELEASE

The court must review the plan submitted by the county department. If the details of the plan adequately meet the treatment needs of the individual and the safety needs of the community, then the court must approve the plan and determine that supervised release is appropriate. If the details of the plan do not adequately meet the treatment needs of the individual or the safety needs of the community, then the court must determine that supervised release is not appropriate or direct the preparation of another supervised release plan to be considered by the court.

REVOCATION FROM SUPERVISED RELEASE

If DHS believes that a person on supervised release, or awaiting placement on supervised release, has violated, or threatened to violate, any condition or rule of supervised release, DHS may petition for revocation of the order granting supervised release or may detain the person. If DHS believes that a such person is a threat to the safety of others, DHS must detain the person and petition for revocation of the order granting supervised release.

The court must hear the petition for revocation of supervised release within 30 days, unless the hearing or time deadline is waived by the detained person. A final decision on the petition to revoke the order for supervised release must be made within 90 days of the filing. Pending the revocation hearing, DHS may detain the person in the county jail or return him or her to institutional care.

If the court finds after a hearing, by clear and convincing evidence, that any rule or condition of release has been violated and the court finds that the violation of the rule or condition merits the revocation of the order granting supervised release, the court **may** revoke the order for supervised release and order that the person be placed in institutional care. The court may also consider alternatives to revocation. The person must remain in institutional care until the person is discharged from the commitment or is placed again on supervised release.

If the court finds after a hearing, by clear and convincing evidence, that the safety of others requires that supervised release be revoked, the court **must** revoke the order for supervised release and order that the person be placed in institutional care. The person must remain in institutional care until the person is discharged from the commitment or is placed on supervised release.

Notice Concerning Supervised Release or Discharge [s. 980.11, Stats.]

The law provides that if the court places a person on supervised release, DHS must do all of the following:

- Make a reasonable attempt to notify whichever of the following persons is appropriate, if he or she can be found:
    - The victim of the act of sexual violence.
    - An adult member of the victim's family, if the victim died as a result of the act of sexual violence. "Member of the family" is defined to mean a spouse, child, sibling, parent, or legal guardian.
    - The victim's parent or legal guardian, if the victim is younger than 18 years old.
- Notify DOC.

In addition, the law specifies the information that must be included in the notice, when the notice must be sent, and other requirements that DHS must meet. These requirements also apply when a person is discharged.

WISCONSIN SUPERVISED RELEASE-RELATED CASE LAW

In addition to upholding the constitutionality of ch. 980 civil commitments, the Wisconsin Supreme Court has addressed issues specific to the ch. 980 supervised release statutory scheme. The following section briefly summarizes several cases relevant to supervised release procedure. However, the section is not intended to represent all relevant case law on the topic.

State v. West, 2011 WI 83, 336 Wis. 2d 578, 800 N.W.2d 929

In *State v. West*, the Wisconsin Supreme Court addressed the burden of proof in a petition for supervised release from ch. 980 commitment. Specifically, the Court clarified which party bears the burden of proof and clarified the level of persuasion that applies under s. 980.08 (4) (cg), Stats., the statutory section which enumerates criteria for granting supervised release to a sexually violent person.

The Court determined that the statute places the burden of proof with the committed individual, even though the statutory language does not explicitly state as much. Consequently, the **committed individual** must produce evidence on all five statutory criteria and prove those criteria to the court before being granted supervised release.

The Court further held that the committed individual must establish the criteria by **clear and convincing evidence**. The Court found that the statutory language was ambiguous regarding the level of persuasion applicable to a supervised release petition and set the standard at clear and convincing evidence. Application of the clear and convincing evidence standard requires the committed individual to persuade the fact-finder "to a reasonable certainty" that the individual meets the criteria for supervised release.

State v. Schulpius, 2006 WI 1, 287 Wis. 2d 44, 707 N.W.2d 495

In *State v. Schulpius*, the Wisconsin Supreme Court addressed the question of whether ch. 980 was unconstitutionally applied to a committed individual who was granted supervised release, but who remained in custody because the agency could not find an appropriate placement.

The Court concluded that the individual's continued detention despite an order for supervised release did **not violate substantive due process** because it did not "shock the conscience." The Court did hold that the individual's procedural due process rights were violated. However, the Court determined that release was not an appropriate remedy because it is not justifiable under the dual purposes of ch. 980--protection of the public from those likely to reoffend, and treatment of the patient.

The Court further stated that courts have authority to order the agency to create an appropriate residential facility for a person authorized for supervised release, though the Court declined to enter such an order in the case. Because the plaintiff was no longer subject to an order for supervised release at the time the Wisconsin Supreme Court issued its decision, the Court declined to determine what remedy, if any, is available to a person who is authorized for supervised release from ch. 980 commitment, but who is not placed in a timely manner.

State v. Rachel, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762

In *State v. Rachel*, the Wisconsin Supreme Court examined the constitutionality of statutory changes to ch. 980 limiting a committed individual's ability to seek supervised release. In 1999, the Legislature enacted changes to ch. 980 so that a court could no longer order a sexually violent person to be committed to supervised release immediately, but instead, required that a court order a person to be initially placed in institutional care. Additionally, the Legislature increased the period of time which a committed individual must wait before petitioning for supervised release from six months to 18 months. The plaintiff asserted that these changes rendered ch. 980 unconstitutional under the double jeopardy, due process, and *ex post facto* provisions of the U.S. and Wisconsin Constitutions.

The Court rejected the arguments and upheld ch. 980 as amended. The Court rejected the double jeopardy and *ex post facto* arguments after finding that ch. 980 commitment is civil and not criminal, despite the changes limiting an individual's ability to petition for supervised release. The Court also rejected the substantive due process arguments after stating that the mere limitation of access to supervised release **does not impose a restraint to the point of violating due process**. This is because ch. 980 still serves the compelling state interests of treatment of the dangerously mentally ill and protection of the public, despite the statutory changes limiting the ability to petition for supervised release.

PART III – DESCRIPTION OF CH. 980 RELATED TO DISCHARGE

Chapter 980 creates a process by which a person who is civilly committed under the chapter may petition for and be granted a discharge. Unlike a person on supervised release, a person who is discharged from civil commitment is no longer under the care and control of DHS or DOC.

A person may be discharged from ch. 980 commitment (released) if a court or jury determines that the person no longer meets the criteria for commitment as a sexually violent person. To be discharged, a committed person must first petition the court and the petition must meet certain pleading requirements. The petition must provide facts from which a court or jury court conclude that the individual's condition has changed since the person was initially committed as a sexually violent person, such that he or she no longer meets the criteria for commitment.

RIGHT TO PETITION FOR DISCHARGE [S. 980.09, STATS.]

Under current law, a committed person may petition the committing court for discharge **at any time**. The court must deny the petition without a hearing unless the petition alleges facts from which the court or 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.

Prior to modifications in 2006, the process for discharge depended on whether the person's discharge was approved by the Secretary of Health and Family Services (the Department of Health and Family Services was the predecessor to DHS). Specifically, under prior law, a committed person could petition for discharge, at any time, in either of the following ways:

- Petition with Secretary's approval
    - If the Secretary determined that a person committed under ch. 980, Stats., was no longer a sexually violent person, the Secretary was required to authorize the person to petition the committing court for discharge.
- Petition without Secretary's approval
    - A person could also petition the committing court for discharge from custody or supervision without the secretary's approval. If the person did not affirmatively waive the right to petition, the court set a **probable cause hearing** to determine whether facts existed that warranted a hearing on whether the person was still a sexually violent person.
    - If the court determined at the probable cause hearing that probable cause existed to believe that the committed person was no longer a sexually violent

person, then the court was required to set a hearing on the issue. The state had the right to have the committed person evaluated by experts chosen by the state. At the hearing, the state had the burden of providing by clear and convincing evidence that the committed person was still a sexually violent person.

Additionally under prior law, if a person had previously filed a petition without the Secretary's approval and the court determined, either upon review of the petition or following a hearing, that the person's petition was frivolous or that the person was still a sexually violent person, then the court was required to deny any subsequent petition without a hearing unless the petition contained facts upon which a court could find that the condition of the person had so changed that a hearing was warranted. If the court found that a hearing was warranted, the court was required to set a probable cause hearing and continue proceedings as described above. If the person had not previously filed a petition for discharge without the Secretary's approval, the court was required to set a probable cause hearing and continue proceedings as described above.

REVIEW OF THE PETITION BY THE COURT

The court must review the petition for discharge 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, using the standards for an initial commitment. In determining whether facts exist that might warrant such a conclusion, the court must consider any current or past reports filed under s. 980.07, Stats., 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 must 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 must set the matter for hearing.**

THE STATE'S BURDEN OF PROOF AT THE HEARING

The court must 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.**

If the court or jury is satisfied that the state has not met its burden of proof, the petitioner must be discharged from custody. If the court or jury is satisfied that the state has met its burden of proof, the court may proceed to determine whether to modify the petitioner's existing commitment order by authorizing supervised release.

PROCEDURE FOR DISCHARGE HEARING

The district attorney or DOJ, whichever filed the original petition, or the petitioner or his or her attorney, may request that a discharge hearing be to a **jury of six**. The verdict is not valid or received unless **at least five** of the jurors agree to it. Motions after verdict may be made without further notice upon receipt of the verdict. Additionally, any party may appeal an order as a final order under chs. 808 and 809, Stats.

If a court discharges an individual from commitment, DHS must comply with requirements for notice to the victim, discussed in Part II.

WISCONSIN DISCHARGE-RELATED CASE LAW

In addition to upholding the constitutionality of ch. 980 civil commitments, the Wisconsin Supreme Court and Wisconsin Court of Appeals have addressed issues specific to ch. 980 discharge. The following section briefly summarizes several cases relevant to discharge petition procedure, but is not intended to represent all relevant case law on the topic.

State v. Arends, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513

In *State v. Arends*, the Wisconsin Supreme Court addressed the procedure for court review of a discharge petition for an individual civilly committed under ch. 980. Specifically, the Court clarified that a circuit court must engage in a **two-step procedure** under s. 980.09, Stats., when determining whether to hold a discharge hearing on a person's petition for discharge from commitment.

First, the circuit court must assess the sufficiency of the petition itself. A court completes this step by engaging in a paper review of the petition and its attachments to determine whether the documents allege facts from which a reasonable trier of fact could conclude that the petitioner no longer meets the criteria for commitment under ch. 980. If the petition alleges sufficient facts, then the circuit court proceeds to the next step of the process.

Second, the circuit court reviews additional items in the record. These items are enumerated in s. 980.09 (2), Stats., and include current or past re-examination reports, the state's written response to the petition, and the arguments of counsel. The circuit court may also request additional items that are not in the record and may hold a hearing to assist in its review. The circuit court completes step two by determining whether the petition and supporting materials contain facts from which a reasonable trier of fact could conclude that the petitioner no longer meets the criteria for commitment under ch. 980. If the petition and documents contain sufficient facts, the court must schedule the petition for a discharge hearing.

State v. Ermers, 2011 WI App 113, 336 Wis. 2d 451, 802 N.W.2d 540

In *State v. Ermers*, the Wisconsin Court of Appeals addressed the pleading requirements for a ch. 980 discharge petition. Specifically, the Court of Appeals clarified the meaning of statutory language requiring that a discharge petition allege facts from which a fact-finder may conclude

that the individual's "condition has changed since the date of his or her initial commitment order" *before* an individual is entitled to a discharge hearing.

The Court of Appeals held that the "condition has changed" language encompasses **all changes** that could result in a person not meeting the criteria for commitment as a sexually violent person. A committed individual may establish that his "condition has changed" when, in the opinion of an expert, a change in the professional knowledge or research used to evaluate dangerousness means the individual no longer meets the requirements for ch. 980 commitment. The court noted that an individual is not required to show his mental condition itself has changed before receiving a hearing on his discharge petition. Instead, an individual may meet the pleading requirement when, for example, an expert opines that the individual is not likely to reoffend based on a new or revised risk assessment tool used by the expert.