I. Mental Disorder and Risk Assessment

II. Chapter 980 is NOT about making a prediction: it's about RISK ASSESSMENT and particularly, whether it is more likely than not, interpreted by case law to mean 51%, that R will commit future act of sexual violence. Not unlike cancer: a person can be of high risk to develop cancer, but never actually get it--this does not mean that the person is not high risk.

III. Key to constitutionality lies in release provisions

A. When can they file?
    1. S.R.= 12 months since commitment or since last S.R. was denied
    2. D = Any time
B. Criteria for Release
    1. SR 980.08(4)(cg); very specific

2005 Act 434 shifted the burden to the committed person to establish that he has met each of five criteria and the court "may not authorize" supervised release unless it finds that <u>all</u> of the five criteria are met:

980.08(4)(a) [*ed. note*: no "b" subsection exists]

> (c) In making a decision under par. (cg), the court may consider, without limitation because of enumeration, the nature and circumstances of the behavior that was the basis of the allegation in the petition under s. 980.02 (2) (a), the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, and 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. A decision under par. (cg) on a petition 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.
>
> (cg) The court may not authorize supervised release unless, based on all of the reports, trial records, and evidence presented, the court finds that all of the following criteria are met:

1. The person has made significant progress in treatment and the person's progress can be sustained while on supervised release.

2. It is substantially probable that the person will not engage in an act of sexual violence while on supervised release.

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

4. The person can be reasonably expected to comply with his or her treatment requirements and with all of his or her conditions or rules of supervised release that are imposed by the court or by 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 while on supervised release.

2. D = 980.09(1)and (2) Two step process

a. 980.09(1) Paper review of pet. and attachments. Do they contain facts from which a reasonable trier of fact could conclude that R doesn't meet the criteria for commitment as SVP?

b. **Arends**: 980.09(1) facts are those "from which the court or jury may conclude that the person's condition has changed since date of initial comm. order so that he doesn't meet criteria for commitment" But see **Arends** p. 21: R need not establish a change in his status; only needs to provide evidence that he doesn't meet criteria for commitment. See **Ermers**: change in methodology of risk assessment/ new professional knowledge about how to assess risk seems to be sufficient.
If so, then

c. 980.09(2) Ct. reviews annual reports: are there any facts from which a reasonable trier of fact could conclude that R does not meet criteria for commit.?

IV. What is being alleged as basis for discharge

A. Change in diagnosis

B. Change in risk assessment: Static99/Static99R

Although our Chapter 980 does not require the use of psychological testing or actuarial analysis of risk, the primary tool used by evaluators is the Static-99, now called the Static-99R. The Static-99 scores offenders on a scale ranging from 0-12 with 12 at the high end of risk. In the fall of 2008, updated norms were released for interpreting the Static-99. These norms were based on a larger and more recent generation of offenders. As a result, practitioners believe the new norms will more accurately predict future dangerousness of sexual offenders. The new norms predict recidivism rates about one-third lower than the previous Static-99 norms, except for the highest risk offenders. The change in norms related

to the Static-99 alone means that every committed offender who petitions for discharge could meet the standard for a hearing.

An additional problem with the change in the norms is that many offenders who would not be appropriate for discharge under the old norms are now below the "more likely than not" (51%) threshold for reoffending. Therefore, we now face the prospect of many more committed offenders being recommended for release by the Department of Health Services. This is particularly true for offenders who have recently turned 60, because at this point, an automatic three-point deduction is made on the instrument based on nothing more than his birthday.

The reasoning for the change in the instrument was that the research is demonstrating that recidivism risks tend to decline with age, but this finding has not been found to correspond to the highest risk sex offenders, but admittedly, there are not many people in that research pool. It is very unclear as to why the developers of the instrument decided to lower a person's score by one point upon his 40th birthday and lower the score by an additional two points upon the 60th birthday.

Example: Per DOC, 44 men were referred for commitment using the Static99R. Only two of these men had scores on this instrument of 9 (remember, it's a 12 point scale), and none were above that score. If a man were committed presently and petitioned for discharge following his 60th birthday, it would be necessary for him to have had a Static99R score of 11 in order to be associated with an over-50% chance of recidivism following his turning 60. (a score of 8 is associated with 55% recidivism risk over ten years).

V. <u>Supervised release protects the community much more than outright discharge, but it is currently easier to be discharged than it is to gain supervised release.</u> Many evaluators from the Dept of Health Services take a very literal and actuarial view of risk assessment: if the Static99R correlates with a less than 50% recidivism rate, some of these evaluators opine that the subject should be discharged. By definition, a person who is released on S.R. remains a sexually violent person, but has been deemed to be safe enough for release into the community under extremely stringent controls. To be discharged, the state has to prove that the person remains a sexually violent person.

VI. Problems with discharge/SR

A. Burdens of proof

1. Burden of proof for initial commitment is BARD and is on the state. This is fair.
2. Burden of proof for supervised release is on the Respondent
3. Burden of proof for discharge is on state to prove he remains SVP, which effectively means we are re-litigating the initial commitment order, but is lower (clear and convincing) than that necessary for commitment.

B. Significant increases in discharge petitions, without a corresponding increase in resources to litigate same, in part due to the fact that subjects can petition for discharge at "any time." We believe that the vast majority of the people seeking discharge must be at least granted hearings under the Arends and Ermers decisions inasmuch as the methodology of risk assessment has changed since most of these people were committed (prior to 2008-2009).

C. Because they can petition for discharge "at any time," we often have multiple petitions for discharge pending at the same time. Until very recently, they requested a different examiner with each petition, which had the effect of the defense being able to rack up several defense experts to face the sole expert from DHS who recommends against same, if indeed the DHS doctor is recommending against discharge.

D. Practically speaking, very, very few people over the age of 60 will continue to evince an actuarial risk above 50% as measured by actuarial instrument by virtue of the above-described changes in how risk is assessed without the examiner using rather controversial extrapolation methods which are far from being universally accepted in the scientific community.

E. The Problem of Experts: Because Rs can petition for discharge at any time, we do have a glut of litigation (as we predicted) on discharge petitions. We believe that in order to effectively challenge a recommendation for discharge, we need supporting expert opinion (and we believe this is what the law requires). We do not have the same means of retaining experts as does the defense (i.e., via court appointment) and the costs of retaining experts is borne by our office. It's my understanding that the SPD has specific funding set aside for experts, which is not the case for the state. For any contract over $2,000, we need full County Board approval and, because of this expense, we are forced to be extremely selective as to on what cases we can <u>afford</u> to get supporting expert opinion.

F. Problems in Milwaukee County

1. No facility exists to place people on Supervised Release and none may be built to accommodate the need. We have deep concerns that the law may be found to be unconstitutional as applied to Milwaukee County subjects.

2. The public is extremely hostile to the proposed release of any Chapter 980 subject, regardless of the conditions placed on the offender. Community notification meetings will typically occur with high risk sex offenders such as 980 subjects and forces within the community are capable of organizing very large scale opposition to the release of offenders, as was the case with Billy Morford.

3. Unlike other counties, we are not able to negotiate a person's agreeing not to pursue discharge in exchange for our not contesting supervised release because no facility exists. This is particularly problematic inasmuch as evaluators from DHS will recommend BOTH discharge and supervised release on some subjects. We believe that keeping a 980 subject on supervised release protects the community better than discharging a 980 from his commitment with no conditions or controls over his release, but are in the untenable position of not being able to recommend supervised release to the court even if we are not able to find an expert to support keeping the subject in custody.

4. People who have refused all treatment at Sand Ridge are being recommended for discharge based only on a change in actuarial score. This seems perverse inasmuch as treatment is the point of a Chapter 980 commitment. While we cannot force people to engage in treatment, we should not be rewarding treatment refusers with discharge simply because of a change in scoring one instrument (the Static99R) used in the course of risk assessment.

Specific Recommendations:

Change the burden of proof in discharge hearings to the respondent, just like SR.

Allow discharge petitions to be filed only after one year after commitment and only once a year thereafter.

Allow for continuances and adjournments for cause in discharge hearings, explicitly, as is the case for original commitment trials.

Require proof of change in the person's condition from the time of the original commitment or since the last discharge petition was denied in order to be granted a discharge trial.